THE GENEVA CONVENTIONS OF 12 AUGUST 1949

COMMENTARY

published under the general editorship of

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

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RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

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GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
1958

Printed in Switzerland

Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, Geneva 1949.

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RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

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GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
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FOREWORD

On August 12, 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 the Powers represented at the Conference signed the Conventions shortly afterwards and the great majority have since ratified them. There is thus good reason to believe that the 1949 Conventions, a decisive step in the work of protecting war victims, will soon have attained the universality which has always given the humanitarian law of Geneva its force.

Once the Conventions had been drawn up the International Committee of the Red Cross decided to undertake a Commentary. This task was entrusted to members of the Committee's staff who had in most cases been working ever since the end of the last world conflict—and even before—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.

The first volume of the Commentary, dealing with the First Convention of 1949, appeared in 1952. The volume on the Fourth Convention is now being published. The fact that this Convention is a new one, its importance and the hopes which rest on it—since it provides civilians at long last with the safeguards so cruelly lacking in the past—have all prompted the International Committee to arrange for its appearance out of its normal turn.

Although published by the International Committee, the Commentary is the personal work of its authors. The Committee, moreover, 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 has, like the first, been published under the general editorship of Mr. Jean S. Pictet, but is a combined effort. It has been

written mainly by Mr. Oscar M. Uhler and Mr. Henri Coursier[1], *but contributions have also been made by Mr. Siordet, Mr. C. Pilloud, Mr. R. Boppe, Mr. R.-J. Wilhelm and Mr. J.-P. Schoenholzer. The translation into English was begun by the late Major R. P. Griffin, who translated the Commentary on the First Convention, and was continued and completed after Major Griffin's untimely death by Mr. C. W. Dumbleton.*

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 the 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 Geneva 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.

[1] Mr. Uhler is the principal author of the comments on Articles 13 to 78 and Mr. Coursier of those on Articles 79 to 135.

INTRODUCTION

1. *Gaps in the protection afforded to civilians*

When the Second World War broke out, civilians were not provided with effective protection under any convention or treaty. The Regulations annexed to the Fourth Hague Convention of 1907 certainly contained some clauses which applied to civilians (Articles 42 to 56), but their protection was only considered in connection with the occupation of a territory by an enemy army. The Regulations confined themselves to a statement of the principle that the Occupying Power must maintain law and order, and to a few elementary rules enjoining respect for family rights, for the lives of persons and for private property; there was also a clause prohibiting collective punishments. If these rules had been applied in good faith, they would, it is true, have represented a real safeguard. But they had been drawn up at a time when hostilities were confined to the area close to the front. What significance could they have under conditions of "total" warfare, which exposed the civilian population of whole countries to the same dangers as the armed forces? Even in the 1914-1918 War they had been insufficient to prevent the exactions inflicted on so many people.

The lack at that time of any recent international Convention for the protection of civilians is explained by the fact that it was until quite recently a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity. It is interesting to note, for example, that the Hague Conference in 1907 decided not to include a provision to the effect that the nationals of a belligerent residing in the territory of the adverse Party should not be interned, considering that that principle went without saying.

This traditional conception was to be profoundly modified as a result of the First World War. On the outbreak of hostilities a large number of civilians were interned and the International Committee of the Red Cross had to improvise means of assisting them under conditions which were often very difficult, making arrangements for the exchanging of family news, for visits to internment camps, etc.

When the war was over the International Committee tried to make good this very unfortunate gap in positive international law, endeavouring above all to reaffirm legal principles which were still entirely valid in spite of the manner in which they had been distorted and circumvented. In 1921 the Committee proposed to an International Red Cross Conference that the text of a Convention for the protection of civilians should be studied at the same time as the Prisoners of War Code. Assured of the support of the Red Cross Conferences, it prepared a preliminary draft Convention, the main provisions of which prohibited the deportation of the inhabitants of occupied countries and the execution of hostages and guaranteed the right of civilians to exchange correspondence and receive relief. Civilians in enemy territory were to be allowed to return to their home country unless there were reasons of State security to prevent this ; internees were to enjoy the same conditions as prisoners of war. The Committee's efforts did not meet with success, however. In the state of general optimism which reigned at that time, various people of standing in official circles considered the moment a particularly inappropriate one to propose that Governments should draw up regulations governing the status of civilians in wartime ; an initiative of that sort would, they felt, be regarded in international circles as almost equivalent to betraying the cause of peace. Consequently the Diplomatic Conference of 1929 was exclusively concerned with the treatment of members of the armed forces, merely recommending in a resolution that the study of a Convention for the protection of civilians should be undertaken.

The International Committee persevered in its efforts and prepared a new and more complete draft which was adopted by the International Red Cross Conference in Tokyo in 1934. This draft text was to have been submitted to a Diplomatic Conference convened by the Swiss Government. But the urgency of holding such a Conference had not yet been generally realized and the replies to the Swiss Government's invitation were slow in coming in. It was not until 1939 that the date for the Conference was arranged. It was to have been held at the beginning of 1940, but it was already too late : the outbreak of hostilities made it impossible to hold it.

As soon as the war began, the International Committee of the Red Cross proposed that the belligerent States should bring the Tokyo Draft into force. The Powers concerned were reluctant to fall in with this proposal, and the Committee then suggested a partial solution to meet the case of civilians who were in enemy territory when hostilities opened : namely that the provisions of the 1929 Convention relative to the treatment of prisoners of war should be

applied by analogy to any such civilians who had been or would be interned. The belligerents expressed a preference for this latter solution and arrived at an agreement of a kind, through the medium of the International Committee. As a result, some 160,000 civilians enjoyed the same legal status and the same safeguards as prisoners of war for the duration of the hostilities. The International Committee was able to engage in the same activities in their behalf as in the case of military prisoners.

No provision was made, however, for civilians in occupied countries; they too would have received protection under the Tokyo Draft if it had been adopted. As many countries were occupied, millions of civilians were left without protection at the mercy of the enemy Power and were liable to be deported, taken as hostages, or interned in concentration camps. Hundreds of thousands among their number met with a ghastly death.

In 1945 the work of revising the Conventions was overshadowed by the imperative necessity of extending their benefits to civilians. As President Max Huber so strikingly puts it, " War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger ".

The undertaking was an arduous one, however. The legal field in question was completely new. Until then the Geneva Conventions had only applied to the armed forces, a well-defined category of persons, placed under the authority of responsible officers and subject to strict discipline; it was now necessary to include an unorganized mass of civilians scattered over the whole of the countries concerned.

Furthermore, as has already been pointed out, the new Geneva Convention could not confine itself, as the earlier Conventions had done, to protecting people who had already become the victims of war—the wounded, prisoners or internees; it had to prevent such people from becoming victims. As President Max Huber put it on another occasion, " We were coming to grips with war itself, since it was no longer merely a case of alleviating suffering, but of attacking the evil at its root ". The wounded and prisoners of war are human beings who have become harmless, and the State's obligations towards them are not a serious hindrance to its conduct of hostilities; on the other hand civilians have not in most cases been rendered harmless, and the steps taken in their behalf may be a serious hindrance to the conduct of the war.

From all that has been said it will be seen that the Committee was venturing on much less solid ground than in the past. Care had to be taken not to undermine the validity of Geneva Law or the

credit attaching to it by introducing rules whose observance could not be assured. The same applied to the tasks that might be entrusted to the Red Cross : they would be much more difficult to carry out in this domain.

2. *Revision of the Geneva Conventions*

At the end of the Second World War, unprecedented as it was in extent, the time had obviously come to revise the Geneva Conventions once more and extend them 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 took up the task anew in 1945.

A choice had to be made between drawing up very full and detailed rules covering all possible eventualities, and formulating general principles sufficiently flexible to be adapted to existing circumstances in each country. It soon appeared that in Government circles the first conception prevailed, as in 1929 in the case of the Prisoners of War Convention. The International Committee, however, set itself to modify this idea, first 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 of the model agreements and regulations annexed to the Conventions.

In the pursuit of these objects the Committee followed its usual methods. The available literature was gathered together and the points in which the law needed codifying, expanding, confirming or modifying brought out. Draft Conventions were then drawn up with expert help from Governments, National Red Cross Societies and other relief societies. Several meetings were convened in Geneva for this purpose, the most important being the Preliminary Conference of National Red Cross Societies in 1946, and the Conference of Government Experts of 1947, which marked a decisive step forward. At the latter Conference the French Delegation submitted an important draft code of rules for the protection of civilians, which was taken as the basis for discussion. The International Committee later drew up complete texts and presented them to the XVIIth International Red Cross Conference at Stockholm in 1948. They were adopted there with certain amendments.

After passing through these various stages, the draft texts were taken as the only 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 April 21 to August 12, 1949, under the chairmanship of Mr. 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. Numerous working parties were formed, and 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 Third Committee elected Mr. Georges Cahen-Salvador (France) as Chairman and Mr. Mevorah (Bulgaria) and General Schepers (Netherlands) as Vice-Chairmen. Two Rapporteurs were appointed: Professor Claude Du Pasquier (Switzerland) for all the general Articles and for Part II and Sections I and II of Part III, and Mr. Hart (United Kingdom) for the other Articles.

The Committee began its work with a first reading which occupied in all twenty-four meetings. During this stage the delegations gave their views on the draft texts submitted to them, and tabled their amendments. There was no voting.

Three Working Committees were set up. The first, whose Chairman was Professor Du Pasquier, examined the first 46 articles, while the second, presided over by General Schepers, considered the whole of the Section dealing with the treatment of internees and a number of Articles from other Sections. A third group of delegates, presided over by Mr. Haksar (India), devoted their attention to Articles 55 to 62. A Special Committee was also set up to study the question of the Preamble.

During the second reading—which occupied twenty-five meetings—the proposals made by the Working Committees were considered and discussed. Votes were taken on various points at issue and the Convention as a whole was adopted by 38 votes to nil, with 8 abstentions.

The Committee had the assistance of an expert from the International Committee of the Red Cross, Mr. Claude Pilloud, Assistant-Director for General Affairs, while Mr. Claude Caillat of the Federal Political Department acted as its Secretary.

The Conference spent several Plenary Meetings in an examination of the text adopted by the Third Committee. Certain points were

discussed again and a number of changes made. The text was finally approved by 47 votes to nil, with 2 abstentions.

The Chairman of the Joint Committee on Articles common to all four Conventions was Professor Maurice Bourquin (Belgium), and the Chairman of its "Special Committee", Mr. 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. The experts from the International Committee of the Red Cross were Mr. Frédéric Siordet and, in the early stages, Mr. C. Pilloud. The Secretary of the Joint Committee was Mr. Henri Thévenaz.

It is not intended to dwell at any length here on the discussions at the Conference, but tribute should be paid to the sustained effort made by the plenipotentiaries for a period of almost four months, to the remarkable willingness to co-operate and understanding which prevailed—in spite of divergent opinions—and, above all, to the sincere humanitarian spirit shown. 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 August 12, 1949 seventeen Delegations signed the four Conventions. The others signed at a special meeting called for the purpose on December 8 of the same year, or subsequently up to February 12, 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 elapsed since the date of ratification of the first two States—Switzerland and Yugoslavia—the Conventions entered into force as between those two countries on October 21, 1950. They come into operation for the other countries six months after each of them ratifies. As from October 21, 1950, the new Conventions have become a part of positive international law, and are thus open to accession by countries which did not help to draw them up.

At the beginning of 1956, the date on which the present volume appears[1], the following fifty-two Powers have either ratified or acceded to the Geneva Conventions of 1949 : Switzerland, Yugoslavia, Monaco, Liechtenstein, Chile, India, Czechoslovakia, the Holy See, the Philippines, Lebanon, Jordan, Pakistan, Denmark, France, Israel, Norway, Italy, the Union of South Africa, Guatemala, Spain, Belgium,

[1] Date of the original (French) edition.—TRANSLATOR.

Mexico, Egypt, Japan, Salvador, Luxemburg, Austria, San Marino, Syria, Viet Nam, Nicaragua, Sweden, Turkey, Liberia, Cuba, the USSR, Rumania, Bulgaria, the Ukraine, Byelorussia, the Netherlands, Hungary, Ecuador, the German Federal Republic, Poland, Thailand, Finland, the United States of America, Panama, Venezuela, Iraq and Peru.

* * *

It is still too early to form a valid opinion concerning the new Convention, considered as a whole. The proper perspective is lacking and the Convention has not—we are glad to say—been actually put to the test. But although the pioneer work of its authors is naturally far from having achieved perfection at the first attempt, it is already possible to say that the Fourth Convention represents an important step forward in written international law in the humanitarian field.

The Convention does not, strictly speaking, introduce any innovations in this sphere of international law. It does not put forward any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war—a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt.

The Geneva Diplomatic Conference was not convened for the purpose of revising the Fourth Hague Convention. Consequently the 1949 Convention relative to the protection of civilian persons does not abrogate the Regulations respecting the Laws and Customs of War on Land. It does not take the place of this latter text, which remains in force ; but, in the words of its Article 154, it will " be supplementary to Sections II and III of the Regulations ".

According to a Resolution adopted by the XVIIth International Red Cross Conference which met in Stockholm in 1948 and approved the Draft Conventions prepared by the International Committee of the Red Cross, the new Convention on the protection of civilians corresponds to " the fundamental aspirations of the peoples of the world " and defines " the essential rules for that protection to which every human being is entitled " [1].

[1] Resolution XIX (5).

TITLE OF THE CONVENTION

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF AUGUST 12, 1949.

During its preliminary stages the Draft Convention was called "The Condition and Protection of Civilian Persons". In the draft submitted to the XVIIth International Red Cross Conference the words used were "Convention *for* the Protection of Civilian Persons in Time of War". The subject was discussed at the Diplomatic Conference. One delegation quite correctly pointed out that this wording might cause confusion, as ninety per cent of the Articles only referred to a limited class of civilians, Part II alone dealing with the protection of the civilian population as a whole[1].

Another point must be emphasized: the main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to the military operations themselves. Anything tending to provide such protection was systematically removed from the Convention. The clause prohibiting unnecessary destruction, for example, which originally appeared among the provisions applying both to the territory of the Parties to the conflict and to occupied territory, now refers only to destruction caused by the Occupying Power (Article 53). In the same way, the Diplomatic Conference declared that a draft Resolution forbidding the use of weapons of mass destruction was not receivable.

It is, perhaps, a pity from the humanitarian point of view that the Conference adopted this course; for no one questions the necessity for restrictive rules in this sphere. It may nevertheless have been wise not to overload the Convention, as that might have jeopardized its chance of ratification by the Powers. Besides, the limitation of means of waging war is a matter which comes traditionally within the purview of the Hague Conventions, whose object is to codify the laws of war in the strict sense of the term. Lastly, mention may be made here

[1] The title of the Convention was amended, but the corresponding correction was not made in the preamble; this was no doubt an oversight. See p. 11.

of the fact that the International Committee of the Red Cross is again working in co-operation with international experts, on measures to provide the civilian population with more effective legal protection against the dangers inherent in modern warfare and to restrict bombing from the air. A draft code of international rules dealing with the subject is in the course of preparation.

It may be wondered, nevertheless, whether the wording of the title, even now that it has been amended, really reflects the precise purpose of the Convention, which, it must be repeated, is above all concerned with the protection of civilians against arbitrary action by the enemy, and not against the whole series of dangers which threaten them in wartime.

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 establishing a Convention for the Protection of Civilian Persons in Time of War[1], *have agreed as follows :*

The extreme brevity of the Preamble will be noted. Unlike the 1929 Conventions and the Hague Conventions of 1907, 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 credentials ; nor does it include the usual statement of the motives which have led the Powers to conclude the Convention. The 1929 Conventions still conformed to this custom but in the Fourth Convention all this has been replaced by a brief statement of the purpose of the Diplomatic Conference, which was to draw up a Convention for the protection of civilians in time of war.

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

" First Convention " will mean the " Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 " ;

" 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 " ; and

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

It will be noted that the Convention is a new one : reference is not made, as it was in 1929 in the case of prisoners of war, to a development of the principles which inspired the international Conventions of the Hague, and in particular the Convention concerning the Laws and Customs of War and the Regulations annexed to it. The relationship between the Convention and the Fourth Hague Convention of 1907 is dealt with in Article 154.

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 it had submitted 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 on the proposal of the French Delegation, the XVIIth International Conference added a Preamble, worded as follows, to 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 can be explained by the fact that an entirely new Convention was being drawn up. 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 humanitarian law affects nearly everyone, and that in a modern war, where the fighting takes place everywhere and is no longer restricted to clearly defined battlefields, any man or any woman may be faced with a situation in which he or she has either to invoke, or 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 in 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 make clear 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 have been drawn up, however clearly they are worded, it is too much to expect every soldier and every civilian to know the details of the four hundred and more Articles of the four 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 more or less correctly what he is called upon to apply under one or the 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]

The subject was discussed in great detail in Committee III, which had been entrusted with the task of drawing up the present Convention.

[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, p. 8.

Most of the delegations were in favour of inserting a Preamble, though their views on the subject of its contents differed. There were, in particular, many objections to the proposal to include a reference to the divine origin of man and to the Creator, regarded as the source of all moral law. Finally, in view of the impossibility of reconciling the different points of view, one delegation proposed dropping the Preamble altogether. This proposal was adopted by 27 votes to 17. In the words of the Rapporteur of Committee III, " No Preamble would be included." [1]

The other Committees quickly came to the same decision in respect of the Conventions for which they were responsible.

Accordingly the essential motive which had brought sixty-four nations together at Geneva was left unexpressed solely on account of non-essential additions that one delegation or another wished to make.

It was thought necessary to give an account of the discussions concerning this Preamble, despite the fact that it was finally dropped altogether, since some of the ideas it contained have, fortunately, been reproduced in other Articles of the Convention, especially in Article 3 dealing with armed conflicts not of an international character. In drafting this latter Article, its authors based themselves very largely on the general ideas contained in the various draft Preambles. Article 3 mentions, for example, that in an armed conflict which is not international in character, the contending Parties must at least comply with the following rule :

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.

This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built. That provision in the case of the present Convention is Article 27.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 813.

PART I

GENERAL PROVISIONS

The Convention is divided into four parts. Part III comprises five sections, Section IV of Part III being itself split up into twelve chapters.

Like the other three Geneva Conventions of August 12, 1949, the present Convention begins with general provisions, a number of which are common to all four 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.

A clause of this kind appeared, in a slightly different form, in the 1929 Conventions. Its prominent position at the beginning of each of the 1949 Conventions gives it increased importance. By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties drew 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 the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from an opponent, indeed perhaps even more for the former reason than for the latter.

[1] Article common to all four Conventions. With the text of each Article is given the corresponding marginal heading. These marginal headings were given their final form by the Conference Secretariat and are not part of the official text of the Conventions. They merely serve as an indication.

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 in all four Conventions of the words " and to ensure respect for " was, however, deliberate : they were intended to emphasize the responsibility of the Contracting Parties. Article 29 expressly states, moreover, that the Party to the conflict is responsible for the treatment accorded to protected persons. It would not, for example, be enough for a State to give orders or directions to a few civilian or military authorities, leaving it to them to arrange as they pleased for their detailed execution. It is for the State to supervise the execution of the orders it gives. Furthermore, if it is to fulfil the solemn undertaking it has given, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of ensuring the faithful enforcement of the Convention 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 proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.

The words " in all circumstances " which appear in this Article, do not, of course, cover the case of civil war[1], as the rules to be followed in such conflicts are laid down by the Convention itself, in Article 3. The expression refers to all situations in which the Convention has to be applied, as described, for example, in Article 2. Disregarding the provisions applicable in peacetime, and Article 3 which relates only to conflicts not of an international character, the words " in all circumstances " mean that as soon as one of the conditions of application for which Article 2 provides, is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety. The words in question also mean 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, whether the intention is

[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.

merely to occupy territory or to annex it, in no way affects the treatment protected persons should receive.

In view of the foregoing considerations and the fact that the provisions for the repression of violations have been considerably strengthened[1], it is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning.

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 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

The earlier humanitarian Conventions, in particular the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864, 1906 and 1929, did not include any definition of the cases to which they applied. Their very titles made it clear that they were intended for use in wartime, and the meaning of war was evident and needed no defining. The Hague Convention relative to the Opening of Hostilities provided that " hostilities . . . must not commence without previous and explicit warning, in the form of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war ". Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being

[1] The Contracting Parties are no longer merely required to take the necessary legislative action to prevent or repress violations. They are under an obligation to seek out and prosecute the guilty parties, and cannot evade their responsibility.

[2] Article common to all four Conventions.

preceded by any of the formalities laid down in the 1907 Hague Convention. Furthermore, there have been many cases where States at war have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation, has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy for this state of affairs, and the change which had taken place in the whole conception of such Conventions pointed the same way. They are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties and more and more as a solemn affirmation of principles respected for their own sake, 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 civilians in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person. The XVIth International Red Cross Conference accordingly drew attention in 1938 to the necessity of providing, in any future revision of the Conventions, for their application to undeclared as well as to declared wars. This became even more necessary after the cruel experience 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, recommended in its turn 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 to " cases of occupation of territories in the absence of any state of war "[2].

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[1] *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, p. 15.

[2] *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, p. 8.

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 reproduced above.

There was no discussion, at the Diplomatic Conference, on the Committee's proposal (which did not include the second sentence of paragraph 3) ; the experience of the Second World War had convinced all concerned of the necessity of including the provisions in question in the new Convention. But the draft text said nothing about the relations between a belligerent, or belligerents, bound by the Conventions on the one hand and a belligerent, or belligerents, not bound by it on the other hand. There could be no question of obliging a State to observe the Convention in its dealings with an adverse Party which deliberately refused to accept its provisions. On the other hand, a Convention is *res inter alios acta* so far as concerns a State which is not bound by it, and it cannot, therefore, lay any obligation on such a State.

Although there was no solution to the question from the legal point of view, it was necessary to find one on the humanitarian plane. The Committee accordingly suggested to the Governments represented at the Diplomatic Conference of 1949 that the following two sentences be added to Article 2 :

> 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 Diplomatic Conference also considered two other proposals [2] —one, from the Canadian Delegation, suggesting that the Convention should be applicable to a Power not party to the Convention so long as that Power complied with its provisions, and another, from the Belgian Delegation, which read as follows : " 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."

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

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

The discussion turned solely on the conditions to be fulfilled. The condition underlying both the Canadian proposal and the proposal of the International Committee of the Red Cross, was resolutive, while the Belgian proposal was based on a suspensive condition. As agreement could not be reached on any of these proposals, they were 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 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

By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.

It remains to ascertain what is meant by " armed conflict ". The substitution of this much more general expression for the word " war " was deliberate. It is possible to argue almost endlessly about the legal definition of " war ". A State which uses arms to commit a hostile act against another State can always maintain 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 members of the armed forces 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

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

respect due to the human person as such is not measured by the number of victims.

The Convention only provides for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war. Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.

PARAGRAPH 2 — OCCUPIED TERRITORIES

Here too the wording adopted was based on the experience of the Second World War, which saw territories occupied without hostilities, the Government of the occupied country considering that armed resistance was useless. In such cases the interests of protected persons are, of course, just as deserving of protection as when the occupation is carried out by force.

Article 2 deals with the entry into force of the Convention as between the Contracting Parties. There may be no case of practical application, owing to there being no protected person on the territory of the belligerents, and no territory which is occupied, but such instances will obviously be very rare. In the same way, the number of persons protected may vary according to the course followed by military operations and the march of events, but as soon as any person answers to the definition given in Article 4, the Convention automatically applies to him.

In case of war being declared or of armed conflict, the Convention enters into force ; the fact that the territory of one or other of the belligerents is later occupied in the course of hostilities does not in any way affect this ; the inhabitants of the occupied territory simply become protected persons as they fall into the hands of the Occupying Power.

The sense in which the paragraph under consideration should be understood is thus quite clear. It does not refer to cases in which territory is occupied during hostilities ; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances. The wording of the paragraph

is not very clear, the text adopted by the Government Experts being more explicit[1]. Nevertheless, a simultaneous examination of paragraphs 1 and 2 leaves no doubt as to the latter's sense : it was intended to fill the gap left by paragraph 1.

The application of the Convention to territories which are occupied at a later date, in virtue of an armistice or a capitulation, does not follow from this paragraph, but from paragraph 1. An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1. It is, for that matter, when a country is defeated that the need for international protection is most felt. The full application of the Convention under those circumstances is limited in point of time by Article 6.

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

1. *Relations between belligerents party to the Convention*

This provision appears to state an elementary truth ; but that was not always the case. The Hague Conventions of 1907 and the Geneva Conventions of 1906 all contained a *clausula si omnes* under which the Convention was not applicable unless all the Parties to the conflict were equally bound by it.

The point raised may still be of some importance in conflicts involving several Powers fighting under a unified command. The International Committee of the Red Cross will always maintain, for its part, that should it not be possible to differentiate between the responsibilities of the different States forming the coalition, the most extensive obligations assumed in the humanitarian sphere by one or more members of the coalition must be binding on the coalition as a whole.

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

The second sentence, added by the Diplomatic Conference of 1949, certainly presents the typical features of a compromise ; for it does not come to a clear decision between the suspensive and resolutive conditions. At first sight it appears to incline towards

[1] See above, p. 18.

the Belgian amendment[1]. But whereas that amendment only made the Convention applicable as from the time of its formal acceptance by the non-Contracting Power, the sentence adopted by the Diplomatic Conference drops all reference to an invitation to be made to the non-Contracting Power, and substitutes 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 ? 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 accordance with their spirit that the Contracting States " shall apply them, in so far as possible ".

The spirit and character of the Conventions lead perforce to the conclusion that the Contracting Power must at least 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 may not be a strictly legal interpretation ; it does not altogether follow from the text itself ; but it is in our opinion the only honourable and reasonable solution. It follows from the spirit of the Conventions, and is in accordance with their character, as has already been stated. It is also in accordance with the moral interest of the Contracting Power, inasmuch as it invites the latter to honour a signature given before the world. It is finally to its advantage from a more practical point of view, because the fact of its beginning itself to apply the Convention will encourage the non-Contracting Party to declare its acceptance, whereas any postponement of the application of the Convention by the Contracting Party would give the non-Contracting Party a pretext for non-acceptance.

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, it must be seen 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, p. 19.

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 disregard rules solemnly proclaimed by itself, while its adversary, though not legally bound by those 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 civilians even before one's adversary had done so, merely because it was inferred from his silence that he was intending to do so ?

The two conditions laid down for the non-Contracting Power are that it 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. It is, on the contrary, most desirable that the latter should 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 the 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 take into account facts above all.

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, its spirit encourages the Power in question to persevere in applying humanitarian principles, whatever the attitude of the adverse Party may be.

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 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.

[1] Article common to all four Conventions.

HISTORICAL INTRODUCTION

This Article, which is common to all four Geneva Conventions, 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 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 and 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 conflict, including internal ones.

The importance of the Article, in which the whole of the rules applying to non-international conflicts are concentrated, makes it necessary, before embarking on analysis and commentary proper, to say something of its origin 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. *Origin and development of the idea*

All international Conventions, including this one, 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, the basis on which all the Geneva Conventions rest, 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

[1] See F. 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.

personnel. But it was not applied to them because of their military status: it is concerned with people, not as soldiers but simply as human beings, without regard to their uniform, their allegiance, their race or their beliefs, without regard even to any obligations which 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 internal conflicts, the horrors of which are sometimes even more terrible than those of international wars because of the fratricidal hatred 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 home policies of the States in which the conflicts 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 on the other side as indirect aid to guilty parties. Applications by a foreign Red Cross Society or by the International Committee of the Red Cross for permission to engage in relief work have more than once been treated as unfriendly attempts to interfere in the domestic 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.

The Red Cross was not discouraged. In spite of frequent lack of understanding on the part of the authorities, it was able in some 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 of all victims of civil wars, or social or revolutionary disturbances, to relief in conformity with the general principles of the Red Cross. The resolution further laid down in considerable detail the duties of the National Red Cross Society of the country in question and, in the event of that Society being unable to take action on an adequate scale, the course to be followed by the International Committee of the Red Cross or foreign National Societies with a view to making the necessary relief available. The resolution, as such, had not the force of a Convention, but it enabled the International Com-

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

mittee 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 give some kind of undertaking to respect the principles of the Geneva Convention[1].

Observing 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 well worth quoting :

> The Conference,
>
> . . . . . .
>
> requests the International Committee and the National Red Cross Societies to endeavour to obtain :
>
> *(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,
>
> . . . . . .

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 within a country, the contending parties should be invited to declare their readiness to apply the principles of the Convention on a basis of reciprocity. The suggestion, modest enough since it took

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[1] See the following documents of the XVIth International Red Cross 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)*.

account of realities, was no more at that stage than an attempt to provide a practice that had already yielded satisfactory results with a more solid foundation in the future by giving it some kind 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 take sides with the advocates of humanitarian ideas, and that the suffering caused by civil wars would be appreciably reduced as a result. 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 matter by a recommendation to insert at the beginning of each of the Conventions 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 movement. What would be thought of it in Government circles remained to be seen. 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 that 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, it admitted the necessity of making provision in the Convention for at least a partial extension of its provisions to the case of civil war. As a result of its efforts an Article was drafted under the terms of which the principles of the Convention were to be applied in civil wars by the Contracting Party, subject to the adverse Party also conforming thereto[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 then only on a basis of reciprocity. But it nevertheless encoura-

[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, pp. 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, p. 8.

ged the International Committee of the Red Cross to continue its efforts.

On the strength of the opinions thus expressed, the International Committee added a fourth and last paragraph to 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. The wording was 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 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 actually 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 draft text was the subject of lengthy discussion at the Stockholm Conference, at which Governments as well as Red Cross Societies were represented. In the end, the Conference adopted the proposals of the International Committee of the Red Cross for the First and Second Conventions, and in the case of the Third and Fourth Conventions made the application of the Convention subject to the proviso that the adverse party should also comply with it.

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

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

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 conflict to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the 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 ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as " acts of war " in order to escape punishment for them.

A rebel party, 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 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 measures of legitimate repression.

The advocates of the Stockholm draft, on the other hand, regarded the proposed text 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, fought like real soldiers who deserved to receive protection under 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 considered 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 very first meeting of which 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 accepting it 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, which in their turn gave rise to new amendments and provoked criticism. It seemed difficult to reach a majority in favour of any one solution.

The French Delegation must be given the credit for ending the deadlock in the Committee. Reverting to an idea previously put forward by the Italian Delegation to meet 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 which applied.

The idea was a good one. But the suggested text had one defect. It referred to a draft Preamble which had not yet been adopted, and was, incidentally, never to be adopted[2]. Moreover, that draft Preamble simply stated that certain things were prohibited. It alluded to principles, but did not define them.

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[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 2A. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 40-48, 75-79, 82-84, 90, 93-95, 97-102.

[2] See above, p. 14.

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 conflict, together with a minimum of mandatory 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 mandatory 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 did not immediately rally unanimous support. Certain delegates still preferred 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 that delegation proposed a new text which read 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 of the civilian population ;

— prohibition, on the territory occupied by the armed forces of either of the parties, of reprisals against the civilian population, the taking of hostages, the destruction and damaging of property which are not justified by the necessities of war ;

— prohibition of any discriminatory treatment of the civilian population 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 in the method employed, preferring 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. It was finally adopted,

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[1] See above, p. 13.

[2] See above, p. 12.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 34-35.

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 principle or were in favour of one 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 will be the only Article 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, which provided for the application of the Conventions in their entirety. But, as the International Committee's representative at the Diplomatic Conference remarked, since that text had obviously no chance of being accepted by the Governments and it was necessary to fall back on a less far-reaching solution, the wording 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. This text has the additional advantage of being applicable automatically, without any condition in regard to reciprocity. Its observance does not depend upon preliminary discussions on 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 mandatory rules. Finally, it has the advantage of expressing, in each of the four Conventions, the common principle which governs them.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, Article 2A, pp. 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—and this would come to the same thing—that a list should be given of a certain number of conditions on which the application of the Convention would depend. 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 drawn from 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
   (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.

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

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 portion of the national territory.

   (c) That the armed forces act under the direction of an organized 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 scope of application of the article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, 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 embodied 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 torture and mutilate prisoners and take hostages ? However useful, therefore, the various conditions stated above may be, they are not indispensable, since no Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.

Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.

B. *Obligations of the Parties.*—The words " each Party " mark the great progress which the passage of a few years had brought about in international law. 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 need not even represent a legal entity capable of undertaking international obligations.

The obligation is absolute for each of the Parties. The reciprocity clause, which appeared in the Stockholm draft of the Fourth Convention, has been deliberately dropped. That represents a great step forward—offset, it is true, by the fact that it is no longer the Convention as a whole which will be applicable, but only the actual provisions of Article 3 itself.

The obligation resting on the Party to the conflict which represents established authority is not open to question. The mere fact of 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 158. 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. It should, moreover, be noted that under Article 158 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 inhuman 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 to dispense with 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, it might be thought that the paragraph should have been divided up, the relevant portion only being included in each Convention. (In the Fourth Convention, for example, mention might have been made only of civilians.) 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 Fourth Convention.

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

We shall explain later, when discussing Article 27, the sense in which " humane treatment " should be understood. The definition is not a very precise one, as we shall see. 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.

Items *(a)* and *(c)* concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War. It may be asked whether 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 great the care taken in drawing up a list of all the various forms of infliction, it would never be possible 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 it arouses — though that 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 judicial 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 33[1], are allowed in the case of non-international conflicts, Article 3 being the only Article which then applies ? 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 incom-

[1] See below, p. 224.

patible with the " humane treatment " demanded unconditionally in the first clause of sub-paragraph (1).

It should be noted that the acts prohibited in items *(a)* to *(d)* are also prohibited under other Articles of the Convention, in particular Articles 27, 31 to 34, and 64 to 77.

As we have already mentioned, Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians—that is to people who do not bear arms. In the case of members of the armed forces, it is the corresponding Article in the Third Convention to which in most cases appeal will be made. All the persons referred to in (1) without distinction are entitled to humane treatment. Criteria which might be employed as a basis for discrimination against one class of persons or another are enumerated in the provision, and their validity denied. Memories of the crimes perpetrated during the last World War led the authors of the 1949 Convention to adopt this formula, which is repeated in several other clauses of the Convention, in particular in Articles 13 and 27. It will be seen that the idea of nationality has not been included in Article 27. That does not in any way mean that people of a given nationality may be treated in an arbitrary manner ; everyone, whatever his nationality, is entitled to humane treatment. On the other hand it is quite possible that special security measures may be taken in the case of civilians of a given nationality ; it is also possible that certain offences may be regarded as more serious or less serious according to whether they have been committed by citizens of the country concerned or by aliens. It is a matter of administrative measures or judicial proceedings which depend on the criterion of nationality, but such measures and proceedings do not affect the treatment of individuals, which must be humane in all cases.

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.

The safeguards enjoyed by the military wounded and sick under the First Convention are, as we know, extended by the present Convention to wounded and sick civilians. In its Article 12 the First Convention says that the wounded and sick are to " be respected and

protected in all circumstances ", while under Article 16 of the present Convention they are to " be the object of particular protection and respect ". In spite of a slight difference in wording, the basic idea is the same in both cases ; the wounded and sick must be respected and protected.

PARAGRAPH 2. — 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. The offer of services costs little and, what is more important, in no way binds the recipient, since they 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 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 asked 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 may, 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 should only, be supplementary. 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 be *humane* and *impartial* also. The International Committee of the Red Cross is mentioned here for two reasons—firstly on its own account, as an organization called upon, 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.

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 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, become to all intents and purposes 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 various other matters. 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 each of the Parties is 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, which

was so often expressed during the discussions ? Will a *de jure* Government 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 implies recognition of the legality of the opposing party. Besides, in practice the conclusion of the agreements provided for in paragraph 3 will depend on 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 those which precede it, is governed by the last clause of the Article.

Which provisions could most easily be brought into force by means of special agreements[1] ? First of all those contained in Articles 27 to 34, which apply both to the territory of the Parties to the conflict and to occupied territory. The provisions dealing with occupied territory could no doubt also be applied. This is also true of those dealing with the treatment of internees (Articles 79 to 135). It would, on the other hand, be more difficult to apply in case of civil war the provisions relating to aliens in the territory of a Party to the conflict, for in a civil war the struggle takes place in a territory whose citizens are all of the one nationality. That was one of the objections raised to the full and unconditional extension of the Convention to such conflicts. Several delegates pointed out that a great many of its provisions could not be applied in case of civil war, or would at all events have to be modified to a considerable extent. In order to solve the problem, the International Committee of the Red Cross presented the Diplomatic Conference with a definition of protected persons in cases of civil war and of the treatment which should be applied to them. The definition read as follows : " Furthermore, in case of a conflict not international in character, the nationals of the country where the conflict takes place, who do not belong to the armed forces, are likewise protected by the present Convention, under the provisions relating to occupied territories." [2]

[1] It should be noted that when signing the present Convention one signatory State (Argentina) made a reservation stating that Article 3, common to all four Conventions, was, to the exclusion of all other Articles, the only one which would be applicable in cases of armed conflict not of an international character.

[2] Cf. *Remarks and Proposals*, pp. 68-69.

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 and power, 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 re-introduced in much the same words 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.

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 by all the means—including arms—provided by its own laws; nor does it in any way affect that Government's 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.

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[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, p. 9.

ARTICLE 4. — DEFINITION OF PROTECTED PERSONS

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons 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, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

General

The very title of the Convention shows in a general way whom it is meant to cover. But it is advisable to be able to determine exactly what classes of persons are protected. That is the purpose of this Article.

When work was begun on the preparation of the texts, it became clear—as early as the time of the Tokyo Draft—that there were two main classes of civilian to whom protection against arbitrary action on the part of the enemy was essential in time of war—on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the inhabitants of occupied territories. The idea that the Convention should cover these two categories was accepted from the first and has never really been disputed. Any discussions which have taken place on the subject have been concerned with points of detail which we shall consider later. This Article is, in a sense, the key to the Convention ; for it defines the people to whom it refers. The meaning does not stand out very clearly, however, and the definition contained in the Article may be easier to grasp if we set it out as follows :

A.—*On the territory of belligerent States:* protection is accorded under Article 4 to all persons of foreign nationality and to persons without any nationality. The following are, however, excluded:

(1) Nationals of a State which is not bound by the Convention;
(2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
(3) Persons covered by the definition given above under A who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.

B.—*In occupied territories;* protection is accorded to all persons who are not of the nationality of the occupying State. The following are, however, excluded:

(1) Nationals of a State which is not party to the Convention.
(2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State.
(3) Persons covered by the definition given above under B who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

Even when the definition of protected persons is set out in this way, it may seem rather complicated. Nevertheless, disregarding points of detail, it will be seen that there are two main classes of protected person: (1) *enemy nationals* within the national territory of each of the Parties to the conflict and (2) *the whole population* of occupied territories (excluding nationals of the Occupying Power). The other distinctions and exceptions extend or restrict these limits, but not to any appreciable extent.

PARAGRAPH 1. — DEFINITION

The definition has been put in a negative form; as it is intended to cover anyone who is *not* a national of the Party to the conflict or Occupying Power in whose hands he is. The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals. The only exception to this rule is the second paragraph of Article 70, which refers to nationals of the Occupying Power who sought refuge in the territory of the occupied State before the outbreak of hostilities. This is a very special case, based on the position such people have taken up with regard to their own country.

It will be observed that owing to its negative form the definition covers persons without any nationality. The Rapporteur to Committee III pointed out that it thus complied with the recommendation made to the Diplomatic Conference by the representative of the International Refugee Organization[1]. In the actual course of the discussions, however, certain speakers observed that the term " nationals " (*ressortissants*, in the French version) did not cover all cases, in particular cases where men and women had fled from their homeland and no longer considered themselves, or were no longer considered, to be nationals of that country. Such cases exist, it is true, but it will be for the Power in whose hands they are to decide whether the persons concerned should or should not be regarded as citizens of the country from which they have fled. The problem presents so many varied aspects that it was difficult to deal with it fully in the Convention. Nevertheless, Article 44, which is applicable to the territories of the Parties to the conflict, lays down that the Detaining Power is not to treat refugees who do not, in fact, enjoy the protection of any Government, as enemy aliens " exclusively on the basis of their nationality *de jure* of an enemy State ".

The words " at a given moment and in any manner whatsoever " were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances : travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs. (It will be seen later, when we come to Article 5, that provision has been made for certain exceptions in this last case.)

The words " in case of a conflict or occupation " must be taken as referring to a conflict or occupation as defined in Article 2. The expression " in the hands of " is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or " hands " of the Occupying Power. It is possible that this power will never actually be exercised over the protected person : very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression " in the hands of " need not necessarily be understood in the physical sense ; it simply means that the person is in territory which is under the control of the Power in question.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 814.

PARAGRAPH 2. — EXCEPTIONS

It was paragraph 2 that gave rise to most discussion both during the preliminary work and at the Diplomatic Conference. The Stockholm Draft made no provision for any exceptions ; but at the Diplomatic Conference it was thought necessary to limit the field of application of the Convention.

The first sentence of the paragraph contains a truism. The spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable *erga omnes*, since they may be regarded as the codification of accepted principles. It must be recognized, however, that the Conventions themselves stipulate that in order to be binding on States they must be ratified by those States ; that being so, it is difficult to see how they could be applied to the nationals of a State which is not party to them. It was in actual fact the attitude adopted by the Delegation of the USSR at the Diplomatic Conference that made the other delegations feel the need to introduce this unnecessary addition. The Soviet Delegation, whose position in the matter was not constant, claimed that any Party to the conflict or any Occupying Power must apply the Convention to all persons covered by the definition in Article 3, irrespective of their nationality. It later modified its line of argument and proposed that the sentence in question be omitted, alleging that it contradicted the last sentence of Article 2, paragraph 3. This line of argument, which was not endorsed by the Diplomatic Conference, does not appear to bear examination. Once a Power which is not party to the Convention accepts and applies the latter's provisions its adversary, if a party to the Convention, must obviously treat the nationals of that Power as protected persons ; there would not appear to be any other possible interpretation ; otherwise the provision of Article 2 referred to above would not make sense.

Paragraph 2 also defines the position of nationals of neutral States ; in occupied territory they are protected persons and the Convention is applicable to them ; its application in this case does not depend on the existence or non-existence of normal diplomatic representation. In such a situation they may therefore be said to enjoy a dual status : their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons.

On the other hand, nationals of a neutral State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hands they are.

This seems to be a legitimate distinction. In the territory of the belligerent States the position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them. In occupied territory, on the other hand, the diplomatic representatives of neutral States, even assuming that they remain there, are not accredited to the Occupying Power but only to the occupied Power. This makes it more difficult for them to make representations to the Occupying Power. In such cases diplomatic representations are usually made by the neutral State's diplomatic representatives in the occupying State, and not by those in the occupied territory. It should moreover be noted that the Occupying Power is not bound by the treaties concerning the legal status of aliens which may exist.

The existence of such situations, often of a complicated nature, gave rise to the idea of granting neutral nationals in occupied territory the status of protected persons within the meaning of the Convention.

The case of nationals of a co-belligerent State is simpler. They are not considered to be protected persons so long as the State whose nationals they are has normal diplomatic representation in the belligerent State or with the Occupying Power. It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention. Examples, however, of co-belligerency during the last World War—in particular the case of Italy—were such that it was felt necessary to lay down the condition that there should be normal diplomatic representation.

According to the Rapporteur of Committee III normal diplomatic representation is " that which functions in peace time comprising at least one diplomatic representative accredited to a Ministry of Foreign Affairs "[1]. This definition has some value, but does not seem adequate ; the words " accredited to " (in the French version of the Report : *trouvant audience auprès de*) must at all events be understood in the widest sense, as implying that the representations made by the diplomatic representative will be followed by results and that satisfactory replies will be given to him. It would also seem essential for the representatives in question to have sufficient liberty of action and liberty of movement to be able to visit their fellow-countrymen and come to their help when circumstances so require.

Finally, it should be noted that certain States which are bound by the Geneva Conventions do not maintain diplomatic relations among themselves ; in case of war, whether one of them is neutral

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 814.

and the other a belligerent or whether they are co-belligerents, their nationals must enjoy full protection under the Convention.

PARAGRAPH 3. — FIELD OF APPLICATION OF PART II

It will be recalled that Part II has the widest possible field of application ; it covers the whole population of the Parties to the conflict, both in occupied territory and in the actual territory of those Parties. It really infringes to a slight extent the general rules according to which the purpose of the Convention is to protect individual men and women against arbitrary action on the part of the enemy. It could have formed a special Convention on its own. That is the reason for the reminder which we are given here.

PARAGRAPH 4. — PERSONS PROTECTED BY OTHER CONVENTIONS

The definition of protected persons in paragraph 1 is a very broad one which includes members of the armed forces—fit for service, wounded, sick or shipwrecked—who fall into enemy hands. The treatment which such persons are to receive is laid down in special Conventions to which the provision refers. They must be treated as prescribed in the texts which concern them. But if, for some reason, prisoner of war status—to take one example—were denied to them, they would become protected persons under the present Convention.

There are certain cases about which some hesitation may be felt. We may mention, first, the case of partisans, to which Article 4, A (2), of the Third Convention refers. Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it.

Doubts may also arise concerning the case of members of the crews of the merchant navy and civil aircraft. The Third Convention lays down that they are to be prisoners of war unless they enjoy more favourable treatment under other provisions of international law. The reference here is in particular to the Eleventh Hague Convention of 1907 relative to certain restrictions on the exercise of the right of capture in maritime war. It is possible that under certain circum-

stances application of the present Convention may constitute the more favourable treatment referred to above.

There is also the case of members of the armed forces of an occupied territory who, after being demobilized, are interned by the Occupying Power simply because they are ex-servicemen. The Third Convention lays down expressly that they must be accorded prisoner-of-war status, which involves a system of discipline and regulations more favourable to them.

When the civilian population rises as one man on the approach of the enemy, before the territory is occupied, and takes up arms in self-defence, persons concerned in the rising must, under Article 4, A (6), of the Third Convention, be treated as prisoners of war and not as civilians. This situation has hardly ever arisen in actual practice however.

In order to complete our survey, we should say a word about a particular class of civilians—the diplomats themselves. Diplomatic representatives who are in enemy territory on the outbreak of war are, without any doubt, protected persons within the meaning of Article 4, but usage has created a body of customary law concerning them, which has been very generally applied. In most cases they very soon receive permission to leave the country of the Government to whom they were accredited, and pending their departure they enjoy preferential treatment. During the last World War, however, the repatriation of diplomats was in some cases delayed by long negotiations or practical difficulties, especially in the case of the war in the Far East. It must therefore be agreed that if diplomats do not enjoy more favourable treatment as a result of international customary law, they must be accorded the full benefit of the Convention's provisions.

In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law : he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status ; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.

ARTICLE 5. — DEROGATIONS

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Historical Background and General Remarks

This question was never broached during the preliminary discussions. Some people considered that the Convention should apply without exception to all the persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits. These divergent views had not been expressed, however, and the problem did not arise until after the Stockholm Conference. It arose then because the Conference had adopted a definition of protected persons which covered those who committed hostile acts without being members of the regular combatant forces[1].

As soon as the subject came up for discussion at the Diplomatic Conference several delegations explained that in their opinion provision would have to be made for certain exceptions in the case of spies and saboteurs. They pointed out that the effectiveness of the

[1] See *Remarks and Proposals*, Geneva, 1949, p. 68.

measures taken to deal with enemy agents and saboteurs depended on the secrecy of the proceedings ; it was inconceivable that a State which had arrested one or more enemy agents should be obliged to announce their capture and let the persons under arrest correspond with the outside world and receive visits ; the situation was the same in the case of saboteurs and also, in occupied territories, in that of members of underground organizations.

Is this line of argument entirely convincing ? There may of course be occasions when it is desirable to keep the fact of an arrest secret in the hope of capturing a whole organization or spy ring. But although the Convention obliges the Powers to give protected persons certain opportunities for communicating with the outside world, even when they are being held for trial, it does allow some latitude : Article 136 lays down, for example, that the names of the detained persons are to be transmitted if they are kept in custody *for more than two weeks* ; one can see that this leaves a margin which will, in the majority of cases, meet any legitimate security requirements. To quote another instance, although Article 25 grants protected persons an absolute right to give news of themselves to their families, that does not mean that the messages sent are not subject to censorship.

It is thus clear that the Draft Convention took security requirements into account and it may be wondered whether it was really necessary to resort to express derogations.

It may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or irregular combatants. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler to exclude them from the benefits of the Convention, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences[1], that it was not advisable to leave the accused at the mercy of those detaining them.

The discussions on this point at the Diplomatic Conference were long and difficult ; the delegations representing the British Commonwealth and the United States took a leading part in them and, in the relevant drafting Committee, met with opposition from the outset from the Delegation of the USSR. A text was finally adopted

[1] It will be remembered that the mere fact of listening to an enemy broadcast or of attempting to cross a frontier has been described as intelligence with the enemy and punished accordingly.

and submitted to Committee III, which approved its terms, by 29 votes to 8, with 7 abstentions, after a fairly lively debate[1].

The original proposal adopted by Committee III was in English. It very soon appeared that the wording was faulty both in French and English. It was nevertheless adopted as it stood by the Conference in plenary session.

Several delegations, which had only agreed with considerable misgiving to the introduction of this major restriction into the Convention, first proposed re-opening the discussion and tabled an amendment ; they later withdrew it and suggested making certain drafting amendments to the French text only[2]. Their proposals were adopted by the Conference and form the present French text of Article 5[3]. We shall see, as we come in turn to each paragraph of this Article, that the meaning conveyed by the French and English texts is not exactly the same. What were put forward as improvements in translation were in reality fairly far-reaching changes. Consequently, when studying the Article it will be necessary to refer simultaneously to the French and English texts, both of which are authentic according to Article 150. The various points of difficulty in the text arise not only from the fact that the original was drafted

[1] The USSR Delegation tried without success to have it replaced by the following provision : " Persons convicted of espionage and sabotage on the national territory of the belligerent, or in occupied territory, shall be deprived of the right to correspond by letter and by other means of communication provided in the present Convention ".

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 101.

[3] The proposal which was not modified and is now the French version of Article 5 of the Convention, reads as follows : " Si, sur le territoire d'une Partie au conflit, celle-ci a de sérieuses raisons de considérer qu'une personne protégée par la présente Convention fait individuellement l'objet d'une suspicion légitime de se livrer à une activité préjudiciable à la sécurité de l'Etat, ou s'il est établi qu'elle se livre en fait à cette activité, ladite personne ne pourra se prévaloir des droits et privilèges conférés par la présente Convention qui, s'ils étaient exercés en sa faveur, pourraient porter préjudice à la sécurité de l'Etat.

"Si, dans un territoire occupé, une personne protégée par la Convention est appréhendée en tant qu'espion ou saboteur ou parce qu'elle fait individuellement l'objet d'une suspicion légitime de se livrer à une activité préjudiciable à la sécurité de la Puissance occupante, ladite personne pourra, dans les cas où la sécurité militaire l'exige absolument, être privée des droits de communication prévus par la présente Convention.

Dans chacun de ces cas, les personnes visées par les alinéas précédents seront toutefois traitées avec humanité et, en cas de poursuites, ne seront pas privées de leur droit à un procès équitable et régulier tel qu'il est prévu par la présente Convention. Elles recouvreront également le bénéfice de tous les droits et privilèges d'une personne protégée, au sens de la présente Convention, à la date la plus proche possible eu égard à la sécurité de l'Etat ou de la Puissance occupante, suivant le cas."

in English, but also because it was drafted in terms of Anglo-Saxon judicial institutions, which often do not exist in other legal systems, especially on the Continent.

PARAGRAPH 1. — IN THE TERRITORY OF PARTIES TO THE CONFLICT

" . . . *is satisfied* "

The French text says : " a de sérieuses raisons de considérer... ou s'il est établi... " which means " has serious reasons for considering... or if it is established... ". The words " is satisfied " (the French translation of which would be " est convaincue que ") are clearer than the French wording and would appear to convey the intention of the authors of the original text more exactly. It may be noted in passing that the words " s'il est établi " are not to be found in the English version. A correct French translation of the English text would be : " celle-ci est convaincue qu'une personne protégée... ou qu'elle se livre... ". In other words the sense of conviction which the Party to the conflict must have refers to cases of legitimate suspicion as well as to cases where the person concerned is actually engaging in hostile activities.

" . . . *that an individual protected person is* . . . " (in French " qu'une personne protégée fait individuellement l'objet... "). During the discussions at the Diplomatic Conference several speakers emphasized the importance of these words. The suspicion must not rest on a whole class of people ; collective measures cannot be taken under this Article ; there must be grounds justifying action in each individual case.

" . . . *definitely suspected* " (in French " d'une suspicion légitime "). The English text is the clearer. It conveys the real meaning of the words used : the suspicion must be a definite one. At the Diplomatic Conference one of the delegates who supported the French wording said that the notion of " legitimate suspicion " (suspicion légitime) was well known in Continental penal law, but we have not been able to trace any reference to the subject in legal writings. In our opinion the expression means that the suspicions must be definite enough to involve the person concerned personally. The question which really comes to mind, on re-reading the French text, is how the authorities could " have serious reasons for considering that a person is an object of legitimate suspicion " (avoir de sérieuses raisons de considérer qu'une personne fait l'objet d'une suspicion légitime).

" . . . *activities hostile to the security of the State* " (in French " une activité préjudiciable à la sécurité de l'Etat "). The word

" préjudiciable " (prejudicial) conveys the idea of an established fact, whereas the word " hostile " implies an intention.

The idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article's weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action.

" . . . *such rights and privileges under the Convention as would . . . be prejudicial to the security of such State* ". This is the only Article in the Convention which speaks of the rights *and privileges* of protected persons. Elsewhere there is no question of anything but rights (in Articles 7 and 8, for example). Undue importance should not be attached to the word " privileges " which should be regarded as otiose. The rights of protected persons are privileges, if their position is compared with that of persons who do not enjoy protection under the Convention.

The rights referred to are not very extensive in the case of protected persons under detention ; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross.

The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions—for example, the provision in Article 37 that they are to be humanely treated when they are confined pending proceedings or subject to a sentence involving loss of liberty, or the stipulation in Article 38 that they shall receive medical attention, if their state of health so requires. Furthermore, it would be really inhuman to refuse to let a chaplain visit a detained person who was seriously ill. Torture and recourse to reprisals are of course prohibited.

It should, moreover, be noted that this provision cannot release the Detaining Power from its obligations towards the adverse Party. It remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks. This is not, in fact, a right or privilege of the protected person, but an obligation of the Detaining Power.

As we see, the Article refers mainly to the relations of the detained person with the outside world, and that is the sphere in which restrictions will doubtless be applied.

PARAGRAPH 2. — OCCUPIED TERRITORY

" . . . *is detained* " (in French " est appréhendé "). The French phrase conveys the idea of arrest. The English text is clearer : the reference is to persons who are deprived of their liberty for a certain period of time.

" . . . *as a spy or saboteur* ". Article 29 of the Regulations annexed to the Fourth Hague Convention of 1907 gives the following definition of a spy : "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party ".

That definition of a spy is still valid. Article 30 of the same Regulations stipulates that a spy taken in the act shall be punished without previous trial—a provision in keeping with the general rule in Article 3 of the Convention, which we have already discussed. Articles 64 to 76 are applicable to the trial of spies in occupied territory, and it must be remembered that Article 68, paragraph 2, authorizes the Occupying Power to impose the death penalty, in certain circumstances, on protected persons who are guilty of espionage. Lastly, a spy who rejoins the armed forces to which he belongs and is later captured by the enemy, is treated as a prisoner of war and cannot be made to answer in any way for his earlier acts of espionage.

Sabotage is harder to define, as no definition of it is given in any text in international law. The term " sabotage " should be understood to mean acts whose object or effect is to damage or destroy material belonging to the army of occupation or utilized by it.

The other terms used in this paragraph have already been commented upon in connection with paragraph 1. The application of these provisions, however, is limited to cases where absolute military security so requires—a more stringent condition than the one in the first paragraph. Moreover it is not, here, the rights and privileges accorded to the protected person by the Convention which are forfeited, but only his rights of communication.

" . . . . *be regarded as having forfeited rights of communication* " (in French " être privée des droits de communication "—be deprived of rights of communication). The meaning of the two versions is not exactly the same. According to the English text, the detained person has, by his past actions, forfeited or deprived himself of his rights of communication. Those rights obviously refer to his relations with the outside world, which we have already discussed. The Detaining Power is, however, in no way released from its obligation to notify the arrest to its official Information Bureau for transmission to the official

Information Bureau of the country of which the person concerned is a national. The Protecting Power too will have to be notified in accordance with Articles 71 and 74 in case of proceedings being instituted.

PARAGRAPH 3. — HUMANE TREATMENT

In stipulating that detained persons are to be treated with humanity, the paragraph merely draws attention to one of the Convention's fundamental principles, which nothing in the first two paragraphs contradicts. The right of detained persons to a fair and regular trial will be ensured, in occupied territory, by applying the provisions of Articles 64 to 76 ; there are no special provisions applying to the territory of the Parties to the conflict but the rule contained in Article 3 will be applicable : i.e. the Court must afford " all the judicial guarantees recognized as indispensable by civilized peoples ".

It is hoped that the Powers will make ample use of the clause indicating that restrictions are to be raised as soon as possible ; there can be no doubt that the reasons which may exist for keeping certain people in solitary confinement are, in most cases, of a temporary nature.

CONCLUSIONS

The Article, as it stands, is involved—one might even say, open to question. It is an important and regrettable concession to State expediency. What is most to be feared is that widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check. It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion.

ARTICLE 6. — BEGINNING AND END OF APPLICATION

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations ;

however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention : 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

This is the only one of the four Geneva Conventions which contains specific provisions relating to the general cessation of its application. The other Conventions contain clauses dealing with the moment when the Convention ceases to apply to each individual protected person, as in the last paragraph of this Article.

Paragraph 1. — Beginning of application

It will be well to recall certain fundamental considerations. The Convention was to enter into force, under Article 153, six months after the deposit of the second ratification. The second instrument of ratification was, in fact, deposited on April 21, 1950, and the Convention therefore entered into force on October 21 of that year. Subsequently it enters into force for each Contracting Party six months after the deposit of that Party's instrument of ratification or accession. Certain provisions of the Convention—Article 144 for instance—must be applied in peace time, but the majority of its provisions are only applicable when the conditions laid down in Article 2 are fulfilled. The purpose of that Article is then to define the cases in which the Convention is applicable, whereas the present paragraph is concerned with the beginning of its applicability by the Contracting Parties engaged in the struggle. From that moment the Convention applies to all protected persons provided they themselves, as individuals, fulfil the conditions laid down in Article 4.

The words " any conflict " may mean declared wars or any other armed conflict covered by Article 2. By using the words " from the outset " the authors of the Convention wished to show that it became applicable as soon as the first acts of violence were committed, even if the armed struggle did not continue. Nor is it necessary for there to have been many victims. Mere frontier incidents may make the Convention applicable, for they may be the beginning of a more widespread conflict. The Convention should be applied as soon as troops are in foreign territory and in contact with the civilian population there. The same would apply if, following frontier incidents, the Government concerned adopted security measures, such as internment,

against the nationals of the other State who are in its territory[1]. The word " occupation " in this paragraph should naturally be taken as including the form of occupation, referred to in Article 2, where no military resistance is encountered. The Rapporteur of Committee III was very definite about this; he expresses himself as follows: "It was perfectly well understood that the word 'occupation' referred not only to occupation during war itself, but also to sudden occupation without war, as provided in the second paragraph of Article 2 "[2]. It is a question here, we repeat, of the application of the Convention as between the Parties concerned. In all cases of occupation, whether carried out by force or without meeting any resistance, the Convention becomes applicable to individuals, i.e. to the protected persons, as they fall into the hands of the Occupying Power.

It follows from this that the word " occupation ", as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer of persons from occupied territory. The same thing is true of raids made into enemy territory or on his coasts. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.

Some of the Convention's provisions become applicable immediately, such as those in Article 136, which concerns the setting up of an official Information Bureau. Others—Articles 52, 55, 56 and even some of the provisions of Articles 59 to 62, for example—presuppose the presence of the occupation authorities for a fairly long period.

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[1] Its application in this case might, of course, only be temporary if the incidents were quickly settled and the situation became peaceful once again, and did not degenerate into a more general conflict.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 815.

However, all the provisions relating to the rights enjoyed by protected persons or to the treatment which must be given to them become applicable forthwith whatever the duration of the occupation. Thus troops advancing into enemy territory cannot under any circumstances execute a civilian without trial, no matter what crime he has committed. The person in question must be tried and sentenced in accordance with Article 64 and the Articles which follow it.

One proposal at the Diplomatic Conference was that this paragraph should contain a reference to Article 3, which relates, as we know, to conflicts not of an international character. The proposal was rejected by 21 votes to 20, with 2 abstentions. This result appears to confirm the opinion already expressed—namely, that Article 3 is really a " Convention in miniature " and itself contains the rules governing its application[1].

PARAGRAPH 2. — END OF APPLICATION IN THE TERRITORY OF THE PARTIES TO THE CONFLICT

Committee III had laid down that in the territory of the Parties to the conflict the Convention would not cease to apply until one year after the general close of military operations[2]. The United Kingdom Delegation proposed in plenary session that this waiting period should be dropped. The British amendment was adopted by 17 votes to 14, with 12 abstentions. It has doubtless certain advantages, but also certain drawbacks, for in the period following the close of military operations conditions are still fairly unsettled and the passions roused by war are still aflame. Hence the necessity for clear rules safeguarding protected persons, most of whom are of course enemy nationals.

It was argued, however, that while the maintenance in force of the Convention would certainly protect foreign nationals in the territory of the Parties to the conflict, it would at the same time provide grounds for prolonging any security measures applied to them, such as assigned residence or internment. But such restrictions of personal liberty are only justified by the existence of an armed struggle. Viewed from that angle, the solution adopted was a happy one ; it means at any rate that there can be no question after hostilities have ended, of applying restrictive measures of this kind to enemy nationals

[1] Needless to say, Article 3 too becomes applicable from the very outset of the conflicts to which it relates.

[2] The solution was to have been the same in the case of occupied territory.

who have not been subjected to them before. This remark only applies, incidentally, to security measures and not to the normal administration of justice.

What should be understood by the words " general close of military operations " ? In the opinion of the Rapporteur of Committee III, the general close of military operations was " when the last shot has been fired "[1]. There are, however, a certain number of other factors to be taken into account. When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide : it will depend either on an armistice, a capitulation or simply on *debellatio*[2]. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned[3].

It should be noted that everything that has just been said is subject to the reservation in paragraph 4 which will be considered shortly.

Paragraph 3. — End of application of the Convention in occupied territories

In the preliminary stages it had been thought that the Convention would only cease to apply when the occupation itself was at an end. That was what the draft text adopted by the Stockholm Conference laid down. Several delegations pointed out at the Diplomatic Conference, however, that if the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the Occupying Power had been handed over to the authorities of the occupied territory. In 1949 the delegates naturally had in mind the cases of Germany and Japan. It was finally laid down, therefore, that in occupied territory the Convention would be fully applicable for a period of one year, after which

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 815.

[2] By *debellatio* we mean the end of an armed conflict which results in the occupation of the whole of the enemy's territory and the cessation of all hostilities, without a legal instrument of any kind.

[3] To quote an example from the pages of history, the armistice which ended the struggle between France and Germany in 1940 did not represent the general close of military operations in the sense in which the phrase is used in the Convention we are discussing.

the Occupying Power would only be bound by it in so far as it continued to exercise governmental functions. The solution appears to be a reasonable one. One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent ; communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an occupation being prolonged after the cessation of hostilities can be envisaged. When the occupied Power is victorious, the territory will obviously be freed before one year has passed ; on the other hand, if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.

The Diplomatic Conference drew up a list of Articles which the Occupying Power must observe after the period of one year has elapsed, so long as the occupation lasts, in so far as that Power exercises governmental functions. They include, first and foremost, the general Articles (1 to 12) ; this is most important, especially in view of the activities of the Protecting Powers provided for in Article 9 : they also include Article 27, which prescribes the humane treatment of protected persons, and Articles 29 to 34, which lay down a certain number of fundamental rules for the treatment of persons in the hands of a Power of which they are not nationals. On the other hand, the provisions which concern situations connected with military operations—in particular Articles 48, 50 and 54 to 58—will no longer apply. The same applies to the clauses relating to internment, with the exception of Article 143 dealing with supervision by the Protecting Power, which will remain in force.

It was noted, when discussing Article 2, that the Convention applies to cases of occupation carried out under the terms of the instrument which brings hostilities to a close : an armistice, capitulation, etc. The present rule applies in such cases.

Article 6 does not say when the Convention will cease to apply in cases of occupation where there has been no military resistance, no state of war and no armed conflict. This omission appears to be deliberate and must be taken to mean that the Convention will be fully applicable in such cases, so long as the occupation lasts. The Convention could only cease to apply as the result of a political act, such as the annexation of the territory or its incorporation in a federation, and then only if the political act in question had been recognized and accepted by the community of States ; if it were not so recognized and accepted, the provisions of the Convention must continue to be applied.

PARAGRAPH 4. — CONTINUED APPLICATION TO CERTAIN PERSONS

This paragraph is a happy addition to the other provisions of Article 6. The time when the Convention as a whole ceases to apply, both in the territory of the Parties to the conflict and in occupied territory, may quite conceivably come before the protected persons have been able to resume a normal existence, especially if they have to be repatriated or assisted to resettle. In the territory of the Parties to the conflict, for example, if internees are not immediately released, the rules laid down in the Convention must obviously continue to apply to them, and if the State decides to repatriate certain enemy nationals, whether interned or not, their repatriation must be carried out in accordance with the Convention. Similarly, in occupied territories, where an Occupying Power considers it necessary to prolong the internment of certain persons after the time limit of one year has expired, the persons concerned will continue to enjoy all their rights under the Convention. The word " resettlement " is used in regard to protected persons who cannot be repatriated for one reason or another and are not allowed to settle permanently in the country where they are living. In such cases another country must be found where they will be received and allowed to settle. It was in particular the experience gained at the end of the Second World War which led to the adoption of this clause.

ARTICLE 7. — SPECIAL AGREEMENTS [1]

In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, 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 protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.

Protected persons 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] Article common to all four Conventions. See First, Second and Third Conventions, Article 6.

General Background

War is accompanied by the breaking off of diplomatic relations between the belligerents. On the other hand, it does not involve the cessation of all legal relations between them. As a delegate to the 1949 Diplomatic Conference aptly put it, " the legal phenomenon continues during and in spite of war, testifying in this way to the lasting quality of international law ".

Apart from the agreements which put an end to hostilities, the belligerents conclude an appreciable number of other agreements during the actual course of a war[1]. They are concerned in particular with the treatment which the nationals of each of the Parties are to receive when in enemy hands. In many cases agreements of this nature were concluded between the belligerents before the Geneva Conventions relating to prisoners of war and civilians existed. A great many agreements concerning prisoners of war were, for example, concluded between the belligerents during the First World War. It was on those agreements that the provisions of the 1929 Prisoners of War Convention were very largely based.

It was the same in the case of civilians. On the proposal of the International Committee of the Red Cross the majority of the belligerents in the Second World War agreed, on a basis of reciprocity, that civilians of enemy nationality interned in their territory would be treated in accordance with the provisions of the 1929 Prisoners of War Convention with certain adaptations made necessary by their civilian status. As is known, the present Convention follows the Third (Prisoners of War) Convention very closely so far as the treatment of internees is concerned. On the other hand, the International Committee of the Red Cross was unsuccessful in its efforts to have the provisions of the " Tokyo " Draft applied, by mutual agreement, to occupied territories.

Apart from these agreements which preceded and, as it were, prepared the way for the Third and Fourth Conventions, there is no doubt at all that the position of civilians under the present Convention can be improved by means of special agreements between the belligerents. Certain Articles of the Convention make express provision for their conclusion.

The provision we are studying already existed in a slightly different form in the 1929 Prisoners of War Convention. It was introduced as a

[1] See, on this subject, R. Monaco : *Les Conventions entre belligérants* in " Recueil des cours de l'Académie de droit international de La Haye ", 1949, II (T. 75), p. 277.

matter of course into the new Convention drawn up in 1949 for the protection of civilians ; it also appears in the other three Conventions.

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

1. *First sentence : Nature and form of special agreements*

A preliminary indication of the nature of the special agreements is given by the list of Articles of the Convention which expressly mention the possibility of agreements being concluded between the Parties concerned. They refer to the following points.

(a) Appointment of an impartial organization as a substitute for the Protecting Power (Article 11, para. 1) ;
(b) Establishment of hospital and safety zones and localities (Article 14) ;
(c) Establishment of neutralized zones (Article 15) ;
(d) Evacuation of besieged areas (Article 17) ;
(e) Exchange and repatriation of enemy nationals (Article 36) ;
(f) Relief shipments for internees (Article 108) ;
(g) Distribution of collective relief to internees (Article 109) ;
(h) Release, repatriation, return to places of residence or accommodation in a neutral country of internees during hostilities (Article 132) ;
(i) Search for dispersed internees (Article 133) ;
(j) Fixing the procedure for enquiries instituted at the request of one of the Parties in cases of alleged violation of the Convention (Article 149).

The above list, which appears in the Convention, must be regarded as having been given mainly as an indication ; for there are other Articles in the Convention which refer to agreements between the belligerents. Article 22 lays down that unless there is an agreement to the contrary, medical aircraft are forbidden to fly over enemy territory. Article 23 implies the conclusion of an agreement between the Parties concerned. According to Article 83, on the marking of internment camps, the Powers concerned may agree upon a method of marking other than that laid down in the Convention. Article 135 makes a reservation in regard to any agreements concluded between the belligerents in connection with the exchange and repatriation of their nationals. Article 143 envisages the possibility of fellow-countrymen of the internees taking part in visits to internment camps by special agreement.

This list shows at once that the term " agreements " is used to denote a wide variety of arrangements. Sometimes it is a matter of local arrangements of a purely temporary nature (evacuation), sometimes of actual regulations (distribution of relief consignments), sometimes of a quasi-political agreement (substitute for the Protecting Power, investigations).

It will be readily realized that the position of civilians can be much improved by special agreements concluded between the belligerents in cases other than those provided for in the Convention itself. The Convention represents a minimum which many States will doubtless wish to exceed whenever they can. Numerous opportunities will, in particular, occur in connection with the material situation of the protected persons. It is conceivable, for example, that States may conclude special agreements, whereby nationals of the other State who are in their hands are free to dispose of their property. The position of civilian medical personnel, doctors in particular, should also be settled in detail.

Special agreements will be concerned above all with the position of protected persons who are in the actual territory of Parties to the conflict, because in such cases the mutual interest of the States concerned will generally be involved. They will, on the other hand, be harder to conclude in the case of occupied territories. Two Powers at war are seldom both in occupation of a portion of each other's territory. Occupation is generally what might be called " a one-way operation ". The factor of mutual advantage, on which special agreements are often based, is therefore less important in the case of a regime of occupation.

The term " special agreements " should be understood in a very broad sense. No limits are placed either on the form they are to take or in regard to the time when they are to be concluded. The only limits set by the Convention concern the subject of the agreements, and are there in the interests of the protected persons.

A. *Form of the agreements.* — For an agreement between two or more belligerents to be regarded as a " special agreement " within the meaning of Article 7, there is no need for it to deal exclusively with matters covered by the Fourth Convention. The clauses relating to that Convention may form part of an agreement of much wider scope between the Parties. An armistice agreement, for example, may contain not only military and territorial clauses but also one or more clauses relating to protected civilians. It is also possible that an agreement may deal at one and the same time with prisoners of war, medical personnel and civilians.

Special agreements would not appear to be subject to formal requirements, such as signature and ratification, which are essential in the case of international treaties. They clearly fall into the category of conventions in simplified form. In wartime, it is sometimes necessary to take immediate steps to implement agreements under circumstances which make it impracticable to observe the formalities required at other times; such agreements will be valid if the contracting authorities have not exceeded their powers. This will for example be the case where local arrangements of a temporary nature are made for the evacuation of the wounded or to set up a neutralized zone.

Even when there is no urgency, the absence of formalities is justified by the fact that special agreements are always, in the final analysis, measures taken in application of the Convention. The latter binds the States concerned and it is only natural that measures to apply it should be within the competence of executive bodies. This absence of formality means that agreements may even be made verbally; reciprocal declarations of intention will often be exchanged through a third party[1]. Apart from those concluded on the actual battlefront between the military commanders, the agreements will generally be arranged through the Protecting Powers or their substitutes, or through the International Committee of the Red Cross. Article 14 expressly invites the Protecting Powers and the International Committee to lend their good offices in order to facilitate the institution and recognition of hospital and safety zones.

B. *Time of conclusion.* — Certain special agreements are meaningless unless they are concluded while hostilities are actually in progress. The examples given by the Convention leave no doubt on the subject; but in some cases agreements may be concluded before hostilities break out; this applies in particular to those mentioned in Articles 11 and 14. That is why the present Article uses the expression " the High Contracting Parties " and not the " Parties to the conflict ", which occurs in most of the other Articles. It is also conceivable that certain agreements could be concluded by one or more belligerent Powers with neutral States which are also party to the Convention, with a view to improving the lot of protected persons—by arranging, for example, for them to be accommodated in hospitals in a neutral country. Furthermore, certain agreements can obviously be concluded

[1] The special agreements concluded between Italy and the United Kingdom provide a good example of this form of agreement. They are, so far as we know, the only agreements of the 1939-1945 war which 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.

after the close of hostilities, in particular those which concern the arrangements for the repatriation of protected persons, for their return to their homes or their resettlement. All such agreements, no matter when they are concluded, are subject to the rules laid down in Article 7.

2. *Second sentence. — Prohibited special agreements*

A. *Agreements in derogation of the Convention.* — In the light of experience gained in connection with the 1929 Prisoners of War Convention, the Diplomatic Conference felt it necessary to introduce this provision into all four Conventions in 1949.

During the Second World War certain belligerent governments—in particular those whose territory was occupied—concluded agreements which deprived prisoners of war of the protection of the Convention in certain respects, such as supervision by the Protecting Power[1], the ban on work connected with military operations or the safeguards in case of penal or disciplinary sanctions[2]. Such measures were represented to those concerned as an advantage, but in the majority of cases involved drawbacks which were sometimes very serious. Disregarding the question of whether such agreements were or were not compatible with the letter and spirit of the 1929 Convention, the International Committee of the Red Cross recommended, when the preliminary work began, that the following words should be added to the provision dealing with special agreements : " special agreements shall in no circumstances reduce the standard of treatment of protected persons ". The Committee's proposal was approved by the Conference of Government Experts in 1947[3], but even then certain experts opposed it on the ground that it restricted the sovereign power of States to far too great an extent ; they also claimed that it would often be very difficult to say whether or not an agreement was in the interests of the protected persons. The same arguments were put forward at the 1949 Diplomatic Conference[4], but the

[1] Agreements which deprive protected persons of the services of a Protecting Power are expressly prohibited in Article 11, paragraph 5, of the Fourth Convention of 1949 (Article 10, para. 5, in the First, Second and Third Conventions).

[2] See on the subject of these agreements, R.-J. WILHELM : *Le caractère des droits accordés à l'individu dans les Conventions de Genève. Revue internationale de la Croix-Rouge*, August 1950.

[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, p. 259.

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

Conference voted by a substantial majority in favour of maintaining the safeguard proposed by the International Committee of the Red Cross.

B. *Scope of the safeguard clause.* — The clause as finally drafted goes further than that originally proposed by the International Committee of the Red Cross, largely because of the addition of the words " nor restrict the rights which it confers upon them "—an important addition which brings out very clearly the real meaning of Article 7.

It will not always be possible to decide at once whether or not a special agreement " adversely affects the situation of protected persons ". What is the position, for instance, if their situation is improved in certain ways and made worse in others ? Some of the agreements mentioned above may have appeared to bring them advantages at the time of conclusion ; the drawbacks only became apparent later. The criterion " adversely affect the situation " is not, therefore, in itself an adequate safeguard. That is why the second condition is of value.

In what sense should the words " rights conferred by the Convention " be understood ? The question is examined here in relation to special agreements between belligerents and not from the point of view of the individual, an aspect that will be studied in connection with Article 8. Should the words be understood to apply solely to provisions which refer directly to protected persons ? By no means. A proposal aimed at prohibiting only those agreements which restricted fundamental rights was rejected by the Diplomatic Conference on the grounds that the Convention laid 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 were not[1]. The reference is, therefore, to the whole body of safeguards which the Convention affords to protected persons.

These safeguards follow from the whole of the provisions of the Convention, save perhaps the purely formal clauses contained in the last section.

In the final analysis, each rule of the Convention represents an obligation on the States party to the Convention. The sense of the expression " restrict the rights " then becomes clear : the States may not by special agreement restrict, i.e. derogate from their obligations under the Conventions. On the other hand, nothing prevents them from undertaking further and wider obligations in favour of protected

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

persons. Obligations under the Geneva Convention must, in fact, be considered as representing a minimum.

It is thus the criterion of " derogation ", rather than that of " adverse effects ", 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 delayed consequence of derogation.

When the Governments which met in Geneva in 1949 expressly prohibited any agreement in derogation of the Convention, they did so because they were afraid to leave the product of their labours, which had been drafted with such patience under the best possible conditions (i.e. in peacetime), at the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances. They were courageous enough to recognize their own possible future weakness, and to guard against it. In that sense Article 7 is a landmark in the progressive renunciation by States of their sovereign rights in favour of the individual and of a higher 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 " safeguard clause " debar the Powers concerned from endeavouring to remedy the situation by an agreement departing from that provision ? This is a question which the States concerned cannot settle on their own account. If such a situation were to arise in actual practice, it would be for the neutral organizations responsible for looking after the interests of the protected persons to give their opinion ; basing their decision, in such contingency, on the rule (inherent in the safeguard clause) of not adversely affecting the situation of protected persons, they could tolerate certain measures of derogation which the States concerned might take, either separately or by mutual agreement, with a view to remedying the situation.

(b) 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. 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 8— they will find difficulty in opposing the conclusion and consequences of such an agreement. In such circumstances the organizations responsible for supervising the regular application of the Convention will have a duty to perform. It will be for them to remind the belligerents of their obligations. Other factors too will

doubtless enter into consideration—such as pressure by Powers party to the Convention but not involved in the conflict, pressure of public opinion, the fear of the Government in power of being subsequently disavowed or even punished, and court decisions. The correct application of the Convention is not a matter for the belligerents alone; it concerns the whole community of States and nations bound by the Convention.

PARAGRAPH 2. — DURATION OF SPECIAL AGREEMENTS

This provision was not really essential. It had been introduced in the 1929 Prisoners of War Convention at the request of Germany, since the Armistice Agreement of November 1918 (Article 10) had abrogated the agreements concluded between the belligerents to supplement the brief stipulations of the Hague Regulations of 1907 in regard to prisoners of war.

Article 6 of the Fourth Convention makes express provision concerning its duration. It is impossible for the belligerents to waive the application of the Convention even in an instrument of capitulation.

Nevertheless, this provision, which was agreed to without comment or objection by the Diplomatic Conference, will have certain fortunate consequences. Should the standard of treatment accorded to protected persons have been improved as a result of special agreements, they will continue to have the benefit of those agreements so long as the Convention applies to them in accordance with the terms of Article 6. Again, the paragraph contains a valuable indication of the meaning of the Convention. The phrase " except . . . where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict" confirms what we have already said: the obligations incumbent on the belligerents with regard to protected persons represent a minimum.

ARTICLE 8. — NON-RENUNCIATION OF RIGHTS [1]

Protected persons 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. First, Second and Third Conventions, Article 7.

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 is the last in the series of articles designed to make that protection inviolable—Article 1 (application in all circumstances), Article 6 on the duration of application, and Article 7 prohibiting agreements in derogation of the Convention.

1. *Renunciation of protection under the Convention*

The series of Conferences which prepared the revision of the Conventions 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 (through occupation, *debellatio*, a change of government or civil war)[1]. Mention has already been made of the example of an occupied country concluding an agreement with its enemy, the terms of which may adversely affect its nationals in enemy hands. Article 7 should now obviate that danger.

The examples which the Diplomatic Conference had in mind were for the most part connected with prisoners of war. Precedents were obviously lacking in the case of protected civilians. There was one fairly striking example however: it concerned the application of the Regulations annexed to the Fourth Hague Convention of 1907 in territories occupied by the Allied Powers after the capitulation of Germany in May 1945. The Allied Powers claimed that the Regulations were not applicable owing to the fact that the German State had disappeared completely. This point of view has been discussed on numerous occasions. Without adopting any definite position in this discussion it is pointed out that a question of that kind could not arise in connection with the Geneva Conventions of 1949, as they provide certain categories of people with a status which does not depend on any political events which may occur. The permanence of the application of the Convention is increased still further by the fact that the persons who benefit by it cannot renounce its benefits.

When a State offers persons in its hands 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

[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, p. 70.

to influence their choice. The pressure may vary in its intensity and be more or less open, but it nevertheless constitutes a violation of their moral and sometimes even of their physical integrity. The inevitable result of such practices is to expose the protected persons to disadvantages of two kinds and sometimes of a serious nature—first, subjection to pressure, and secondly, as already indicated, the partial or total renunciation of the protection accorded to them by the Convention.

To meet those dangers and to meet a general desire, the International Committee of the Red Cross included in its draft Conventions an Article stipulating that " protected persons may in no circumstances be induced by coercion or by any other forced means, to 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 ".

In their proposal, the International Committee emphasized what appeared to them to be the greatest risk—namely, the pressure exerted to obtain renunciation. The text might, however, have been interpreted as implying that protected persons could renounce the benefits of the Convention, provided that 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 8, thus intimating to States party 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 opposition. Special situations in which prisoners of war might find themselves were quoted. Other delegations wondered whether Conventions designed to protect the individual should be carried to the point where in a sense they deny him the essential attribute of liberty.

In the end, however, the Diplomatic Conference unanimously adopted the present wording—mainly for the reasons given above [1],

[1] The Norwegian representative, who stated these motives the most forcibly, said among other things that the question was being examined of prisoners of war or civilians in the hands of a Power being able, through an agreement concluded with the latter, to renounce finally for the whole duration of the war the rights conferred on them by the Convention. To say that such agreements would not be valid if they are obtained by duress was not sufficient in his view ; they all knew that it was extremely difficult to produce proof of there having been duress or pressure. Generally, the Power

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

Among the reasons put forward in favour of the present Article 8, two points call for notice.

The Conference did not overlook the fact that the absolute character of the rule as drafted might entail for some persons what one delegate termed " harsh " consequences. 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 might have cause to regret ? Faced with this dilemma, the Conference felt that full application of the Convention would be the lesser evil, if it is permissible 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 8 would appear to entail for certain protected persons, the underlying 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 in the hands of the enemy are not really in a sufficiently independent and objective state of mind to realize fully the implications of a renunciation of their rights under the Convention. " Liberty " in such a connection would be a misnomer.

B. *The wishes of protected persons in the application of the Conventions.*—The Conventions do not, it is true, completely ignore the wishes of protected persons. In the Civilians Convention several clauses indicate that the wishes of individuals are to be taken into consideration. Article 35, for example, invites the Powers to authorize protected persons to leave the territory if they so desire. In the same way the participation of internees in religious ceremonies and in certain artistic or intellectual pursuits depends entirely on their own wishes. In general, however, it can be said that the authors of the Convention have endeavoured to ensure standards of treatment which depend as little as possible, for their application, on the wishes of those concerned. Provision has only been made for their wishes

which obtained the renunciation would have no difficulty in asserting that it was obtained with the free consent of those concerned, and the latter, for their part, might confirm this alleged fact. The only genuine means of ensuring the protection they were seeking would 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 of 1949*, Vol. II-B, pp. 17 and 18.)

to be taken into account on points of detail, so as to allow of a more flexible application of the Convention.

It should further be noted that this prohibition by the authors of the Conventions of 1949 of any renunciation of rights was a logical consequence of their desire to lay down rules representing the minimum required for the preservation of human dignity. Rules of this kind were *in the common interest* and could be renounced by the beneficiaries only under the pressure of external circumstances, against which it was the very purpose of the Convention to protect them. In this connection the example has been quoted of certain social legislation which applies to the persons concerned independently of their wishes[1]. 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 [2].

Nor does Article 8 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 implicit in those Conventions. States which are party to them are required to apply them when certain objective conditions exist ; but there is nothing in the texts which would justify those States in 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 provide war victims with complete protection. Had they wanted to lay down the wishes of those victims as a condition of application, they would not have failed to provide safeguards and forms of procedure permitting those wishes to be expressed freely, knowing as they did how great the possibilities of misrepresentation were in wartime. They did not do so, however.

Should it therefore be concluded that such a conception reflects greater interest in the rights and duties of States than in the position of the individual under the legal system set up by the Convention ? That would be a completely erroneous conclusion, as will be shown.

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

A. *The basic concepts.*—In the comments on Article 7 the meaning to be attached to the expression " rights which the Convention confers

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 18.

[2] Article 27 of the Swiss Civil Code lays down that " No one may renounce, even in part, the exercise or enjoyment of his rights ".

on protected persons " in relation to the Contracting States was indicated. It is now necessary to define its meaning in relation to the individual, since the expression recurs in the same form in Article 8, except for the word " confer " which is here replaced by " secure ", a still stronger word.

In the development of international law the Geneva Convention occupies a prominent place, since with the exception of the provisions of the Congress of Vienna relating to the Slave Trade, which were themselves still strongly coloured by political aspirations, it is the first time that a set of international regulations has been devoted not to State interests, but solely to the protection of the individual [1].

The initiators of the 1864 and subsequent Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights are attached to it even when hostilities are 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 word " right " appeared in several provisions of the 1929 Prisoners of War Convention. It was not, however, until the Conventions of 1949 (in particular in Articles 7 and 8) that the existence of rights conferred on protected persons was affirmed.

The affirmation is explicit. Faced with a proposal to replace the term " confers upon them " in Article 7 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 prescribed to the States, the Diplomatic Conference decided to maintain the words " confers upon them " which figured in the draft prepared by the International Committee of the Red Cross [2].

In selecting this term the International Committee, doubtless under the influence of the theoretical trends which also resulted in the Universal Declaration of Human Rights, had been led to define in concrete terms a concept which was implicit in the earlier Conventions. It had at the same time, however, complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized

[1] See Max HUBER : *The Red Cross, Principles and Problems*, pp. 11 and 12, and Jean S. PICTET : *La Croix-Rouge et les Conventions de Genève*, lectures delivered before the Academy of International Law at The Hague, 1950, p. 30.

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

by the Conventions " a personal and intangible character allowing " the beneficiaries " to claim them irrespective of the attitude adopted by their home country "[1].

B. *Practical aspect of the rights.*—As already seen in connection with Article 7, " rights conferred by the Convention " should be taken to mean the whole system of rules under the Convention. The subject will not be discussed again here, and readers are referred to the explanations given above.

On the other hand, the question arises of whether the fact of considering those rules as " rights conferred on protected persons " corresponds to an intrinsic reality. From the practical standpoint, indeed, and no longer merely in theory, 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 very clear evolution. Let us take the case of penalties. The Convention of 1864 contains nothing on the subject. The Conventions of 1906 (Articles 27 and 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 146 to 148, with the requisite precision, the obligation incumbent on all States party to the Conventions, belligerent or neutral, to seek out those who are guilty and to punish breaches of the Convention, which is tantamount to saying breaches of the rights of the persons protected.

There has been progress too in the means open to such persons for the defence of their rights. The role of Protecting Powers has now been defined, and extended to all four Conventions (Article 9). It is through the Protecting Power that protected persons will be able most readily to obtain the intervention in their behalf of their state of origin. Provision has been made for substitutes for the Protecting Power. The International Committee of the Red Cross, moreover, enjoys prerogatives under the Convention which will enable it to act in the interests of protected persons (Articles 10 and 11).

A precisely worded provision, Article 30, expressly provides for the possibility of protected persons appealing to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross Society of the country in which they are, or to any organization which may be able to assist them. A protected person does

[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, p. 71.

not, therefore, merely have rights ; he is also provided with the means of ensuring that they are respected.

So far this commentary has only dealt with the question of safeguarding rights against violations committed by the belligerents in whose hands the persons concerned are. What, then, is the position when the violations are the consequence of an agreement concluded between that belligerent and the State of origin of the protected persons ? Would it not be possible for the State of origin to be held responsible at a later date and prosecuted by the protected persons who have suffered prejudice, in those countries at least in which individual rights may be maintained before the Courts ? It would seem that the reply to this question must be in the affirmative.

Undoubtedly, owing to the still undeveloped character of international law, the safeguards protecting the rights conferred on persons to whom the Convention relates are by no means as complete, effective, or automatic as those of national legislations. Nevertheless, Article 8 is of the greatest assistance to all protected persons. It allows them to claim the protection of the Convention, not as a favour, but as a right, and in case of violation, it enables them to employ any procedure available, however rudimentary, to demand respect for the Convention's terms. 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.

C. *Obligation on persons protected.* — One last question remains to be considered. Rights entail obligations. With reference to the individual, under Article 8, the rules of the Conventions, or certain of them, can also be considered as obligations directly incumbent on the persons protected. It is an indisputable fact that certain obligations, such as the respect due to the wounded and sick under Article 16, are also laid upon persons who can claim protection under the Convention. For example, a protected person who robbed the wounded or dead would be liable to the punishment prescribed for such offences under the law of his country or that of the enemy, in partial application of the Convention.

It is in connection with Article 8 that the question arises, since that Article appears to take the form of an obligation laid on the persons protected, stating that they " may in no circumstances renounce .... " It was for that reason that the International Committee of the Red Cross pointed out (in their " Remarks and Proposals " submitted to the Diplomatic Conference) that the general effect of the Conventions was to impose obligations on the States

which were parties to the Conventions rather than on individuals and proposed to draft Article 8 in that sense.

The Diplomatic Conference preferred to keep 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 concerning the changing of their status could have no legal effect[1].

However that may be, Article 8 may be interpreted as implying, if not an obligation, at least a direct indication or even warning to the protected persons. As a corollary to the couching of the rules of the Convention in the form of individual rights in the interest of protected persons, those persons 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.

ARTICLE 9. — PROTECTING POWERS[2]

The present Convention shall be applied with the co-operation 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.

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

[2] Article common to all four Conventions. Cf. First, Second and Third Conventions, Article 8.

GENERAL

1. *Historical background*

A provision dealing with the part played by Protecting Powers in connection with the Convention's application had been included in the 1929 Prisoners of War Convention (Article 86). When a new Convention for the protection of civilians was being drawn up in 1949, it was naturally suggested that a similar provision should be introduced.

A 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). It will be seen at once that the activities of a Protecting Power are dependent upon two agreements: the first between the Power of Origin and the Protecting Power and the second between the Protecting Power and the State of Residence.

Protecting Powers have existed since the XVIth century. Only the larger States then had embassies, and for reasons of prestige they often protected the interests of small or medium-sized countries and of their nationals. Later on, some of these small and medium-sized countries asked the great Powers to undertake the protection of their interests in countries where they themselves were not represented. There are still cases of this practice at the present time.

The activities of the Protecting Powers in this connection were of a most varied nature, ranging from special representations in particular cases to the general and permanent protection of the interests of nationals of the protected country. This activity could not, of course, have the effect of shielding protected persons from the laws of the State of Residence; it was aimed rather at ensuring that they were treated in accordance with those laws and with international treaties and custom. This is important, since the safeguarding of foreign interests in wartime is merely one case of protection among others, with this difference, however, that the existence of a State of war makes it more necessary, while at the same time limiting it in some ways. In actual fact the role of a Protecting Power in Wartime has often been restricted to the custody of diplomatic and consular premises and archives, and the occasional forwarding of documents.

That was, in short, the situation in 1914, at the outbreak of the First World War. The very large numbers of prisoners of war on either side and the time their captivity lasted very quickly raised the question of the supervision of their treatment—to which no answer

had previously been found. The Regulations annexed to the Fourth Hague Convention of 1907 contained certain brief rules concerning the treatment of prisoners of war, but made no provision for the possibility of supervision. Civilians, whether interned in the territory of the Parties to the conflict or detained in occupied territory, were not protected by any international treaty; all that could be applied to their case was customary law, in so far as it could be determined.

The International Committee of the Red Cross was very soon successful in obtaining permission from the principal belligerents, to visit prisoner-of-war camps. It sent many missions to such camps and in certain cases its delegates were also allowed to visit the enemy civilians interned in the territory of the Parties to the conflict. The Protecting Powers were granted the same prerogatives and they too visited prisoner-of-war and civilian internment camps. Neither the International Committee of the Red Cross nor the Protecting Powers were able to take any action, however, in regard to the relations existing in occupied territory between the Occupying Power and the population.

When the Prisoners of War Convention was being drawn up in 1929, the need for supervision was recognized. This duty was assigned to the Protecting Powers.

Under the system set up by the 1929 Convention, however, the Protecting Power remained a private representative—a voluntary representative, moreover—and duties could not be assigned to it, since it acted solely at the behest of the appointing Power. The most that could be done was to recognize the activities of the Protecting Power, and provide them with a legal basis by requiring the Detaining Power to tolerate and even to facilitate them. Article 86 of the 1929 Prisoners of War Convention therefore began with the following words: "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; . . . ".

The Article paid tribute to the work accomplished by certain Protecting Powers in the past, while at the same time legalizing such work in the future. Moreover, by giving certain details concerning the activities in which the Protecting Powers might engage, it eliminated many material and political obstacles. Henceforward their representatives would be less open to suspicion of sympathizing with the enemy, since their intervention would be arranged for in advance and desired.

Nevertheless this Article had the drawback of crystallizing the Protecting Powers' special position as agents of the belligerent States.

It did not make their supervision compulsory, and yet it gave them no authority to act on their own initiative ; the Protecting Power had to be content to carry out the instructions it received ; although it naturally remained free not to do so if in certain given cases it considered that its own position might be prejudiced by the representations it was called upon to make.

So far as it went, Article 86 of the 1929 Convention proved to be of very great value during the Second World War. Many neutral States took a broad view of their protecting mission, and their task was also facilitated by circumstances ; for in several cases the same Protecting Power found itself representing two opposing States. This altered its rôle very appreciably ; for once a Power represented the interests of two opposing belligerents, it became as it were an umpire and this enabled it to use the argument of mutual advantage to obtain the improvements desired.

The system by which the Protecting Powers supervised the application of the Convention certainly proved its value during the Second World War ; but civilians were still without the protection of any definite provisions, as they had been during the First World War. However, as we have seen, enemy nationals who were interned in the territory of the Parties to the conflict were for the most part placed on the same footing as prisoners of war and given the benefit of the provisions relating to them, in particular so far as the activities of the Protecting Powers were concerned. Those Powers gave the same service to them as to the prisoners and also helped enemy civilians in the territory of the Parties to the conflict who were not interned, especially by forwarding remittances or relief consignments received from their country of origin. On the other hand, it was in most cases impossible for the Protecting Powers to act in occupied territories, either because they had been refused access to the territory in question or because they were no longer recognized as Protecting Powers following the occupation ; at the very most they were, in certain cases, permitted to visit camps where enemy civilians were interned in occupied territory ; but this was not allowed in the case of nationals of the occupied territory itself. British and American citizens interned in France by the German authorities could, for example, be visited by agents of the Powers which represented British and American interests in Germany.

The system of Protecting Powers was deficient in certain important respects during the Second World War. The functioning of a Protecting Power presupposes the existence of agreements in which three States participate. If any one of those States does not recognize the Government of the other two States, the appointment of a Pro-

tecting Power becomes impossible. This occurred, for example, in the case of all the Governments of occupied countries which established themselves outside their national territory. In other cases the Protecting Powers, with the best will in the world, were unable to carry out any real work on behalf of war victims.

The experience gained in the Second World War showed the absolute necessity for supervision. When it was lacking—both in the case of prisoners of war without a Protecting Power and in that of the civilian population of occupied territories—the violations and exactions were more numerous and more serious and the victims suffered the most.

Accordingly, in the preliminary work carried on after 1945, the International Committee had three main objects in view :

(a) The extension to all the Conventions of the supervision exercised by the Protecting Powers.

(b) Compulsory supervision.

(c) Arrangements for providing a substitute in the absence of a Protecting Power.

The study devoted to these questions produced the draft text which was to serve as a basis for the work of the Diplomatic Conference of 1949 : " 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 . . . ".

The provisions concerning the visiting of protected persons and those providing for the compulsory appointment of substitutes for Protecting Powers which ceased to function, were in each case made the subject of a separate Article.

2. *Discussions at the Diplomatic Conference of 1949*

Surprisingly enough, the Stockholm Draft gave rise to hardly any objections at the Diplomatic Conference [1]. 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 " was the subject of the longest discussion both in the Joint Committee and in its Special

[1] In the Stockholm Draft the provision under study appeared as Article 7. 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.

Committee. As previously at Stockholm, the English-speaking delegations were all, without exception, opposed to the adoption of the English word " control ", and rightly so, since it is by no means an exact translation of " contrôle ", being much stronger and implying domination. It must be admitted, however, 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[1].

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 of the Protecting Power on the same footing as its diplomatic staff, the draft text having only referred to the latter.

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 of its having temporarily restricted the activities of the Protecting Power in exceptional cases because of military requirements or for security reasons[2]. 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

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, Article 6/7/7/7, pp. 19-20 and 57-58.

[2] *Ibid.*, p. 59.

Article. A compromise formula was then proposed[1], 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 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[2].

PARAGRAPH 1. — GENERAL ROLE OF THE PROTECTING POWERS

A. *First sentence : Obligatory character*

This is a command. The English text, which is authentic equally with the French, makes this absolutely clear[3]. It is no longer therefore a case of collaboration being merely possible, and of supervision being authorized, at it was in the 1929 Prisoners of War Convention.

This command is addressed in the first instance to the Parties to the conflict and to the Occupying Powers, since the responsibility for application is theirs. They are bound to accept the co-operation of the Protecting Power ; if necessary they must demand it. The whole Convention shows that it was intended to exclude any possibility of the protected persons not having the benefit of the services of a Protecting Power or a substitute for such a Power.

An obligation is also laid on the Protecting Power, if the latter is party to the Convention. The Protecting Power must not wait until the Party to the conflict, in relation to which 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. Article 9 is the basis of the Protecting Power's activities for the purposes of this Convention. It is nevertheless mentioned on numerous occasions in individual provisions of the Convention. Article 143 is of particular importance, since it lays down the conditions under which the Protecting Powers' delegates are to have access to the protected persons. The other references to the Protecting Power are often important, a case in point being the clause in Article 30 which establishes the right of every protected person to make applica-

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, Article 6/7/7/7, p. 74.

[2] *Ibid.*, p. 28.

[3] 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.

tion to the Power protecting his interests. There are in all 37 references to the Protecting Power in this Convention[1].

Quite apart from the express references to the Protecting Power that Power must undoubtedly not only supervise the application of the whole Convention, but also take part in its application should the need arise ; the references in question do not restrict its action. The Diplomatic Conference intended to give it an imperative mission with very wide terms of reference and extensive powers to carry it out.

The first sentence of Article 8 is not inserted merely for purposes of style ; it has its own value. It entitles a Protecting Power to intervene or take action on its own account in any way and on any occasion for the purpose of checking the application of any provision of the Convention, or of helping to ensure that it is better applied. Its action will be determined by the circumstances of the conflict and the means at the Protecting Power's disposal.

The Protecting Power's task may be an extremely heavy one in certain cases where the State concerned has few diplomatic representatives. It will often be a real problem to set up an organization which may require a staff of several hundred people for a single country, and it will be necessary to find premises and to have certain material resources. In most cases such services will be installed in the premises of the embassy or legation of the country whose interests are protected; these are, incidentally, buildings which the Protecting Power will generally be responsible for safeguarding and administering. The expenses incurred in such work should certainly be borne by the Power whose interests are protected. Special financial arrangements will be made in each individual case.

The procedure for appointing a Protecting Power is not laid down in the Convention. It is quite a simple matter. The belligerent Power which wishes its interests to be protected asks a neutral Power if it is willing to represent it. Should the neutral Power agree, it asks the enemy Power for authorization to carry out its duties. If the enemy Power gives its consent, the neutral Power then starts its work as a Protecting Power. The enemy Power is not obliged to accept any neutral Power automatically. It may consider, for political reasons for example, that the neutral Power in question is not sufficiently neutral in its eyes to carry out its protective mission in an impartial manner. Although the enemy Power is not forced to accept any neutral Power proposed to it, it cannot refuse all the neutral

[1] Articles 9, 11, 12, 14, 23, 30, 35, 39, 42, 43, 45, 49, 52, 55, 59, 60, 61, 71, 72, 74, 75, 76, 83, 96, 98, 101, 102, 104, 105, 108, 109, 111, 123, 129, 137, 143 and 145.

Powers in turn ; that would be entirely contrary to the spirit of the Convention and to international usage.

The Protecting Power will naturally carry out its duties throughout the territory of the belligerent State and its dependencies, unless otherwise arranged. What is the position in regard to occupied territories ? The activities of the Protecting Power representing the interests of the occupied State in the State opposed to it are gradually extended to such territories as they are occupied. But another Protecting Power could conceivably be appointed for the occupied territories. What is the position if the occupation extends to the whole territory of the State ? In such cases Protecting Powers have sometimes considered that their duties were at an end. The neutral Powers protecting the interests of Germany considered, for example, that their duties were at an end when the German Government disappeared following the capitulation in May 1945.

It may be wondered whether such an attitude on the part of the neutral Powers should not be deemed incompatible with the spirit of the new Convention and whether the neutral Powers, having received a regular mandate from a recognized Government should not continue their activities as long as there are still protected persons within the meaning of the Convention. Although the Protecting Powers act as the special representatives of a given Government so far as their general activities are concerned, they are, as we have pointed out elsewhere, the representatives not of that Government alone but of all the States party to the Geneva Conventions when carrying out their functions under those Conventions. In any case, if the neutral Power appointed considered that its duties were at an end in such a contingency, the provisions of Article 11 would come into play and a substitute would have to be found.

The task of the Protecting Powers will be a particularly onerous one in occupied territories. They will have to investigate the position of people living in such territories and exercise supervision ; but that is not all ; they will also have to consider whether the arrangements made by the Occupying Power are compatible with the Convention. According to Article 55, for example, the Protecting Power is at liberty to verify, at any time and without hindrance, the state of the food and medical supplies in occupied territories. Moreover the whole field covered by the penal legislation enacted by the Occupying Power is subject to examination by the Protecting Power. It should, lastly, be remembered that in occupied territory the whole of the population is protected by the Convention and each protected person is entitled under Article 30 to make application to the Protecting Power. One can well imagine, therefore, that the work of a Protecting Power in

occupied territory may make it necessary to set up services much larger than those established by various Protecting Powers in the territory of the Parties to the conflict during the Second World War.

B. *Second and third sentences : Executive agents*

All members of the diplomatic and consular staff of the Protecting Power are *ipso facto* entitled, in virtue of their capacity as official representatives of their Government, to engage in the activities arising out of the Convention. This rule covers, not only members of the staff who were occupying their posts when hostilities broke out, but also those who are sent to relieve or assist them. It makes no difference whether they are employed solely on the work of the Protecting Power as such, or whether they carry out other diplomatic or consular duties as well. No formalities are required except those which their diplomatic or consular rank would entail in normal times (*agrément, exequatur*). Special consent is only required for the auxiliary delegates, specially appointed by the Protecting Power, who do not have diplomatic or consular status. More often than not these will be persons recruited in the country where the Protecting Power has to act, from among its own nationals or from those of neutral countries. It is only natural, therefore, that the State of Residence should be entitled to refuse its consent, in particular where it has reason to fear that these auxiliary delegates, knowing the country and perhaps having connections there, may take advantage of the facilities for moving about and making contacts which their duties afford, to engage in activities that have but little connection with the application of the Convention and may be harmful to the security of the State.

In occupied territories the Protecting Power will often find it necessary to establish permanent delegations, making use of its own consulates if any. It will probably also be able to make some use of the public buildings of the State whose interests it is protecting, provided of course that they are not requisitioned by the Occupying Power or utilized by local government services. It will also certainly be necessary to establish a degree of collaboration with the authorities of the occupied territory who remain there.

PARAGRAPH 2. — FACILITIES

This provision is quite general, and applies to all the activities of the Protecting Power. Bearing in mind what we have said above the reader will readily imagine the numerous practical facilities which the Protecting Power will need if it is to carry out its duties under satisfactory conditions : premises, means of transport, visas, etc.

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 practically any activity on the part of 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 ignore 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 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 is to happen 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 it would be 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 it must be wondered 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. The Conference thought fit to adopt this provision, however —not so much because it was necessary as because it provided a means of combating an amendment which was still more restrictive ; let us therefore try to see what positive features 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 scrutiny of the latter as co-

[1] See above, pp. 85-86.

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 protected persons must always be treated humanely and without any adverse distinction. Thus, when instructing its agents, the Protecting Power should not forget to bring this provision to their notice. 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, too essential 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.

In the First and Second Conventions, this paragraph contains an additional restriction expressed in the following sentence : " Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities ". The restriction is understandable, as these two Conventions will usually be applied on the battlefield or in its immediate vicinity, so that it is hardly conceivable that the belligerents would authorize the representatives of the Protecting Power to go to the actual spot. There was no call for this restriction in the present Convention, which mainly affects areas behind the lines, although, as we have already said, it is in fact applicable as soon as enemy troops penetrate into the territory of the opposing side.

Conclusions

As it stands Article 9 is not perfect ; far from it, but what has to be considered is the huge advance which it represents in international humanitarian law. It has to be realized that, to achieve what they did, the diplomats assembled in Geneva had to take into account 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 opposite conceptions of the role of the Protecting Power, viewed by some as their agent (of whom the maximum is demanded), by others as the agent of the enemy (to whom the minimum is accorded). When it is remembered, 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 9 presupposes the existence of a Protecting Power appointed by the Power of Origin. It does not make the 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 Contracting Parties, including the Power in whose territory it carries out its task.

By making a duty of what formerly was merely the optional exercise of a right, Article 9 reinforces the supervision over the correct application of the Convention, and consequently increases the Convention's effectiveness. It does more than that : it calls in a third Power, a neutral Power and as such immune from the exacerbation of opposed opinions which war provokes, so often leading to a faulty appreciation of the most firmly established moral values, and invokes the aid of this third Power in respect of those fundamental principles.

If the Protecting Power is not 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 backslidings, by signing the Geneva Conventions.

ARTICLE 10. — 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 civilian persons and for their relief.

General Background

During the First World War, the International Committee of the Red Cross did a great deal of work in behalf of prisoners of war and a certain amount for civilians, without having any legal basis for its actions. It will be remembered, for example, that in the course of the war it set up the International Prisoners of War Agency, which was to be of immense service and that visits to prisoner-of-war camps by its delegates became general. In 1929, the International Committee's special position was recognized by the Diplomatic Conference of that year when drawing up the Convention relative to the treatment of prisoners of war. After entrusting the Committee with the task of proposing " to the Powers concerned " the organization of a " Central Agency of information regarding prisoners of war ", Article 79 of the Convention went on to state in its final paragraph that " these provisions shall not be interpreted as restricting the humanitarian work of the International Red Cross Committee ". In the same way, after making provision for the Protecting Powers' activities on behalf of prisoners of war, the Convention stipulated, in Article 88, that the provisions in question did " not constitute any obstacle to the humanitarian work which the International Committee of the Red Cross may perform for the protection of prisoners of war with the consent of the belligerents concerned ". The use the International Committee made of the freedom of action allowed it by these provisions is well known.

In the case of civilians, however, the International Committee had no legal basis on which to act when the Second World War broke out in 1939. It had, it is true, been engaged for several years in drawing

[1] Article common to all four Conventions. Cf. First, Second and Third Conventions, Article 9.

up a Convention for the protection of enemy nationals in the territory of the Parties to the conflict and for the protection of the population of occupied territories, but, as we know, work on the project was interrupted by the opening of hostilities.

The International Committee's right of initiative nevertheless exists quite apart from any mention made of it in an international Convention. It follows from the Committee's traditions, and also from its Statutes and those of the International Red Cross, which recognize that it has extensive competence in this field. The International Committee accordingly proposed, as has already been said, that the belligerents should, from the outbreak of hostilities, apply the so-called " Tokyo " Draft, which had been adopted by the XVth International Red Cross Conference in 1934[1]. The result of this initiative was modest, but of some value nevertheless, since at all events enemy nationals in the territory of the belligerent Powers and interned by them, were allowed the benefit of the rules relating to prisoners of war.

Apart from the work described above, the International Committee did a considerable amount of relief work in behalf of the civilian population ; in some instances this work was carried out on a vast scale. In conjunction with the League of Red Cross Societies, it founded the Joint Relief Commission of the International Red Cross for the purpose of assisting the civilian population of countries suffering as a result of the war[2]. The International Committee also undertook relief schemes in behalf of the civilian population of occupied territories on its own account, sometimes on a considerable scale. It will suffice to mention the case of the Channel Islands, that of the German " pockets " in France, that of Holland, etc. Reference may also be made to the relief work on behalf of the civilian population, that was carried out in Greece in co-operation with the Swedish Government ; it assumed huge proportions[3]. Work was also done in other spheres : we may mention, in particular, the relief consignments sent by the International Committee to help persons detained in concentration camps in Germany and also the consignments for Jews in various countries under German occupation. Unfortunately these consignments were far from meeting the great need which existed. For information on all these points reference should be made to the

[1] See above, p. 4.

[2] See *Report of the Joint Relief Commission of the International Red Cross, 1941-1946*, Geneva 1948. The value of the relief consignments despatched by the Commission between 1941 and 1946 amounted to over 314 million Swiss francs, representing over 165,000 tons of goods.

[3] See *Rapport de la Commission de gestion pour les secours en Grèce sous les auspices du Comité international de la Croix-Rouge*, Athens 1949.

account given by the International Committee of the Red Cross in its report[1]. It will be seen that in all directions, the International Committee, making use of its right of initiative, did everything in its power to help civilians.

When the present Convention was drawn up in 1949 its provisions were very largely drafted in the light of the work done by the International Committee. Many of the clauses were based on the Committee's experience, and its main activities in behalf of civilians are the subject of express provision in the new Convention. The authors of the Convention felt it necessary, however, to allow for the possibility of the International Committee again acting in the future in a wider sphere in its work in behalf of civilians. That is the meaning of Article 10.

At the Diplomatic Conference little time was spent on discussing this provision[2]. Nobody disputed the principle involved. On the contrary, the draft was 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 fears, and the Article, with the above addition, was accordingly adopted in plenary session without discussion or opposition.

COMMENTS ON THE ARTICLE

In the 1929 Prisoners of War Convention the right of initiative of the International Committee was only mentioned in connection with certain specific activities—the setting up of the Central Prisoners of War Agency and arranging for the visiting of camps. Its insertion among the general Articles of all four Conventions of 1949, and the wording adopted, give it much greater scope. They mean that none of the provisions of these Conventions exclude humanitarian activities on the part of the International Committee of the Red Cross or another similar organization. That is of importance in the case of the present Convention, which mentions the International Committee of the Red

[1] *Report of the International Committee of the Red Cross on its activities during the Second World War* (September 1939-June 30, 1947), in three volumes, Geneva 1948. Vol. I—General Activities, 736 pages ; Vol. II—The Central Agency for Prisoners of War, 320 pages ; Vol. III—Relief Activities, 539 pages.

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

Cross seventeen times in all[1]. The Central Prisoners of War Agency, which under Article 140 can be set up on the proposal of the International Committee, is also mentioned on several occasions.

In theory, all humanitarian activities are covered, not only those for which express provision is made. They are covered subject to certain conditions with regard to the character of the organization undertaking them, the nature and objects of the activities concerned and, lastly, the will of the Parties to the conflict.

In order that the International Committee's position should be quite clear, it should be noted in conclusion that the provisions which refer to the Committee do not lay any legal obligation on it ; they merely authorize it to act if it wishes to do so, or request it to intervene; it is nevertheless undoubtedly under a moral obligation to intervene whenever its help is needed.

1. *Approved organizations*

The humanitarian activities authorized are to 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—first on its own account, because of its special character and its earlier activities, 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 " impartial humanitarian organization ". It must be remembered that the International Committee of the Red 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-option. 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 tradition and organization better qualified than any other body to help effectively in safeguarding the principles expressed in the Conventions.

The organization must be *humanitarian* ; in other words it must be concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit. It must also be *impartial.* Article 10 does not require it to be international. As the United States delegate at the Conference remarked, it would have been regrettable if welfare organizations of a non-international character had been prevented from carrying

[1] Articles 3, 11, 12, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142 and 143.

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. It is international in its activities, however, as its name shows. Furthermore, the Convention does not require the organization to be neutral.

2. *Activities authorized*

It is not enough for the organization which offers its services to be humanitarian and impartial. Its activities, too, are subject to certain conditions. They 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 make it easier to put into practice the general principle contained in Article 27. Consequently, any subsidiary activity which helps to achieve this, and only this, is not only authorized but desirable under Article 10. Such activities may take the form of :

1. representations, interventions, suggestions and practical measures affecting the protection accorded under the Convention ;
2. the sending and distribution of relief (foodstuffs, clothing and medicaments), in short, anything which can contribute to the humane treatment provided for under Article 27 ;
3. the sending of medical and other staff.

It follows from the wording that these activities must also be impartial. It should be noted in this connection that impartiality does not necessarily mean mathematical equality. The degree and urgency of the need should, for example, be taken into consideration when distributing relief.

During the Second World War the action of the International Committee of the Red Cross itself, although impartial, was in actual fact often unequal. In certain countries it could, for instance, visit a particular category of civilians, while in others it was forbidden access to the self-same category. Its impartiality lay in the fact that it had offered its services equally to all the belligerent Powers. Its action in the relief field was also at times unequal. The reason in this case was that the International Committee was not the donor, but merely an intermediary. Its services as an intermediary were, however, offered to everyone equally. Moreover, whenever it noticed that a particular class of victims was especially short of its essential requirements, it tried, often with success, to obtain the necessary relief.

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

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 in question.

All these humanitarian activities are subject to one final condition —the consent of the Parties to the conflict. This condition is obviously harsh but it might almost be said to be self-evident. 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 since they are pledged 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*

There are one hundred and fifty-nine Articles in the Convention which we are studying and it might have been thought that they would provide a solution, based on the experience gained in previous conflicts, for any situation which could arise. No one, however, can foresee what a future war will be like, under what conditions it will be waged and to what needs it will give rise. It is therefore right to leave a door open for any initiative or activity, however unforeseeable today, which may be of real assistance in protecting civilians. It must be pointed out that although the 1949 Civilians Convention contains detailed rules concerning the treatment of civilians who are in enemy hands, it deals only in a very summary fashion with the lot of the population as a whole in the territories of the Parties to the conflict. The only provision it makes for the protection of the civilian population from the actual dangers of war is the possible establishment of hospital and safety zones. Since 1950 the International Committee has been devoting particular attention to the question of what can be done to prevent the civilian population suffering the horror of bombardments and the use of weapons which cause completely indiscriminate destruction over a wide area.

Article 10 is also of considerable value from the legal point of view. 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 (ridiculously weak compared with the forces of war) of attaining this object. Therefore, when everything had been settled by legal 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.

That is where Article 10 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 action on the field of battle. Article 10 is more than a tribute to Henry Dunant. It is an invitation to all men of good will to continue his work.

ARTICLE 11. — SUBSTITUTES FOR PROTECTING POWERS [1]

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

When protected persons 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

[1] Article common to all four Conventions. Cf. First, Second and Third Conventions, Article 10.

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.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State in which the State of which they are nationals has not normal diplomatic representation.

General Background

This Article supplements Article 9, and reference should be made to the commentary on that Article.

Protecting Powers are not, it must be repeated, a creation of the Geneva Conventions. They are an institution—or more precisley a practice only—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 enter into the matter. All they do is to designate the Protecting Power—in this case a private agent—as 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 of the Conventions and supervising their observance.

The exercise of the Protecting Power's functions accordingly presupposes the juridical existence and 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 automatically comes to an end.

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 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 men and women in the power of the enemy were left at his mercy for better or for worse.

The International Committee of the Red Cross could not allow its interest in the victims of war to be overridden by juridical considerations. Juridical considerations are a matter for Governments. In the eyes of the International Committee on the other hand the victims of war are always human beings in distress, whether the country to which they belong is, or is not, recognized by its opponent. The care their often difficult situation calls for does not depend on the entry into force or the lapsing of a Convention.

The International Committee accordingly set itself, with varying, and generally limited, success to make its traditional humanitarian assistance available to prisoners of war whose right to protection under the 1929 Convention was in dispute[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 normally reserved to the Protecting Power[2]. On several occasions, for example, it visited civilian internees to whom the Protecting Power had not had access for one reason or another.

The International Committee of the Red Cross took all these points into consideration when it undertook the study of the existing Conventions with a view to revising them, and the drafting 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 all times, 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, p. 515 ff.

[2] *Ibid.*, Vol. I, Part III, Chapter VII, pp. 352 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, pp. 263-298.

Furthermore, if persons protected by the present Convention 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 subject of difficult, and frequently confused, discussions. To the principle there was little opposition; but the wording gave rise to numerous amendments[1].

Some delegations felt that the second paragraph was not sufficiently precise. They wished to draw a 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, they argued, be placed on the same footing as substitutes.

The International Committee of the Red Cross stated that it was willing, where there was no Protecting Power, to take its place, so far as possible, in carrying out the *humanitarian* tasks devolving upon Protecting Powers under the Convention, but that the independence which must characterize its action would not permit of its acting as the agent of a particular Power. Moreover, although most of the duties falling on a Protecting Power under the Geneva Conventions are of a humanitarian nature, there were other duties, outside the Conventions, of an administrative or even a political character, which it could not carry out.

The trend of the discussion was now towards the idea of distinguishing between substitutes proper for Protecting Powers and the humanitarian organizations to whose services recourse must be had, if there were no substitute available.

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

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

forward on several occasions by the French Delegation. It was to the 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 were set up in peacetime.

These various views were embodied in three main amendments or proposals, as follows :

1. An elaborate amendment submitted by the United Kingdom, which proposed splitting up the second paragraph of the Stockholm Draft into three separate parts, dealing in turn 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 thirty persons of established impartiality, and capable of replacing a 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 put in the form of a simple recommendation, and as such adopted as Resolution 2[2].

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

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

[2] See p. 651. See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, Article 7A, especially pages 27, 130 and 487.

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 the defects unavoidable in the translation of oral discussions, that this view was put forward, founded, as it is, on a misunderstanding of the scope 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, one case appears to be omitted, i.e. that if one Protecting Power ceased to function, the Power of Origin would appoint another in its place. That was a provision, however, which it was not for the Conference to make. It was not for the Conference to create or to regulate the system of Protecting Powers, which is governed by international usage. All that it 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, its duties should be transferred.

Paragraph 1. — Special international organization

By the mere fact of choosing a Protecting Power, in accordance with international usage, a belligerent State appoints that Power to carry out the duties laid down in Article 9 and the activities arising thereunder.

The first paragraph of Article 11 gives the High Contracting Parties the option of entrusting this high mission to a special organization.

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[1] Ten delegations made reservations on this point when signing the Convention. Nine of the ten countries they represented have so far ratified the Geneva Convention, and confirmed their reservations, the wording of which is identical in each case. The Czechoslovak reservation reads as follows : —

" The Government of the Czechoslovak Republic 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 protected persons, unless the Government whose nationals they are has given its consent. "

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

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 safeguarding the diplomatic, commercial and financial interests of the Power of Origin in enemy territory, 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 very well appoint simultaneously :

(a) a neutral State as ordinary Protecting Power, to do the usual work of a Protecting Power, other than those 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 must be fulfilled : 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 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. For in the case considered in paragraph 1, the special organization can only be appointed by agreement ; failing such agreement the duties for which the Convention provides fall automatically to the Protecting Power.

Paragraph 1 is applicable *at any time*. There are three main possibilities :

(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

[1] See above, p. 97.

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 9. The Protecting Powers appointed by the Parties to the conflict will be *ipso facto* freed of responsibility for performing these functions.

Such was the original idea voiced at the Conference of Government Experts in 1947. The agreement regarding the appointment of a special organization need not, however, be concluded necessarily 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 9 except in regard to relations between adversaries who are parties to the agreement. In all other cases the Protecting Powers will continue to be responsible for those functions.

(b) When hostilities first break out, 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, making over to the special organization the functions provided for in Article 9, *eo ipso* dispenses the Protecting Powers from the exercise of those functions, and limits them to the discharge of other duties which international usage assigns them.

(c) In the course of the conflict the opposing Parties may agree for some reason—in order, for example, to ease the burden on the Protecting Powers—to entrust to a special organization that part of the Protecting Powers' functions arising from the provisions of the Convention.

It may be noted that in any 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, performed by the Protecting Power. It was not for the Convention to lay down rules on the subject. It is a matter falling within the exclusive competence of the Parties concerned.

The Diplomatic Conference refrained from giving a 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 11, or it may be already in existence. If it does already exist, it may be specialized or general, official or private, international or national. The essential point is that it should be impartial.

PARAGRAPH 2. — ABSENCE OF PROTECTING POWER

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

The text, as we have seen, was strongly opposed, and even led to reservations[1]. It was feared that a Detaining Power might appoint a substitute of its own choice, contrary to the wishes of the Power of Origin which is primarily concerned, by the simple process of inducing the Protecting Power appointed by the Power of Origin to relinquish 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 first 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, and so on. These successive States are not " substitutes " for the first Protecting 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 contending parties have not taken advantage of the possibility offered by paragraph 1, only Article 9 is applicable. The same thing is true where the Parties to the conflict have made use of the option given in paragraph 1 and the special organization thus appointed ceases for some reason to function. Its disappearance does not in any way deprive them of the right to appoint, each in its own capacity, an ordinary Protecting Power. Better still, the Protecting Powers they have appointed to represent them in the ordinary way will in such a case automatically become responsible under Article 9 for the duties provided for in the Convention.

These 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 least suitable for the purpose) which is made responsible for ensuring the protection of enemy personnel fallen into its hands, all point to the conclusion that paragraph 2 cannot, and

[1] See above, p. 104.

must not, be applied before exhausting 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.

In practice this contingency is hardly likely to arise, unless the Power of Origin ceases 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 failed or refused to appoint a Protecting Power.

The Detaining Power is not completely free in the choice of the substitute. It has to " request a neutral State, or such an organization, to undertake . . . " the duties in question. 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 would leave it a certain minimum of independence in relation to the Detaining Power. It was hardly possible in the Convention to go into further detail. However, a State which, while keeping out of the conflict, had previously broken off diplomatic relations with the enemies of the Detaining Power would obviously be ineligible.

The text leaves no freedom of choice with regard to the organization whose services may be requested. Only one can be meant. 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 is entitled to perform all the duties devolving upon a Protecting Power under the Convention, but no others[1].

[1] In the Korean War, the Parties to the conflict, although not bound by the Geneva Conventions of 1949, made known their intention of applying their principles. No Protecting Power was appointed, however. The system of supervision established in 1949 was not tried out, therefore, during that war.

PARAGRAPH 3. — ABSENCE OF A SUBSTITUTE

This is the final stage, in which no organization has been appointed under paragraph 1 and the Power of Origin is unable to appoint a Protecting Power while the Detaining Power, although wishing to apply 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 in this case no longer uses the words " undertake the functions performed by a Protecting Power ", but speaks only of " humanitarian functions ". The distinction is logical. There is no longer any question of a real substitute, and a humanitarian organization cannot be expected to fulfil *all* the functions incumbent on a Protecting Power by virtue of the Convention. What it is asked to do, in the chaotic conditions that would exist if there were no longer any neutral State, is to undertake at least those activities which bring directly and immediately to the persons protected by the Conventions 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 that organization which is an essential condition for its humanitarian work.

The Detaining Power *must* request the intervention of a humanitarian organization. Moreover, should such an organization anticipate the Detaining Power's request by spontaneously offering its 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 would be true if the first organization which it approached, or which offered its services, ceased to function for any reason.

On the other hand, the obligation to accept the offer of services is qualified by the condition " subject to the provisions of this Article " ; and these provisions can only be those of the paragraphs 3 and 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.

The Detaining Power is naturally always free to request, and accept, the simultaneous services of several humanitarian organizations.

No indication is given either in paragraph 2 or in paragraph 3 of the time limit for appointing the different substitutes for the Protecting Power. Two possible situations can be envisaged ; the first would occur if the contending parties did not appoint a Protecting Power or could not reach agreement on the appointment. This is the case referred to by the words " When protected persons do not benefit... " Such a situation could not be allowed to continue for very long and it seems clear that a substitute should be appointed within a period of one month at the most.

The second possibility is that of a Protecting Power ceasing its activities for some reason without another Protecting Power being appointed. That is the contingency referred to in the words " or *cease* to benefit ". The difficulty of finding a substitute may be greater in such cases, but it is felt that the time-limit should not exceed from six weeks to two months.

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, but this requirement does not divest the Protecting Power of its primary character as representative of the Power of Origin. In the absence of a Protecting Power on the other hand, the substitute which takes its place is appointed by the enemy of the Power of Origin. This led to fears being 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 home to the substitute that although it has been chosen by the Detaining Power, the procedure is exceptional and adopted only for want of a better alternative ; the substitute does not thereby become the agent of the Detaining Power, and is expected by all the Contracting Parties to co-operate loyally in the application of the Convention in relation to the adversaries of the Detaining Power. Was this reminder essential ? It would have no effect on a substitute of deliberate bad faith ; but there may be risk of an honest substitute regarding it as an offen-

sive suspicion. Our own feeling is rather that the paragraph is not so much an admonition to the substitute as a weapon to enable it to insist on the Detaining Power granting the means and independence necessary for the performance of its duties with the impartiality required by the Convention.

It must be admitted, however, that to a large extent this clause meets the fears expressed by the authors of the reservation referred to above. A neutral Power or humanitarian organization which is invited by a belligerent Power to discharge the functions of a Protecting Power, should make sure, whenever possible, that the Power of Origin has no objection to its appointment. It is of course true, as has been seen above[1], that in most cases a substitute will only be appointed when the Power of Origin is not in a position, or no longer in a position, to express any opinion or to appoint a Protecting Power. The appointment of a Protecting Power might, however, meet with other obstacles. This would occur, for example, if the Detaining Power did not recognize the legitimacy of the Government of the adverse Party. In such cases, the neutral Powers or organizations invited should consult the authorities representing the interests of the persons to be protected, even if their consultations were only unofficial.

As for the " sufficient assurances " stipulated, reference should be made to what was said concerning paragraph 1. The matter is one on which the Detaining Power will in practice be the sole judge, and, as such, it alone will bear the responsibility for unsatisfactory application of the Convention due to incapacity or lack of impartiality on the part of a substitute which it has called upon or accepted in place of one better qualified.

Paragraph 5. — Prohibition of derogations

This paragraph, which was added to the draft proposals of the International Committee of the Red Cross by the Stockholm Conference, but only in the case of the Third Convention, was inserted in all four Conventions by the Diplomatic Conference. 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 11 by reaching an agreement with a Government of the enemy State

[1] See above, p. 107.

which has fallen under its influence, or which it has actually set up, to establish a system in which a special substitute, at its beck and call, would in actual fact place the protected persons 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 11.

Paragraph 6 explains itself and calls for no comment.

Paragraph 7. — Neutrals

The nationals of neutral countries are protected persons if they are in an occupied territory, or if they are in the territory of a Party to the conflict and do not enjoy the advantages of normal diplomatic representation. In occupied territories the role of a Protecting Power will be assumed, so far as they are concerned, by their diplomatic representatives. When a neutral Power has no normal diplomatic representatives either in an occupied territory or in the territory of one of the Parties to the conflict, it may utilize the services of a Protecting Power for the protection of its nationals. If, for any reason, no Protecting Power is appointed, the provisions of Article 11 should be applied by analogy.

Conclusion

It would be idle to deny that Article 11 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 rather than go into them here, it would be preferable to consider the positive side of the Article.

Like the two Articles which precede it, Article 11 supplements and reinforces Article 1. The Convention is to be respected *in all circumstances*. That requirement is so imperative 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 that is impossible, one last opening is provided.

The one thing that matters, the one thing that counts, is the principle set forth in Article 27, 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. There may be many interpretations of Article 11 ; but only one true one—namely, the one which is best fitted to give practical effect to the provisions of Article 27.

ARTICLE 12. — 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, and in particular of the authorities responsible for the protected persons, 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 provision already existed 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. The International Committee proposed that the two passages should be combined to form 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 adopted.

The Article was adopted almost without change by the Diplomatic Conference, which did not discuss it at any great length. It was submitted with others to the Committee for the study of Articles common to all four Conventions. The Joint Committee, as it was called, referred the Article to its Special Committee, which appointed

[1] Article common to all four Conventions. Cf. First, Second and Third Conventions, Article 11.

a Working Party to consider all the provisions concerning the settlement of disputes which might arise in the application of the Conventions. The Working Party's proposal to insert this Article in all four Geneva Conventions was approved in turn by the Joint Committee and the Plenary Assembly.

Such alterations as were made were in general intended to facilitate the activities 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 with regard to the application of the Convention (as in the 1929 Convention) that the Protecting Powers are to lend their good offices ; they are to do so in all cases where they deem it advisable in the interest of protected persons. Furthermore, it is explicitly laid down—and this is new—that the Protecting Powers are to act in this way when there is disagreement with regard to the interpretation of the provisions of the Convention.

The only indication which the Convention contains of the form which such good offices will take, is the provision made in paragraph 2 of this Article for a possible meeting between representatives of the Parties to the conflict. There are, however, other methods to which the Protecting Powers may have recourse. They will undoubtedly in most cases try to achieve a fair 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 two belligerents *vis-à-vis* one another, or there may be two different Protecting Powers. In the latter case they can take action either separately or jointly. It is in general preferable for the two Protecting Powers to come to an understanding beforehand.

During the Second World War there were several cases of disagreement between belligerents concerning the way in which the provisions of the 1929 Conventions should be applied. The Protecting Powers, however, were inclined more often than not to regard themselves as agents, acting only on the instructions of the Power whose interests they safeguarded. The new wording invites them to take a more positive attitude. 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, and with a certain power of initiative. They thus become, as it were, the agents of all the Contracting Parties and act in such cases solely as thir own consciences dictate[1]. The burden on countries which agree to act as Protecting Powers will naturally be much heavier now than it was under the 1929 Convention.

PARAGRAPH 2. — MEETING OF REPRESENTATIVES OF THE PARTIES TO THE CONFLICT

This paragraph is a recast of provisions taken from Article 83, paragraph 3, and Article 87, paragraph 2, of the 1929 Prisoners of War Convention. It must be borne in mind, however, that henceforward Protecting Powers have the right to act on their own initiative, and are no longer dependent, as the 1929 text implied, on the initiative being taken by the Party to the conflict whose interests they represent. 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, led to the conclusion of special agreements on the treatment of prisoners of war and on other problems of a humanitarian nature[2].

On the other hand, no meeting of this kind took place during the Second World War, so far as is known to the International Committee of the Red Cross. It is true—and deplorable—that the particularly bitter nature of the struggle made the holding of such meetings very difficult, if not impossible.

It cannot be denied that meetings of this kind, if they had been held, might have brought civilians considerable benefits, since the difficulty of reaching agreement when the parties are not in direct contact, and the delays which occur when negotiating under such conditions, are well known. There are certainly many points in the present Convention which call for improvement. It is to be hoped, therefore, that the new rôle assigned to the Protecting Powers will enable them to arrange meetings between belligerents on a strictly humanitarian basis, with a view to improving the lot of war victims.

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[1] This extension of their powers is a logical consequence of the general mission entrusted to them under Article 9 : " The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers ".

[2] See Mme FRICK-CRAMER : *Le Comité international de la Croix-Rouge et les Conventions internationales pour les prisonniers de guerre*, Revue internationale de la Croix-Rouge, May and July, 1943 ; Georges CAHEN-SALVADOR : *Les prisonniers de guerre*, pp. 100 ff.

The other 1929 provisions have been little changed. The Parties to the conflict are bound to give effect to the proposals for a meeting made to them by the Protecting Powers. The Protecting Powers may suggest that a neutral person, possibly one 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 should certainly do a great deal to facilitate the application of the Geneva Conventions, and to ensure satisfactory treatment for the persons protected by those Conventions.

During the Diplomatic Conference one delegation was against any reference in the Article to disagreements concerning the interpretation of the Convention, on the ground that its interpretation 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 word should be said here concerning a provision whose insertion in the Conventions was proposed by several delegations when discussions at the Diplomatic Conference began. They maintained 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 130 D, to be inserted immediately after the Article relating to enquiry procedure (Article 149 in the present Convention). 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. [1]

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, where several delegates stressed the fact that such a provision was inconsistent with Article 35 of the Statute

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 873.

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 party to its Statute. 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 one of its bodies. After a lengthy discussion the Conference decided to change the proposed Article into a Resolution, which was adopted without opposition. It reads 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 accede to them. They strive after universality, irrespective of all political and juridical problems.

Nevertheless, the strong recommendation contained in the Resolution undoubtedly carries weight and constitutes a powerful incentive to belligerents, in the circumstances indicated, to appeal to the Hague Court.

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

ARTICLE 13. — FIELD OF APPLICATION OF PART II

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

1. *Object and field of application*

A. *Object.*—Part II is intended to provide the civilian population with general protection against certain consequences of war. Part III —the main body of the Convention—is intended to provide civilians with certain safeguards against arbitrary action on the part of an enemy Power in whose hands they are. Part II is much more general in intention. Its object is to bind belligerents to observe certain restrictions in their conduct of hostilities, by erecting protective barriers to shield certain categories of the population who, by definition, take no part in the fighting : children, women, old people, the wounded and the sick. To this end Part II provides for a whole series of practical measures which may limit the destruction caused by modern methods of warfare.

B. *Field of application.*—In former times the need to protect the civilian population in wartime was not felt to the same degree as since the more recent wars. Military operations nowadays—particularly bombing from the air—threaten the whole population. Consequently the provisions in Part II are as general and extensive in scope as possible : Article 13, independently of the rest of the Convention, defines the field of application of Part II, by specifying that it covers the whole of the populations of the countries in conflict. The provisions in Part II therefore apply not only to protected persons, i.e. to enemy or other aliens and to neutrals, as defined in Article 4 but also to the belligerents' own nationals ; it is that which makes these provisions exceptional in character : the mere fact of a

person residing in a territory belonging to or occupied by a party to the conflict, is sufficient to make Part II of the Convention applicable to him. It was because of this derogation from the general principles of the Convention that it was necessary, in Article 4, to make an explicit reservation in regard to the provisions in Part II.

During the preliminary discussions and at the Diplomatic Conference itself, it was suggested that because of its special character, Part II should be placed after Part III. The Diplomatic Conference considered, however, that the Articles of wider application should precede those of less general scope. The original order was therefore maintained.

2. *Prohibited distinctions*

The list of certain adverse distinctions, such as those based on race, nationality, religion or political opinion, is declaratory but not limitative in character. By explicit mention of certain concepts—race (a genetic quality), religion (a spiritual concept) and nationality (an idea with both physical and spiritual elements)—the Convention aims merely at drawing attention to various particularly serious causes of discrimination. Other examples could be given—language, for example or colour, social class, or financial position—all of which might equally give rise to adverse distinctions.

It should be noted that the new Geneva Conventions only prohibit adverse distinctions : this is reasonable, since there are legitimate distinctions, even distinctions which must be made, such as those, in fact, which are based on suffering, distress, or the weakness of the protected person. It is in this very sphere that the Red Cross acts to assist suffering man in his distress. The Conference did not therefore prohibit distinctions in treatment, intended to take into account, for example, a person's age, state of health or sex. It is normal and natural to favour children, old people and women ; the Geneva Conventions expressly stipulate that women are to be treated with all the respect due to their sex.

ARTICLE 14. — HOSPITAL AND SAFETY 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 and safety zones and localities so organized as to protect from the effects of war, wounded,

sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the 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 and safety zones and localities.

General

1. *Terminology*

The terminology in normal use should be defined. A distinction is made between :

A. *Hospital zones and localities*, generally of a permanent character, established 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, established 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] ;

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.

This is the terminology used in the 1949 Geneva Conventions, although they do not contain any formal definition. *Locality* should

[1] The expression " hospital towns " has been dropped by the experts since 1938.

[2] The Association internationale des Lieux de Genève, which will be referred to later, adopted the terms " Lieux de Genève " (Geneva localities) or " zones blanches " (white zones).

be taken to mean a specific place of limited area, generally containing buildings. The term *zone* is used to describe a relatively large area of land and may include one or more localities.

Article 14 relates to hospital and safety zones and localities intended for civilian wounded and sick and for certain categories of the civilian population. The hospital zones and localities set aside for wounded and sick members of the armed forces are dealt with in Article 23 of the First Geneva Convention of 1949[1]. Neutralized zones are dealt with in Article 15 of the Convention we are studying[2].

Although it was necessary to define the meaning of the various terms employed, it should be pointed out that in practice, and even in theory, the problem of providing places of refuge[3] is capable of solution by several combinations of means. The system described in the Geneva Conventions provides all the flexibility required in this respect. A hospital locality, for instance, could be established 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 and safety zones and localities were first incorporated in positive law in 1949, it will be advisable to dwell at some length on the origin of the problem and its history[4]. In 1870, during the Franco-Prussian War, Henry Dunant, the founder of the Red Cross, suggested that certain towns should be declared neutral and the wounded members of the armed forces collected 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.

During the Paris Commune of 1871, Dunant tried, once more 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.

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[1] See commentary on Article 23 in *The Geneva Conventions of 12 August 1949 : I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 1952, pp. 206-216.

[2] See below, p. 128 ff.

[3] The common expression " places of refuge " may be used to denote any piece of territory so laid out as to afford shelter to certain categories of persons. It may therefore cover hospital zones and localities, safety zones and neutralized zones.

[4] This survey 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.

In 1929, Surgeon-General Georges Saint-Paul drew up a plan for setting aside places of refuge to shelter not only the wounded and sick of the armed forces, but also sick civilians and certain other categories of civilians whose weakness entitles them to be placed 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 encouraging its realization[1].

In 1934, a commission of medical and legal experts, meeting in Monaco on the recommendation of the International Congress of 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, contained important provisions concerning hospital localities and safety zones. The Belgian Government which had at first contemplated holding a Diplomatic Conference to adopt 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 Congresses on Military Medicine and Pharmacy. The Commission considered that some progress might be made, at least so far as hospital zones were concerned, but pointed out that the assistance of military experts would be essential to carry the work to a successful conclusion. The International Committee of the Red Cross then drew up a preliminary draft Convention, and proposed that a commission of military experts and experts in international law should be convened. In spite of repeated representations, the Commission did not meet until October 1938, on the recommendation of the XVIth International Red Cross Conference.

On the basis of all the documents then existing, the commission drew up a Draft Convention (known as the 1938 Draft) for the Creation of Hospital Localities and Zones in Wartime. This draft, together with a report by the International Committee of the Red Cross, was communicated to all States by the Swiss Government. It was intended to serve as a basis for the work of the Diplomatic Conference which it was proposed to hold at the beginning of 1940 to revise and extend the Geneva Conventions. The Conference, however, was postponed owing to the outbreak of war.

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[1] The headquarters of the Association is now in Geneva.

During the Second World War, the International Committee of the Red Cross proposed on several occasions that the belligerent Powers should conclude agreements for the setting up of hospital and safety zones[1]. The 1938 Draft was to have provided the basis for these agreements. It would have been extended 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 acted on these proposals, practical and precise though they were.

Apart from negotiations of a general nature, the International Committee of the Red Cross was informed, during that period, of a certain number of proposals, more or less private in character, to set up hospital or safety zones (e.g. at Siena, Bologna, Imola, Constance, Tromsö and Shanghai). No official action followed, however, as the proposals did not come from belligerent Governments, which continued to treat the whole question with great reserve.

The International Committee took the 1938 Draft relating to hospital localities and zones as the basis for the preparatory work it undertook in 1945 in connection with the revision and extension of the Geneva Conventions, extending it to cover certain categories of civilians.

The 1947 Conference of Government Experts agreed to the possibility of providing in the Geneva Conventions for the establishment of places of refuge whose recognition by the enemy would depend upon the conclusion of special agreements.

About the same time, i.e. in 1948, the International Committee of the Red Cross had been 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 categories of the civilian population against long-range weapons, especially bomber aircraft. In actual practice, however, it was always found necessary to establish temporary places of refuge in the actual combat area, 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.

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[1] See in particular the *Memorandum sent to all the belligerent Governments* by the International Committee of the Red Cross on March 15, 1944.

The International Committee of the Red Cross accordingly pre-prepared a draft Article providing for the establishment of places of refuge of the type just described, open without distinction to the wounded and sick and to all non-combatants, and known 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 instituting hospital zones for wounded and sick members of the armed forces, and the other hospital zones for wounded and sick civilians and safety zones for certain categories of the population.

PARAGRAPH 1. — ESTABLISHMENT OF ZONES

1. *Time of establishment*

A. *Date.* — Hospital and safety zones and localities may be set up either in case of war or in peacetime. They may be actually prepared in peacetime, but they are not, as a rule, recognized by the enemy until the outbreak of a conflict. The establishment of the zones remains a purely unilateral measure and in no way binds the adverse Party until such time as it contracts obligations under the special agreement referred to in paragraph 2.

The Convention expressly mentions the fact that the zones may be established in time of peace, despite the fact that States are free to organize them when they please ; this is to show the importance attached to preparatory measures of this sort. The many problems connected with the setting up and administration of a refuge zone cannot be solved during the first days of a war, when government services will be overburdened by numerous other tasks. It is, on the contrary, desirable that such questions should be studied in detail before hostilities break out.

B. *Method.* — Both psychological and physical obstacles may be encountered to setting up hospital and safety zones and localities in peacetime. Among the physical obstacles may be mentioned the real difficulty of foreseeing the strategical situation in which a State will find itself in case of war ; there is nothing to prevent it, however, establishing a number of zones, of which only some will be utilized, the choice depending upon events.

There is no express obligation to set up hospital and safety zones and localities, since Article 14 is only optional in character. The authors of the Convention wished, however, to draw attention to the importance of such zones from a humanitarian point of view, and to recommend their adoption in practice. The responsible authorities in each country are therefore urged to make every effort to implement Article 14.

For this purpose they may base themselves in peacetime on the rules contained in the Draft Agreement annexed to the Convention. It is, indeed, important that the zones should be established on a basis which has already been approved in principle at the Diplomatic Conference. In all probability such zones will be accepted once and for all by the adverse Party, whereas it might not recognize zones established on some other basis.

The Convention provides that the belligerents may establish zones not only in their own territory but also in territory they occupy. This provision should be compared with Article 50, paragraph 5, which considers the situation from the opposite point of view—that is to say in cases where the occupied State has already adopted preferential measures, such as the creation of refuge zones for certain categories of the civilian population. In such cases the Occupying Power should endeavour not to hinder those measures[1].

2. *Persons sheltered*

The categories of persons who may find shelter in the zones are as follows: wounded, sick, crippled[2] and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

As has already been pointed out, the provisions relating to hospital and safety zones in the First and Fourth Geneva Conventions are sufficiently flexible to make various combinations possible. There is, for instance, no reason why a hospital zone should not combine the two types and provide shelter for both soldiers and civilians in need of treatment, since once a soldier is wounded or sick, he may be said to be no longer a combatant on either side, but simply a suffering, inoffensive human being. Safety zones or localities, reserved solely

[1] See Article 12 of the *Draft Agreement* annexed to the Convention below, p. 639.

[2] The English text of the Convention makes no mention of cripples (les infirmes), who are however referred to in the French text. Both versions of the Convention being equally authentic, crippled or disabled persons must clearly be included among those protected under Article 14. — TRANSLATOR.

for the categories of civilians enumerated in the Convention, may be set up independently of hospital zones to which we have just referred. Or again,—and this is the most comprehensive combination—zones which are at one and the same time hospital and safety zones might be set up, to shelter both civilian and military wounded and sick, as well as certain categories of the civilian population. This is, in fact, the solution which the Article we are discussing makes possible.

These various categories among the civilian population are based on a very simple criterion : they are persons who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country ; they thus appear to be particularly deserving of protection. Experience shows that any separation into categories necessarily includes an arbitrary element. Certain definite categories—children under fifteen and mothers of children under seven—were nevertheless chosen because the Conference considered that they were appropriate, reasonable and generally in accord with the requirements of the physical and mental development of children. No limit was fixed for " aged persons ". Should this expression be taken to mean those over 65, as stipulated in the Stockholm Draft ? The Conference refrained from naming a definite age, preferring to leave the point to the discretion of Governments. 65 seems, however, to be a reasonable age limit. It is often the age of retirement, and it is also the age at which civilian internees have usually been released from internment by belligerent Powers.

The list of beneficiaries as defined in the first paragraph of the Article should be extended to include the personnel entrusted with the organization, administration and supervision of the zones and with the care of the persons therein assembled[1].

It will also be necessary to take into consideration members of the population who reside permanently inside the zones and have been given the right to stay there[2].

The right of admission to a refuge zone is independent of the race, nationality, religion, political beliefs and social status of the persons concerned. This follows categorically from the principle of non-discrimination proclaimed in Article 13. Expectant mothers of enemy nationality would thus have the same right to shelter in a refuge zone as expectant mothers who are nationals of the State concerned[3].

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[1] *Draft Agreement*, Article 1, para. 1 ; see p. 627.

[2] *Draft Agreement*, Article 1, para. 2 ; see p. 627.

[3] See also Article 38 (5), below, p. 248.

3. *Object*

The object of Article 14 is to *protect* certain categories of the civilian population *from the effects of war.*

The general wording of the above formula is intentional. The protection is clearly intended to be first and foremost against the dangers which may arise from aerial bombardements, long-range artillery fire and guided missiles, but dangers resulting from fighting close at hand are, of course, also included.

The Article is, moreover, intended to cover the indirect effects of war, such as shortage of food, clothing and medical supplies, breakdown of health services, etc. The concentration of the protected persons in an area which has been specially prepared and equipped for the purpose, will make it easier to give them the care and treatment which their condition requires.

Finally, attention should perhaps be drawn again to the fact that the establishment of hospital and safety zones may in no case be construed as allowing a reduction in the protection to which not only the wounded, sick, disabled and aged persons, etc., but the whole civilian population outside such zones, are entitled, under the general rules of international law both customary and embodied in treaties and conventions. Indeed protection is not accorded under Article 14 to the persons listed, but to the hospital and safety zones and localities as such. The persons themselves are entitled to protection independently of the refuge zones, which are merely a means of providing such protection.

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. It is only an agreement of this kind, concluded, as a general rule, after the outbreak of hostilities, which gives legal form to the obligation on States which have accorded recognition to zones to respect those zones.

An agreement recognizing the zones is thus a *sine qua non* of their legal existence from the international point of view. It should contain all the provisions, particularly in regard to control procedure, required to prevent disputes arising later in regard to its interpretation.

In order to encourage the establishment of hospital and safety zones and to facilitate negotiations, 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 definite value. It has been seen above how desirable it is that the principles contained in it should be used as a basis for the establishment of any hospital or safety zone[1]. Comments on the Draft Agreement are to be found at the end of this volume.

PARAGRAPH 3. — GOOD OFFICES

The establishment and notification of hospital and safety zones, the conclusion of the agreement mentioned above, and, above all, the arrangements for supervision, all demand the existence in wartime of a neutral acting as intermediary 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 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 themselves take the initiative and put forward proposals to Governments, without waiting to be asked to do so.

ARTICLE 15. — NEUTRALIZED ZONES

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction :

(a) *wounded and sick combatants or non-combatants ;*

(b) *civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.*

[1] Article 7 of the *Draft Agreement* provides, however for the possibility of zones being recognized in time of peace. See below, p. 634.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

General Background

The neutralized zones mentioned in Article 15 are based on the same idea as the hospital and safety zones covered by the previous Article. They too are intended to protect people taking no part in the hostilities or placed *hors de combat*, from the effects of military operations by concentrating them in a given area. It has already been pointed out however, that neutralized zones differ from hospital and safety zones in that they are established in the actual regions where fighting is taking place and are intended to give shelter to both civilian and military wounded and sick, as well as all civilian persons who take no part in hostilities. Furthermore, they are generally set up on a temporary basis to meet the tactical situation at a particular moment, whereas hospital and safety zones tend to be more permanent in character.

The historical outline at the beginning of Article 14 holds good for Article 15 too, since neutralized zones are merely one instance of what are described generally as places of refuge[1]. It need only be said that Article 15 is the result of a certain amount of practical experience : it will be remembered that at the instance of the International Committee of the Red Cross a neutralized zone was established in a district in Madrid during the Spanish Civil War ; that during the conflict in Palestine in 1948, two, and at one time three, neutralized zones, directed and administered entirely by the International Committee of the Red Cross, were set up in Jerusalem and that, in 1937, during the Sino-Japanese war, a neutralized zone was also established in Shanghai[2]. It was called the Jacquinot Zone, in honour of the man who organized it.

The experience gained on these occasions, especially in Jerusalem, led the Diplomatic Conference to adopt this Article, which reproduced, without any change of importance, a draft text submitted by the International Committee of the Red Cross.

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[1] See above, p. 122.

[2] For further details concerning these precedents, see *Hospital Localities and Safety Zones*, published by the International Committee of the Red Cross, Geneva, 1952.

PARAGRAPH 1. — ESTABLISHING THE ZONES

1. *Procedure*

The speed with which the tactical situation often changes and the urgency of the measures to be taken means that the procedure adopted must be practical and simple. There can be no question of setting up neutralized zones in peace time ; that is why this provision refers only to the Parties to the conflict.

A proposal to one of the Parties to the conflict that a neutralized zone be set up may be direct or indirect. In the first case it comes from the other Party to the conflict ; in the second it is made by a neutral State or by a humanitarian organization.

A. *Direct method.* — Recourse will be had to the direct method, which in an emergency will be the most suitable, to ensure that those in danger as a result of the fighting are given speedy assistance. Since arrangements will have to be made in the combat zone itself, it will obviously be military authorities, the commanders of forward units, for example, who will be in the best position to take the necessary protective measures, which will depend on the operations in progress and on the terrain.

Article 15 takes this fact into account when it uses the adverb " direct ", letting it be understood that the rules of diplomatic procedure need not be applied, but that the military authorities on the spot are competent to negotiate. This interpretation of the text has some claim to validity, as it appears in the minutes of the discussions at the Diplomatic Conference[1].

B. *Indirect method.* — The indirect method which may also be adopted consists in diplomatic negotiations through a third Party. This slower procedure will be adopted when the establishment of a neutralized zone can brook a certain delay, and when the size of the zones and their organization are likely to raise problems. The intervention of a third Party may make agreement easier to reach.

The Convention here mentions a neutral State or a humanitarian organization as intermediaries, while in Article 14 dealing with the establishment of hospital and safety zones and localities, the reference is confined to the Protecting Powers and the International Committee of the Red Cross. The term " neutral state " obviously includes the Protecting Powers, while the International Committee of the Red

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 817.

Cross, owing to its experience and independence, is particularly qualified among humanitarian organizations to act as intermediary. Moreover, any other neutral state or any humanitarian organization, such as a National Red Cross Society, could also lend its good offices.

Although the Convention does not say so in so many words, it must be assumed that neutral States and humanitarian organizations may intervene not only when invited to do so, but also of their own accord, with a view to the establishment of neutralized zones. The intermediaries may also assume the role of Contracting Parties by concluding separate, but complementary agreements with each of the countries concerned. This method has its advantages, especially in armed conflicts which are not international in character[1]. It may also be applied successfully in international wars, when circumstances so demand.

2. *Those who benefit*

Reference to the categories of persons who by virtue of this Article may take refuge in neutralized zones will show that those zones serve at one and the same time as hospital zones for wounded and sick combatants and non-combatants and as safety zones for civilians who take no part in hostilities and who, while they reside in the zones, perform no work of a military character.

There can be no doubt that the words " wounded and sick, combatant or non-combatant " mean wounded and sick members of the armed forces and civilian wounded and sick.

So far as civilians are concerned the whole of the population in the combat area is authorized to take refuge in the neutralized zones, and not only certain categories as envisaged in Article 14 in the case of safety zones. This is due to the different purposes of the two types of place of refuge[2]. The persons who take no part in hostilities or are no longer taking part in them would be protected temporarily in the neutralized zones from dangers arising from fighting close at hand, while the hospital and safety zones give permanent shelter in areas away from the front to the weakest categories among the population.

The two restrictions on access to neutralized zones are self-explanatory. Civilians taking part in the hostilities are quite naturally excluded from the zones, whether they are obeying an order for a levy in mass or whether they belong to an organized resistance movement within the meaning of Article 4 (2) and (6) of the Third Geneva

[1] Precedents for this can be found in the Spanish Civil War and in the Palestine conflict.

[2] See above, p. 127.

Convention. The question of evacuation to a neutralized zone does not even arise in the case of such people, who have of their own free will relinquished their title to be treated as peaceful civilians and will enjoy prisoner-of-war status should they be captured[1]. They nevertheless retain the right to be sheltered there, should they be wounded or fall sick.

The second condition, that no work of a military character may be performed in a zone, is just as easy to understand, for any activity which helped current military operations, directly or indirectly, would be incompatible with the very idea of neutralized zones.

The Convention also says that people authorized to take refuge in neutralized zones must be taken in without distinction, thus reaffirming the absolute prohibition of discrimination, proclaimed in Article 13 for the whole of Part II.

PARAGRAPH 2. — PROCEDURE AND FORM OF THE AGREEMENT

Care has been taken to mention certain essential points on which the Parties concerned must come to an understanding before the agreement can be finally concluded—the delimitation, administration, food supply, and supervision of the zone, and the beginning and duration of its period of neutralization. It is of the greatest importance that there should be regulations dealing as precisely as possible with all these arrangements, which involve many technical details. It is to be hoped that subsequent disputes which might jeopardize the effectiveness of a zone will thus be avoided.

That too is a reason for the two stipulations in the Convention concerning the form of the agreement—that it is to be in writing, and signed by representatives of the Parties to the conflict.

The stipulation that the agreement must be in writing and signed must not, however, be regarded as compulsory in all circumstances. It is merely a general provision which the Parties are recommended to observe. In an emergency, therefore, demanding a minimum of formalities, the agreement could be concluded verbally—a procedure fully admissible in international law. The agreement might even conceivably be negotiated and concluded by telegram or by radio, especially in cases where it is desired to neutralize a limited area very quickly, and for a short time.

An important question which is not mentioned in the Convention but must be settled in an agreement setting up a neutralized zone, is that of marking. The Contracting Parties may adopt a solution

[1] With the exception, however, of snipers.

similar to that proposed in the Draft Agreement relating to Hospital and Safety Zones and Localities (annexed to the Convention)[1], and mark the zones with the red cross emblem (when they are reserved entirely for the wounded and sick), or with oblique red bands on a white ground (when they are also used by able-bodied civilians, as will most often be the case).

ARTICLE 16. — WOUNDED AND SICK: GENERAL PROTECTION

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

PARAGRAPH 1. — PROTECTION AND RESPECT

1. *General principles*

" Protection and respect " is the time-honoured formula used in the First Geneva Convention [2], and appearing in the other three Conventions. Its importance and the fact that it also occurs in several other places in the Fourth Convention [3] make it desirable to say a few words here about its origin.

The 1864 Convention confined itself to stating the principle in all its simplicity, but at the same time in all its strength, without developing its meaning in any way: " Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for ".

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.

The idea of " neutralization ", characteristic in the 1864 text of the immunity enjoyed by ambulances, medical personnel and, by implication, the wounded themselves, was dropped in 1906. This idea certainly made it clear enough that a combatant ceased to be an enemy

[1] See p. 640.

[2] See First Geneva Convention of 1949, Article 12, para. 1, which corresponds to this provision.

[3] See Articles 18, 20, 21 and 27.

once he was wounded and therefore unable to fight, and that the medical personnel were outside the conflict ; but it did not correspond to reality, as the term " neutrality " refers in international law to people who do not take part in a conflict. In place of this unsuitable form of wording, 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), whereas " protect " (protéger) means " to come to someone's defence, to give help and support ". These words make it unlawful to kill, ill-treat or in any way injure an unarmed enemy, while at the same time they impose an obligation to come to his aid and give him any care of which he stands in need.

These rules are even more essential when the wounded or sick person is a civilian, i.e. a person who, by definition, takes no part in the hostilities.

This leads logically to the provisions concerning the search for wounded and sick (Article 16, para. 2.), evacuation (Article 17), the protection of civilian hospitals and their staff (Articles 18 to 20), medical transport (Articles 21 and 22) and the consignment of medical supplies and equipment (Article 23). Articles 38 (2), 56 and 59 in Part III are also based on them.

2. *Scope of the obligation*

The obligation to protect and respect the wounded and sick, the infirm and expectant mothers is general and absolute in character. It applies to all Parties to the conflict, to all members of armed forces, combatant or non-combatant, as well as to persons who are placed in the same category by Article 4 of the Third Geneva Convention. It is an obligation which admits of no derogation and applies to wounded and sick civilians wherever they may be.

The authors of the Convention have not defined what is meant by a " wounded or sick " civilian nor has there been any attempt to determine the degree of severity of a wound or the sickness entitling the wounded or sick person to respect. 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.

In addition to the wounded and sick the Diplomatic Conference mentions the infirm and also expectant mothers, as those persons are in a state of weakness which demands special consideration. Their being placed on the same footing as the wounded and sick is fully

justified by the fact that they belong to categories of the population which do not take part in hostilities.

It should be emphasized once again in connection with this paragraph, that the special respect due to wounded, sick and infirm persons and expectant mothers cannot be considered under any circumstances or in any manner whatsoever to free the belligerents from their obligation to give the civilian population as a whole the respect and protection to which they are entitled. The special protection given to these special categories is not instead of, but in addition to the protection given generally.

PARAGRAPH 2. — SEARCH AND PROTECTION

1. *Search*

A. *Practical measures.* — Each Party to the conflict must facilitate steps taken to search for and bring in the killed and wounded. That is a measure for which the First Geneva Convention has made provision since 1864, and experience in two world wars has shown the necessity of applying it to the case of civilians who in modern wars may be struck down in the same way as members of the armed forces[1].

The provision applies in particular to the actual theatre of operations and the most frequent and most important instance is when an army is retreating before an enemy offensive. The victorious forces must search the terrain without delay for the wounded and for the dead. They must all be brought to a safe place. Even human remains must be collected with the utmost care. Apart from moral considerations, the interest of the next-of-kin of the deceased demands that the legal consequences of disappearances without the issue of a death certificate should be avoided as far as possible.

In carrying out these various tasks close co-operation must undoubtedly be established between the medical personnel of the armed forces and the relief organizations responsible for searching for, collecting and bringing in civilian casualties. It is true that saving civilians is the responsibility of the civilian authorities rather than of the military. That is why the wording of Article 16 (" each Party to the conflict shall facilitate the steps " . . .) is slightly different from the corresponding Article in the First Geneva Convention (" Parties to the conflict shall, without delay . . . take all possible measures . . ."). In actual practice, however, when it is necessary to search devastated

[1] The corresponding provision dealing with the search for wounded and sick of the armed forces is in Article 15, para. 1, of the First Geneva Convention of 1949.

areas, the military and civilian bodies will usually carry out a joint relief operation covering all war casualties, civilians and members of the armed forces, friends and enemies. This is the only attitude to adopt in work of this description which consists, in short, not in helping soldiers on the one hand and civilians on the other, but simply in assisting human beings plunged into suffering by a common destiny—human beings among whom all distinctions have been wiped out by suffering. That is the fundamental principle of humanity in virtue of which the Convention, as will be seen later[1], authorizes civilian hospitals to give shelter to military wounded and sick; and it is in virtue of the same principle that the First Convention (Article 22(5)) allows the Army Medical Service to extend its humanitarian work to wounded and sick civilians. The two Conventions thus overlap, which shows clearly that in both of them the human aspect takes precedence over the distinction normally drawn between civilians and members of the armed forces.

The same rules apply to civilian casualties resulting from naval action. The Parties to the conflict should, in such cases, facilitate the steps taken to bring help to the shipwrecked, pick them up, take them on board, tend them and send them to a port. This provision is complementary to Article 18 of the Second Convention, which deals with the search for service casualties of a naval engagement, as the counterpart of Article 15 of the First Convention. Furthermore, the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Article 35 (4)) makes detailed provision for the Naval Medical Services to give attention to wounded, sick and shipwrecked civilians as part of its humanitarian work.

In addition to the killed, wounded and shipwrecked the Article mentions " other persons exposed to grave danger ", in a general clause ensuring that the list is not in any way restrictive. It covers any civilians who while not being either wounded or shipwrecked are exposed to some grave danger as a result of military operations. A particular case which the Conference had in mind was civilians trapped in air-raid shelters.

B. *Reservation.* — The obligation under paragraph 2 is not absolute. Indeed, the provision begins with a reservation (in regard to military considerations) which is not contained in the corresponding articles of the First and Second Geneva Conventions. The difference is more apparent than real, however, as the search for casualties is undertaken

[1] See below, p. 155.

by the Army or Navy Medical Services, which are bound to take military requirements into account. Under the Fourth Convention the service responsible for searching for wounded and dead is placed not under the control of military commanders, but under that of the civilian authorities ; it is obvious that the latter could not send relief teams into the battle area without taking into account the essential military requirements. Consequently, the Diplomatic Conference rejected various proposals that the reservation should be omitted[1].

2. *Protection*

As has just been mentioned, it will not always be possible to evacuate civilian wounded at once, and it will be necessary to protect them in the meantime against pillage and ill-treatment and also to prevent the dead from being robbed. Pillage is certainly prohibited under Article 33, paragraph 2, of the Convention, which repeats a similar provision in the Hague Regulations of 1907 ; but in Article 33 the prohibition refers to the pillaging of towns and whole areas as well as individual cases, and the fact that it is in Part III restricts its scope to protected persons in the sense of Article 4 of the Convention.

The present paragraph requires belligerents to facilitate steps taken to prevent any act of pillage either by civilians or by members of the armed forces, whatever their nationality[2].

The presence of hordes of pillagers, formerly called the " hyenas of the battlefield " may not be so common today but the possessions of the wounded and dead may well excite the greed of unscrupulous soldiers or civilians and incite them to pillage. Such acts are odious and must be prevented.

ARTICLE 17. — EVACUATION

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 392.

[2] Most penal codes, both civil and military, already provide for the punishment of pillage on the field of battle. For countries where this is not yet the case, see Article 146.

General Background

The idea behind this Article has been the subject of resolutions at several International Red Cross Conferences[1]. During the Second World War certain localities or zones held out against siege for months or even for years, and in several cases delegates of the International Committee of the Red Cross had been able to enter such areas to carry out their humanitarian work, rendering useful service. In 1947 the Conference of Government Experts suggested that civilians should be given the benefit of the experience thus gained ; this suggestion was adopted by the Diplomatic Conference of 1949 at the instance of the International Committee.

1. *Besieged or encircled areas*

The words " besieged or encircled areas " must be understood to mean not only an open piece of country or some other more or less extended area occupied by an encircled army, but also a town or fortress offering resistance on all sides to a besieging force.

The definition can even be extended to cover vast territories, to a whole region containing several towns or villages, except in so far as the encircled belligerent has the necessary hospitals and equipment within the encircled area to ensure that the wounded, sick, and other civilians in question are properly looked after.

The provision also applies to the case of an island or beach-head encircled by enemy naval forces. If circumstances so required, the civilians could be evacuated by sea, as envisaged by the Second Geneva Convention[2].

2. *Evacuation*

A. *Beneficiaries.*—The Convention mentions wounded, sick, infirm and aged persons, children and maternity cases, the same categories in fact, as those listed in the preceding Articles. They are included for the same reasons.

Unlike Article 14 (Hospital and Safety Zones), the present Article does not fix an age limit up to which children are to be evacuated. The belligerents concerned are free to come to an agreement on the

[1] See in particular Resolution IX of the Hague Conference of 1928 and Resolution XXIV of the Brussels Conference of 1930 ; also Article 15, para. 3, of the First Geneva Convention of 1949.

[2] See Article 18, para. 2, of that Convention.

subject ; the upper limit of 15 years of age, which applies to admission to a safety zone, seems reasonable and would appear to merit adoption in the present instance.

The term " aged persons " is used in the same sense as in Article 14; here again the criterion is unfitness to take part in military operations.

B. *Local agreements.* — The words "The Parties to the conflict shall endeavour " show that under the Convention evacuation is not compulsory ; belligerents should nevertheless regard this provision as a very strong recommendation to arrange for evacuation whenever it is in the interest of the civilian population and the military situation makes it possible.

It is conceivable that the commander of a besieged place would always be in favour of evacuating people whose presence is a burden to him. The same cannot be said, however, of the besieging forces, who may be tempted to oppose evacuation in order to avoid relieving the besieged forces of their supply difficulties and with the idea of inducing them to capitulate sooner. It is therefore to the besieger that the present urgent recommendation is addressed. As sieges generally last some time, during which a suitable moment for negotiation can be found, it will not be easy to maintain that " circumstances " have never permitted the adoption of this measure.

C. *Procedure.* — The method of evacuation should be arranged by means of local agreements concluded between the belligerents concerned. They should deal with such points as the number of people to be evacuated, the beginning and duration of the truce, the means of transport and the route to be taken. Since the measures adopted will often have to be improvised on the spot, at a moment when conditions are favourable and there is no time to lose, it is essential that negotiations should take place through the most rapid and direct channels. Area commanders, and even officers commanding small units, should therefore be authorized to propose a short truce to allow for evacuation to begin.

When it is desired to prepare a large-scale evacuation—that of a whole area, for example—the conclusion of an agreement will often be made easier by having recourse to the good offices of a neutral State (such as the Protecting Power) or to those of a suitable humanitarian organization (such as the International Committee of the Red Cross), in the same way as the Convention provides in connection with the establishment of hospital and safety zones [1] and neutralized

[1] See above, p. 119.

zones[1]. Such an intermediary may take the initiative in proposing to the parties that a besieged or encircled area should be evacuated, taking part not only in the negotiations but also in the practical execution of the agreements, and even going so far as to organize and carry out the whole operation.

It must again be emphasized that his consent to the evacuation of part of the civilian population cannot, under any circumstances, release the besieger from his other obligations under the Convention, both towards the people evacuated and towards those left behind. Evacuation is a measure adopted in the interests of the population which must not, therefore, be left without protection: civilians who go on living in the area will continue to be entitled to the protection of the Convention.

3. *Ministers of religion and medical personnel and equipment*

The commander of a besieged place may request permission to evacuate his wounded and sick and the weaker categories of the civilian population, or he may ask the besieger to allow free passage for medical personnel and equipment. He may conceivably make both requests, however. The Convention does not treat them as alternatives. As for ministers of religion, 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 who require them, whether wounded or fit.

The nationality of the medical and religious personnel in question is not specified. The besieging Power must either permit the passage between the lines of enemy personnel of the same nationality as the persons 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, a practice in complete conformity with the general principles of the Convention. The status of the besieger's personnel, where these are sent, and the conditions of their stay, may be specified in the arrangement concluded.

We may mention in conclusion that in the First Geneva Convention of 1949, Article 15, paragraph 3, provision is made for very similar measures in favour of wounded and sick of the armed forces in an encircled area. By applying the two Conventions simultane-

[1] See above, p. 128.

ously it would be perfectly possible to include both civilians and military wounded and sick, as well as infirm and aged persons, children and maternity cases, in one and the same evacuation operation. In the same way, free access could be granted to religious personnel to cater for the needs of both the civilian population and members of the armed forces.

ARTICLE 18. — PROTECTION OF CIVILIAN HOSPITALS

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for 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, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military consideration permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

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.

General Background

Article 27 of the Hague Regulations deals briefly with the protection of hospitals, together with that of buildings dedicated to religion, art, science and charitable purposes. It stipulates that their presence is to be indicated by distinctive and visible signs, but it does not say what the signs are to be. Article 5 of the Ninth Hague Convention provides that " hospitals and places where the sick or wounded are collected " are to be protected and indicated by " visible signs which shall consist of large, stiff rectangular panels, divided diagonally into two coloured triangular portions, the upper portion black, the

lower portion white ". Here then the special sign is exactly defined; but the Ninth Hague Convention dealt only with bombardment by naval forces.

In view of the inadequacy of these provisions, efforts were made from the time of the First World War onwards, to extend to civilian hospitals the protection to which military hospitals had been entitled since 1864.

Certain States militarized their civilian hospitals in order to bring them within the scope of the Geneva Convention. That meant placing them under military control, military management and military discipline. If the validity of this method was to be recognized by the enemy, however, the hospitals so militarized would have to be really used, at least in part, for wounded and sick of the armed forces. A provision stating that civilian hospitals would be placed under military control in case of war would not entitle them *ipso facto* to the protection of the Convention. It would be necessary for a hospital to fulfil the two conditions mentioned before it could claim an unquestionable right to protection under the Convention and obtain the military authorities' permission to fly a white flag with a red cross.

Towards the end of the Second World War, certain belligerents, including Germany and Italy, marked their civilian hospitals with a red square in the centre of a white circle. That emblem was recognized by the adverse Powers. The Ceylon authorities took a similar step, marking their civilian hospitals with an emblem consisting of a red square placed in the centre of a white one and covering one ninth of its area[1].

Although those three systems were of some service they were still no more than palliatives or makeshift solutions; it was still necessary to seek a general solution which would provide civilian hospitals with effective protection based on the provisions of a Convention of universal scope. The Preliminary Conference of the National Red Cross Societies, to which the International Committee had submitted the question in 1946, considered that civilian hospitals should be empowered to use the emblem of the Geneva Convention and discountenanced the idea of creating a new emblem[2].

The following year the Conference of Government Experts was of the opinion that the Geneva Convention should confine itself to its traditional sphere and relate only to the armed forces, and suggested that the principles of that Convention could be extended to civilian

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 708.

[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, 1947, p. 64.

wounded and sick by the insertion of special Articles on the subject in the draft Convention for the general protection of civilians. The experts agreed with the Preliminary Conference of National Red Cross Societies that civilian hospitals should enjoy special protection, on condition that they were recognized as such by the State and were able permanently to care for wounded and sick civilians. Both the Experts and the Preliminary Conference advocated that the hospitals should use the red cross emblem[1], subject to the consent of the military authorities.

The provisions which the International Committee of the Red Cross proposed to the XVIIth International Red Cross Conference in 1948, were very largely based on the ideas put forward by the Experts, and the Conference adopted them without any change of importance. The statement of the characteristics which a civilian hospital must have was retained, and the marking of civilian hospitals with the red cross was made conditional upon the joint authorization of the State and the National Red Cross Society[2].

The Diplomatic Conference of 1949, to which the draft Convention was referred for final decision, was unanimous in recognizing the necessity for giving civilian hospitals better protection and of providing for the possibility of marking them. The discussions showed that wide differences of view existed in regard to the definition of civilian hospitals and the conditions on which their marking should depend. As we shall see, the wording finally adopted has all the characteristics of a compromise text.

PARAGRAPH 1 — DEFINITION AND PROTECTION

1. *Purpose*

A. *General principles.* — The main purpose of Article 18 is to protect civilian hospitals; by that very fact it protects also the wounded, sick, infirm and maternity cases under treatment in those hospitals. This list, which is exhaustive subject to the provision in Article 19, paragraph 2, does not give a precise definition of a civilian hospital.

The text recommended by the XVIIth International Red Cross Conference spoke of civilian hospitals recognized as such by the State

[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, 1947, pp. 69 sqq.

[2] See *XVIIth International Red Cross Conference : Revised and New Draft Conventions for the Protection of War Victims*, Geneva, 1948, p. 120.

and able to give treatment on a permanent basis. That definition is clearer ; it lays down two restrictive conditions in regard to civilian hospitals : viz. official recognition and the ability to give care to the sick on a permanent basis. Since agreement could not be reached, however, the Conference instructed an *ad hoc* Working Party to study the Article. After overcoming many difficulties the Working Party succeeded in finding a wording acceptable to all. It was primarily the fear of jeopardizing this delicately balanced and hardly won compromise which led the plenary assembly to adopt this definition of civilian hospitals without objection.

Careful examination will nevertheless bring out the points of value in the definition of civilian hospitals in Article 18, and show that it expresses the intentions of the Diplomatic Conference and is in accordance with the spirit and general arrangement of the Conventions.

In the first place the list of categories in paragraph 1 is not cumulative. It is not necessary, therefore, for a civilian hospital to be able to treat all categories in the list, in order to meet the requirements laid down in Article 18. It will suffice if the hospital devotes itself to one category only, as in the case of maternity hospitals.

A civilian hospital must have the staff (including administrative staff) and the equipment required to fulfil its purpose. It must be organized to give hospital care. That is the essential point. It is not necessary for the hospital to function permanently as a hospital. The Diplomatic Conference considered that establishments converted into auxiliary hospitals as an emergency measure consequent upon the events of war, should not be excluded from the protection of the Convention [1], as such hospitals are very often established in the combat area itself, and their need for protection is thus all the greater. The deciding factor is, as has just been mentioned, that it must be effectively possible to give hospital treatment and care, and that necessarily implies a modicum of organization.

The capacity of the establishment cannot be used as a criterion for deciding whether or not it is a civilian hospital. There is no mention of size in Article 18, and the preliminary discussions show that the point was deliberately omitted. It is possible, however, that in their national laws for applying the Convention, States may adopt size as a criterion and make recognition by the State depend on the number of beds. Twenty beds, the lower limit suggested by the Government Experts, would appear to be reasonable.

Civilian hospitals are entitled to protection under the Convention,

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 701-703.

whether they contain patients or not. That follows from the wording of the clause, which merely mentions the fact that they must be organized and lists the categories of people who are to receive treatment there. One thing is quite clear, however, and it is of great importance : if a hospital is to enjoy special protection under the Convention, it may under no circumstances be used for non-medical purposes. If a school has been converted into an emergency hospital, for instance, classes may no longer be held in it, even if there are periods when it contains no wounded or sick.

Finally, it should be noted that Article 18 does not in any way depend on the legal status of the hospitals under the law of the country concerned. Private hospitals and State or municipal hospitals are alike entitled to special protection under the Convention, provided they satisfy the conditions laid down.

B. Application.—In the case of establishments where medical attention is given, whatever they are called—hospitals, clinics, sanatoria, health centres, ophthalmic, psychiatric or child clinics —there can be no doubt that they are hospitals within the meaning of Article 18 and it is unnecessary to labour the point.

The problem becomes more complicated in the case of establishments intended for persons whose state of health demands attention although they cannot be said to be sick : for example, homes for children, infants or the old, preventive sanatoria, invalid hostels, hydropathics, etc.

Of course, the Convention nowhere contains a definition of a sick or infirm person. Nevertheless it should be possible, on the basis of general principles and the end in view, to determine the scope of the Article in such a way as to decide on a suitable dividing line permitting the exclusion of establishments not fulfilling true hospital functions.

Institutions for the old are not of the nature of civilian hospitals. They are intended to enable old and lonely people to live without having to bother about their accommodation and subsistence, but are not designed to provide hospital treatment for the inmates ; they could be likened to *pensions* or homes rather than to hospitals. To class them as hospitals would be contrary to what is understood by the word. For this reason institutions for the old cannot be regarded as covered by Article 18.

On the other hand, those establishments whose sole end is the care of the sick, infirm, old people or old people suffering from incurable diseases, could be classified as civilian hospitals within the meaning of Article 18.

As for homes intended solely for the care of infirm persons, for instance homes for the blind or the deaf and dumb, they should qualify for inclusion in the civilian hospital category as defined in Article 18, provided that the inmates are receiving care.

Invalids are not included in the list contained in Article 18. However, establishments where they are treated can be considered civilian hospitals, for invalids are also wounded or sick so long as their state of health requires hospital treatment. Article 18, however, does not cover establishments intended solely to receive invalids whose state of health does not necessitate hospital treatment.

Homes for infants and children, like institutions for the aged, house the weak to whom care is given but whose health is not impaired. For that reason they cannot be classed as civilian hospitals.

It seems reasonable to class preventive sanatoria, in most instances at least, with sanatoria and hospitals. The distinction between sanatoria and preventive sanatoria will often be difficult to establish. Of course, if their name only is considered, preventive sanatoria do not in principle receive persons actually suffering from a disease, but only persons predisposed to that disease ; however, in so far as these establishments are organized in much the same way as civilian hospitals and the persons accepted there are subject to medical discipline and are given preventive care, it would seem justified to treat them as civilian hospitals. It may be added that preventive sanatoria frequently accommodate persons already ill, if only slightly, and the name " preventive sanatorium " is, in many cases, merely a euphemism.

The great majority of hydropathics, on the other hand, are not frequented solely by the ailing and infirm, but also—for the most varied reasons—by persons in good health or at least by persons who are not ill in the proper sense of the word. Moreover, persons who frequent these establishments live in hotels or boarding-houses for the greater part of the time and are not subject to medical supervision outside the hydropathic itself ; they are therefore not hospital patients. Hence it may be concluded, in general, that hydropathics are not covered by Article 18. There may conceivably occur cases, however, where a hydropathic is organized on the lines of a civilian hospital and that the persons using it are sick in the proper sense of the word. In that case it could be classed as a civilian hospital.

In view of the great variety of cases which may arise, it is difficult to give *a priori* a general definition of the civilian hospitals referred to in Article 18. It would therefore be very desirable for the measures of application in each country to specify as precisely as possible the conditions for recognition of an establishment as a civilian hospital.

If several types of institution have been omitted from this study of establishments which may be classed as civilian hospitals as defined by the Convention, that does not mean that they do not benefit from protection by virtue of other provisions of the law of nations. Thus it is certain that several of the establishments mentioned above, but which it was decided could not be included, are devoted to charitable purposes and may therefore claim protection under the articles of the Hague Regulations quoted above[1]. Furthermore, while it may be wondered whether these establishments are entitled to protection as such, it should be noted that the persons housed therein are all protected persons, since they have taken no part or no longer take part in the fighting (children, women, old people, wounded and sick).

2. *Respect and protection*

After defining what the object of the protection is, paragraph 1 goes on to say against what the protection is given. The provision gives two indications: the first, negative in character, states that hospitals may not be the object of attacks; the second, in positive form, lays certain duties on the belligerents.

The idea contained in the words " may not be the object of attack " is implicit in the idea of " respecting ". It was deliberately emphasized in the same way in the corresponding provision of the First Geneva Convention, and it can only be assumed that the authors of the provision had in mind the increasing scale of bombing from the air[2]. The prohibition in paragraph 1 obviously refers primarily to attacks *deliberately* directed against hospitals. Under war conditions, however, such an intention is infrequent and in any case difficult to prove. The prohibition must therefore be regarded as wider in its significance; some light may be thrown on this by the use of the term " respect " and by the absolute quality of the obligations expressed in paragraph 1 (" in no circumstances " and " at all times "); the belligerents are under a general obligation to do everything possible to spare hospitals. That is the essential point.

Understood in that way, as it should be, the prohibition of attacks on hospitals will have very definite consequences because of the conditions in which most of them have to work today. They are very often situated either close to or inside towns which may also contain military objectives. When attacking such objectives, the attacking force is

[1] See above, p. 141.

[2] See *Commentary I*, page 196. See also *Report on the Work of the Conference of Government Experts*, Geneva, 1947, pp. 23-24.

bound under paragraph 1 to take special precautions to spare hospitals as far as is humanly possible. That is a reasonable corollary to the precautions which the State to which the hospital belongs must itself take by siting them as far as possible from any military objectives, as recommended in the last paragraph of Article 18[1].

If a hospital, by and large, fulfils this requirement—which is no more than a recommendation—direct hits on it by an attacking force which has not taken such precautions during operations against a military objective might with justice be regarded as a violation of paragraph 1.

Furthermore, under certain circumstances (during an attack by air-borne troops, for example), a point close to a hospital may suddenly become a military objective, without there being any practical possibility of transporting the sick and equipment to a sufficient distance. The general obligation to spare hospitals requires, even in such cases, that the two belligerents should take precautions to ensure that hospitals should suffer as little as possible from the attacks and from hostilities in general.

After this negative statement of principle, there follows the now conventional positive form of wording, prescribing that the Parties shall at all times *respect* and *protect* civilian hospitals. While the word " respect " expresses positively the idea behind the prohibition of attack, the word " protect " strengthens that idea by making it obligatory to ensure that respect and impose it on others. Like the prohibition of attack, the obligation to respect and protect is absolute and universal. However, civilian hospitals in occupied territory are subject to requisition within the limits set forth in Article 57 of the Convention.

PARAGRAPH 2. — OFFICIAL RECOGNITION

Only recognized establishments may avail themselves of the emblem with a view to obtaining protection. This recognition is expressed in an official document testifying that they are civilian hospitals ; that goes without saying. The text adds, however, that this document must show that the buildings are not used for any purpose which would deprive these hospitals of protection under the terms of Article 18. This second condition, added by the Diplomatic Conference, is open to criticism. Indeed such an assurance would only have very dubious value, for it is impossible for a State at the beginning

[1] See in this connection : *Les Conventions de Genève et la Guerre aérienne*, par R.-J. WILHELM, Revue internationale de la Croix-Rouge, janvier 1952, p. 30.

of a war or even—and this would more often be the case—during peace time, to give a cogent undertaking that in the future a hospital would in fact refrain from acts harmful to the enemy. All that may reasonably be done is to declare that the hospital at the time of issue of the document is intended strictly for humanitarian tasks and contains nothing which might serve military ends.

Recognition should take the form in the first place of a legal instrument drawn up by the State concerned. The authority responsible for issuing certificates of recognition is not specified. States are therefore free to designate it themselves and may delegate their functions to the National Red Cross Society. There is nothing in the Convention against such a delegation of functions. The possibility was even expressly mentioned in the course of the discussions at the Diplomatic Conference [1].

The belligerents have the duty (and not merely the right) to issue the certificate of recognition. This provision is mandatory : whenever a hospital fulfils the conditions laid down in the first paragraph, it has a right to official recognition. Recognition means that the State recognizing assumes responsibilities towards the hospital, which are not affected by the fact that the State may have delegated its powers of recognition to an organization which is not part of the State administration. The State continues to be responsible towards any contracting Powers for the consequences of any abuse committed by the organization in which this administrative function has been vested.

Paragraph 3. — Marking

1. *Authorization by the State*

Civilian hospitals may be marked by means of the red cross emblem defined in Article 38 of the First Geneva Convention of 1949, namely the heraldic emblem of the red cross on a white ground (red crescent, red lion and sun) [2].

The general rule that " civilian hospitals *shall be* marked . . . " is nevertheless subject to State authorization and this is optional. It follows therefrom that while marking of civilian hospitals is obligatory in principle, its application depends on authorization by the State.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 469.

[2] See *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 1952, pp. 330 ff.

The marking of civilian hospitals is then a different matter from their recognition. It does not necessarily follow upon recognition. Whereas all civilian hospitals marked with the protective emblem must necessarily have been officially recognized, all recognized civilian hospitals may not necessarily be marked. Of course, in practice official recognition is most often accompanied by authority to display the distinctive sign. It is also possible, however, for a belligerent to authorize certain hospital establishments, because of their situation or importance, to be marked with the protective emblem whilst refusing this right to other hospitals, also recognized, when, for one reason or another, such marking is considered inopportune. It may so happen, for instance, that the State wishes to confine this marking to the large civilian hospitals and in this respect lays down the standards of application.

This system, which leaves discretionary power to the State, reveals clearly the anxiety of the Diplomatic Conference which, alive to the risks attendant upon any extension of the use of the emblem, preferred to proceed with caution by making the authorization of the emblem optional. The Diplomatic Conference made the marking dependent on State authorization, thus enabling the Powers to wield this authority according to circumstances and experience gained : it will be widely applied if results are good in practice, whereas its use will be limited if experience shows that extended use of the red cross results in abuses harmful to its prestige and, consequently, to the cause of those whom it is designed to protect. Thus States conscious of their responsibility will be able to regulate what is done in this matter.

This provision does not, any more than the previous paragraph, specify the body which is to give permission for marking ; it merely says that the authority to do so is vested in the State. The provision thus possesses all the necessary flexibility and it will be for internal legislation to determine the responsible body.

The system of joint authorization by the State and the National Red Cross Society adopted at Stockholm was not accepted by the Conference, nor was the condition of military consent, as provided for in the Government Experts' draft and which certain delegations to the Diplomatic Conference would have liked to see reinserted.

However, nothing in the present wording prevents States delegating their powers in this matter to the military authorities, to the National Red Cross or to any other qualified body. What is important is that the responsibility of the State is clearly established by the Convention.

The marking of civilian hospitals is intended essentially for time of war ; it is then that it takes on its real importance. However, the rule may be made more flexible in application, in order to ensure that practical considerations are taken into account so that the marking will be completely effective. There is in fact no reason why a State, which is obliged to consider every possibility, should not be able to mark its civilian hospitals in peace time.

As for the choice of the best time to carry out the marking, it is advisable to leave the Governments concerned a wide discretionary power. In particular, a State would appear to be justified in using the sign for its hospitals in peace time when circumstances are such that war may be considered imminent and when other preparatory measures are being taken against the possibility of a conflict (preparations for mobilisation, partial mobilisation, general mobilisation, etc.). However, it would seem preferable in this case to confine action to putting up fixed signs requiring a certain amount of work and time (painted signs for instance on roofs).

The unnecessary and inordinate use of the red cross in peace time on buildings not belonging to the Red Cross Society may create confusion in people's minds[1]. It would not affect only the Society in question, whose premises might be confused with other buildings similarly marked, but would impair the prestige and symbolic force of the emblem.

2. *Supervision*

It seems essential that the body entrusted under the national laws with the issue of certificates and the granting of authorization to mark the hospitals by means of the red cross emblem, should also be given the necessary powers of supervision. It is important that all establishments recognized by the State should be subject to continuous and strict supervision. It is even absolutely necessary in the case of hospitals granted the right to display the emblem. This strict supervision is the inevitable consequence of extending the use of the red cross emblem, which would otherwise run the risk of being misused and therefore of losing its high significance and its authority. For that reason, the right of a civilian hospital to fly the flag should always be accompanied by the obligation to submit to supervision.

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[1] To avoid any confusion, it will be in the interest of the National Society to display its name distinctly together with the emblem on its premises and property.

PARAGRAPH 4. — VISIBILITY OF THE MARKING

The protective emblem is of practical value only in so far as it is recognizable. For that reason, the Convention recommends that the Parties to the conflict should make the distinctive emblem indicating civilian hospitals clearly visible to the enemy land, air and naval forces.

The emblems should be large enough to be recognized from a distance, particularly by high-flying planes, and from all directions.

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, is scarcely recognizable from altitude of more than 8000 feet[1].

For the emblem to be visible from a distance and from all sides, use may be made of rigid panels placed in different planes (horizontal, vertical, oblique), or large red crosses on a white ground painted on the roof and walls or marked out on the ground with suitable material.

It is naturally desirable that civilian hospitals should be marked at night, for instance by lines of lights to outline the red crosses. However, the military command is most unlikely to give its consent, total blackout being the most effective practical means of safeguarding an area from air attack. If civilian hospitals whose position had been spotted during the day were lighted up at night, enemy aircraft would be provided with useful landmarks. Lighting of civilian hospitals might, however, conceivably be used only where an attack is being made on a military objective. As will be noted in the following paragraph, the safety of civilian hospitals is best ensured by siting them well away from military objectives.

The danger that marking may facilitate the enemy's operations exists not only at night but also during the day, although to a lesser degree. It is for this reason that the obligation to ensure perect visibility of the protective emblem is subject to military requirements, as by the terms of the similar provision in Article 42, paragraph 4, of the First Geneva Convention. This reservation is justified, for the marking of a hospital may, for one reason or another, assist the enemy forces.

PARAGRAPH 5. — DISTANCE FROM MILITARY OBJECTIVES

This provision recommends that the responsible authorities should ensure that hospitals are, as far as possible, situated at a distance

[1] See *Revue Internationale de la Croix-Rouge*, May 1936, p. 409 (inset).

from military objectives. The provision was obviously intended to cover the possibility of bombing from the air and to ensure that civilian hospitals should be protected against stray bombs. In the First Geneva Convention medical units of the armed forces were protected by the introduction of a similar clause (Article 19, paragraph 2). In neither clause is the term " military objective " defined. Attempts to define the term officially, independently of the Geneva Conventions, have failed, although several Governments declared before the Second World War that they subscribed to the definition given in Article 24 of the Hague Rules of 1923.

It would nevertheless appear necessary, and of obvious importance from the humanitarian point of view, to arrive by international agreement at some sort of definition of the term, since a whole series of measures for the protection of civilians are based on its use.

Accordingly, the International Committee of the Red Cross has made a proposal, a mere suggestion to that effect, with a view to the re-affirmation of the rules of international law protecting civilian population as a whole.

The expression " military objectives " must undoubtedly be understood in the strictest sense as a clearly defined point of actual or potential military importance. Needless to say the civilian population can never be regarded as a military objective. That truth is the very basis of the whole law of war.

When studying paragraph 1 we saw the scope of the clause prohibiting attacks on hospitals. The last paragraph shows clearly that wide as that scope is, it is not intended to confer immunity on military objectives situated close to a hospital or to restrict the right to attack them as such. It is for that reason that the legal protection accorded to military hospitals must be accompanied by practical measures to ensure that they are situated as far as possible from military objectives and to protect them from the accidental consequences of attacks on such objectives. If that is not done the protection is very likely to be illusory, even if the hospitals are clearly marked.

It will no longer be possible to change the location of many civilian hospitals already in existence. That is why the provision is recommendatory and not mandatory in character. In such cases the precautionary measure will consist in seeing that no military objectives are sited in the vicinity, and, if they are already there, that they are removed if possible. Needless to say close co-operation between the responsible civilian and military authorities is highly desirable.

ARTICLE 19. — DISCONTINUANCE OF PROTECTION OF HOSPITALS

The protection to which civilian hospitals 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 due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

PARAGRAPH 1. — CONDITIONS UNDER WHICH PROTECTION IS DISCONTINUED

1. *Basic condition — Acts harmful to the enemy*

The immunity bestowed on civilian hospitals cannot be taken away unless they are used to commit acts harmful to the enemy. The wording adopted by the Diplomatic Conference was intended to draw attention to the exceptional character of the provision and to make it clear that protection could only be discontinued in this one case.

Despite the efforts of the 1949 Conference[1], it was not found possible to produce a more concrete definition of the notion " acts harmful to the enemy " (in the French version : actes nuisibles à l'ennemi), which had already been used in the 1929 version of the First Geneva Convention. The idea was made clearer, however, by the insertion of the phrase " outside their humanitarian duties ".

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 ammunition store, as a military observation post, or as a centre for liaison with fighting troops. The sense will become still clearer when paragraph 2, below is considered, which mentions two specific acts which are not to be regarded as being harmful to the enemy. One thing is certain. Civilian hospitals must observe, towards the enemy, the neutrality which they claim for themselves and which is their right under the Convention. Standing outside the struggle, they must steadfastly refrain from any interference, direct or indirect, in military

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 632 and 703 and *Commentary*, Vol. I, pp. 201 ff.

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 patients in a hospital may be very seriously affected by its consequences. Furthermore, from a more general point of view, such acts may lessen the protective value of the Convention in other cases.

It is possible for a humane act to be harmful to the enemy or for it to be wrongly interpreted as such by an enemy lacking in generosity. Thus the presence or activities of a hospital might interfere with tactical operations. By introducing the phrase " outside their humanitarian duties ", the Diplomatic Conference emphasized explicitly that the accomplishment of a humanitarian duty can never under any circumstances be described as an act harmful to the enemy.

2. *Formal condition — Warning and time limit*

The object of the second sentence in the paragraph is to reduce the severity of the rule laid down in the first. Safeguards had, in fact, to be provided, in order to ensure the humane treatment of the patients in the hospital, who could not, of course, be held responsible for any unlawful acts committeed.

It is thus stipulated that protection may cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

The enemy will, therefore, warn the hospital to put an end to the harmful acts and will fix a time limit, on the expiry of which he may attack if the warning has not been heeded. 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 to allow the unlawful acts to be stopped or for the hospital patients to be removed to a place of safety. The respite will also give the hospital an opportunity of replying to any unfounded accusation and clearing itself.

PARAGRAPH 2. — ACTS NOT CAUSING PROTECTION TO CEASE

Paragraph 2 gives two specific instances of circumstances which do not deprive a civilian hospital of its right to protection, or, in other words, which are not to be regarded as acts harmful to the enemy. The first case quoted is that of sick or wounded members of the armed forces being admitted to civilian hospitals. That cannot affect the hospital's right to immunity and protection. Civilian hospitals are therefore authorised implicitly, under the Fourth Geneva Convention, to take in sick and wounded members of the forces

as well as civilians. This provision has a counterpart in Article 22 (5), of the First Geneva Convention of 1949, which permits units and establishments of the Army Medical Service to collect and treat civilian wounded and sick, and also in the Second Geneva Convention, Article 35 (4), which authorizes hospital ships and the sick-bays of vessels to do the same.

This provision simply embodies the principle that, when it is a matter of relief, all wounded and sick persons, whether civilians or members of the armed forces, are placed on an equal footing. That conception is absolutely necessary in view of the character which modern warfare—especially aerial warfare—has assumed: military and civilians, friends and foes, may now be struck down by the same act of war and it must be possible in such cases for them to be treated by the same nursing orderlies and accommodated in the same buildings.

In the second place, military wounded and sick, when admitted to a civilian hospital, 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 the hospital be visited by the enemy before it has been done, he must not be entitled to consider the circumstance as a harmful act. That is what the last part of paragraph 2 makes clear.

ARTICLE 20. — HOSPITAL STAFF

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognisable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for 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.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in

this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

This Article underwent many important changes during the preliminary work on the Conventions. It began as a clause drafted by the Conference of Government Experts of 1947, who had wondered whether they should establish a system of protection for all the people engaged in the care of wounded and sick civilians or whether the protection provided should be confined to civilian hospitals. They decided to adopt the latter course[1].

The next year the International Committee of the Red Cross, in the draft Convention submitted to the XVIIth International Red Cross Conference, included in Article 18 provisions which followed the ideas expressed by the experts very closely. The first paragraph of their draft proclaimed the principle of the protection of civilian hospital staff and drew up an identity card for use by the staff ; use of the red cross emblem was not contemplated here as it was in the case of the hospitals themselves. The second paragraph laid an obligation on the hospital management to keep an up-to-date list of members of the staff and of patients.

The XVIIth International Red Cross Conference (Stockholm 1948) after giving its approval to the marking of civilian hospitals with the red cross emblem, decided to go still further and adopted a new second paragraph authorizing the use of the distinctive sign by civilian hospital staff.

The Diplomatic Conference concentrated its attention on deciding which category of civilian medical personnel were to be allowed to use the distinctive sign, but opinions differed widely. There were two opposing trends of opinion. Some delegates wished to go even further than the Stockholm text and to extend the use of the emblem to the authorities in charge of the public health and hygiene services, and to representatives of the civil defence services[2].

Others wished on the contrary to restrict the use of the emblem by comparison with what was authorized under the Stockholm Draft.

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[1] See *Report on the Work of the Conference of Government Experts*, Geneva, 1947, pp. 72-73.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 632 and 819.

The International Committee of the Red Cross explained its point of view in the following words, in the memorandum *Remarks and Proposals*[1], which it published just before the Conference:

Any widening of the applicability of the red cross emblem will inevitably entail a far greater risk of misuse and violation; this in turn might compromise the repute attaching to the emblem and undermine its very great significance and good name. Hitherto, the use of the emblem has been confined to a clearly defined category of persons who are subject to military discipline. Even in these circumstances, the prevention of misuse has met with no small difficulties. If, therefore, the use of the emblem is extended to ill-defined categories of civilians, scattered over the country, who are not subject to discipline, proper registration or strict supervision, the combating of abuse would become impracticable, and the consequences would be borne by those who are legally entitled to the protection of the emblem.

Members of the army medical personnel were authorized to wear the emblem solely because they belong to the category of military personnel, that is to say, those who may lawfully be attacked.

The law of nations however rests on the principle that hostilities should be confined to armed forces, and that civil populations should be generally immune. The whole economy of the new Civilian Convention derives from this acceptance. Since it is illegal to fire upon any civilian, clearly it is inadmissible to fire upon civilians in charge of the sick. Article 13 of the present Convention expressly states, in fact, that the parties to the conflict shall allow medical personnel of all categories to carry out their duties. To seek protection for certain categories of civilians would be an admission, at the outset, that the new Convention would not be respected in the case of other civilians; this would be a confession of poor faith in the new treaty, and would weaken its authority.

No doubt the XVIIth Conference was prevented by want of time from studying all the aspects of the problem and from assessing the full effect of the proposed extension. An exception might perhaps still be made for the use of the emblem by the regular staffs of civilians hopitals, who are a well defined category of persons duly registered by the State and holding identity documents to this effect. If a protective emblem for all civilian medical personnel is still desired, however, it would be better to examine the possibility of using a special device, entirely distinct from the Red Cross emblem.

While wishing to authorize the use of the emblem by further categories of people, the Conference was anxious to avoid increasing its use to an extent which would lower its value. It finally decided, therefore, to adopt the solution contained in the Article as it now stands, the main features of which are:

[1] See *Remarks and Proposals*, pp. 72 and 73.

(a) restriction of the use of the distinctive sign to the staff of civilian hospitals, that is to a well defined category of people who are members of an organized whole, which is subject to discipline and comparatively easy to keep under supervision ;

(b) restriction of the use of the emblem to occupied territory and zones of military operations.

PARAGRAPH 1. — PERMANENT STAFF

This provision relates to the permanent staff of a civilian hospital, as opposed to its temporary staff which is dealt with in paragraph 3.

1. *Status and duties*

To fall within the definition given in paragraph 1, staff must be regularly and solely engaged in the operation or administration of a civilian hospital as defined in Article 18 of the Convention.

The stipulation that such staff must be regularly engaged in hospital duties excludes temporary staff ; while the word " solely " bars them from doing any other work.

These two conditions are cumulative. For example, a surgeon who works regularly in a hospital, but is not exclusively employed there because he devotes part of his time to his private practice, or again, voluntary laboratory assistants or auxiliaries, who only work at the hospital for part of the day, or for one or two days a week, would not be engaged " solely " in hospital duties and would consequently not be covered by paragraph 1[1].

The close connection with the Convention establishes between the hospital and its staff thus represents the first criterion.

The description of the duties of the hospital staff provides us with further information. The paragraph refers to persons " engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases ". This form of wording, which contains a general idea—operation and administration—followed by a list of four specific tasks, is restrictive in character. That does not mean that the persons concerned must be employed on one of those duties only. They may be assigned to several of these duties, provided that they do not include any not listed here.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 705 and 706 and 819 ; see also *Commentary* on para. 3 below, p. 164.

The wording of the provision makes it quite clear that it covers the staff not only when they are in the hospital itself but also when they have to perform any duty away from the hospital buildings. If the hospital management, for example, were to send relief teams from its staff to the bombed areas after an air raid, to collect and care for the wounded and convey them to the hospital, the staff in question would be covered by Article 20 even while they were carrying out this duty outside the hospital.

Whereas duties outside are subject to certain restrictions, those carried out inside the establishment are free from them. Thus protection is not only accorded to the staff in direct contact with the hospital patients, e.g. doctors and nurses, but to the whole of the staff necessary for the operation and administration of the hospital, including the people employed in the laboratories, the X-ray department, the dispensary, the domestic services, the kitchens, the cleaning services, etc.[1] The idea on which this rule is based is that a hospital is an organized whole which cannot function efficiently unless all its parts are working normally. People who are not part of the medical staff proper are nevertheless an integral part of a hospital, since without their help it could not provide the services expected of it[2]. In this category also, personnel must be employed regularly and solely in a hospital.

Many hospitals have auxiliary enterprises attached to them, such as farms. What is the legal status of the staff employed on such farms ? Can they be considered as " persons regularly and solely engaged in the operation and administration of civilian hospitals " ? We do not think they can. There is not, between such staff and the hospital patients, the close connection upon which the Convention insists, whereas such a connection does exist in the case of the medical and administrative staff, who generally live under the same roof as the patients in the hospital ; they thus form with the latter a single community linked by a common purpose. For that reason Article 20 should be interpreted as limited in application, in that the words " operation " and " administration " must be taken to refer only to the hospitals themselves and not to auxiliary undertakings.

2. *Respect and protection*

The permanent staff of a civilian hospital are to be " respected and protected ". This is the traditional form of words, used since 1906 in the First Geneva Convention, and already used in Article 18.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 819.

[2] See *Commentary I*, p. 219.

If hospital staff are to enjoy immunity they must naturally abstain from any participation, even indirect participation, in hostile acts. It was seen in Article 19 that the protection to which civilian hospitals are entitled would cease if they committed acts harmful to the enemy.

PARAGRAPH 2. — IDENTIFICATION OF PERMANENT STAFF

1. *Identity card*

To prove their right to wear the armlet marked with the protective emblem, members of hospital staff will carry an identity card.

The card must show the occupation and status of the bearer, give his surname, first names and date of birth, indicate to which hospital he belongs, and specify whether he is a member of the medical staff proper or of the administrative staff.

Another essential factor in identification is the photograph of the bearer which must be attached to the card.

On the other hand the stipulation that identity cards should carry finger prints, contained in the Stockholm draft, was dropped for the sake of convenience by the Diplomatic Conference[1].

A further condition imposed by the Convention is that the card must be embossed with the stamp of the responsible authority. It is that stamp which makes the card authentic. It will be noted that the word " embossed "—i.e. stamped by pressure—is used, experience having shown that ordinary ink stamps may wear off and are fairly easy to imitate.

The Conference decided not to specify what is meant by the responsible authority, in order to leave the system the necessary flexibility. Each State will be free to determine the competent authority as an internal matter. The essential is that the use of these identity cards should be regulated by the State, acting in full awareness of its responsibility.

2. *The armlet*

The permanent staff of civilian hospitals are to be recognizable by an armlet " bearing the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ". That emblem is a red cross on a white ground.

It has already been shown that this provision is an important innovation by comparison with the law as it previously stood, as it

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 633 and 705.

extends to a further category of person the benefit of an emblem until then exclusively reserved to medical personnel of the armed forces.

A. *Description of the armlet.*—The distinctive emblem being a red cross on a white ground, there is no necessity, in theory, for the armlet itself to be white.

It would be very desirable, however, to provide the hospital staff with a white armlet bearing a red cross, as this is the custom everywhere for the medical personnel of the armed forces[1]. Indeed such armlets are the only ones which give good visibility, owing to the contrast of colours.

The armlet is to be water-resistant. This precaution, which is intended to keep it in good condition, is obviously not indispensable.

As in the case of the red cross emblem in general, the form and dimensions of the armlet are not specified—a rigid definition might have opened the way to dangerous abuses, as attempts might have been made to justify attacks against persons protected by the armlet, by alleging that the emblems were not of the prescribed dimensions.

It is laid down, in the same way as in the case of military medical personnel, that the armlet is to be worn 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 reasonably claim the right to deny protection to a medical orderly who for some plausible reason wore the armlet on his right arm.

B. *Issue of armlets. Stamp.*—The Convention stipulates that the armlets are to be issued by the State[2]. Since the competence and, consequently, the responsibility of the State is thereby established, it remains for the legislators in each country to produce regulations governing the use of that competence.

Since the armlets are only to be worn in occupied territory or in zones of military operations, it seems essential that the State should delegate its power to issue armlets. An area may be transformed quite unexpectedly into a zone of military operations, and that would make a distribution of armlets a matter of particular urgency. It is important therefore that the armlets should at all times and in all places be available for hospital staff. That would not appear to be possible unless distribution were largely decentralized. Primarily it is hospital managements who would no doubt be entrusted with the task. Such decentralization of the issue of armlets may, it is true, encourage

[1] See *Commentary*, Vol. I, p. 310.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 396-397.

abuses, but it nevertheless seems necessary, if the provision in the Convention is to be put into operation rapidly. Hospital managements must be conscious of their responsibility and exercise strict and constant supervision over their staff.

It is above all necessary to ensure issue to the proper persons. It is important that the armlet should only be worn by those entitled to do so under the Convention, but the armlet alone will not suffice for that. As has been said, nothing is easier than to make an armlet and put it on. Even if such an armlet was worn for honest motives in order to bring help to the wounded, its wearer could be punished. The belligerents must have reliable guarantees.

Consequently an armlet will not be of any value and cannot be legitimately worn unless it has been stamped and issued by the State. That is a compulsory and absolute condition. Issue alone is note nough. The fact of its issue by the State must be shown by an official mark. The Article does not say what authority is entitled to stamp armlets ; in actual practice it will probably be the body which is made responsible for issuing them.

C. *Conditions governing the wearing of the armlet.*—The wearing of the armlet, like the carrying of the identity card, is only envisaged in occupied territory and areas where military operations are taking place.

Occupied territory means an enemy territory from which one of the belligerents has succeeded in expelling the armed forces of his adversary and over which he has established his authority. Occupation may extend to the whole territory of a country or to a portion only.

The expression " zones of military operations " refers primarily to the area where fighting is taking place. But it may also apply to areas in which military authorities are given certain powers and restrictions are placed on the movement of civilians, in areas, for example, where there are troop movements but not fighting, and even in those where there is no actual movement of troops but in which the High Command wishes to be able to move them at short notice. As a rule areas of military operations are fixed expressly by decree. It is thus the State which decides, with full authority, where and when the armlet may and must be worn[1].

Bombing is undoubtedly a military operation and the possibility of its use on an extensive scale may lead to the idea of a zone of military operations being interpreted as covering the whole of the territory of the belligerents. Such a broad interpretation, however,

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 819.

does not accord with the idea behind this provision ; for the fact of being exposed to bombing is not in itself sufficient to turn a territory into a " zone of military operations ". Contact must, on the contrary, be established with the enemy's land forces, or at least it must be imminent. It is then that the wearing of an armlet is warranted ; it is then that it can actually fulfil its protective role by helping the wearer to move about and preventing him from being arrested by the invader. That is what distinguishes the armlet from the signs marked on civilian hospitals which, as has been seen, are above all intended to preserve the hospital buildings from the effects of attack from the air.

In addition to this territorial restriction, the Convention lays down a second condition : namely that the armlet can only be worn by permanent hospital staff while carrying out their duties ; this means that members of the staff are not authorized to wear the armlet when they are on leave, on their holidays for example, or when they go out in the evening, but only while they are actually working in the hospital or out on one of the special duties mentioned in paragraph 1[1].

This restriction on the wearing of the armlet is based on the idea that there should be a close connection between the distinctive sign and the duties it is intended to protect. Hospital staff do not enjoy special protection on their own account, but because of the humanitarian work they are doing. Besides, the restriction in question is likely to reduce the risk of abuse ; for it is difficult, if not impossible, to supervise the wearing of the armlet when personnel are off duty.

Attention should also be drawn to the fact that this restriction applies only to the armlet and not to the identity card, which may always be carried by members of the hospital staff, even when they are on leave.

Paragraph 3. — Temporary staff

1. *Status and duties*

Whereas the permanent staff are employed at all times in a hospital, this paragraph refers to a special category of personnel who are only employed there temporarily. The Convention describes them as " other personnel ", meaning all the people working in a hospital without being regularly or solely employed there—such people in fact as a surgeon who has a private practice, but goes regularly to the hospital to carry out operations, or an auxiliary nurse who goes to help in the hospital two afternoons each week, or again a night watch-

[1] For the exact meaning of the expression " while carrying out their duties " see also pp. 166-168.

man who has another job during the day. What all these people have in common is that their work at the hospital is not their only occupation ; they are not therefore covered by paragraph 1. It would have been going too far, however, to deprive them of special protection while they were working in the hospital. Paragraph 3 was designed to extend the application of paragraph 1 for their benefit.

A condition which applies to this category of staff is that they should belong to that organized whole, with its ranks and grades, known as a hospital. In their case too the deciding factor is their employment in a hospital ; temporary personnel must be subordinate to the management of the hospital : the management must be able to give them administrative orders while they are working for the hospital.

It does not seem possible to conclude from the fact that paragraph 3 does not again mention the four specific outside tasks listed in paragraph 1, that temporary personnel are only protected while on duty inside the hospital. That list develops and clarifies the words " operation and administration of civilian hospitals ", and the use of the same terms again in paragraph 3 tacitly implies that the same list holds good. The only criterion on which the Diplomatic Conference wished to base the distinction between the two categories of staff was the nature of the connection between the hospital and its staff, and not the nature of the services rendered[1]. The application of paragraph 3 does not therefore depend on whether the temporary staff work in the hospital itself or whether they are engaged on one of the duties mentioned in paragraph 1, i.e. in searching for, removing, transporting and caring, outside the hospital for wounded and sick civilians, the infirm and maternity cases. They will be protected in either case.

2. *Respect and protection*

Temporary staff must be respected and protected[2] in the same way as the permanent staff. The fact that they are giving their services to a hospital raises them to the same level as members of the permanent staff and makes them equally worthy of special protection.

They will, however, be granted immunity only while they are working in the hospital ; it will cease as soon as they have reverted to their usual occupation, and will again be granted when they are once more engaged on their hospital duties.

It is, lastly, obvious that both temporary and permanent staff must strictly abstain from taking any part, direct or indirect, in the hostilities.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 395-397.

[2] For the meaning of these terms see above, p. 160.

3. *Identification*

I. *The armlet*

A. *Conditions covering the use of the armlet.*—Temporary staff will be entitled to wear the armlet " as provided in and under the conditions prescribed in this Article, while they are employed on such duties." This sentence means first and foremost that the armlet can only be worn in occupied territory and in zones of military operations, since temporary personnel could not conceivably be given wider rights than the permanent staff.

It also means that the armlet worn by temporary personnel will be similar in its essential features to that worn by the permanent staff : it must be issued and stamped by the State ; it must be water-resistant and must be marked with a red cross on a white ground ; it must, lastly, be worn on the left arm[1].

It is then stipulated that the armlet may only be worn while the wearer is employed on one of the duties listed in paragraph 1. This restriction is similar to the one in the previous paragraph, where it is stated that the armlet shall be worn by permanent staff only while they are carrying out their duties. Whereas the point of this restriction is easy to see in the case of temporary personnel (since such personnel can only reasonably claim that they are entitled to wear the armlet while they are engaged in their hospital duties, and not while they are doing their other work) it is more difficult to see the significance of the provision in the case of permanent staff.

B. *Differences in regard to the wearing of the armlet by permanent staff and temporary personnel.*—The draft Article submitted to the Diplomatic Conference by Committee III [2] gave all civilian hospital staff, permanent and temporary, the right to wear the armlet, but limited this right to the actual time during which they were on duty.

The Plenary Assembly of the Conference had to consider amendments to the Article, tabled jointly by several delegations ; they were adopted by a slight majority, giving the Article its present wording[3].

The amendments were accompanied by the following written explanation of the reasons for submitting them :

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[1] For further details on this subject, see p. 161.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 851.

[3] *Ibid.*, Vol. II-B, p. 391.

In the case of hospital personnel the protection of the red cross, etc., emblem is at present extended by Article 18 to all personnel regularly engaged in hospital duties. This would cover all part-time employees, e.g. persons who devote a few hours a day to work in hospitals but who engage in other activities, such a work in munition factories, during the rest of the day. It is clearly wrong that such persons should wear red cross, etc., armlets and receive full protection while engaged in factory work, and it is therefore proposed that the full protection of the Article should be restricted to persons " regularly and solely " engaged in hospital work.

To cover other hospital employees, e. g. part-time workers, it is proposed to add a new paragraph affording them full protection and entitlement to wear the armlet while they are actually engaged in hospital work.[1]

It will be seen from this explanation that the authors of the amendments wish to divide the staff into two categories : permanent staff, who would be entitled to wear the armlet at all times, and temporary staff, who would only be protected by the armlet when they were actually carrying out their duties in a civilian hospital. The explanation clarifies the Article in a very satisfactory manner, and if no other explanation had been given it would have been comparatively simple to arrive at an interpretation in accordance with the author's intentions. One of the delegations which had proposed the amendments in question made a statement, however, before the Plenary Assembly, which seems to contradict what was said above. The statement was as follows :

In the Geneva Convention the protection of medical personnel rests on the early conception of Henry Dunant that they are outside the fight ; they take no part in the actual fighting, and their position is that of looking after the victims of the battle. In the same way if we are to maintain effective protection for those who look after civilian sick and wounded we must secure that the persons protected are not, in fact, actually fighting in the war against the enemy.

Now it is perfectly possible—maybe it did indeed happen—that doctors or other staff of hospitals engaged during part of the day or even during the full day in looking after wounded and sick felt their patriotism demanded that in their spare time they should take a more active role in resisting the enemy : if medical personnel in a hospital become involved in that kind of operation, then the difficulty of protecting them while occupied with their hospital duties will be tremendously increased. Therefore we propose that in the first paragraph of the Article the words " and solely " should be added after " regularly " so that the full-time staff of hospitals shall be precluded from taking part in activities incompatible with their hospital duties.[2]

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 109.

[2] *Ibid.*, Vol. II-B, pp. 395-396.

That indicates that it was indeed the intention of the authors of these amendments to prevent members of the staff of civilian hospitals, including members of the permanent staff, from engaging in resistance work against the occupying forces during the time when they were not at the hospital. Now, it is hard to see how that could be achieved without restricting the wearing of the armlet to the time when those concerned were on hospital duty, either inside the hospital or outside.

The proceedings of the Diplomatic Conference do not therefore make it possible to determine with any certainty what the legislators' intentions were. The exact significance of the distinction between the two categories of staff remains somewhat obscure[1].

Nevertheless it would seem possible to draw certain conclusions concerning the interpretation of the Article after studying the text in the light of the discussions which produced it. It is possible to state, in a general way, that the undoubted intention of the Diplomatic Conference in distinguishing two categories of staff was to give each of them a different status. It did not succeed in bringing out this distinction clearly, because of the expressions it used. The distinction will therefore have to be made in the national legislation of each country. In our opinion the following general rules might help to produce a satisfactory solution of the problem ; they take account of the presumed wishes of the legislator, while being at the same time compatible with the wording of the Article.

1. Temporary staff should wear the armlet only while actually carrying out hospital duties, either inside the hospital or outside it when entrusted with one of the tasks mentioned in paragraph 1.
2. It would seem reasonable that permanent staff should be recognized as having the right to make rather freer use of the armlet. Members of the permanent staff who do not live in the hospital might, for example, be authorized to wear the armlet when going directly to and fro between their homes and the hospital. Their journey to and fro between their homes and the hospital might be considered, by a free interpretation of the text, to be part of their duty and would, consequently, be covered by the words " while carrying out their duties ". Such a solution would appear to be logical and sensible, and the application of any legal provision should be based on logic and good sense.

[1] The distinction drawn in the First Geneva Conference of 1949 between permanent and temporary medical personnel (see *Commentary*, Vol. I, pp. 218-224) undoubtedly influenced the decision of the Conference to adopt the same solution in the present Convention. See in this connection, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 396.

II. *Identity card.*

Temporary staff as well as permanent staff will carry an identity card to prove that they belong to a civilian hospital and have the right to wear the armlet.

The card has the same features as the identity card carried by the permanent staff. It should therefore contain the following particulars and items: the name of the bearer, his photograph and the embossed stamp of the issuing authority[1]. It is also stipulated that the identity card carried by temporary staff shall state the duties on which they are employed.

PARAGRAPH 4. — NOMINAL LIST OF HOSPITAL STAFF

The management of every civilian hospital must keep an up-to-date nominal list of all the hospital staff, both permanent and temporary, specifying the duties of each of them.

This measure is indispensable for purposes of supervision. It will enable the managements of civilian hospitals to ensure that the armlet is not being misused.

Moreover, since the list in question must be made available to the competent authorities—those of the country concerned or of the occupying forces, when they so request—they will be in a position to verify at any time that the armlet is being used only by those entitled to wear it. A nominal list, always kept up-to-date, would therefore appear to be a means of control which is indispensable to the authorities entrusted under national laws of application with the task of ensuring that the armlet is not misused. That task will often be a difficult and very responsible one, but it is a necessary corollary to the extension of the right to use the Red Cross emblem to new categories of persons.

ARTICLE 21. — LAND AND SEA TRANSPORT

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided

[1] For fuller details concerning the items on the identity card, see above, p. 161.

for 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.

1. *Definition*

This Article only applies to transport conveying the wounded and sick civilians, the infirm or maternity cases, in convoys of vehicles or in hospital trains on land or, at sea, by vessels provided for the purpose. Medical transport by air will be dealt with in the next Article.

A convoy of vehicles means a number of vehicles forming a column. The presence of a convoy commander, with authority over the drivers and escort, gives an organized character to such a mobile unit. The Article is restricted to transport in convoys ; medical transport in the form of single vehicles is therefore excluded from its scope.

The word " vehicle " must be taken in the broadest possible sense : it covers any means of transport by land ; it need not necessarily be used solely for medical purposes. It will be enough if it is so used occasionally and temporarily, provided, of course, that while so employed it is not used for any other purpose. A medical convoy composed of horsedrawn vehicles normally used for transporting agricultural produce and occasionally used in the service of the wounded, must, therefore, be protected in the same way as a convoy of specially designed ambulances[1].

The soundness of this provision does not seem open to question. It is vitally necessary for the wounded to be transported to hospital as quickly as possible. Motor ambulances used solely for such work will not always be readly available and, as has often happened, any vehicle available will be used. It must not be possible to use this as an excuse for opening fire on transport carrying wounded or sick people.

Hospital trains are expressly mentioned in this Article as one of the forms of land transport. They are mobile units on rail, and are composed of carriages used for the hospital treatment, and transport of the wounded, the sick and other persons in like case. Here again it is not necessary for them to be used exclusively for medical purposes. In cases where they are so used temporarily or occasionally, protection under the Article is of course confined to the actual duration of their use as hospital trains.

Sea transport must be by " specially provided vessels " ; the word " specially " has been omitted in the French version, as the Diplomatic Conference considered that the word " affectés " already implied that

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 398-399.

the vessels were specially provided. The discussion which took place on the subject in the Plenary Assembly of the Diplomatic Conference brought out quite clearly that the word " provided " (in the French text " affectés ") does not necessarily mean permanently provided ; it will suffice if the vessels are provided occasionally[1]. In order to enjoy protection under Article 21 it is not necessary for those concerned to be conveyed by sea in hospital ships proper, i.e. vessels constructed or specially equipped solely for that purpose ; any merchant vessel used temporarily as a hospital ship is protected under the provision.

Nor is it necessary for merchant vessels which have been converted into hospital ships to be used for medical transport throughout the hostilities. On that point the present provision differs from that contained in Article 33 of the Second Geneva Convention of 1949. Apart from the crew, a hospital staff and medical equipment, no people or goods may be carried on the vessel other than the categories of person enumerated in the provision.

2. *Respect and protection*

The Article states that medical transport is to be respected and protected in the same manner as civilian hospitals as defined in Article 18. It may therefore be concluded that they may be regarded as mobile hospitals.

On that point, the reader is referred to the Commentary on Article 18 ; for information concerning the origin and significance of the traditional words " respect and protect ", reference should be made to what we said about Article 16 concerning the protection of the wounded and sick.

To respect medical convoys means, in the first place, not to attack them, not to harm them in any way, which also means not to interfere with their running. The enemy should avoid interfering with them, but that is not enough ; he must also allow them to carry out their work.

To protect medical convoys etc. means to ensure that they are respected ; it may even involve ensuring that they are respected by a third party. It also means giving them help in case of need.

As in the case of civilian hospitals and their staff, the protection of medical transport depends on strict abstention from any direct or indirect participation in a hostile act.

As is known, the Convention lays down that civilian hospitals are not to be deprived of protection on the ground that wounded and

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 471-472.

sick members of the armed forces are being treated therein. That provision also applies to the medical transport considered in Article 21.

By the terms of this Article protection depends on certain restrictive conditions, but that does not in any way mean that where such conditions are not fulfilled, the means of transport, or the wounded and sick, are deprived of all protection. For example, the wounded and sick in vehicles which are moving singly, are still entitled to immunity and remain protected in theory. However, since a single vehicle is not allowed to display the red cross emblem, it is quite certain that its passengers will not in fact have the same guarantees of safety as those travelling in convoys. In short, Article 21, over and above the individual protection due to every wounded or sick person under Article 16, confers general protection on medical convoys as such.

3. *Marking*

In order to ensure the protection of civilian medical convoys, the Convention allows them to be marked with the red cross emblem.

This is the third example given of the use of the distinctive emblem being extended to civilians. As in the case of the other two (civilian hospitals and their staff) this provision is the result of a compromise between the liberal view, that use of the emblem should be accorded to all civilian medical transport, and the restrictive view aimed at limiting its use. As has been said, the solution embodied in this provision is based on the latter view and the Article illustrates the same anxiety to avoid any danger of diminishing the value of the emblem, as was noted in the commentary on Article 20. Use of the sign is only extended to well defined groups of people, forming organized units and subject to some form of discipline. It is therefore essential that there should be constant supervision of the use made of the sign. The greatest care should be taken to ensure that the emblem of a red cross on a white ground should only be displayed while the vehicle is used as medical transport and that it should be removed when the work is at an end. Strict orders to that effect must be given to any organization, official or private, which is engaged in medical transport, especially to the officers commanding convoys of vehicles or hospital trains and to the captains of hospital ships. While it must not be pretended that no danger of abuse exists: it is easy to imagine lorries which had brought back civilian wounded from the fighting zone to the rear, under the protection of the red cross, might then return to the front with a load of war material; if the red cross emblem had been not removed by then, a very serious

violation of the Convention would result. Constant vigilance is therefore required, if it is wished not to weaken the moral authority and protection afforded by the distinctive emblem.

ARTICLE 22. — AIR TRANSPORT

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the parties to the conflict concerned.

They may be marked with the distinctive emblem provided for 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.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such 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.

PARAGRAPH 1. — GENERAL PRINCIPLES

1. *Definition*

Article 22 is designed to protect medical aircraft. The term " aircraft " (" aéronef "), taken from Article 36 of the First Geneva Convention[1], refers to aeroplanes, helicopters, airships or any other flying machines. Like the transport referred to in the previous Article, medical aircraft may only be used for conveying wounded, sick, the infirm and maternity cases.

2. *Protection*

The essential difference between this Article and that dealing with land transport is the fact that it was thought necessary for medical aircraft to be protected when flying singly as well as when in convoy. Nevertheless they are to be respected only when flying at heights and times and on routes specifically agreed upon by all the parties to the conflict concerned. The experts who adopted this solution,

[1] See *Commentary*, Vol. I, pp. 285 sqq.

based on the First Convention, pointed out that under conditions of modern warfare painted markings were a useless system of identification; for 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 real security and provide belligerents with adequate safeguards.

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 in each case of fixing routes and times of flights, such agreements will no doubt be made by a simple exchange of communications between the military commands and the responsible civilian authorities. Agreements of a general nature, concluded for the duration of hostilities, are also conceivable, however.

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 check at his disposal, especially when the aircraft is marked with distinctive signs.

As in the previous provision, a medical aircraft, 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 they may afford the only available means of transport. Aircraft used temporarily on medical 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, any medical aircraft must, during its relief mission, be used exclusively for that purpose, and must consequently be completely unarmed. That is obvious. It should be noted, lastly, that for reasons of military security it did not seem possible to confer protection on aeroplanes searching for wounded and sick or shipwrecked persons.

Paragraph 2. — Marking and recognition

Marking is not obligatory, because the conditions of flight will have been agreed upon by the Parties to the conflict. There is therefore no obligation under the Article to mark medical aircraft bearing known code letters and flying on routes and at heights and times settled beforehand. Marking is made optional, the decision being left to the discretion of the belligerents. Whether an aircraft will

be marked will depend on the terms of the agreement ; if it is, in order that the distinctive emblem of the Convention may be clearly seen, it should be prominently displayed beside the national colours on the top, bottom and sides of the aircraft.

It should be mentioned, however, that marking with the distinctive emblem appears, in actual fact, to be indispensable. A medical aircraft might, for instance, be diverted from the given route through no fault of its own ; its protection would then depend solely on the sign of the red cross on a white ground.

Besides being marked with a red cross, medical aircraft can be given other means of identification. They might, for example, be painted completely white, as white offers good visibility and is quite distinct from the colour of military aircraft. This solution was adopted in the 1929 Geneva Convention in the case of medical aircraft belonging to the armed forces.

Belligerents may also quite possibly decide, in the agreements mentioned in paragraph 1, on other methods of marking or recognition likely to increase the safety of medical aircraft : the best means of establishing that an aircraft is genuinely on relief mission is permanent contact by radio with the ground and also with other aircraft. Every aircraft now has its own call sign. 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 flight and to question it as to the nature of its mission 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, to order it to land.

Paragraph 3. — Prohibition of flight over enemy territory

The question of flight over enemy territory was the main stumbling-block in 1929. On this point it was found necessary to bow to the demands of military security, as otherwise the whole idea of protecting military medical aircraft might have had to be abandoned ; the general staffs considered that the risk of unwarranted observation from such aircraft would have been too great. The same reasons appear to have been decisive in the case of civilian medical aircraft.

The ban refers both to flights over the actual territory of the enemy power and to those over territory occupied by that power. 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 supplies to the wounded and sick and the other people concerned, who are then brought back to hospitals behind the lines. For these purposes it flies over the territory of the country it is serving or territory occupied by that country's armed forces[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 place, 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.

What is to happen if, as a result of an error in the notification 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, any belligerent conscious of his duty would warn the offending plane by 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 fully entitled to the protection due to them in all circumstances.

PARAGRAPH 4. — SUMMONS TO LAND

The summons to land provides the adverse party with a safeguard ; it is the one real means of defence against abuse. This extremely important provision has also been taken from the First Geneva Convention of 1949 ; 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 they are authorized to do so. It also applies to aircraft which are over their own territory but close to the 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 range, the summons obviously becomes 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.

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[1] 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 (Chicago, December 7, 1944), the territory of a state is deemed to be the land areas and territorial waters adjacent thereto under the suzerainty, protection or mandate of such state. It did not appear necessary to enter into these details in the Geneva Convention.

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 see for 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. When the examination is over, the aeroplane with its occupants may resume its flight. That appears reasonable. The object of medical aviation is to permit rapid evacuation of the categories of person referred to in this Article. They should not, therefore, have to suffer from the enemy's exercise of 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. Lastly, it should not be forgotten that the plane has actually obeyed the summons to land ; that fact must be placed to the credit of its occupants.

If—and it is to be hoped that such cases will be the exception—if examination reveals that an act "harmful to the enemy", in the sense of Article 19, has been committed, i.e. if the plane is carrying munitions or has been used for military observation, it loses the benefit of the Convention ; the enemy may seize it and intern the crew and passengers or, should occasion arise, treat them in accordance with Article 5 of the Convention. On the other hand, wounded and sick who are being carried in the aircraft, will not lose their right under the Convention to the respect and medical care they need, subject to any punitive measures which may be taken in their case if they are personally guilty or guilty as accessories.

ARTICLE 23. — CONSIGNMENTS OF MEDICAL SUPPLIES, FOOD AND CLOTHING [1]

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to

[1] For the discussions leading up to the adoption of this Article, see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 635-636, 708, 763, 764 and 819-820 ; Vol. II-B, p. 402.

the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) *that the consignments may be diverted from their destination,*
(b) *that the control may not be effective, or*
(c) *that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.*

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

General Background

In consequence of the growing economic interdependence of States the blockade has become a most effective weapon. A ban on all trade with the enemy or with any country occupied by the enemy, strict regulations governing trade with neutral countries, and an extension of the idea of " war contraband " are measures whose object is to place the adverse party in a state of complete economic and financial isolation ; such measures cause suffering to the population as a whole, as they affect combatants and non-combatants indiscriminately.

After the First World War several International Red Cross Conferences discussed this problem and recommended that combatants should come to an agreement to allow medicaments, medical equipment, food and clothing through any blockade when they were intended for certain categories of the civilian population[1].

From the very beginning of the Second World War the International Committee of the Red Cross tried to persuade the authorities responsible to relax the blockade in order to relieve the distress among millions of human being who were exposed to famine or epidemics. Undaunted by the difficulties and the many refusals, the Committee made untiring efforts which were finally rewarded when it was able

[1] See in particular, Resolution XII of the 1921 Conference at Geneva, Resolution IX of The Hague Conference in 1928 and Resolution XXIV of the Brussels Conference of 1930.

to arrange for relief supplies to pass through the blockade to the civilian population which had been tried most sorely—in Greece, the Channel Islands, the Netherlands, the " pockets " on the Atlantic coast etc. This assistance was given almost entirely to the populations of occupied countries : help could not be brought to those of the belligerent countries themselves until hostilities ended[1].

In order to provide a legal basis for future action of this kind, the International Committee proposed inserting in the new Civilian Convention provisions designed to save certain categories of civilian from the unfortunate consequences of the blockade, the categories in question being the most vulnerable and most worthy of protection and assistance. The Committee prepared a draft Article prescribing free passage for any consignment of medicaments or medical equipment on its way to another contracting State, even an enemy. A second paragraph provided for the free passage of any consignment of food, clothing and tonics for the exclusive use of children under fifteen and expectant mothers, subject to supervision by the Protecting Powers as a safeguard for the interests of the State authorizing passage.

The Committee's draft was approved by the XVIIth International Red Cross Conference[2] and submitted to the Diplomatic Conference in 1949. After lengthy discussion the Diplomatic Conference adopted the general principle but considerably expanded the stipulations concerning supervision.

PARAGRAPH 1. — RIGHT TO FREE PASSAGE

1. *Principle — Distinction between two kinds of consignment*

The right to free passage means that the articles and material in question may not be regarded as war contraband and cannot therefore be seized. This right is subject to numerous conditions which are laid down in the Article.

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[1] One case may, however, be mentioned here : at the very beginning of the war, when the restrictions imposed by the blockade were still comparatively light, consignments of food from Latin America were able to pass through the blockade into Germany as a result of representations made by the International Committee of the Red Cross ; they were then distributed to the wounded and sick by the German Red Cross : see *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, p. 370.

Relief actions in behalf of the populations of occupied territories and the role played by International Red Cross organizations are discussed. See *Commentary* on Articles 59 ff.

[2] *XVII^e Conférence internationale de la Croix-Rouge, résumé des débats des Sous-commissions de la Commission juridique*, pp. 54-55 ; and *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 117.

One condition relating to the nature of the consignment and the category of people for whom they are intended, appears in paragraph 1. A distinction is drawn between two classes of consignment: (1) consignments of medical and hospital stores and objects necessary for religious worship; (2) consignments of essential foodstuffs, clothing, and tonics. The former cannot be a means of reinforcing the war economy and can therefore be sent to the civilian population as a whole. On the other hand, consignments which fell into the second category are only entitled to free passage when they are to be used solely by children under fifteen, expectant mothers and maternity cases.

This distinction is based on military considerations. The intention is to keep a strict check on the destination of provisions which might reinforce the economic potential of the enemy if used for other purposes.

It is well to point out, as the International Committee had already done in the pamphlet "*Remarks and Proposals*" published on the eve of the Diplomatic Conference, that the words "intended only for civilians" cannot be interpreted *a contrario* as meaning that that right does not apply to medical consignments intended to be used for the treatment of wounded and sick of the armed forces. When such consignments are sent by sea, they are in fact entitled to free passage under Article 38 of the Second Geneva Convention of 1949. Such an interpretation is in full accordance with the general idea underlying the Geneva Conference, which, as we have mentioned on several occasions, tends to put the wounded and sick, whether civilians or members of the armed forces, on a footing of equality in the matter of relief. It would, therefore, be perfectly possible, if the present Article and the Article of the Second Convention mentioned were applied in conjunction, for a medical consignment to be intended both for civilians and for wounded and sick members of a belligerent's armed forces.

It should also be noted that the expression "consignments of medical and hospital stores" covers consignments of any pharmaceutical products used in either preventive or therapeutic medicine, as well as consignments of medical, dental or surgical instruments or equipment.

The paragraph stipulates that only essential foodstuffs are entitled to free passage. That should be understood to mean basic foodstuffs, necessary to the health and normal physical and mental development of the persons for whom they are intended, viz. children under fifteen, expectant mothers and maternity cases. Examples are milk, flour, sugar, fats and salt.

The term " tonics " covers any pharmaceutical products which are intended to restore normal vitality to the human organism[1].

2. *Scope of the provisions*

The principle of the free passage of the consignments mentioned in paragraph 1, is general in scope. It applies to all such consignments, when they are intended for the civilian population of another contracting party, whether that party is an enemy, allied, associated or neutral State.

It is the words " even if the latter is its adversary " which give this Article its full significance, since almost insurmountable obstacles have up to the present time been placed in the way of consignments intended for an enemy State. The provision is certainly intended to refer primarily to the relations between the States carrying out a blockade—especially the great maritime powers, as they are the traditional blockading powers—and the States against whom the blockade is directed.

Furthermore, the principle of free passage applies to any consignment sent on any grounds whatever within the meaning of this Article. No distinction will be made between relief consignments in the strict sense of the term, sent by States or humanitarian organizations or private persons, and the imports of merchandise which a belligerent has acquired regularly through trade channels from allied or neutral States. The general character of the Article under discussion here distinguishes it from Article 59 and those following it, which are more limited in scope and refer only to relief consignments for the population of occupied territories.

PARAGRAPH 2. — SAFEGUARDS

Paragraph 2 brings together, under (*a*) to (*c*), a number of conditions offering guarantees to the belligerents granting free passage that the consignments will not serve any purpose other than those for which provision is made in the Convention. Those guarantees are as follows :

[1] As an indication, Article 24 of the London Declaration of 1909 on the laws of maritime warfare, declares that food, clothing, clothing material and footwear suitable for military use are conditional contraband as opposed to absolute contraband. Article 29 of the Declaration proclaims that articles and material used solely for treating the sick and wounded cannot be regarded as war contraband. The Declaration, however, was not ratified.

A. *Danger of misappropriation.* — A doubt as to the destination of consignments would not be sufficient reason for refusing them free passage; the fears of the Power imposing the blockade must be based on serious grounds, i.e. they must have been inspired by the knowledge of certain definite facts. On the other hand, supervision by a neutral intermediary, e.g. by the Protecting Powers or the International Committee of the Red Cross, should afford the blockading Power adequate assurances. The question will be discussed again in the commentary on paragraph 3.

B. *Supervision.* — It is essential that consignments should be subject to strict and constant supervision from the moment they arrive until they have been distributed. That task is primarily the responsibility of the Power to whom the consignments are sent, but quite obviously only a disinterested organization, independent of the State receiving the consignment, will be in a position to offer the degree of efficiency and impartiality which the State granting free passage is entitled to demand.

C. *Ban on undue advantage.* — The Diplomatic Conference completed this series of safeguards by a last condition, under which the right of free passage would not be granted to consignments through which a definite advantage might accrue to the enemy.

This condition refers to the indirect effect the consignments in question might have on the enemy's position. It is true that any consignment of medical and hospital stores, food and clothing, always benefits the receiving Power in one way or another. The Convention does not disregard that fact and to avoid a belligerent using it as a pretext for refusing to authorize any free passage of goods, it lays down that there must be some "definite advantage" (avantage manifeste). It will be agreed, generally speaking, that the contribution represented by authorized consignments should be limited: in the majority of cases, such consignments will be hardly sufficient to meet the most urgent needs and relieve the most pitiable distress; it is hardly likely, therefore, that they would represent assistance on such a scale that the military and economic position of a country was improved to any appreciable extent.

Nevertheless, if, however unlikely it may seem, a belligerent has serious reason to think that the size and frequency of the consignments are likely to assist the military or economic efforts of the enemy, he would be entitled to refuse free passage.

The conditions laid down in paragraph 2 have been criticized as leaving too much to the discretion of the blockading Powers. Such objections appear to be only too well justified. The wording of para-

graph 2 is vague and there is a danger that it may seriously jeopardize the principle set forth in paragraph 1. Nevertheless the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. Some delegations had originally intended to accept the principle of free passage only in the form of an optional clause. It was only after the insertion of the safeguards set out under *(a)*, *(b)*, and *(c)* above, that it was possible to make the clause mandatory. It is doubtless true that the conditions in question cannot be gauged with mathematical precision and that the value of the principle will depend to a very large extent on the use which the Powers imposing the blockade make of their discretionary powers. It is to be hoped that they will use those powers in full awareness of their responsibilities.

PARAGRAPH 3. — PROTECTING POWERS

The intervention of a neutral and independent intermediary is the best way to ensure that goods passing through the blockade actually reach the addressees named in the Convention. This supervision is one of the duties laid upon the Protecting Powers under Article 9, which states that the Convention is to be applied with the co-operation and under the supervision of the Protecting Powers. Supervision of this kind often raises delicate problems. If it is to be effective, it must be carried out on the spot, at the very place where the goods are handed over to the beneficiaries : constant surveillance is necessary to ensure that the articles are in actual fact received by those for whom they are intended and that any illegal trafficking is made impossible. Receipts for individual consignments, frequent spot checks in depots and warehouses, periodical verification of distribution plans and reports and other measures of supervision will make it possible to avoid abuses, the consequences of which would be borne in the first instance by those categories in the greatest distress and who could not possibly be held responsible for any unlawful acts which may have been committed.

Although the Convention expressly mentions only the Protecting Powers, they are not alone in being able to assume responsibility for supervising the distribution of the consignments. Recourse might also be had to the good offices of another neutral State or any impartial humanitarian organization. Among the latter the International Committee of the Red Cross would appear to be particularly qualified to assume such a responsibility, by virtue of its independent position and its experience. Mention may be made in this connection of the

role played by the International Committee in the Second World War, during which the Allies only authorized relaxation of the blockade in cases where the Committee was able to supervise the forwarding and distribution of consignments.

PARAGRAPH 4. — METHODS OF FORWARDING

Once free passage has been authorized, the consignments must be forwarded as rapidly as possible. This stipulation is justified in view of the charitable nature of the work. It reminds those responsible of the special character of the ship's cargoes or vehicle loads for which the blockade is raised.

The State authorizing free passage is nevertheless entitled to prescribe the technical arrangements. No mention is made of the points on which its instructions will bear, but it will be agreed that the Power authorizing free passage is entitled to check the consignments and arrange for their forwarding at prescribed times and on prescribed routes. That will ensure the safety of the convoys and at the same time adequately safeguard the belligerents against abuses. The making of these technical arrangements presupposes the conclusion of an agreement between the Powers concerned in each case; a general agreement might be concluded, covering a certain period of time. The essential is that the arrangements should not run counter to the rule that the consignments should be forwarded as rapidly as possible.

ARTICLE 24. — MEASURES RELATING TO CHILD WELFARE

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

General Background

Recent wars have emphasized in tragic fashion how necessary it is to have treaty rules for the protection of children. During the last World War, in particular, the mass migrations, bombing raids and deportations separated thousands of children from their parents. The absence of any means of identifying these children, some of whom were even too young to vouch for their own identity, had disastrous consequences. Thousands of them are irretrievably lost to their own families and thousands of fathers and mothers will always suffer the grief of their loss. It is therefore to be hoped that effective measures can be taken to avoid such harrowing experiences in the future.

The question of providing protection under a Convention for these innocent victims of the war has long engaged the attention of the Committee of the Red Cross, and of the International Union for Child Welfare, an organization set up, as is known, under the auspices of the International Committee of the Red Cross.

In 1938 the XVIth International Red Cross Conference in London asked the International Committee of the Red Cross, in its Resolution No. XIII, to pursue the study of this question in collaboration with the International Union for Child Welfare. The two organizations set up a joint committee which in 1939 produced a Draft Convention for the Protection of Children. Unfortunately the outbreak of hostilities put an end to this work.

During the War the International Committee of the Red Cross took action on many occasions in behalf of children. Worthy of particular mention are its efforts to arrange for adolescent prisoners of war, under eighteen years of age, to be placed in special camps; its proposal that international regulations should be drawn up making it obligatory for every small child to wear an identity disc giving its name, date of birth and domicile ; its broadcasts concerning children separated from their parents ; and, lastly, its organization of children's homes in the devastated countries. In these various matters, the International Committee of the Red Cross acted in close co-operation with the International Union for Child Welfare, as the London Resolution of 1938 had stipulated. Besides these specific actions, children benefited by a whole series of steps taken by the International Committee of the Red Cross as part of its general work in aid of civilians.

After the war the International Committee of the Red Cross was associated, so far as its resources allowed, with the highly praiseworthy

efforts made to reunite children and parents who had lost touch with each other. Some success was achieved in the face of great difficulties[1].

In 1946 a Draft Convention for the Protection of Children in the Event of International Conflict or Civil War was submitted by the Bolivian Red Cross to the Preliminary Conference of National Red Cross Societies for the study of the Geneva Conventions; the Conference recommended that the provisions in question should be incorporated in the new Geneva Convention relating to civilians; the idea of a separate Convention relating to child welfare was thus abandoned.

In 1947 the Conference of Government Experts recommended the same course. The International Committee of the Red Cross again incorporated a certain number of provisions relating to preferential treatment for children in its draft Civilians' Convention. These provisions were approved by the XVIIth International Red Cross Conference in 1948 and were later adopted without any substantial amendment by the Diplomatic Conference of 1949. In addition to the Article under discussion, Articles 14, 16, 23, 38, 50, 51 and 68 of the present Convention make provision for special measures in favour of children[2].

PARAGRAPH 1. — MAINTENANCE AND EDUCATION

An age limit of fifteen was chosen because from that age onwards a child's faculties have generally reached a stage of development at which there is no longer the same necessity for special measures. The same age limit is mentioned in Articles 14 and 23, and it will be seen further on that fifteen is also the age limit for the application of Articles 38 and 50.

In the case of orphans, and in that of children separated from their families but whose parents are still living, the situation in which the child finds itself must be a result of the war to entitle it to benefit under this article.

Children whose parents died before hostilities broke out may be assumed to be already enjoying the protection of other members of

[1] Special attention should be made of the " Children's Tracing Servcie " run by the German Red Cross in co-operation with the International Tracing Service of the International Refugee Organization.

[2] All these provisions were considered in co-operation with the International Union for Child Welfare.

their family, or, if they also have died, the protection and assistance of the State. In the same way, where children are separated from their families not as a result of the war, but for other reasons, by a decision of civil or penal law for example, they will be looked after under the social welfare measures instituted in application of the ordinary laws of the State.

Where children are deprived of their natural protectors as the result of an event of war, the Convention makes it obligatory for the country where they are living to adopt the necessary measures to facilitate, in all circumstances, their maintenance, their education and the exercise of their religion. The Convention does not specify the measures to be taken and the Parties to the conflict will therefore enjoy great freedom of action ; they will apply the measures which seem most appropriate under the conditions prevailing in their territory.

The maintenance of the children concerned means their feeding, clothing, and accommodation, care for their health and, where necessary medical and hospital treatment.

In carrying out this task the Parties to the conflict are to give the children the benefit of existing social legislation supplemented, where necessary, by new provisions. They are to ensure that any child who has been found abandoned is entrusted as soon as possible to the tender care of a friend or, when there is no such person, ensure that he is placed in a crèche, children's home or infants' home. This provides a wide field of activity for private institutions and organizations such as the National Red Cross Societies whose help in this sphere was of inestimable service during and after the Second World War.

The idea of education must be understood in its broadest sense as including moral and physical education as well as school work and religious instruction. The Article specifies that this task is to be entrusted, as far as possible, to persons of the same cultural tradition as the parents.

That provision is most important. It is intended to exclude any religious or political propaganda designed to wean children from their natural milieu ; for that would cause additional suffering to human beings already grievously stricken by the loss of their parents.

The principles set forth in Article 24 apply to all the children in question who are living in the territory of a Party to the conflict, whether they are nationals of that country or aliens. The effort made by certain delegations to have the Article transferred from Part II to Part III, Section II, where it would only have applied to children of foreign nationality, was not successful.

PARAGRAPH 2. — RECEPTION IN A NEUTRAL COUNTRY

However well organized child welfare measures may be, they will never be able to protect the children completely from all the various privations suffered by the population of a belligerent country.

Paragraph 2 therefore makes provision for a more effective measure : it recommends that Parties to the conflict should facilitate arrangements for accommodating children in neutral countries.

It is not necessary that the neutral State should be a Party to the Convention, but the Diplomatic Conference provided the evacuated child with two safeguards which did not appear in the earlier drafts.

One safeguard stipulates that the consent of the Protecting Power must be obtained. The provision, however, only applies to children who are not nationals of the country where they have been living, nor of any country which has diplomatic representation there ; it therefore applies primarily to children of enemy nationality ; the transfer to a neutral country of children whose country is represented by a diplomatic mission will be subject to the mission's consent.

The reason why the consent of the Protecting Powers is required is to prevent children of enemy nationals from being evacuated for ideological reasons and sent to countries from which they may never come back. Children must only be evacuated for strictly humanitarian reasons[1].

The first condition, formal in character, is accompanied by a further safeguard of a practical nature which concerns all the children in question, nationals as well as aliens : they may only be evacuated when the State is assured that the principles stated in Paragraph 1 will be observed. That means that the country of reception must have the means of providing under all circumstances for their maintenance, their education and the exercise of their religion. Furthermore their education must, in a neutral country too, be entrusted as far as possible to persons of the same cultural tradition as the children's parents.

The meaning of this provision seems clear. The idea of transfer to a neutral country is based on the assumption that these essential rules will be more easily observed in a neutral country which is largely free of the restrictions of all kinds resulting from war. If that were not so, and the welfare of the children could be looked after better in the country where they normally live, there would be no reason for evacuating them.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 638.

In connection with this subject mention may be made of the excellent work done by several Red Cross Societies belonging to neutral countries which gave a home to children from the belligerent countries during the last World War. Red Cross Societies are particularly well equipped to take an active part in applying the present provisions, which give legal form to this humanitarian work.

PARAGRAPH 3. — IDENTIFICATION

It will be noticed that the age limit here is twelve, whereas in the first two paragraphs it was fifteen years of age : this is in accordance with a recommendation made at the XVIIth International Red Cross Conference in Stockholm, where it was considered that children over twelve were generally capable of stating their own identity. Moreover, whereas the first two paragraphs refer only to war orphans and children separated from their families as a result of war, paragraph 3 refers to all children under twelve years of age. This extension of the field covered is fully justified, for it is essential to be able to identify all young children, whatever their situation may be.

The only practical means of identification mentioned by the Convention, by way of example, are identity discs ; in this sphere too States will therefore be completely free to select the system of identification which they consider best. The comparative vagueness of the Convention in this matter can be explained by the fact that strongly marked differences of opinion on the subject arose at the Diplomatic Conference of 1949. The idea of identity discs was treated with scepticism by many delegates, who pointed out for instance how mistakes could arise from children losing or exchanging their identity discs. That danger certainly exists and although experience of this method of identification in the armed forces has been generally satisfactory, that does not necessarily prove anything in regard to children. Other delegates feared that the wearing of discs in occupied territories might lead to the persecution of certain categories of children, which would not be in accordance with the result sought. However that may be, the number of children saved by wearing a disc will certainly be greater than the number of children whom it may harm. The fact that no better solution was proposed leads to the conclusion that identity discs may be of great service.

The identity discs used should be made of non-inflammable material and should bear the surname, date of birth and address of the child and its father's first name. These markings should either be engraved on the disc or inscribed in indelible ink. Further par-

ticulars might be useful, to reduce the danger of mistakes arising: finger prints, a photograph, an indication of the child's blood group, rhesus factor, etc.

Paragraph 3 differs from the first two paragraphs in that it is not obligatory. It constitutes a strong recommendation to States to devote their full attention to this urgent question. The text obviously implies that the matter should be thoroughly studied in peace-time and even specific measures taken. The institution of a system of identification requires long preparation and it seems essential for the work to be undertaken in good time, so that children may carry a means of identification with effect from the first day of the war. The co-operation of National Red Cross Societies with governments would facilitate study of the question and, if necessary, the adoption of the above measures[1].

Finally it should be pointed out that although it was designed to operate in the case of a conflict, the provision could be equally well applied during national calamities, such as floods, earthquakes or other catastrophes which might also lead to the separation of families.

Some governments and National Red Cross Societies have already begun to study a practical programme and the International Committee is following their efforts with close interest[2].

ARTICLE 25. — FAMILY NEWS

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to

[1] As the provision is optional, States are naturally free to extend the measures of identification to children over twelve or even to the whole population. On the other hand, a State may consider, e.g. for financial reasons, that it cannot arrange for the identification of all children under twelve. If it were decided to identify only new-born children as from a given date, that would be fully in accordance with the spirit of the Convention.

[2] The *Revue Internationale de la Croix-Rouge* has reported the steps taken and the plans being studied. See in particular the issues of February and December, 1955, and January, 1956.

the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the co-operation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

General Background

The outbreak of hostilities immediately results in the severance of postal communications ; almost insurmountable barriers are raised between the countries at war, and millions of men and women are left without news of one another.

During the First World War the International Committee of the Red Cross did its best to redress this unfortunate situation by forming its first civilian message service under the auspices of the Central Prisoners of War Agency. This service enabled some degree of contact to be maintained between members of the same family who had been separated by the war. Later, at the time of the Spanish War, the Committee devised a system of messages of twenty-five words each, which allowed communications to be maintained between civilians living on either side of the fronts. These messages were collected by the International Committee's delegates and sent to Geneva, whence they were forwarded to the addressees. More than five million were transmitted in this manner from one zone to the other.

During the Second World War the International Committee of the Red Cross again acted as an intermediary in this work. In the autumn of 1939 it set up a Civilian Message Section as part of the Central Prisoners of War Agency. In view of the vast number of messages received it devised a special family message form which is universally accepted today. The German and British Red Cross Societies were the first to accept this system of civilian messages and ensured their transmission in both directions via the International Committee. All Red Cross Societies later adopted this method of carrying on correspondence, by means of which over twenty-three million civilian messages were sent through the post between September 1939 and June 1945.

The effects of the wartime ban on communications between enemy countries were thus mitigated, and the anxieties of millions of scattered human beings were set at rest[1].

PARAGRAPH 1. — PRINCIPLE

1. *Extent of the right to news*

This right only exists in regard to family news. That condition, which is essential will be readily understood, since it is not for the Convention, which is purely humanitarian in character, to deal with the forwarding of correspondence of any other type.

The expression " family news " should be taken as meaning all particulars, news, questions, information, etc. concerning the personal and family life of a person.

The right to give family news is accompanied by the right to receive it ; it applies to members of a family i. e. to people who are related, or connected by marriage.

The right to give his family news of a personal nature and to receive personal news from them is one of the inalienable rights of man ; it must be respected fully and without reservations. That is why the Diplomatic Conference of 1949, which proclaimed that right, rejected proposals that the Article should be placed in Part III, Section I, where its field of application would have been less wide. This right to family news belongs to the whole population of the countries engaged in the war, including those living in their own country[2].

2. *Forwarding of family news*

The right of any person living in a country at war to give and receive family news lays an obligation on the belligerents not to put any obstacles in the way of such correspondence. The Convention goes even further and requires the Parties to the conflict to forward such correspondence " speedily and without undue delay." Delays due to the existence of a war obviously cannot be avoided ; the provision therefore only refers to undue delay, or in other words delays which are not caused by material difficulties alone ; the censorship must, for example, carry out their work promptly and give priority to the examination of correspondence of a personal nature.

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. II, pp. 68 sqq ; Jean-G. LOSSIER : *De la question des messages familiaux à celle de la protection des civils*, Genève 1943.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 710-711.

It will be observed that the clause does not make express provision for the forwarding of family correspondence by the most rapid means, viz. by air[1]. Experience has shown, however, that in forwarding correspondence by ordinary mail insuperable obstacles are sometimes encountered ; large-scale military operations and especially bombing from the air paralyse land communications and thus often make the rapid transmission of correspondence impossible. It is therefore to be hoped that belligerents will send family correspondence by air whenever possible.

PARAGRAPH 2. — NEUTRAL INTERMEDIARY

Postal communications between belligerent countries are completely severed when the frontiers are closed but when a country is partially occupied the same forced silence is sometimes inflicted on families separated by the line of demarcation. The right to family news is thus in danger of becoming illusory in the very cases where it is most necessary. In order to provide a remedy for such a state of affairs, the Convention contains provisions by which the Parties to the conflict are required to apply to a neutral intermediary to decide in consultation the best means of ensuring that family news is transmitted.

As an example of such an intermediary the Convention refers expressly to the Central Information Agency, set up in a neutral country to receive and transmit to the authorities of their home country any information it can obtain concerning protected persons. The organization and duties of the Agency will be considered further on[2]; but it should be noted here that the organization in question may be the same as the Central Prisoners of War Agency, which has rendered invaluable service during past wars.

In regard to the role of the neutral intermediary, the Article merely says that it is to decide in consultation with the States concerned how to ensure fulfilment of their obligations under the best possible conditions. The wording has been deliberately left extremely general, so that the Agency's action may be adapted as well as possible to the circumstances existing at the time. The intermediary will have the task, in collaboration with the transport services and censorship of the States concerned, of arranging the channels through which

[1] In the draft Article concerning the right to family news, which was approved by the XVIIth International Red Cross Conference in 1948, the wording adopted was " as rapidly as possible ". The new wording : " speedily and without undue delay " is less imperative.

[1] See Article 140.

correspondence is to be forwarded, choosing those which are safest and most rapid.

In carrying out this work the intermediary must be able to count on the support and co-operation of national agencies whose impartiality, organization and experience offer guarantees of the safe transmission of family news on national territory. The Diplomatic Conference decided to make express mention here of the National Red Cross Societies, in view of the great services which they had rendered in connection with the transmission of civilian messages during the Second World War.

Paragraph 2 is of the first importance to both national and international Red Cross organizations, because it will henceforth provide a solid legal basis for their humanitarian work, which in the past has rested solely on agreement with the belligerent powers.

PARAGRAPH 3. — USE OF STANDARD FORMS

Pressure of circumstances and technical considerations may oblige belligerents to limit the number of letters and cards that each person is entitled to send and receive.

The last paragraph therefore deals with a special form of correspondence which guarantees a minimum right to correspondence; using standard forms containing twenty-five freely chosen words; States may limit the number of these forms dispatched to one each month; that is an extreme measure which could only be taken in exceptional circumstances. The limit envisaged in regard to the number of cards dispatched and the number of words represent an absolute minimum and belligerents must respect those limits under all circumstances. The clause lays down that the people concerned must be free to word the message as they wish, on the understanding, of course, that the news must be of a strictly family nature.

As in the case of the previous paragraph, this provision may, as has already been pointed out, be regarded as a formal endorsement of one of the most important successes achieved by the International Committee of the Red Cross, in collaboration with the National Red Cross Societies, during past wars. The essential points are as follows: a special form for exchanging family correspondence, designed by the International Committee of the Red Cross (Civilian Message Form No. 61), was adopted in agreement with the administrative authorities in each country by nearly all National Red Cross Societies. The name of the National Red Cross Society issuing the card, or that of the International Committee of the Red Cross, appears at the top. There are places left for a message of twenty-five words of family news and

for the names and addresses of the sender and addressee. The person who receives the message can write a reply of twenty-five words on the back of the card and return it to the original sender. It is forwarded through the National Red Cross Societies via the Civilian Message Section of the Central Agency, an organization set up by the International Committee of the Red Cross.

The arrangements for transmission provided for in paragraph 2, apply equally to the implementation of paragraph 3.

A question on which the Convention is silent is whether family messages can be sent free, as is the case, for example, with consignments sent to civilian internees and prisoners of war[1]. The answer to this question must be in the negative: postage and the cost of sending messages between non-interned civilians must still be met by the sender.

ARTICLE 26. — DISPERSED FAMILIES

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

General Background

A feature of the Second World War was that large numbers of people were forced to leave their homes ; some fled before the advancing enemy forces ; the destruction caused by the war, especially by bombing, led to mass evacuations ; transfers and deportations for political, economic and racial reasons affected in some cases the whole population of a region, in others isolated individuals.

During the war the International Committee of the Red Cross asked the Central Prisoners of War Agency to draw up a standard enquiry card[2], on which people separated from their families through the war could give their new address and the name of members of their family with whom they wished to be reunited. With the assistance of the National Red Cross Societies and the administrative authorities in the countries concerned, the cards were made available

[1] See Article 110, p. 458.

[2] Standard card No. P. 10027.

to the public in post offices, in special centres for the distribution and forwarding of Red Cross " Civilian message forms ", and in the premises of branches of National Red Cross Societies and other relief organizations.

In Geneva the Dispersed Families Section, set up in 1943 in the Central Prisoners of War Agency, was made responsible for receiving the cards, classifying them and using them for their purpose by means of the so-called tally method (the concordance of two cards classified alphabetically under the name of the person sought, providing the information required). In 1945, these tasks were taken over by UNRRA[1].

The Central Prisoners of War Agency thus worked to put several million civilians in all parts of the world in touch with their families again[2].

In future Article 26 will provide a basis in international law for this work, which has been carried out on the initiative of the International Committee of the Red Cross. The text was proposed by the International Committee and adopted in 1949 by the Geneva Diplomatic Conference ; it lays down that each Party to the conflict is to encourage the searches and activities of organizations specializing in this work. The International Red Cross Societies will clearly be among the first to benefit by those facilities.

1. *Obligation to facilitate enquiries*

It should be emphasized that in accordance with the usual practice of the International Committee of the Red Cross during the Second World War, Article 26 is concerned only with the re-establishing of family ties and therefore applies solely to members of dispersed families, not to all " displaced persons ". The Article is intended to safeguard the family unit, to re-establish contacts between members of a family group.

The Parties to the conflict must not only allow members of dispersed families to make enquiries ; they must facilitate such enquiries. The Convention does not go into detail but among the examples which could be quoted are the organization of official information bureaux and centres ; notification by postal authorities

[1] United Nations Relief and Rehabilitation Administration for Europe.

[2] For fuller details of the practical work done during the Second World War, see R. M. FRICK-CRAMER: *Au service des familles dispersées*, Revue internationale de la Croix-Rouge, 1944, pp. 307 sqq. ; and *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. II, pp. 308 sqq.

of changes of address and possible places of evacuation : the arranging of broadcasts ; the granting of facilities for forwarding requests for information and the replies ; and, as a precautionary measure, the provision of identity discs for children under twelve years of age, as provided in Article 24, paragraph 3, of the Convention ; this would be of considerable help in reuniting dispersed families.

It should be noted that the Convention makes express provision for setting up information bureaux, and lays down detailed regulations concerning them. Each belligerent should set up an official Information Bureau to receive and transmit information about protected persons in its hands ; the information should mention the measures adopted concerning them and should include any particulars which will enable a protected person to be identified, and his family notified. It must be realized, however, that these information bureaux are only competent to deal with protected persons within the meaning of Article 4 of the Convention, in the first place enemy nationals ; they are not responsible for information concerning the belligerent powers' own nationals [1] unless, of course, the Parties to the conflict have decided otherwise.

One measure likely to facilitate this work would be free postage for correspondence dealing with family enquiries. During the Second World War the International Committee of the Red Cross arranged with the Universal Post Union for the standard enquiry cards mentioned above [2] to be carried post free. This was of great assistance to the senders.

2. *Assistance from humanitarian organizations*

Article 26 requires belligerents to encourage the work of organizations engaged in the task of renewing contact between members of dispersed families and reuniting them.

The assistance given by such organizations within their own country is extremely valuable ; it is of the very first importance in the case of enquiries by families whose members are in different belligerent countries, especially when such countries are enemies. Without the help of such organizations international enquiries would usually meet with very great difficulties. The organizations must fulfil a certain number of conditions : they must be acceptable to the Parties to the conflict, and they must comply with the security regulations of the belligerent in whose territory they are working.

[1] See Articles 136-141.

[2] See p. 195.

This condition was not mentioned in the draft Article submitted to the XVIIth International Red Cross Conference ; it was introduced at Geneva in 1949. Any organization which satisfies these two conditions must, as a rule, be allowed to carry on its work in connection with the reuniting of dispersed families. The National Red Cross Societies and their local branches have a most important role to play ; they are mentioned expressly in the previous Article. Now the exchange of family news, with which Article 26 deals, is often a preliminary to the reunion of the family concerned ; National Red Cross Societies, which have given such valuable service in this connection during past wars, are called upon to play a very important part in this work in the future, as they have done in the past.

The same will be true of the Central Information Agency, which the International Committee of the Red Cross may suggest setting up. It may be set up as part of the Central Prisoners of War Agency, whose Dispersed Families Section will have the task of collating in a central card index all information and enquiries received concerning members of dispersed families, the information being put to use by means of the so-called " tally " method. This system proved its value during the Second World War and is worthy of attention. In the same way standard enquiry cards seem a simple and practical means of facilitating the renewal of contact between members of families. The Convention, rightly, does not go into details of the methods which could be used, since they cannot be set out in advance, but must depend on circumstances, which will vary. The Convention merely states that belligerents are under an obligation to encourage the work of competent organizations, thus showing clearly that it is not merely a matter of tolerating their activities, but above all, of supporting and actively furthering their efforts, or even, as the English text has it, of encouraging them.

PART III

STATUS AND TREATMENT OF PROTECTED PERSONS

SECTION I

PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO THE CONFLICT AND TO OCCUPIED TERRITORIES

ARTICLE 27. — TREATMENT: GENERAL OBSERVATIONS

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

GENERAL REMARKS. HISTORICAL BACKGROUND

Article 27, placed at the head of Part III, occupies a key position among the Articles of the Convention. It is the basis of the Conven-

tion, proclaiming as it does the principles on which the whole of " Geneva Law " is founded. It proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women.

The statement of these principles in an international convention gives them the character of legal obligations and marks an essential stage in the history of international law—in particular international humanitarian law, which is concerned above all with man as man.

It codifies notions which date back to ancient times and which, through Christian thought and particularly Thomism, have, since the Reformation made their appearance in international law[1]. Such notions are not characteristic of western civilization alone ; they are also found in the basic philosophies of other civilizations, especially in the philosophies and religions of Islam, India and the Far East. Article 27 is a characteristic manifestation of the evolution of ideas and law[2].

It will be remembered that the XVIIth International Red Cross Conference had thought of giving the Convention a Preamble solemnly drawing attention to certain rules considered to constitute the " basis of universal human law " ; but the Diplomatic Conference was unable to reach agreement on the matter and the present Article, together with Articles 31-34 of the Convention, must, in the absence of a Preamble, be regarded as setting forth those rules[3].

The first three paragraphs of Article 27 reflect the spirit which imbues the whole Convention in regard to the rights of the individual, but the last paragraph of the Article nevertheless makes a reservation concerning military requirements and other matters of imperative national interest, thus balancing the rights and liberties of the individual against those of the community[4].

As has been said, Article 27 is the basis on which the Convention rests, the central point in relation to which all its other provisions

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[1] See Max HUBER : *Le Droit des Gens et l'Humanité*, Revue internationale de la Croix-Rouge, 1952, pp. 646 ff. For points common to the Convention and the Declaration of Human Rights, see C. PILLOUD : *La Déclaration universelle des Droits de l'Homme et les Conventions internationales protégeant les victimes de la guerre*, ibid, 1949, pp. 252-258.

[2] For comments on the question as a whole see LAUTERPACHT : *International Law and Human Rights*, London, 1950. With special reference to Humanitarian Law, see H. COURSIER : *Etudes sur la formation du droit humanitaire*, Geneva, 1952.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 113.

[4] The reservation in regard to State security matters was added by the 1949 Conference at the suggestion of the Delegation of the United States of America.

must be considered. It was in order to give greater prominence to this essential Article and to underline its fundamental importance that the Diplomatic Conference placed it at the beginning of Part III on the status and treatment of protected persons.

PARAGRAPH 1. — GENERAL PRINCIPLES

1. *First sentence. — Respect for fundamental rights*

A. *Respect for the person.* — This provision is based on a similar obligation laid down in the 1929 Geneva Convention on prisoners of war. The right of respect for the person must be understood in its widest sense : it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers ; it includes, in particular, the right to physical, moral and intellectual integrity—an essential attribute of the human person.

The right to physical integrity involves the prohibition of acts impairing individual life or health; it is reinforced by two other provisions of the Convention—the second sentence of this same paragraph, which lays down expressly the obligation to give humane treatment, and Article 32 which prohibits certain practices which have shocked the conscience of the world.

Respect for intellectual integrity means respect for all the moral values which form part of man's heritage, and applies to the whole complex structure of convictions, conceptions and aspirations peculiar to each individual. Individual persons' names or photographs, or aspects of their private lives must not be given publicity.

What about the right to life itself ? Unlike Article 46 of the Hague Regulations [1] the present Article does not mention it specifically. It is nevertheless obvious that this right is implied, for without it there would be no reason for the other rights mentioned. This is a simple conclusion *a majori ad minus*, and is confirmed by the existence of clauses prohibiting murder, reprisals and the taking of hostages, in Articles 32, 33 and 34 of the Convention. Furthermore, the death penalty may only be applied to protected persons under the circumstances strictly laid down in Article 68.

The right to personal liberty, and in particular, the right to move about freely, can naturally be made subject in war time to certain

[1] This Article, in which the provisions under discussion had their origin, reads as follows : " Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

restrictions made necessary by circumstances. So far as the local population is concerned, the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require. That right is not, therefore, included among the other absolute rights laid down in the Convention, but that in no wise means that it is suspended in a general manner. Quite the contrary : the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on the idea of the personal freedom of civilians remaining in general unimpaired. The right in question is therefore a relative one which the Party to the conflict or the occupying power may restrict or even suspend within the limits laid down by the Convention.

B. *Respect for honour.* — Honour is a moral and social quality. The right to respect for his honour is a right invested in man because he is endowed with a reason and a conscience. The fact that a protected person is an enemy cannot limit his right to consideration and to protection against slander, calumny, insults or any other action impugning his honour or affecting his reputation ; that means that civilians may not be subjected to humiliating punishments or work.

It should be noted that respect for a prisoner of war's honour, as well as respect for his person, in stipulated in Article 46 of the Hague Regulations, and also in the 1929 Geneva Convention.

C. *Respect for family rights.* — The obligation to respect family rights, already expressed in Article 46 of the Hague Regulations, is intended to safeguard the marriage ties and that community of parents and children which constitutes a family, " the natural and fundamental group unit of society "[1]. The family dwelling and home are therefore protected ; they cannot be the object of arbitrary interference.

Respect for family life is also covered by the clause prohibiting rape and other attacks on women's honour, as stated in the next paragraph. Furthermore, Article 82 of the Convention provides that in case of internment "members of the same family, and in particular parents and children, shall be lodged together in the same place of internment". In the same way the Convention lays down that "internees may request that their children who are left at liberty without parental care shall be interned with them ".

Respect for family rights implies not only that family ties must be maintained, but further that they must be restored should they have

[1] See *Universal Declaration of Human Rights* of December 10, 1948, Article 16, para. 3.

been broken as a result of wartime events. That is the object of Articles 25 (family correspondence) and 26 (dispersed families) and of some of the clauses of Articles 39, 40 and 50.

D. *Respect for religious convictions and practices.* — The principle of freedom of thought is the basis of the great movement for the Rights of Man which invaded and transformed politics and law. It is therefore inscribed at the beginning of the traditional proclamations of essential rights and fundamental liberties.

The right to respect for religious convictions is part of freedom of conscience and freedom of thought in general. It implies freedom to believe or not to believe, and freedom to change from one religion or conviction to another. This safeguard relates to any system of philosophical or religious beliefs.

Religious freedom is closely connected with the idea of freedom to practise religion through religious observances, services and rites. Protected persons in the territory of a Party to the conflict or in occupied territory must be able to practise their religion freely, without any restrictions other than those necessary for the maintenance of public law and morals. That is the object of Articles 38, paragraph 3, and 58 of the Convention which provide that internees shall receive spiritual assistance from ministers of their faith.

Article 27 reaffirms the provision in Article 46 of the Hague Regulations that occupying forces are bound to respect " religious convictions and practice ".

E. *Respect for manners and customs.* — Respect for the human person implies respect for " manners " (in the sense of individual behaviour) and " customs " (meaning the usages of a particular society).

Manners may be said to refer to the ordinary way of behaving or acting—to the expression of personality by the most ordinary actions of daily life. It is these constant personal habits which the Convention aims at protecting.

The idea of a custom is more objective, that is, it indicates, in a general way, the body of rules hallowed by usage which man observes in his relations with his fellow men. Custom draws its authority from its tacit acceptance by the whole body of citizens. Such ancient and general customs taken as a whole constitute part of the law of each country.

The obligation to respect manners and customs is particularly important in the case of occupied countries. Everybody remembers the measures adopted in certain cases during the Second World War, which could with justice be described as " cultural genocide ". The

clause under discussion is intended to prevent a reversion to such practices.

2. *Second sentence. — Humane treatment*

The obligation to grant protected persons humane treatment is in truth the *leitmotiv* of the four Geneva Conventions. After proclaiming the general principle, the Convention enumerates the acts which are prohibited.

The expression " to treat humanely " is taken from the Hague Regulations and from the two 1929 Geneva Conventions. The word " treatment " must be understood here in its most general sense as applying to all aspects of man's life. It seems useless and even dangerous to attempt to make a list of all the factors which make treatment " humane " [1]. The purpose of this Convention is simply to define the correct way to behave towards a human being, who himself wishes to receive humane treatment and who may, therefore, also give it to his fellow human beings. What constitutes humane treatment follows logically from the principles explained in the last paragraph, and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example, using the same wording as the Third Geneva Convention [2], any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity, etc.).

The Convention does not confine itself to stipulating that such acts are not to be committed. It goes further ; it requires States to take all the precautions and measures in their power to prevent such acts and to assist the victims in case of need [3].

This first list has very rightly been supplemented in Article 32 by a further list of acts considered as grave breaches of the duty of humane treatment : extermination, murder, torture, mutilation, biological experiments not necessitated by medical treatment of the person concerned.

The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character,

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[1] See *Commentary I*, p. 53.

[2] See Article 13, para. 2, of that Convention.

[3] The Diplomatic Conference rejected a proposal that the expression " protected against " should be replaced by the words " shall not be exposed to " which would have greatly reduced the scope of the Clause. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 712-713.

like the obligation enjoining respect for essential rights and fundamental liberties. They are valid " in all circumstances " and " at all times ", and apply, for example, to cases where a protected person is the legitimate object of strict measures, since the dictates of humanity and measures of security or repression, even when they are severe, are not necessarily incompatible. The obligation to give humane treatment and to respect fundamental rights remains fully valid in relation to persons in prison or interned, whether in the territory of a Party to the conflict or in occupied territory. It is in such situations, when human values appear to be in greatest danger, that the provision assumes its full significance.

PARAGRAPH 2. — TREATMENT OF WOMEN

Paragraph 2 denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind : rape committed in occupied territories, brutal treatment of every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale[1].

These facts revolt the conscience of all mankind and recall the worst memories of the great barbarian invasions. They underline the necessity of proclaiming that women must be treated with special consideration. That is the object of this paragraph, which is based on a provision introduced into the Prisoners of War Convention in 1929, and on a proposal submitted to the International Committee by the International Women's Congress and the International Federation of Abolitionists[2].

The provision is founded on the principles set forth in paragraph 1 on the notion of " respect for the person ", " honour " and " family rights ".

A woman should have an acknowledged right to special protection, the special regard owed to women being, of course, in addition to the safeguards laid down in paragraph 1, which they enjoy equally with men.

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[1] See *Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr. 14-26, 1947). Preliminary Documents*, Vol. III, p. 47.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 821.

The Conference listed as examples certain acts constituting an attack on women's honour, and expressly mentioned rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault. These acts are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.

PARAGRAPH 3. — EQUALITY OF TREATMENT; NON-DISCRIMINATION

Paragraph 3 contains a statement of the principle that all protected persons are to receive the same standard of treatment, with a further clause concerning non-discrimination. That means that any protected person is entitled to all the rights and liberties proclaimed by the Convention under a general principle common to all the Geneva Conventions [1].

It is clear from the wording of the provision that the list of various criteria on which discrimination might be based—race, religion and political opinion—is only given by way of example. The criteria of language, colour, social position, financial circumstances and birth might be added. In a word, any discriminatory measure whatsoever is banned, unless it results from the application of the Convention.

Nationality is not among the various criteria mentioned (it was mentioned in Article 13) and the discussions at the Diplomatic Conference make it clear that it cannot be regarded as implicitly included [2].

A prohibition of discrimination does not mean that all differentiation is forbidden. That is clear from the qualified character of the wording, which only excludes differences when they are of an adverse nature. Equality might easily become injustice if it was applied to situations which were essentially unequal, without taking into account such circumstances as the state of health, age and sex of the protected persons concerned. It is in this way that the principle of equality is understood in the Convention.

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[1] ... It will be noted, for example, that the three other Geneva Conventions of 1949 also contain a clause prohibiting discrimination ; see Article 12, para. 2, of the First and Second Conventions and Article 16 of the Third Convention.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 640-642.

It should be noted too that the prohibition of all adverse distinctions in the treatment given to protected persons is not merely a negative duty. It implies an active role. An occupying Power is, for example, bound to abrogate any discriminatory laws it may find in occupied territory, if they place difficulties in the way of the application of the Convention. That follows also from the first paragraph of Article 64.

PARAGRAPH 4. — RESERVATION IN REGARD TO SECURITY MEASURES

The various security measures which States might take are not specified ; the Article merely lays down a general provision. There are a great many measures, ranging from comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms, to harsher provisions such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment (which, according to Article 41, are the two most severe measures a belligerent may inflict on protected persons).

A great deal is thus left to the discretion of the Parties to the conflict as regards the choice of means. What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified.

Although these supreme rights are not, generally speaking, in any danger as a result of the first administrative measures we mentioned, that is not so in the case of assigned residence or internment. The experience of the Second World War has shown in tragic fashion that under such conditions there is a particularly great danger of offences against the human person. That is why the Convention, conscious of the danger, only accepts internment and assigned residence as measures to be adopted in the last extremity, and makes them subject to strict rules (Articles 41 to 43 and Article 78) ; and why, furthermore, it lays down in great detail (Articles 79 to 135— treatment of internees) standards of treatment designed to ensure that the human person is respected under the circumstances where it appears to be in greatest danger.

ARTICLE 28. — DANGER ZONES

The presence of a protected person may not be used to render certain points or areas immune from military operations.

1. *Distinction between ruses of war (which are permissible) and acts of barbarity (which are unlawful)*

During the last World War public opinion was shocked by certain instances (fortunately rare) of belligerents compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for the fighting troops. Such practices, the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric ; in this they differ from ruses of war, about which a few words ought to be said in order to bring out the exact meaning of this Article.

Ruses of war used in conjunction with armed force have been from time immemorial an essential part of the conduct of operations. A special Article of the Hague Regulations [1], confirming the unwritten law on the subject, states specifically that " ruses of war . . . are considered permissible ". There is not the slightest doubt in regard to the general principle ; but when it is wished to define ruses of war, a difficult question arises : at what point does a practice authorized by the laws and customs of war cease to be lawful and become, instead, an act condemned by international law ?

It may be stated, in the first place, that certain actions involving treachery, bad faith or deceit are prohibited as measures of war. Misuse of a flag of truce or of the Red Cross emblem would be cases in point.

Ruses of war are not a valid pretext for breaking the law. They must remain *intra legem* ; they must " have regard to the duties imposed by international law " [2]. The lawfulness of ruses of war depends on the observance of the laws and customs of war, which are themselves based on the principle of respect for the civilian population. Consequently, the presence of civilians must never be used to render immune from military operations objectives which are liable to be attacked.

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[1] See *The Hague Regulations of 1907*, Article 24.

[2] FAUCHILLE : *Traité de droit international public*, Vol. II, No. 1086.

2. *Scope of the provision*

In order to determine the exact scope of the provision, it is necessary to define the term " military operations ". Those words refer here to any acts of warfare committed by the enemy's land, air or sea forces, whether it is a matter of bombing or bombardments of any kind or of attacks by units near at hand. It also covers acts of war by groups, such as volunteer corps and resistance movements, which are placed in the same category as the regular armed forces under Article 4, sub-paragraphs (2), (3) and (6), of the Third Geneva Convention of 1949. The prohibition is expressed in an absolute form and applies to the belligerents' own territory as well as to occupied territory, to small sites as well as to wide areas.

The prohibition expressed in this Article also occurs in Article 83, which lays down that places of internment for civilians are not to be set up in areas particularly exposed to the dangers of war.

ARTICLE 29. — RESPONSIBILITIES

The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

1. *Responsibility of the State and of the individual*

Any breach of the law is bound to be committed by one or more individuals and it is normally they who must answer for their acts. Nevertheless, if the author of the act contrary to international law is an agent of the State, it is no longer his responsibility alone which is involved, but also that of the State, which must make good the damage and punish the offender. To the extent, however, that individual men and women acquire " international " rights and obligations and thus become " subject " to international law (as they do in connection with the laws and customs of war), so are they invested with the capacity of committing international offences, for which they personally may be held responsible, as well as the State to which they belong.

The existence of this dual responsibility is reflected in the varying tone of the Article, which begins by declaring that the State is responsible and then goes on to make a reservation in regard to the

individual responsibilities which may be incurred. The Convention thus shows clearly that two distinct responsibilities co-exist and emphasizes that they are not alternatives but supplementary to one another. The fact that the State has made good the damage caused in no way diminishes the responsibility of the author of the offence and, *vice versa*, punishment of the offender does not relieve the State of its responsibility. The two forms of punishment for violations of the Convention thus run parallel to each other, a fact the Diplomatic Conference wished to stress.

Only the responsibility of the State will be dealt with here, as the question of individual responsibility is considered in Part IV in connection with Articles 146 and 147 (on penal sanctions).

2. *Principle*

The principle of the responsibility of States implies an obligation on the Parties to the conflict to instruct their agents in their duties and their rights. They must take the greatest pains to ensure that the State services in contact with the protected persons are in actual fact capable of applying the provisions of the Convention. In that respect Article 29 is similar to Article 1 which, as has been seen, binds the Contracting Parties to respect and " ensure respect for " the Convention in all circumstances, and to Article 144 which stipulates that the text of the Convention is to be disseminated as widely as possible both in time of peace and in time of war.

The principle of State responsibility further demands that a State whose agent has been guilty of an act in violation of the Convention, should be required to make reparation. This already followed from Article 3 of the Fourth Hague Convention of 1907 respecting the Laws and Customs of War on Land, which states that " a belligerent Party which violates the provisions of the said Regulations (The Hague Regulations) shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces ".

Compensation for damage resulting from the unlawful act, although not stipulated explicitly, is undoubtedly implied by the authors of Article 29. Consequently, a State which bears responsibility for a violation of the Convention is in duty bound to make good the damage caused, either by restoring everything to the former condition *(restitutio in integrum)* or by paying damages, the choice resting, as a general rule, with the party entitled to reparation, that is, with the injured party. In many cases, however, reparation will have to be limited to the payment of damages, when the nature of the prejudice

caused makes restoration impossible and admits of no other form of compensation. An example of this would be the physical and mental injury suffered by protected persons who, despite the formal safeguards provided in the Convention, have been brutally treated while interned in enemy or occupied territory.

It was not for the Convention to lay down rules concerning the procedure for applying this Article. The position is not the same as in the case of the individual liability to punishment of persons guilty of infringing clauses of the Convention. That is a comparatively new principle of the law of war, while here we are dealing with a chapter of international law in which there are numerous precedents. It is possible to refer, on the matter, to recognized rules embodied in the clauses of peace treaties, to provisions of statute law and to awards in international arbitration.

The safeguard contained in the present Article is reinforced by a provision in Article 148 relating to the responsibilities of the Contracting Parties, which may not absolve themselves of any liability incurred in respect of one of the grave breaches defined in Article 147.

One other point should be made clear. The Convention does not give individual men and women the right to claim compensation. The State is answerable to another contracting State and not to the individual. On that point the recognized system was not in any way modified in 1949.

3. *Scope of the provision*

Article 29 defines, by means of a general formula, the persons who can, by their acts, involve the State in responsibility: the State is only responsible in so far as the treatment contrary to the Convention is due to action by its " agents "[1].

The term " agent " must be understood as embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity. It included civil servants, judges, members of the armed forces, members of para-military police organizations, etc., and so covers a wider circle than the definition in the Fourth Hague Convention according to which the responsibility of the State could only be involved by " persons forming part of its armed forces ". The term employed is more appropriate than any list of categories[2]. On the other hand it embodies an essential reservation ; for the word

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 642-643, 713-714 and 822.

[2] See, for example, the *Stockholm Draft of 1948*, Article 26.

" agent " limits the scope of the provision to those persons alone who owe allegiance to the Power concerned. In this it differs from the corresponding provision in the Stockholm Draft of 1948, where the general scope of the provision was emphasized by the use of the words " or on any other persons " at the end of the Article.

The nationality of the agents does not affect the issue. That is of patricular importance in occupied territories, as it means that the occupying authorities are responsible for acts committed by their locally recruited agents of the nationality of the occupied country. The position is just the same whether the agent has disregarded the Convention's provisions on the orders, or with the approval, of his superiors or has, on the contrary, exceeded his powers, but made use of his official standing to carry out the unlawful act. In both cases the State bears responsibility internationally in accordance with the general principles of law.

The decision to limit the responsibility of the State to its agents was the subject of criticism at the Diplomatic Conference. Various delegations pointed out that an Occupying Power might have certain of its decisions carried out by the local authorities, or it might set up a puppet government, in order to throw responsibility for crimes, of which it was the instigator, upon authorities which were regarded as being independent of it[1]. In order to remove this difficulty, it is necessary to disregard all formal criteria. It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State ; what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given. If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible ; if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible.

One other question arises. Will States have to answer not only for the actions of their agents, but for any acts in violation of the Convention, committed by their own subjects ?

The question is of importance, particularly for protected persons of enemy nationality living in the territory of a Party to the conflict, as they are liable to be a target for hostile demonstrations by the public. It was seen in discussing Article 27 that under the Convention protected persons are entitled to protection against all acts of violence or threats of violence and against insults and public curiosity. Gener-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 643 and 714.

ally speaking, reference should be made in this matter to the principles of international law, which remain fully valid side by side with the Article under discussion. According to those general principles a State is not automatically responsible for the private actions of its nationals. It is responsible, however, if it has failed to give proof of the requisite diligence and attention in preventing the act contrary to the Convention and in tracking down, arresting and trying the guilty party.

It must be remembered that the Contracting States have to disseminate the text of the Convention in peacetime in order to bring it to the knowledge not only of their agents, but of the whole population. That is laid down in formal terms in Article 144.

ARTICLE 30. — APPLICATION TO PROTECTING POWERS AND RELIEF ORGANIZATIONS [1]

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

The Diplomatic Conference adopted Article 30 without making any change of importance to the text based on the Government experts' recommendations. The Article is placed in this Section as all protected persons, both in the territory of a belligerent power and in occupied territory, are entitled to communicate with the Protecting Powers and with relief organizations. It should be read in conjunction with Article 142, one of the general provisions concerning the execution of the Convention, which establishes the status of relief organizations

[1] For the discussions leading up to the adoption of Article 30, see *Final Record*, Vol. I, p. 118 ; Vol. II-A, pp. 644-645 ; p. 715, p. 822 ; Vol. II-B, p. 406.

and other bodies. The two Articles are inter-dependent and complementary ; in fact, they overlap to some extent, so that the commentary on one forms part of the commentary on the other.

Since the section with which we are dealing is concerned with the treatment of protected persons, Article 30 might merely have mentioned the right of such persons to appeal to the Protecting Power and to relief societies. In view of the importance of the subject, however, the authors of the Convention, when stating the general principle involved, had no hesitation in giving certain details concerning its application in practice.

PARAGRAPH 1. — RIGHT OF COMMUNICATION

1. *Principle*

As the Rapporteur of Committee III of the Diplomatic Conference very rightly pointed out, " it is not enough to grant rights to protected persons and to lay responsibility on the States : protected persons must also be furnished with the support they require to obtain their rights ; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are. Article 30 therefore charges such Powers to afford protected persons every facility for making application to the Protecting Power, the International Committee of the Red Cross etc. " [1]

The right in question is an absolute right, possessed by all protected persons both in the territory of a Party to the conflict and in occupied territory, whether they are not detained, or are internees, persons placed in assigned residence or detained. The communication may have a wide variety of causes, and it may take the form of an application, suggestion, a complaint, a protest, a request for assistance, etc. ; it is not even necessary for an infringement of the Convention on the part of the authorities to have occurred. The right of communication may be exercised under all circumstances. It must be pointed out, however, that this right may be suspended if the seriousness of the circumstances so demands [2].

The provision under consideration will not be really effective unless the right of communication can be exercised without hindrance ; the Diplomatic Conference therefore wished to give it an essentially practical form ; hence the absence of procedural clauses. The Confer-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 822.

[2] See Article 5.

ence considered that the right of communication is justified by the mere fact of a protected person needing assistance.

The fact that the new Convention grants civilian war victims a formal and absolute right of appeal to supervising and relief agencies, a facility which up till then had depended solely on the goodwill of the Parties to the conflict, is of great significance; the certainty of being able to avoid isolation, of being able to establish contact with impartial charitable agencies, together with the hope of sympathy and relief in cases of distress, is psychologically most valuable to protected persons for the moral support it gives them. On the other hand, the obligation laid on the belligerents represents a warning and will encourage a scrupulous observation of the provisions of the Convention.

2. *Organizations*

A. *The Protecting Powers.* — Article 9 provides the legal basis for the action of Protecting Powers in favour of protected persons, since it gives them the task of supervising the application of the Convention. Thirty-two other Articles provide for the intervention of those Powers in specific cases. Article 30 is a very valuable addition to this system of intervention *ex conventione*, since it gives the protected persons an opportunity of themselves making the Protecting Power act, by means of a simple individual request.

B. *Humanitarian organizations.* — In addition to the Protecting Powers, Article 30 mentions the International Committee of the Red Cross and the National Red Cross Societies. It is not intended to consider here the general problems connected with the admission and status of relief organizations within the territory of the Parties to the conflict[1], but merely to emphasize one of the essential aspects of their work.

(*a*) *The International Committee of the Red Cross* appears to be particularly well qualified to receive complaints, requests and suggestions of various kinds from protected persons. Because of its traditional neutrality and impartiality and its independence it is in a unique position as a neutral intermediary for all categories of protected person. Its position, in fact, is very different from that of the Protecting Powers, which, being agents of belligerent States, can only receive applications from people who owe allegiance to those States. Thus during past wars the International Committee has brought assistance and relief to millions of people in distress. For some of

[1] See Articles 10, 63 and 142.

these unfortunates the Committee represented their last defence against arbitrary action by the enemy authorities.

Although the Convention leaves protected persons complete freedom of choice, there are some cases which naturally fall to a specific organization. Certain matters of an official nature in general form part of the duties of the Protecting Powers ; examples are legal aid, the issue and renewal of passports, the attestation of documents, the issue of birth, marriage and death certificates, the laws of inheritance, the protection of private property and many other questions which are dealt with in peacetime by the diplomatic or consular service.

On the other hand humanitarian organizations will be qualified to intervene and to bring relief in response to appeals from human beings in distress or in order to come to the spiritual or material aid of protected persons.

(*b*) The Diplomatic Conference also mentioned the *National Red Cross (Red Crescent, Red Lion and Sun) Societies* of the countries where the protected persons are living, as a tribute to the enormous amount of work which they accomplished in behalf of civilian victims of the war.

The Societies, however, are under certain circumstances in a position different from that of the Protecting Powers or the International Committee. In a belligerent country or a country involved in the conflict, the National Red Cross Society has not the same degree of independence as the Protecting Powers (which cannot of course be Parties to the conflict) or the International Committee of the Red Cross (whose members are citizens of a neutral State). The National Societies have in fact close bonds with the country in which they do their work. It is therefore necessary to distinguish between two different situations :

1. *In the territory of Parties to the conflict,* the protected persons within the meaning of Article 4 of the Convention are aliens, and generally of enemy nationality. National Societies which extend their relief programme to cover all victims of the war [1] are worthy of the highest praise. It must be recognized, however, that it will sometimes be difficult for a National Society to respond to appeals from enemy subjects. Their attitude might be misunderstood by public opinion and courage and integrity would be needed to have it accepted. Nevertheless every effort must be made to ensure that the principles of humanitarian aid, without discrimination, whose

[1] See in this connection XVIIth International Conference of the Red Cross, Resolutions 25 and 26.

moral value is so high, take precedence over national interests and are applied to everyone, friend and foe with the same solicitude, the same devotion, disregarding all national, racial, political, religious, social and other considerations. That is the National Societies' most noble task—one which is inspired directly by the idea on which the Red Cross is based.

Consequently, National Red Cross Societies which have not already done so, will no doubt feel called upon to modify their statutes with a view to organizing this charitable work in behalf of civilians. It would be desirable to complete all such arrangements in peacetime, as the operation of relief services requires detailed organization, effective leadership and a large and well-qualified staff, if the work is to be done properly.

2. *In occupied territories,* the protected persons will represent nearly the whole of the population. The activities of the National Society of the occupied territory will therefore be mainly concerned with their fellow countrymen. There is no need to emphasize the importance of the privilege given to such a society. How much suffering could have been relieved if this formal right had existed before the last war, during which people were detained and imprisoned without being able to inform anyone or apply to any organization which could help them.

It is in occupied territories that this right to communication is of greatest importance; it opens up a wide field of activities for National Red Cross Societies, but they must be careful not to promote hostile action against the occupation forces, under the cover of relief activities. Patriotic feelings may make this temptation a strong one; but to give way to it would inevitably cause the collapse of a system built up with such pains.

(*c*) The paragraph provides, lastly, that protected persons may apply to any other organization that might assist them.

The National Red Cross Societies of countries other than that in which the protected persons are living will certainly be included among those organizations. The Red Cross Societies in question, particularly those of neutral countries, will sometimes be in a better position to take action than local Red Cross organizations, for the reasons given above. The Diplomatic Conference deliberately refrained from making the assistance of such organizations subject to any condition, other than that of being capable of assisting those who ask for their help[1]. Under circumstances where distress assumes such proportions that

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol. II-A, pp. 644-645.

there can never be enough assistance, it is essential to call upon all possible sources of relief. These organizations, however, whether national or international, must likewise strictly avoid, in their humanitarian activities, any action hostile to the Power in whose territory they are working or to the Occupying Power. These principles, needless to repeat, govern all forms of relief organized in connection with the Geneva Convention [1].

PARAGRAPH 2. — FACILITIES. RESERVATION

The Convention requires the Parties to the conflict to grant all facilities to the Protecting Powers and relief organizations. That means that it will not be enough merely to authorize them to carry out their work ; their task must be facilitated and promoted. It is the duty of the authorities to take all necessary steps to allow approved organizations to take rapid and effective action wherever they are asked to give assistance. Among examples of such measures can be mentioned the provision of facilities for delegates to move about and carry on correspondence, to have free access to all places where protected persons are living, transport facilities and facilities for distributing relief, etc.[2]. The obligation to facilitate this work is limited however by military or security considerations, as stated in the reservation at the end of the paragraph. It is essential, however, that the belligerents, who will be sole judges o the validity of the reasons put forward, should show moderation in the use they make of this reservation and only apply it in cases of real necessity. Moreover limitations should only continue as long as the reasons for them continue to exist. States should only resort to them as an exceptional and temporary measure and not use them as a pretext for paralysing the whole work of relief. The right of communication of protected persons may, for instance, be temporarily restricted by means of exceptional measures taken to ensure the secrecy of military operations in certain specified areas ; but such restrictions should never be applied generally and they should be lifted as soon as circumstances allow ; in the meantime the responsible authorities should make suitable arrangements in behalf of the protected persons in the areas concerned.

It should be noted also that the reservation in regard to military or security considerations is merely a repetition of a reservation already discussed in regard to Article 9 in connexion with the general

[1] This obligation is enforceable through the Detaining Power's right to " limit " the number of such organizations (see Article 142, para. 2).

[2] See Commentary on Article 142.

activities of the Protecting Powers. The same reservation is also found at the beginning of Article 142.

PARAGRAPH 3. — VISITS

Paragraph 3 begins with a reference to Article 143, which authorizes representatives or delegates of the Protecting Powers and delegates of the International Committee of the Red Cross to go to all places where protected persons are, particularly to places of internment, detention and work[1].

The object of the clause under discussion is to grant the same prerogatives to organizations not mentioned in Article 143, which are also able to give protected persons moral or practical assistance. The Convention does not however place the " other organizations " on a par with the Protecting Power and the International Committee. So far as they are concerned, the Power exercising authority over the territory where they wish to do their work is left with certain discretionary and restrictive powers, based on the terms of Article 142. That Power, however, is under a moral obligation to give its consent to the work of any organization which is capable of performing the tasks and is impartial.

ARTICLE 31. — PROHIBITION OF COERCION[2]

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

I. *Scope of the prohibition*

The prohibition laid down in this Article is general in character and applies to both physical and moral forms of coercion. It covers all cases, whether the pressure is direct or indirect, obvious or hidden

[1] Similar facilities, subject to certain conditions, are provided under Article 142 for religious organizations, relief societies or any other organizations assisting the protected persons. Article 142 might therefore have been mentioned here as well as Article 143. The omission is apparently due to the fact that Article 142 was inserted in the Convention by the Diplomatic Conference. It was not contained in the Stockholm Draft. The Article under discussion, based in this respect on the Stockholm Draft, was adopted as it stood and consequently does not refer to the new Article 142.

[2] For the discussions leading up to this Article, see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 118; II-A, pp. 647-648, 808; II-B, p. 406.

(as for example a threat to subject other persons to severe measures, deprival of ration cards or of work).

Furthermore, coercion is forbidden for any purpose or motive whatever. The authors of the Convention had mainly in mind coercion aimed at obtaining information, work or support for an ideological or political idea. The scope of the text is more general than that of Article 44 of the Hague Regulations of 1907, under which " a belligerent is forbidden to force the inhabitants of a territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence " ; Article 31 prohibits coercion for any purpose or reason and the obtaining of information is only given as an example. Thus, the custom, hitherto accepted in practice but disputed in theory, that an invasion army may force the inhabitants of an occupied territory to serve as " guides " is now forbidden[1].

Furthermore, the prohibition is no longer limited in scope to the population of an occupied territory, but covers all protected persons, thus including even civilian aliens on the territory of a party to the conflict.

2. *Significance of the prohibition*

The general nature of the new provision marks an important step forward in international law. For its exact significance to be appreciated, it should not be considered in isolation but rather in the light of the other provisions of the Convention. It will then be seen that there is no question of absolute prohibition, as might be thought at first sight. The prohibition only applies in so far as the other provisions of the Convention do not implicitly or explicitly authorize a resort to coercion. Thus, Article 31 is subject to the unspoken reservation that force is permitted whenever it is necessary to use it in the application of measures taken under the Convention. This power is embodied and expressed particularly in penal legislation and in the control and security regulations enacted by the belligerents and to which protected persons are subject. Thus, a party to the conflict would be entitled to use coercion with regard to protected persons in order to compel respect for his right to requisition services (Articles 40, 51), to ensure the supply of foodstuffs, etc. to which he is entitled (Article 55, para. 2, Article 57), to carry out the necessary evacuation measures (Article 49, para. 2), to remove public officials in occupied territories from their posts (Article 54, para. 2) and in regard to everything connected with internment (Articles 79 et sqq.).

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[1] See, for example, C. HYDE : *International Law*, Vol. II, pp. 1839-1840; ROLIN : *Le droit moderne de la guerre*, Vol. I, pp. 458-460.

ARTICLE 32. — PROHIBITION OF CORPORAL PUNISHMENT, TORTURE, ETC.

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

The principle stated in Article 27 of absolute respect for the human person might have constituted a sufficient guarantee for protected persons in itself. However, the memory of the barbaric acts of which there were only too many examples in the two world wars showed the need to strengthen this principle and to prohibit expressly all acts contrary to it.

It was for that purpose that the XVIIth International Red Cross Conference in 1948, on the suggestion of the International Committee of the Red Cross, adopted a provision prohibiting torture, corporal punishment and coercion.

Article 32 states a principle common to the four Geneva Conventions of 1949[1].

1. *First sentence. — General principles*

A. *Subject to prohibition.* — The words " The High Contracting Parties " at the beginning of this Article cover States which by ratification or accession, have accepted the text of the Convention. They are of a more general and solemn character than the expression " the Parties to the conflict " or the " Contracting Parties " often used in the text of the Convention. They seem therefore to have been used deliberately to emphasize the fundamental nature of the provision. The intention of the authors of the Convention is also clearly shown by the way the prohibition is worded : " The High Contracting Parties specifically agree that each of them is prohibited . . . " which expresses the idea that each Contracting Party makes a formal pledge in regard to itself and to other States, and that this pledge is equally binding on those under its authority or acting in its name.

[1] See First and Second Conventions, Article 12; Third Convention, Article 13; Article 3 common to the four Conventions; *Commentary*, Vol. I, pp. 138-139.

B. *Purpose of the prohibition.* — The Diplomatic Conference deliberately employed the words " of such a character as to cause " instead of the formula " likely to cause " which figured in the original draft. In thus substituting a causal criterion for one of intention, the Conference aimed at extending the scope of the Article ; henceforth, it is not necessary that an act should be intentional for the person committing it to be answerable for it[1]. The aim is to ensure that every protected person shall receive humane treatment from the civil and military authorities. In this respect, Article 32 is as general as possible and mentions only as examples the principal types of atrocity committed during the Second World War, which should be prohibited for ever. However, it should be noted that most of the acts listed in the second sentence of this Article can only be committed with intent.

C. *Those who benefit from the prohibition.* — Those who benefit under Article 32 are alien or enemy civilians in the hands of a Party to the conflict.

Some delegations remarked that bombardment or bombing, which strike from a distance at individuals who are not " in the hands " of the Parties to the conflict, can cause death or entail suffering in the same way as direct cruelty. They therefore considered it preferable not to restrict the guarantee only to protected persons " in the hands " of the Parties to the conflict, but to extend it to the whole of the civilian population. The Diplomatic Conference recognized the humanitarian importance of this suggestion but considered that it was not for the Conference to adopt it since to do so would be to encroach on the sphere of the Hague Regulations concerning the Laws and Customs of War and to go beyond the intended scope of the Geneva Conventions.

In fact, problems of the laws and customs of war are of a quite different nature and the words " in their hands " define exactly the purpose of this Article[2].

2. *Second sentence. — Prohibited acts*

A. *Murder.*—The word refers to any form of homicide not resulting from a capital sentence by a court of law in conformity with the provisions of the Convention.

This provision is applicable not only to cases where murder is done by civilian or military agents of one of the Parties to the conflict,

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 716-718.

[2] *Ibid.*, Vol. II-B, pp. 407-410.

but also to cases of omission leading to death, for example, deliberate refusal to give medical care[1]. The omission must be with homicidal intent. Murder as a form of reprisal, the execution of hostages and the use of euthanasia in regard to certain categories of detainees or sick persons are all covered by this definition.

The idea of " murder " may be compared with that of " extermination ", in the first sentence of this Article. While murder is the denial of the right of an individual to exist, extermination refuses the same right to whole groups of human beings ; it is a collective crime consisting of a number of individual murders[2].

B. *Torture.*—A formal distinction may be made between judicial torture to extort confessions and extrajudicial torture. Under both forms, torture is an attack on the human person which infringes fundamental human rights. Judicial torture, although it has been abolished for more than a century in all the civilized countries, has reappeared with the racial and political persecutions.

The prohibition of torture set forth in this Article is absolute ; it covers all forms of torture, whether they form part of penal procedure or are quasi- or extra-judicial acts, and whatever the means employed. There need not necessarily be any attack on physical integrity since the " progress " of science has enabled the use of procedures which, while they involve physical suffering, do not necessarily cause bodily injury.

In occupied territory, the use of judicial torture is prohibited even if the penal legislation of the occupied territory provides for it. In such a case, the Occupying Power, under Article 64, para. 1, must repeal such laws.

Like murder, torture is one of the acts listed in Article 147 as a " grave breach ". It is also prohibited by Article 3 common to all four Conventions and Article 12 common to the first two Conventions of 1949[3].

C. *Corporal punishment and mutilation.*—These expressions are sufficiently clear not to need lengthy comment. Like torture, they

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[1] See also Third Convention, Article 13, which provides that any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the Convention.

[2] See, in this connection, the Convention for the Prevention and Repression of Genocide of December 9, 1948, Article 2.

[3] See Article 5 of the *Universal Declaration of Humans Rights*, of December 10, 1948 and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, of November 4, 1950, both of which prohibit torture.

are covered by the general idea of " physical suffering ". Mutilation, a particularly reprehensible and heinous form of attack on the human person, is also included in the list of " grave breaches " and is mentioned formally in Article 147 among " acts wilfully causing great suffering or serious injury to body or health ". Furthermore, it is expressly forbidden by Article 3 of the Convention.

D. *Medical experiments.*—In prohibiting medical experiments on protected persons, the Diplomatic Conference wished to abolish for ever the criminal practices from which thousands of persons suffered in the death camps of the last world war.

The Convention, however, refers only to " medical or scientific experiments not necessitated by the medical treatment of a protected person ". It does not, therefore, prevent doctors using new forms of treatment for medical reasons with the sole object of improving the patient's condition. It must be permissible to use new medicaments and methods invented by science, provided that they are used only for therapeutic purposes. Protected persons must not in any circumstances be used as " guinea-pigs " for medical experiments.

" Biological experiments " are also prohibited by the other three Conventions of 1949 [1] and they are listed among the " grave breaches " in Article 147.

E. *Other measures of brutality.*—The list of prohibited acts should not be considered as exhaustive. The wording used at the end of the list proper gives the Article an altogether general character. This prohibition, which is similar to the one relating to " acts of violence " set forth in Article 27 [2] is intended to cover cases which, while they are not among the specifically prohibited acts, nevertheless cause suffering to protected persons. There is no need to make any distinction between such practices carried out by civilians or by military personnel ; in both cases and in respect of all the acts covered by this Article, the agent and the Power for whom he acts must both bear responsibility in accordance with the provisions of Article 29 above.

ARTICLE 33. — INDIVIDUAL RESPONSIBILITY — COLLECTIVE PENALTIES — PILLAGE — REPRISALS

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

[1] With regard to the First Convention, see *Commentary I*, p. 139.
[2] See also Article 118, para. 2 and Article 119, para. 2.

Pillage is prohibited.
Reprisals against protected persons and their property are prohibited.

Article 33 is derived from Article 50 of the Hague Regulations: " No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible ".

The text adopted unanimously in Geneva in 1949 reproduces, with only slight changes, the original draft of the International Committee of the Red Cross[1].

PARAGRAPH 1. — PRINCIPLE OF INDIVIDUAL RESPONSIBILITY

1. *Prohibition of collective penalties*

The first paragraph embodies in international law one of the general principles of domestic law, i.e. that penal liability is personal in character.

This paragraph then lays a prohibition on collective penalties. This does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.

This provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility[2].

Thus, a great step forward has been taken. Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.

Obviously, the belligerents will retain the right to punish individuals who have committed hostile acts, in accordance with Article 64 et sqq. concerning penal legislation and procedure, when it is a matter of safegarding their legitimate interests and security.

2. *Measures of intimidation or of terrorism*

During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 118; Vol. II-A, pp. 648-651; Vol. II-B, p. 406.

[2] See MECHELYNCK: *La Convention de La Haye concernant les Lois et Coutumes de la Guerre sur terre d'après les Actes et Documents des Conférences de Bruxelles de 1874 et de La Haye de 1899 et 1907*, p. 403.

them ; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be[1].

PARAGRAPH 2. — PILLAGE

The purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds, etc., furniture, clothing, provisions, tools, etc.)[2].

This prohibition is an old principle of international law, already stated in the Hague Regulations in two provisions : Article 28, which says : " The pillage of a town or place, even when taken by assault, is prohibited ", and Article 47, which reads : " Pillage is formally forbidden ". The Geneva Convention of 1949 omitted the word " formally " in order not to risk reducing, through a comparison of the texts, the scope of other provisions which embody prohibitions, and which, while they contain no adverb, are nevertheless just as absolute in character[3].

This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear ; it leaves no loophole. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps. The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private

[1] See Article 27, para. 1.

[2] See Article 53.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 823.

persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure[1].

PARAGRAPH 3. — REPRISALS

1. *Definition and historical survey*

Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered as lawful in the particular conditions under which they are carried out. This would be the case, for example, if a belligerent employed weapons forbidden by the Hague Regulations to counter the use of the same weapons by his adversary. A distinction is generally drawn between reprisals and retortion which, while it constitutes a severe counter-measure to the acts which it is wished to end, nevertheless remains in accordance with ordinary law. Thus, a belligerent would be able to withdraw from civilian internees privileges he had granted them over and above the treatment laid down in the Convention.

In 1874, the Brussels Conference, and in 1880, the Institute of International Law, had emphasized the need for regulations to cover reprisals, " an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. "[2]

The International Committee of the Red Cross has always raised its voice against reprisals, notably in respect of prisoners of war. It expressed this idea openly in its appeal to all the belligerents in 1916. The belligerents took account of this in certain special agreements made towards the end of the war and Article 2, paragraph 3, of the Geneva Convention of 1929 forbids all measures of reprisal against prisoners of war.

This rule, which emphasizes a principle of far-reaching importance, was generally respected during the Second World War.

With regard to civilians, at the beginning of the Second World War the International Committee of the Red Cross had obtained agreement that enemy civilians interned in the territory of a belligerent should benefit by analogy from the provisions of the 1929 Convention relative to the Treatment of Prisoners of War. All reprisals against these internees were consequently prohibited[3], but it proved impossible

[1] This right, which is dealt with by the Hague Regulations, is also the subject of Articles 55 and 57 of this Convention.

[2] See the *Oxford Manual of the Laws of War on Land*, Articles 84-86.

[3] For the action taken by the International Committee of the Red Cross in regard to reprisals during the world wars, see the *Report of the International Committee on its activities during the Second World War 1939-1947*, Vol. I, pp. 365-372.

to obtain the same decision in regard to civilians in occupied territory and it was not until the drawing up of the Geneva Convention relative to the Protection of Civilian Persons in Time of War that the prohibition of reprisals against civilians was given its general form. The principle of the prohibition of reprisals against persons has now become part of international law in respect of all persons, whether they are members of the armed forces or civilians protected by the Geneva Conventions[1].

2. *Scope of the provision*

The prohibition of reprisals is a safeguard for all protected persons, whether in the territory of a Party to the conflict or in occupied territory. It is absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity.

The solemn and unconditional character of the undertaking entered into by the States Parties to the Convention must be emphasized. To infringe this provision with the idea of restoring law and order would only add one more violation to those with which the enemy is reproached.

It was possible for the Convention to prohibit reprisals only because it substituted for them other means of ensuring respect of the law, based on the principles of supervision by the Protecting Powers and the obligation to punish individuals in cases of grave breaches.

The prohibition of reprisals is closely connected with the provisions which, by ensuring that the Convention is applied in all circumstances[2], give it the character of a primary duty based essentially on the protection of the human person. This paragraph, like the first one, marks a decisive step forward in the affirmation and defence of rights of individuals and there is no longer any question of such rights being withdrawn or attenuated as a result of a breach for which those individuals bear no responsibility. Finally, reprisals constituted a collective penalty bearing on those who least deserved it. Henceforth, the penalty is made individual and only the person who commits the offence may be punished. The importance of this development and its embodiment in the new Geneva Convention is clear.

3. *Interpretation with regard to retortion*

Should the rule laid down in Article 33 be interpreted as applicable to measures of retortion, i.e. measures which are lawful yet cause serious damage ?

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[1] See *Commentary*, Vol. I, pp. 341-347.
[2] See Articles 1, 7 and 8.

Supposing that the civilian internees on the territory of the two enemy belligerents had obtained in both countries certain privileges which represented an improvement upon the treatment stipulated in the Convention, can one of the countries withdraw these privileges if the other has done so ?

It would obviously be desirable for no retortion to take place. What is most important, however, is respect for the rules of the Convention which embody the rights of protected persons, and it must be admitted that a belligerent never agrees to accord privileges over and above the rights laid down in the Convention, except on condition of reciprocity. There would perhaps be a risk, therefore, of discouraging the Parties to the conflict from ever granting such privileges if it were insisted that they were sacrosanct. It would appear wiser to conclude that the rule embodied in this Article only concerns reprisals.

ARTICLE 34. — HOSTAGES [1]

The taking of hostages is prohibited.

1. *Definition and historical survey*

The word " hostage " has stood for rather different conceptions. It is not, therefore, easy to give a definition of it valid for every case. Generally speaking, hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces.

In the beginning, the hostage constituted a guarantee by the adversary that a treaty would be carried out ; hostages were given

[1] See C. PILLOUD : *La question des otages et les conventions de Genève*, Revue internationale de la Croix-Rouge, 1950, pp. 430-447. For different aspects of the question of hostages, the following should also be consulted :

Annuaire de l'Institut de droit international, 1913, tome VI, pp. 1113-1114.

Bellot Regulations of Laws of War in Occupied Territory, Article 29, in *The International Law Association, Report of the 35th Conference*, Warsaw, 1928, p. 287.

Report of Robert H. Jackson ; United States representative to the International Conference on Military Trials. Department of State, 1949.

Jugement du Tribunal militaire international, Paris, p. 22.

Revue de droit international, de sciences diplomatiques et politiques, 1948, p. 109.

Lord Wright : The Killing of Hostages as a War Crime, British Year Book of International Law, 1938, pp. 296 sq. ; *Nispen tot Sevenaer, La Prise d'otages*, The Hague, 1949, pp. 123 sq. *Revue* (Belgian) *de Droit pénal et de criminologie*, 1948-1949, pp. 986-995.

as a pledge or a safeguard; this practice, which is very ancient, has now disappeared. The modern form, with which this Article is concerned, is the taking of hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage in order to ensure the security of the Detaining Power.

(a) The most frequent case is that of an Occupying Power taking as hostages persons generally selected from among prominent persons in a city or a district in order to prevent disorders or attacks on occupation troops.

(b) Another form of the taking of hostages which is very close to *(a)* consists of arresting after an attack a certain number of inhabitants of the occupied territory and announcing that they will be kept captive or executed if the guilty are not given up.

(c) Resort has also been had to the taking of hostages to guarantee the life of persons themselves detained as hostages by the adverse Party.

(d) Hostages have also been taken and kept prisoner by the Occupying Power in order to obtain the delivery of foodstuffs and supplies or the payment of an indemnity, etc.

(e) Finally, the practice of taking so-called accompanying hostages consists of placing inhabitants of occupied territory on board lorry convoys or trains in order to prevent attacks by their compatriots[1].

These are examples. In accordance with the spirit of the Convention, the word " hostages " must be understood in the widest possible sense.

During the last two world wars, hostages were imprisoned, often put in solitary confinement, deported and in many cases executed without previous warning or trial.

The International Committee of the Red Cross considered that the prohibition of such practices, which are based on contempt for the principle of individual responsibility for breaches of the law, must be one of the essential elements in the new Convention. In the Tokyo Draft submitted to the XVth International Red Cross Conference in 1934, it had devoted two provisions to the question of hostages: Article 4, applicable to enemy civilians in the territory of a belligerent and forbidding the taking of hostages, and Article 19 regarding enemy civilians in occupied territory and according to which if, " in an

[1] See also Article 28, p. 208.

exceptional case ", it appeared indispensable for an Occupying Power to take hostages, they should always be treated humanely ; under no pretext should they be put to death or subjected to corporal punishment[1]. During the Second World War, the Committee on several occasions made representations to the Governments and Red Cross Societies in the belligerent countries, urging them to respect, even in face of military considerations, the natural right of man not to be subjected to arbitrary treatment and not to be made responsible for acts he has not committed[2]. During the work of revising and preparing the Convention, between 1945 and 1949, the Committee considered that the moment had come to state clearly that the taking of hostages was forbidden. The very short text which it had put forward was approved at all preparatory meetings and adopted without change by the Diplomatic Conference.

2. *Absolute nature of the provision*

This Article, coming at the very end of the provisions common to the four Conventions, is absolute in character. It applies to persons protected under the terms of Article 4 in the territory of the belligerent or in occupied territory, in the case of international conflict or in that of civil war. It supplements Article 33 which embodies the principle of individual responsibility and the prohibition of collective penalties and measures of reprisal. The two Articles bring positive law into line with the principles of justice and humanity.

While it is true that Article 5 of the Convention provides for certain exceptions to its application in cases where the security of the State or of the Occupying Power may be threatened, these exceptions could not be taken to extend as far as not applying the fundamental rules such as those in Articles 33 and 34. Paragraph 3 of Article 5 in any case provides every guarantee in this respect.

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[1] See *Conférence diplomatique pour la revision et la conclusion d'accords relatifs à la Croix-Rouge*, document préliminaire n° 6, Berne, January 1939, p. 12.

[2] See *Appeal of the International Committee of the Red Cross*, Geneva, July 24, 1943.

SECTION II

ALIENS WITHIN THE TERRITORY OF A PARTY TO THE CONFLICT

INTRODUCTION

In the course of history the legal status of civilians of enemy nationality living in the territory of belligerent States has undergone numerous changes. Treated as slaves under Roman law, they were still regarded as prisoners of war in the time of Grotius ; but their position gradually improved under the impact of new ideas. Many States concluded treaties in peacetime guaranteeing that nationals of other Parties to the treaty would be free to leave the country should a war break out. An unwritten law[1] was thus created and the authors of the Hague Regulations may be said to have endorsed it when they refrained from stipulating that nationals of a belligerent residing within the territory of the adverse party were not to be interned. They felt that it went without saying[2].

The First World War was to modify this liberal concept profoundly. As soon as the conflict broke out the belligerent States closed their frontiers, sometimes preventing any foreigners from leaving, and interning large numbers of civilians of enemy nationality.

The change in their attitude may be explained by the general adoption of a system of compulsory military service. This raised a danger which had not existed when armies were formed of mercenaries or when conscription was carried out by drawing lots (up to the beginning of the 20th century). Nowadays every enemy national is a potential soldier and his internment becomes understandable. Inter-

[1] See Robert R. WILSON : *Treatment of Civilian Alien Enemies* (American Journal of International Law, 1943, p. 32).

[2] See article by Max HUBER, in the *Jahrbuch des öffentlichen Rechts*, Vol. II, 1908, pp. 579-580.

nees, however, were usually forced to live in deplorable conditions and the voice of the Red Cross was raised in protest. In order to improve the treatment accorded to them, the International Committee prepared a preliminary Draft Convention which was adopted by the XVth International Conference (Tokyo, 1934).

The outbreak of hostilities in 1939 unfortunately prevented the draft from entering into force, but the International Committee of the Red Cross was able to arrange for civilian internees to be given the benefit, by analogy, of the provisions of the 1929 Prisoners of War Convention ; as a result of the Committee's action some 160,000 civilians, of fifty different nationalities, received the same treatment as prisoners of war throughout the duration of hostilities.

A gap remained, however, and the provisions in this Section are intended to fill it. They give protected persons [1] a legal status in the form of a comprehensive series of safeguards set out in detail.

ARTICLE 35. — RIGHT TO LEAVE THE TERRITORY

All protected persons who may desire to leave the territory at the outset of, or during, a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

[1] It must be remembered that under Article 4 of the Convention, nationals of a neutral or co-belligerent State are not regarded as protected persons " while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are ".

GENERAL REMARKS. — HISTORICAL BACKGROUND[1]

Article 35 is similar to the provisions in the Tokyo Draft[2] laying down that civilians of enemy nationality must be allowed to return to their home country (Article 2), unless they are liable to be mobilized or their departure would threaten the security of the State of residence in some other way (Article 4).

During the Second World War[3] negotiations carried out through diplomatic channels or through the Protecting Powers made it possible to repatriate civilians. This was usually done on a basis of reciprocity, through exchanges. In 1940 British and German women were thus able to return to their own countries, and French and German women who had been interned returned home by way of Switzerland[4]. In 1942 more than 2,000 persons were exchanged in this manner. In addition 28,000 Italians from Abyssinia—women, children, old people and the sick—were granted permission by Great Britain to return to their home country, this action being taken unilaterally without any condition of reciprocity. In 1943, 1,500 civilians of American and Canadian nationality were exchanged in Mormugao (in the Portuguese colony of Goa) for the same number of Japanese[5]. In 1944 further exchanges took place between Germany and the British Empire, some 1,000 people on either side being involved[6]. Exchanges concerned exclusively with the diplomatic and consular staff of the belligerent countries were, moreover, arranged between the majority of the countries taking part in the war[7].

As a rule these repatriations were arranged by the Protecting Powers ; but the International Committee of the Red Cross also took a hand when negotiations undertaken by the Protecting Powers seemed unlikely to achieve any result and the Committee was asked to intervene, and also when it felt called upon to make use of its traditional right of initiative in humanitarian matters[8].

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[1] For the origin of Article 35, see *Final Record*, Vol. I, p. 119; Vol. II-A, pp. 652-655, 737-738 and 823 ; Vol. II-B, p. 410.

[2] See p. 233.

[3] For information concerning the First World War, see GARNER : *International Law and the World War*, London, 1920.

[4] See *Revue internationale de la Croix-Rouge*, 1940, pp. 358-359.

[5] See *ibid.*, 1944, pp. 239-240.

[6] See *Annuaire Suisse de droit international*, Vol. II, 1945, p. 117, and JANNER : *La Puissance protectrice en droit international*, Basle, 1948, pp. 45-46.

[7] See *ibid.*, pp. 34-35, and *Annuaire Suisse de droit international*, Vol. I, 1944, pp. 132-133.

[8] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 602 and 638.

In the light of the experience thus gained, the International Committee of the Red Cross put forward suggestions which were to a large extent adopted by the Diplomatic Conference in drafting this Article.

PARAGRAPH 1. — RIGHT TO LEAVE THE TERRITORY

1. *First sentence*

A. *Principle.*—People whose right to leave the territory is recognized generally wish to return to their own country. That is not a condition, however, for the word " repatriation " does not appear in the provision ; it lays down that they are entitled to leave, but does not say what their destination is to be. A belligerent is therefore also bound to authorize the departure of protected persons who wish to go to a country other than their home country, to a neutral State for example.

The words " who may desire to leave the territory " show quite clearly that the departure of the protected persons concerned will take place only if they wish to leave. The International Committee's original draft laid down that no protected person could be repatriated against his will ; the same idea is implicit in the text actually adopted, although it is expressed somewhat differently[1]. The point is an important one, for many foreign civilians do not wish to leave a country where they have lived for many years and to which they are attached[2]. This principle applies to all protected persons as defined in Article 4, except for civilian internees whose position is regulated by Article 132[3]. It should be noted that the right to leave the territory is not in any way conditional, so that no one could be prevented from leaving as a measure of reprisals[4].

B. *Reservation.*—Belligerents have the right to refuse protected persons permission to leave the territory if their departure is " contrary to the national interests of the State ".

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[1] While forced repatriation—that is, sending a person back to his country against his will—is prohibited, the right of expulsion has been retained. For example, if France were to break off diplomatic relations with Germany, she would not be entitled to send German nationals under escort to the German frontier against their will ; she could, however, decree their deportation and send them under escort to the Belgian, Spanish, or Swiss frontiers.

[2] For the case of refugees, see Article 44 below, pp. 264-265.

[3] In regard to aliens on official business, diplomatic practice rules that they must be enabled to leave the territory of the State which has received them and that they keep their privileges and immunities up to the moment of their departure. If this practice is not observed, they will obviously be entitled at least to the treatment laid down in this Article.

[4] See Article 33, p. 224.

This reservation is in accordance with a general practice among States, which, as we have already pointed out, have normally refused to repatriate certain classes of civilian, in particular men of an age to bear arms (from 16 to 60 years old) and persons whose departure is regarded as dangerous to the security of the State where they have been residing.

" National interests " is a broader notion than " security considerations "—the term used in the Tokyo and Stockholm Drafts and rejected by the Diplomatic Conference. With this wording the belligerents may object to someone's departure not only when it would endanger their security but also when the national economy would suffer as a result. The Conference had in mind, in particular, the case of countries of immigration, where the departure of too large a proportion of aliens might prejudice national interests by creating manpower or economic problems, etc.[1]

A great deal is thus left to the discretion of the belligerents, who may be inclined to interpret " national interests " as applying to many different spheres. It is therefore essential for States to safeguard the basic principle by showing moderation and only invoking these reservations when reasons of the utmost urgency so demand. For although internment may be justified as a matter of principle, the same cannot be said of the poor conditions in which civilian aliens have all too often been detained.

2. *Second sentence — Procedure*

Applications to leave have to be considered in accordance with " regularly established procedures ", which means that there must be procedural safeguards to prevent arbitrary decisions. Belligerent States must therefore specify in advance the conditions under which permission to depart will be granted, and must appoint a responsible authority which will make decisions impartially, as rapidly as possible, and with reasons stated, after the applicant has been given an opportunity of submitting his application and explaining the grounds on which he makes it.

The Convention leaves it to the States concerned to appoint the responsible authority. The discussions at the Diplomatic Conference showed, however, a tendency to prefer an administrative authority, as such an authority is generally regarded as best able to make rapid decisions concerning applications affecting the security of the State[2].

[1] See *Final Record*, Vol. II-A, pp. 653-654 and 737-738 ; Vol. II-B, p. 410.
[2] *Ibid.*, Vol. II-A, pp. 653-654 ; Vol. III, pp. 120-122.

The main point, however, is not so much to know what authority will be appointed as to be quite certain that each case will be examined objectively and thoroughly and that the rights of the protected person will be fairly weighed against the legitimate interests of the State of residence.

3. *Third sentence — Travel facilities*

The Government of the country of residence must allow the protected person who is permitted to leave the territory to provide himself with the necessary funds for his journey and to take with him a " reasonable amount " of his " effects and articles of personal use ". The context shows how " a reasonable amount " should be interpreted, for it will only be the personal effects and articles which the protected person can actually carry with him. Bonds and the like and furniture would appear to be excluded, unless special regulations enacted by the Power of residence should be more favourable in this respect.

The provision was necessary because of the various exchange control measures, decrees forbidding the export of capital and other similar bans which are normally enacted when war breaks out. Too strict an application of such measures might in practice lead to the prevention of protected persons from making use of the right to leave, since a journey is bound to require adequate financial or other resources.

For that matter there is nothing to preclude a Power of residence from arranging group travel if it considers its security would be better safeguarded thereby than in the case of individual departures. The restrictive measures in force could then include clauses of exception applying solely to members of these organized parties[1].

PARAGRAPH 2. — RIGHT OF APPEAL

The system laid down offers States a choice between an administrative and a judicial procedure and is therefore flexible enough to cover the procedures already in use in different countries. Thus, during the Second World War applications for repatriation were dealt with administratively in certain countries, while other countries set up special courts for aliens.

The Diplomatic Conference made a point of specifying that when the law of a country provided for action through administrative

[1] See Article 36, p. 239.

channels the task must be entrusted to an administrative board (in French " collège "). The Conference felt that the fate of protected persons ought not to depend on a single official and that they could be more certain of impartiality if the decision were taken by a number of people on a majority vote[1].

Governments are moreover free to entrust appeals to existing courts (by extending the duties and responsibilities of such courts) or to bodies specially set up for that purpose. This paragraph seems to indicate a preference for this type of solution.

The question of rules of procedure—which may be verbal or written—is left to the discretion of the Government concerned. The main point is that protected persons should have the widest possible facilities for pleading their cause. Parties to the conflict may therefore go further in this matter than is laid down in Article 35 ; they might for example set up, in addition to the courts envisaged, an advisory body whose members would be independent persons of standing. This course was adopted by certain States during the Second World War.

Paragraph 3. — Intervention by the Protecting Power

This paragraph gives an additional safeguard to protected persons who have not received permission to leave. The obligation to furnish the Protecting Power, on request, with the names of persons who have been refused permission to leave and the reasons for such refusal, will make it possible to provide their families and the authorities in their home country with information concerning the fate of civilians in these circumstances and would thus make it possible to avoid arbitrary action on the part of the Detaining Power. Where the alleged reasons seem inadequate or the procedure adopted does not appear to have been in accordance with the provisions of the Convention the Protecting Power will have cause to intervene[2].

This obligation, however, to notify the names of retained persons and the reasons for retaining them on request is, however, subject to two important reservations. The first is based on the principle of the freedom of the individual : protected persons may particularly desire that the names and place of residence should not be known to the authorities in the home country. The second reservation is based on State interests and allows the Detaining Power to take no action on

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 654 and 738.

[2] For details of the role of the Protecting Power in supervising the application of the Convention, see Article 9, p. 80. For its role in cases of internment or assigned residence, see Article 43, para. 2, p. 262.

a request for notification when, in certain clearly defined cases, there are legitimate security reasons against it. The Detaining Power, however, could not raise an objection on security grounds —and this must be stressed—in order to refuse systematically to reply to questions asked by the Protecting Power.

ARTICLE 36. — METHOD OF REPATRIATION[1]

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

PARAGRAPH 1. — PRACTICAL ARRANGEMENTS

1. *First and second sentences — Conditions, costs*

After laying down the general principle and defining the procedure for applying it, Article 36 sets forth a number of safeguards which apply to individual and collective departures alike. It should be noted, however, that individual departures will in most cases be impossible ; in the interests both of protected persons and of the Detaining Power, their departure will almost always be organized on a collective basis. Article 36 is primarily intended to meet such cases.

It begins by laying down that departures—that is the actual movement of those concerned—are to be carried out under satisfactory conditions as regards safety, hygiene, sanitation and food. At the beginning of a war it should be possible to meet these requirements without any difficulty ; the destruction of means of transport and the economic disorganization of the country may, however, soon make it difficult to carry out the measures prescribed by the Convention. Whatever the circumstances, the State of residence must take all

[1] See *Final Record*, Vol. I, p. 119 ; Vol. II-A, pp. 655, 739 and 823 ; Vol. II-B, p. 406 ; Vol. III, p. 122.

necessary precautions to avoid endangering the life and health of the protected persons and to ensure that their journey takes place under satisfactory conditions as regards food and health.

As a rule the cost of transport is borne by the individuals concerned and there is no need for the State to take action as long as transport facilities are working normally[1].

During former wars financial difficulties, however, sometimes delayed repatriation operations and in 1949 the Diplomatic Conference, acting on a suggestion by the Central Office for International Transport by Rail[2], decided that all costs incurred from the point of exit in the territory of the Detaining Power were to be borne either by the country of destination or by the country of which the protected persons were nationals.

This system of financing is important where the journeys are long or take place by sea, as the expenditure involved is then often considerable. It will prevent protected persons from being in practice deprived, through lack of financial resources, of their right to leave the territory.

The Convention makes no stipulation concerning the cost of travel to the frontier of the Detaining Power. It must be concluded, therefore, that in general they are to be borne by the protected persons. However, if lack of financial resources were to prove an obstacle to their departure it would be incumbent on public authorities of the country in which the people concerned were still living to take all necessary measures to facilitate their departure, either by reducing their fares or by informing the Protecting Power for possible action.

2. *Third sentence — Special agreements*

In many cases the departure of protected persons will be able to take place without any action on the part of States, in particular when they leave individually at the beginning of a war, during the period which may elapse between the declaration of war and the opening of actual hostilities. Departures may also be easier if there is a neutral country bordering on the country of residence.

The position is more difficult when there has been no declaration of war or if departures have to take place during hostilities, and it will be particularly awkward when the frontiers are closed as a result of military operations. Under such circumstances the protected persons will only be able to leave the territory where they have been

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 655.

[2] *Ibid.*, Vol. III, p. 38.

living in organized groups, and that of course implies action and assistance by the States concerned.

The last sentence of the paragraph refers to this contingency when it envisages the possibility of settling the practical details of such movements by special agreements between the Powers concerned. The complicated practical problems connected with such moves demand that the greatest possible use be made of this procedure which will in many cases be a necessity. Although the Article does not expressly state that the assistance of a neutral intermediary is to be sought, it is tacitly assumed. The neutral country called in may be the Protecting Power or any other neutral power, and its good offices will be required not only in negotiating the agreements but also in supervising their execution. The same role might also be assumed by an organization such as the International Committee of the Red Cross which was, in fact, called upon on several occasions to render services of this nature during the Second World War. It should be noted that the Convention speaks of the " Powers concerned " and not simply of the " Parties to the conflict ", thus implying that special agreements may, if necessary, be concluded between the Detaining Power and a neutral State.

PARAGRAPH 2. — RESERVATION

This paragraph was added by the Diplomatic Conference.

Although the point was not brought out very clearly in the discussions, it is reasonable to assume that the agreements referred to in this clause cover a wider field than those mentioned in the previous paragraph. The special agreements referred to in paragraph 1 are intended to make possible the departures authorized under Article 35 by settling certain practical details, whereas those referred to in paragraph 2 concern the whole group of problems connected with the repatriation of civilians. They are treaties in which the Parties to the conflict reach agreement on a general plan for the repatriation and exchange of their respective nationals. Belligerents might, for example, agree to exchange all their subjects living on the territory of the other Party, and for this purpose make financial arrangements different from those laid down in paragraph 1. Nor are such agreements necessarily confined to civilians ; they may, for example, include wounded and sick prisoners of war. Reference should be made on this point to Articles 109 to 117 of the Third Geneva Convention of 1949. This reservation was introduced in order to make it clear that the arrangements provided for in paragraph 1 do not conflict with such agreements.

It is nevertheless important to note that such special agreements cannot be allowed under any circumstances to limit the right accorded to all protected persons to leave the territory of the State in which they are residing, in accordance with the conditions laid down in Article 35. That follows from the basic principle proclaimed in Article 7 which states that " no special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them ".

Finally, it should be noted that the Convention contains a clause providing for the conclusion of special agreements for the release and repatriation of certain classes of internees[1].

ARTICLE 37. — PERSONS IN CONFINEMENT[2]

Protected persons who are confined pending proceedings or subject to a sentence involving loss of liberty, shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

PARAGRAPH 1. — SCOPE

Article 37 applies to protected persons who are confined pending proceedings or are serving a sentence involving loss of liberty for an offence against the penal law of the country where they are living. It is of small importance whether the period of confinement began before or after the outbreak of war ; on the other hand, the protection afforded under this Article is restricted to protected persons who are the subject of judicial measures either on preventive grounds or as a result of conviction and sentence. Persons to whom security measures are applied are protected under other provisions[3].

It was essential to prevent representatives of the Detaining Power's administrative services, in particular police officers and prison warders, from dealing in an inhumane manner with foreigners who were at one and the same time enemies and detainees.

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[1] See Article 132, p. 510.

[2] For the origin of Article 37, see *Final Record*, Vol. I, p. 119 ; Vol. II-A, pp. 655-656, 739 and 823-824 ; Vol. II-B, p. 407 ; Vol. III, p. 122.

[3] See Articles 79 et sqq., pp. 371 et sqq.

The text prepared by the International Committee laid down that detained persons should not " be subjected to conditions more severe than at the opening of hostilities ", thus insisting on the maintenance of the conditions of imprisonment which had obtained in peacetime. Taken in the broadest sense, however, these conditions, under the law of most countries, included certain provisions favourable to the prisoner—remission of sentence, release on bail, release on parole, etc.—whose application to enemies had certain drawbacks for the Detaining Power.

Having considered this aspect of the question the Diplomatic Conference of 1949 did not insist on the full application in wartime of the system obtaining in time of peace, so that certain favourable measures which are in fact inapplicable to aliens may, when necessary, be abrogated. The essential point is that in wartime protected persons under confinement are safeguarded against arbitrary action and brutality.

PARAGRAPH 2. — RIGHT TO LEAVE THE TERRITORY

This provision is clear enough in itself and does not call for any special comment. As soon as foreign civilians are released, they automatically resume their status as protected persons. As such, they may request permission to leave the territory in conformity with the provisions of Articles 35 and 36.

ARTICLE 38. — NON-REPATRIATED PERSONS[1]

With the exception of special measures authorised by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them :

(1) *They shall be enabled to receive the individual or collective relief that may be sent to them.*

(2) *They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.*

[1] For the discussions leading up to Article 38, see *Final Record*, Vol. I, p. 119 ; Vol. II-A, pp. 656, 739-740 and 807-808 ; Vol. II-B, p. 407.

(3) *They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.*

(4) *If they reside in an area particularly exposed to the dangers of war, they shall be authorised to move from that area to the same extent as the nationals of the State concerned.*

(5) *Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.*

1. *Principle*

A. *Continuation of peacetime treatment.* — The first paragraph of Article 38 sets forth the great principle which governs the whole legal status of protected persons who have remained or been retained in the territory of a Party to the conflict. By virtue of this principle the position of such persons will continue to be regulated by the " provisions concerning aliens in time of peace ".

To understand this clause properly, it is necessary to refer to the Convention to which the Hague Regulations are annexed. According to the preamble to that treaty its provisions are " intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants ".

The Hague Regulations, however, only govern the relations of the belligerents with the civilian population in cases where one of the belligerents has occupied the territory of the other. They state that the Occupying Power is to respect," unless absolutely prevented, the laws in force in the country ". It is thus the *status quo ante* whose continuation is recommended.

The Hague Regulations did not deal with the case of enemy civilians retained on the territory of one of the Parties to the conflict ; the present provisions of the Fourth Convention are intended to fill this gap and are, as stated in Article 154, " supplementary " to the text in force. It follows that they were conceived in the same spirit and they too aim at continuing the *status quo ante* in favour of protected persons as far as possible and unless absolutely prevented.

What should be understood by " provisions concerning aliens in time of peace " ?

It seems beyond doubt that the relations of the State of residence with enemy aliens whom it retains on its territory cannot continue to be governed by peacetime laws, in particular by the treaties concerning residence and domicile, whose benefits they enjoyed before hostilities broke out. But in the absence of these special

treaties enemy aliens must, as a matter of principle, enjoy treatment similar to that generally accorded to other aliens before the hostilities.

The legal status of aliens depends in the first instance on the national legislation of the country of residence, but that country is not entirely free to settle the matter, being bound to respect certain rules of international law. Those rules may derive either from the treaties concerning residence and domicile, which States very often conclude with one another in order to define the status of their nationals, or, in the absence of such treaties, from the principles and practice of international law. These rules, whether contained in treaties or resulting from usage, will in general be characterized by a growing tendency to place aliens on the same footing as nationals (the principle of treatment as nationals)[1]. This is above all true of the position of aliens in civil and penal law, as well as in legislation relating to procedure ; for the principle of treatment as nationals has made greatest progress in those spheres, and foreigners therefore enjoy the protection of the laws and authorities of the territory where they are living, in regard to their personal safety and the respect due to their rights.

On the other hand that principle of equality does not, according to the usual practice of governments, include political rights, which aliens do not enjoy.

The Article under discussion refers, then, to such clauses—above all to the rule stipulating treatment as nationals—when it proclaims that they are to remain in force and that foreigners are to continue to benefit by them.

B. *Reservations.* — It will be readily understood, however, that a state of war creates a situation which will inevitably have repercussions on the standing of aliens and does not always permit their peacetime status to be wholly maintained.

The Diplomatic Conference took this fact into account and recognized that belligerents were entitled to apply supervisory and security measures, necessary in the national interests, to certain classes of aliens.

Thus Article 38 begins with a clause making an exception in favour of the special measures authorized by the Convention, in particular by Articles 27 and 41, to which express reference is made.

It has already been seen that Article 27 does not specify the various security measures which may be taken by States, but merely sets forth a general provision. In the commentary on that Article several

[1] In the case of certain States this tendency has, however, been less marked since the First World War.

examples were given of supervisory and security measures which the belligerents might be forced to take, such measures varying from insignificant restrictions to two of the most severe measures allowed under the Convention—namely internment and assigned residence, which are considered in Article 14.

It should be remembered, however, that recourse may only be had to exceptional measures in cases of absolute necessity. The general rule is that peacetime status must continue ; under no circumstances must it be rendered illusory by a general application of coercive measures.

One point should nevertheless be mentioned. Restrictive measures applied by the State to the population as a whole (martial law etc.) must also apply to protected persons, for if aliens are to enjoy the same treatment as nationals in peacetime within the limits referred to above, the same treatment, subject to the same limits, will still apply to them with the modifications which the existence of a state of war involves for the nationals of the country. There is no violation of the Convention if aliens suffer through the fact that these measures are less favourable than those applying in peacetime and it is self-evident that an enemy alien could not expect to escape the consequences of war by virtue of Article 38.

Protected persons will thus be subject to all the restrictions imposed upon the civilian population in wartime. The Diplomatic Conference nevertheless wished to grant them a number of essential and imprescriptible rights.

2. *Imprescriptible rights*

In the second part of the Article under (1) to (5) rights are specified which must " in any case " be granted to protected persons. The obligation is unconditional and applies to all protected persons in the country of residence, whether security measures have been applied to them or whether they are, in principle, enjoying the treatment afforded to aliens in peacetime.

The rights which are considered as indispensable under this heading comprise :

A. *Relief.* — Every protected person is entitled to receive any individual or collective relief that may be sent to him. This clause refers first and foremost to relief in kind, relief in the form of money being considered separately in Article 39, which deals with means of existence. Relief as meant here will consist, for example, of consignments of food, clothing and medical supplies sent to the protected

persons individually or collectively. Such consignments may come either from the country of origin of the protected persons or from any other country and may be sent by private individuals, humanitarian organizations or governments.

The right of protected persons to receive relief implies an obligation of the country of residence to allow the consignments to enter its territory and to pass them on intact to the addressee.

Are such consignments to be considered exempt from customs duty in the same way as relief consignments intended for the civilian population of occupied territory and for civilian internees[1] ? This is a moot point, for no reference was made to it during the discussions at the Conference. However, any possible levy of duty must not have the effect of depriving protected persons of their right to the relief. Enemy civilians who are permitted to remain at liberty often live under more difficult conditions than the internees ; it will sometimes be impossible for them to pay any large amount of customs duty ; and yet it will sometimes be they who stand in greatest need of relief. In such cases the State of residence, although not formally bound to do so, must nevertheless grant such consignments customs facilities similar to those provided in the case of relief intended for civilian internees. The essentially humanitarian character of the consignments fully justifies such a course.

Since direct postal communication between opposing belligerent States will have been interrupted, relief supplies from the protected persons' home country can be transmitted only through a neutral agency. This duty will normally fall on the Protecting Powers but any humanitarian organisation, such as the International Committee of the Red Cross, may also assume it.

B. *Medical care.* — The State of residence must ensure that protected persons receive the medical attention and hospital treatment required by their state of health. The application of this clause, which the Diplomatic Conference transferred from Article 16 to its present place, depends upon the same principle of treatment as nationals that governs the whole status of aliens in the territory of belligerent countries. Consequently, the only justification for priority in the giving of medical care is medical urgency and not nationality.

C. *Religion.* — As will be seen later, this clause corresponds to a similar clause in Article 58, which refers to occupied territories[2]. It may also be compared with Article 27, paragraph 1, which provides

[1] See Articles 61 and 108, pp. 324 and 452.

[2] See p. 318. This text should be compared with Article 46 of the Hague Regulations.

a guarantee that the religious convictions and practices of all the persons protected by the Convention are respected. It has already been pointed out that freedom to practise a religion is an absolute right and subject to no restrictions other than those imposed by the necessity of preserving public order and morals.

D. *Protection.* — Protected persons who live in an area particularly exposed to the dangers of war will be entitled to move from it. This applies to persons who live in areas where there is a danger of bombing and those who are liable to suffer hardship when the fighting draws close.

This right too is subject to the rule of treatment as nationals. That is expressly laid down. The belligerent State retains the right to authorize or limit such moves to the same extent as those of its own nationals. The rights of protected persons in this connection are thus neither greater nor less than those of nationals of the State where they are residing.

It is conceivable—and an instance has actually occurred—that a belligerent might forbid all movement of the civilian population in order to prevent military operations from being hampered by overcrowding of roads and railways following an exodus of the civilian population. If such a ban were general and applied to the population as a whole there would be no reason to complain of the action taken by the State of residence. The case would be different, however, if the ban on movement was discriminatory in character and applied only to aliens. That would obviously be a case of violation of the Convention, all the more so as Article 28 prohibits the practice of using the presence of protected persons to render certain points or areas immune from military operations.

E. *Preferential treatment.* — This clause refers to a specific category of protected persons—namely children under fifteen years old, pregnant women and mothers of children under seven. Such persons are to benefit by any preferential treatment accorded to the corresponding categories of the native population. Here again the rule of treatment as nationals is the criterion.

What should be understood by the phrase " preferential treatment " ? It covers the whole body of provisions, normally promulgated in countries at war, for the benefit of persons whose weakness in one respect or another warrants special care.

Measures granting preferential treatment may be most varied in scope and application : they may cover the granting of supplementary ration cards, facilities for medical and hospital treatment, special welfare treatment, exemption from certain forms of work, protective

measures against the effects of war, evacuation, transfer to a neutral country, admission to hospital and safety zones and localities, etc.

This provision is in the same spirit as Articles 14, 17, 23, 24, 50, 89 and 132 which are applicable in whole or in part to the same categories of people.

ARTICLE 39. — MEANS OF EXISTENCE [1]

Protected persons who, as a result of the war, have lost their gainful employment shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependants.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

General Historical Background

Article 39 deals exclusively with the means of existence of protected persons. It is based on one of the clauses in the Tokyo Draft [2], which laid down that enemy civilians were to have an opportunity of carrying on their occupations subject to any control or security measures which might be applied to them.

Experience during the Second World War showed that the living conditions of enemy civilians who remained at liberty in the territory of a belligerent were sometimes more precarious than those of internees. Some Governments encouraged employers to continue to employ their foreign man-power [3]; but a great many employees nevertheless lost their jobs because of their enemy nationality and were unable to find work again. Furthermore, when the head of the family was interned or deported his next of kin were often reduced to poverty.

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[1] For the debates leading up to Article 39, see *Final Record*, Vol. I, p. 119; Vol. II-A, pp. 656, 740 and 824-825; Vol. II-B, p. 407.

[2] See p. 4.

[3] See Norman Bentwich: *Alien Enemies in the United States*, Contemporary Review, 1943, p. 226.

The action taken by belligerent States in such cases varied very greatly. Some of them allowed enemy civilians who were in need to receive social welfare benefits on the same footing as their own nationals ; others paid them monthly allowances ; others again tried to give them work ; and sometimes their home country sent them funds through the good offices of the Protecting Power and the International Committee of the Red Cross.

But such measures were only palliatives, limited in scope. For while it seemed possible to consider giving civilian internees a monthly allowance to cover their most urgent needs—the solution for which provision had been made in the case of prisoners of war—the same course could not unfortunately be adopted in the case of those who were not interned, because of the wide variety of cases and the difficulty of deciding the amount of help necessary. Consequently thousands of people in nearly all the countries involved in the war found themselves in an extremely difficult financial position.

These facts led the International Committee of the Red Cross to draft the text of an Article which was approved by the various preliminary Conferences and adopted, with certain modifications, by the Diplomatic Conference.

Paragraph 1. — Right to work

The rule of treatment as nationals is applied here once again, but with two reservations : " subject to security considerations and to the provisions of Article 40 ".

The first reservation is liable to prejudice the position of protected persons most seriously ; it might even cause them to lose the whole benefit of the rule placing them on the same footing as nationals, if the control measures applied to them for security reasons were to deprive them of the freedom of action necessary for following a normal occupation. Paragraph 2 is intended to reduce this danger.

The second reservation refers to the right to compel protected persons to do work to the same extent as nationals of the country concerned are compelled (Article 40).

In most cases it will be possible for security measures to be sufficiently flexible not to hinder those concerned in looking for work. Enemy civilians will therefore find themselves, apart from exceptional cases, in the same position on the labour market as nationals. If in addition they had been granted gainful employment and if allowances had been made to them unconditionally by the Detaining Power as provided for in the Stockholm Draft, they would have enjoyed preferential treatment by comparison with nationals. The Diplomatic

Conference considered that such a privilege would be excessive and thought it advisable to keep to the rule of treatment as nationals[1].

Protected persons are therefore placed on a footing of equality with nationals of the country in all cases where they have lost their jobs. They also have an equal right to benefit by the country's social security system and to possible assistance by the State.

PARAGRAPH 2. — ALLOWANCES FROM THE COUNTRY OF RESIDENCE

Nevertheless the State of residence can always institute measures to place protected persons under supervision should it consider that the national interest so demands. Experience has shown that such measures sometimes restrict the freedom of action of those subjected to them and may even prevent them from earning their living. This is so, for example, when people are placed in assigned residence [2] or forbidden to work in certain areas or in certain industries. In such cases the foreigners concerned are forced to leave their work and may often fail to find new posts.

It is then that the duty of providing assistance falls on the country where the protected person is residing; the duty remains also if he can only find employment on conditions which are not " reasonable ". It is true that the wording used in this connection in the Convention may be interpreted in various ways, for what is meant by " reasonable conditions " ? Are they minimum conditions, which are left to the discretion of the administrative services concerned ? The text gives no guidance on this point.

It is to be hoped, however, that such cases, which should be exceptions to the general rule, would be judged fairly. The amount of the allowance should depend upon the needs of those concerned and their families and should be sufficient to maintain them in a good state of health. Moreover, a foreigner who is wronged may always appeal to the Protecting Power, whose specific role is to safeguard the interests of protected persons in all cases where the Convention leaves something to the discretion of the Parties to the conflict.

The persons concerned must at all events receive, as a minimum, allowances equal to the cost of interning them. Since the State considers them to be less dangerous than those interned, it cannot inflict

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 119; Vol. II-A, p. 740.

[2] In this case the Convention lays down (in Article 41, para. 2) that the Detaining Power is to be guided as closely as possible by the rules relating to the treatment of internees. See p. 257.

a less favourable treatment on them. It will be seen later that a protected person may under certain circumstances demand to be interned[1].

PARAGRAPH 3. — OTHER ALLOWANCES

The State of residence is bound to take the necessary measures to facilitate the transfer and payment of allowances.

Since direct financial transactions between enemy States are impossible, payment of funds sent from the protected person's country of origin must be made through a neutral agency. This will normally be the Protecting Power, as was the case during the last world war[2].

This paragraph, however, also mentions the relief societies referred to in Article 30, that is the International Committee of the Red Cross, the National Red Cross Society of the country of residence or any organization which comes to the assistance of protected persons. The Diplomatic Conference thus stressed that no one could be excluded when it was a matter of bringing practical assistance to protected persons and helping to improve their living conditions.

During the last world war the International Committee of the Red Cross tried to persuade the Parties to the conflict to adopt measures to assist families when the head of the family was interned as an enemy alien ; in certain cases the Committee was authorized to pay allowances to civilians who were not interned, although that role was as a rule reserved for the Protecting Powers[3].

The action of charitable societies may be on a considerable scale if one of the belligerents loses its international status. Since the Protecting Powers will then have no Power to represent, they will have to terminate their activities and the relief societies will alone retain their right to intervene in favour of protected persons. In such a case, the fact that relief societies are expressly mentioned will prevent a belligerent from basing a refusal of an offer of its services by one of them on Article 11, paragraph 3, on the grounds that the transfer and payment of funds goes beyond what may be considered humanitarian activities and that it therefore need not accept the offer. The payment of relief in kind is, of course, only one of the many forms of assistance to protected persons which the authorities of the country of residence are bound to facilitate under Article 30.

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[1] See Article 42, p. 257.

[2] Funds to a value of several hundred million Swiss francs were transferred through the good offices of the Protecting Powers to civilians held in enemy countries.

[3] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 637 and 639.

In conclusion, it should be noted that Article 98 contains a similar provision in favour of internees.

ARTICLE 40. — EMPLOYMENT

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers, in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

PARAGRAPH 1. — COMPULSORY WORK

This provision is of great importance in an age when belligerents have made a general practice of mobilizing civilian man-power with a view to ensuring that the national economy works properly in wartime.

Once again the criterion adopted is that of treatment as nationals, subject to certain detailed conditions set forth in the paragraphs which follow.

PARAGRAPH 2. — RESTRICTIONS

When protected persons are of enemy nationality they may only be compelled to work under certain conditions. These concern types of work, of which a restrictive definition is given : " work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations ".

These two restrictions are based on an idea expressed in several other Articles of the Geneva Conventions, namely that an enemy subject who has fallen into the hands of the Opposing Power must not

be forced to participate in warlike measures directed against his home country[1].

The meaning of the words " feeding, sheltering, clothing, transport and health " is clear, but what exactly is meant by the phrase " which is not directly related to the conduct of military operations " ? These words are based on a clause in the 1929 Prisoners of War Convention, but it is not easy to determine their precise significance : experience has shown that their interpretation is a matter of considerable difficulty, as in the modern conception of war most types of work may be regarded as contributing to the country's war effort. Nevertheless, despite the variety of possible cases and the consequent difficulty in laying down *a priori* a dividing line between activities which are directly related to the conduct of military operations and those which are not, the practical application of the clause is a question of common sense. Article 40 is very restrictive. Its purpose is to prevent enemy aliens from being employed for purposes which conflict with the interests of their home country and are incompatible with their conscience and patriotic sentiments.

By enumerating the only types of work which are permitted, the clause *a contrario* prohibits compulsory enlistment. That constitutes an advance on the Hague Regulations of 1907 (Article 23, para. 2) which prohibited steps to compel the nationals of the hostile party to take part in operations of war directed against their own country, but made no mention of their not being compelled to take part in work connected with the feeding and supplying of the armed forces.

These restrictions apply only to foreign aliens and not to protected persons as a whole. It is known that many States reserve the right to compel aliens residing in their territory who are not of enemy nationality to do military service. In the case of such persons the rule of treatment as nationals is still applicable.

Paragraph 3. — Working conditions

This paragraph once again asserts the principle of treatment as nationals. Cases in which that rule is applied are only given by way of example. Safeguards in regard to age, the physical capacity of workers, the employment of women, etc., may be added to the list.

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[1] See this *Convention*, Articles 51 (work done by civilians in occupied territory) and 95 (work done by civilian internees), and the *Third Convention*, Article 50 (work done by prisoners of war).

Cf. also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, pp. 31 and 254.

The obligation to give protected persons the benefit of the labour laws of the country concerned is, of course, applicable to all protected persons, whether they are of enemy nationality or not.

PARAGRAPH 4. — RIGHT OF COMPLAINT

Paragraph 4 draws attention to the fact that if one of the provisions laid down in the preceding paragraphs is infringed, protected persons are allowed to exercise their right of complaint in accordance with Article 30 of the Convention. As has been seen, that Article gives them the right to make application to the Protecting Powers, the International Committee of the Red Cross and the National Red Cross Society of the country where they are living, or to any other organization which is able to help them.

ARTICLE 41. — ASSIGNED RESIDENCE. INTERNMENT [1]

Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

The three Articles in this section which deal with internment specify the circumstances under which belligerents are entitled to resort to that measure and also give details of the procedure to be adopted, but do not lay down the conditions in which the internee is to live. This last point is the subject of Section IV of the Convention, the whole of which is devoted to the question of internees' treatment and, as will be seen, includes regulations just as detailed as those contained in the Third Geneva Convention in the case of prisoners of war.

These three Articles apply solely to protected persons as defined in Article 4 of the Convention. They do not therefore govern the rela-

[1] For the discussions leading up to this Article, see *Final Record*, Vol.I, p. 120 ; Vol. II-A, pp. 658, 756-757, 808-809 ; Vol. II-B, p. 411.

tions of citizens of a country with their own Government; such persons are not covered by the Convention[1], except for the provisions of Part II.

PARAGRAPH 1. — GENERAL PRINCIPLE

Earlier Articles referred to " measures of control " without giving any further details; the present text picks out two of them — assigned residence and internment—as being the most severe to which the detaining State may resort when other measures have proved inadequate.

The object of assigned residence is to move certain people from their domicile and force them to live, as long as the circumstances motivating such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised. In that respect it differs from " being placed under surveillance " which was the idea referred to in the International Committee's draft and is a form of supervision which allows the person concerned to remain in his usual place of residence.

Internment is also a form of assigned residence, since internees are detained in a place other than their normal place of residence. Internment is the more severe, however, as it generally implies an obligation to live in a camp with other internees.

It must not be forgotten, however, that the terms " assigned residence " and " internment " may be differently interpreted in the law of different countries. As a general rule, assigned residence is a less serious measure than internment.

The end of the paragraph lays down that belligerents cannot place protected persons in assigned residence or intern them except in accordance with the limits and conditions set by Articles 42 and 43, which set forth a number of safeguards in favour of protected persons.

Finally, it should be pointed out that the Diplomatic Conference discussed at great length whether the provision should be amended to state that any decision concerning assigned residence or internment " should be taken individually ". The proposal was rejected, on the ground that there might be situations—a threat of invasion for example—which would force a government to act without delay to prevent hostile acts, and to take measures against certain categories without always finding it possible to consider individual cases. The safeguards provided in Article 43 seem adequate to reduce the risk of arbitrary decisions[2].

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[1] See pp. 46 and 372.

[2] See *Final Record*, Vol. II-A, pp. 658 and 808-809; Vol. II-B, p. 411 and Vol. III, pp. 126-127.

PARAGRAPH 2. — STATUS OF PERSONS PLACED IN ASSIGNED RESIDENCE

Whereas internment forms the subject of carefully framed regulations, comprising over sixty Articles, there is nothing of the sort in the case of assigned residence. There might therefore be reason to fear that an unscrupulous government might prefer to resort to this measure in order to avoid the obligations imposed upon it by internment.

This paragraph is intended to dispel such fears[1], while at the same time taking into account the difference between an internment camp and assigned residence ; it merely requires the State of residence to continue to have regard for the welfare of persons placed in assigned residence, in particular in connection with accommodation, food, clothes, hygiene, medical care and financial resources.

ARTICLE 42. — GROUNDS FOR INTERNMENT OR ASSIGNED RESIDENCE. VOLUNTARY INTERNMENT

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

PARAGRAPH 1. — SCOPE

It has already been seen that internment and the placing of a person in assigned residence are the severest measures of control that a belligerent may apply to protected persons. Article 42, paragraph 1, stipulates that recourse may only be had to these two measures when the security of the State makes it absolutely necessary.

It did not seem possible to define the expression " security of the State " in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 126.

Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country ; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage; the provisions of Article 5 of the present Convention may also be applied in such cases.

On the other hand, the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living ; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security[1].

The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions ; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.

Paragraph 2. — Voluntary internment

After considering the case of compulsory internment in the interests of state security, the Convention deals with the case of voluntary internment in the interests of the protected persons themselves[2].

Voluntary internment is subject to three conditions : it must be requested by the protected person concerned, his request must be made through the representatives of the Protecting Powers and it must be warranted by the situation of the applicant.

The above three conditions must all be fulfilled in each case. The first two safeguard both the protected person and the authorities of

[1] The fact that a man is of military age should not necessarily be considered as justifying the application of these measures, unless there is a danger of him being able to join the enemy armed forces.

[2] During the Second World War the International Committee of the Red Cross concerned itself on several occasions with the position of foreigners residing on enemy territory who, being without any means of subsistence, begged to be interned in order to be relieved of their more urgent material cares.

the country where he is living. Intervention by representatives of the Protecting Power will stamp as authentic requests for internment presented through diplomatic channels ; it will prevent requests for internment being made lightly and ensure that internment is not ordered on the false pretext that it was asked by those concerned.

With regard to the third condition, the circumstances of the different cases will vary very widely and it will be for the responsible authorities to judge whether they justify internment. As has been seen the persons concerned will in most cases be those who cannot earn their living. There is also the possibility, however, of cases where a person's security may be threatened by hostile actions committed by the general public. In such cases too internment cannot, of course, be arranged unless the person concerned asks officially to be interned.

When a request to be interned meets the above conditions, the authorities of the State of residence are obliged to give it favourable consideration. The protected persons have then an absolute right to be interned. On the other hand the State is free to decide the action it will take on a request for internment which is not submitted through the Protecting Power or which is not justified by the circumstances of the person concerned.

Persons who are interned voluntarily will as a rule receive the same treatment as that laid down in Part III, Section IV of the Convention. In view of the essentially different character of the two forms of internment, however, it is reasonable to assume that belligerents will as far as possible give persons interned at their own request more favourable conditions than those who have been interned by force.

In conclusion, this provision applies to any protected persons who are in the territory of a Party to the conflict, whether they have been subject to security measures or not. In this respect, the clause differs from the second paragraph of Article 39, which also lays an obligation on the Government of the country of residence to help, but only to help, protected persons who are subjected to measures of control which make it impossible for them to earn their living.

ARTICLE 43. — PROCEDURE

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall

periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence ; the decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

PARAGRAPH 1. — RIGHT OF APPEAL

Article 43 supplements Articles 41 and 42 ; it lays down a procedure which is designed to ensure that Parties to the conflict which resort to measures of internment or assigned residence do not go beyond the limits permitted under those two Articles.

1. *First sentence — Method*

The safeguard provided here is an *a posteriori* arrangement. It has been seen that the Convention leaves a great deal to the discretion of the State of residence in the matter of the original internment or placing in assigned residence. On the other hand decisions to take such measures may be reconsidered after a very short time.

The system adopted is modelled on the provision in Article 35, paragraph 2, concerning the question of permission to leave the country. The State may act either through the courts or through administrative channels. The existence of these alternatives provides sufficient flexibility to take into account the usage in different States. The Article lays down that where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.

Decisions to intern people or place them in assigned residence are not reconsidered automatically, but only at the request of the person concerned. Once an application has been put forward, the court or administrative board must examine it at the earliest possible moment.

The essential point is that protected persons should be absolutely free to make their appeals and that the authorities should examine them with absolute objectivity and impartiality. They must never forget

that the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State. An appeal court or board which decided that a decision to place persons in internment or assigned residence was inspired by other considerations than those of security would be bound to cancel them.

In view of the similarity between the problems considered in this Article (internment and assigned residence) and in Article 35, paragraph 2 (applications to leave), it will be possible to refer them to a single court or administrative board.

2. *Second sentence. — Periodical reconsideration*

The second sentence contains an additional safeguard for the persons who are interned or placed in assigned residence when their appeals have been rejected. The court or administrative board mentioned in the preceding sentence must reconsider their cases periodically, and at least twice a year, with a view to favourably amending the initial decision if circumstances permit.

Unlike the procedure for the initial appeal, which only takes place at the request of the person concerned, these periodical reconsiderations will be automatic once a protected person has made his first application to the responsible authority[1].

The object of the provision is clear. If a case is examined periodically and at least twice a year, the responsible authorities will be bound to take into account the progress of events—which is often rapid—and changes as a result of which it may be found that the continuing internment or assigned residence of the person concerned are no longer justified.

The procedure provided for in the Convention is a minimum. It will be an advantage, therefore, if States Party to the Convention afford better safeguards (examination of cases at more frequent intervals, or the setting up of a higher appeal court). The main point is that no protected person should be kept in assigned residence or in an internment camp for a longer time than the security of the Detaining State demands. This point is also emphasized in Article 132 which should be compared with the present provision ; that Article lays down the rule that " each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist ".

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 826.

PARAGRAPH 2. — INTERVENTION BY THE PROTECTING POWER

This provision lays down an important rule [1]—namely that the Detaining Power is obliged to give the Protecting Power, as rapidly as possible, the names of protected persons who are interned, placed in assigned residence or released. The Detaining Power is under the same obligation in respect of the decisions made by the courts or administrative boards concerning appeals.

The home authorities will thus, through the good offices of the Protecting Power, be able to form an exact picture of the position of the majority of their nationals who have remained in the territory of the adverse Party and will be able to inform their families. These measures provide an effective safeguard against arbitrary action on the part of the Detaining Power.

Unlike Article 35, paragraph 3, which only requires notification to be made on request, this provision lays down that names and decisions must be communicated without any request being made.

The obligation to notify such cases is, however, subject to an important reservation, which makes allowance for the position of certain people who might wish their identity and address to remain unknown to the authorities of their country ; protected persons may therefore object to information being communicated to the Protecting Power when they consider that such a communication might entail dangerous consequences for themselves or their families [2].

ARTICLE 44. — REFUGEES [3]

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure *of an enemy State, refugees who do not, in fact, enjoy the protection of any government.*

1. *General*

Among the enemy aliens in the territory of a Party to a conflict there may be one category whose position warrants special considera-

[1] See also Article 35, p. 233.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 577, and Article 35, p. 238.

[3] For the discussions leading up to the Article, see *Final Record*, Vol. II-A, pp. 660, 758, 809, 826 ; Vol. II-B, pp. 411-413 ; Vol. III, p. 128.

tion—namely refugees who have been forced by events or by persecution to leave their native land and seek asylum in another country.

When the country in which they have taken refuge is involved in a war with their country of origin, they become enemy aliens, since they are citizens of an enemy Power. Their position, however, is a special one, for they are expatriates who have no longer any connection with their State of origin and do not enjoy the assistance of a Protecting Power. On the other hand, they have not established any permanent connection with the country which has granted them asylum. Consequently they do not enjoy the protection of any government.

During the Second World War the number of refugees living in the territory of the belligerents was greater than ever before. Various belligerent countries made allowances for this state of affairs by introducing laws exempting such persons from measures taken against enemy aliens.

This course was, for example, adopted in certain English-speaking countries where the number of refugees was particularly high. The countries in question entrusted the consideration of individual cases to special tribunals set up in different parts of the country ; their task was to establish a clear distinction between enemy aliens (" real enemies ") and refugees who originally came from an enemy country ("friendly enemies"). The latter enjoyed a status which was appreciably more favourable than that possessed by the former. The right to appeal to advisory committees composed of independent persons of some standing was an added safeguard for those who wished to claim refugee status[1].

Article 44, which deals exclusively with refugees, was adopted by the Diplomatic Conference in order to take account of this situation and of certain observations made by the International Refugee Organization and the Israel Delegation.

2. *Definition. Treatment*

Several instruments of international law—the Constitution of the International Refugee Organization, the Statutes of the Office of the High Commissioner for Refugees and the Convention on the Status of Refugees of July 28, 1951[2]—have defined the term refugee. The

[1] For further details, see R. M. W. KEMPNER : *The Enemy Alien Problem in the Present War*, American Journal of International Law, 1940, pp. 443 et seq. ; R. A. WILSON : *Treatment of Civilian Alien Enemies*, loc. cit., 1943, pp. 30 et seq. ; and G. LEIBHOLZ : *Die volkerrechtliche Stellung der " Refugees " im Krieg*, Archiv für Volkerrecht, 1949, pp. 146-147.

[2] Article 8 of that Convention embodies a provision similar to this one.

definitions in question are valid for the particular purposes of law for which they were formulated, but are too technical and too limited in scope to meet the requirements of the Geneva Convention.

The Convention does not define the term refugee. It merely notes the fact that certain persons do not " enjoy the protection of any government " : if a protected person who is in law a national of an enemy State is in actual fact without any diplomatic protection (whether because he has broken with his country's government or because he does not wish to claim its protection), this provision applies to that person. The clause should be interpreted in this broad sense, in accordance with the spirit of the Convention.

People who are in fact the first victims of the Power at war with their country of asylum and who are in certain cases in favour of the latter's cause, obviously cannot be treated as enemies. The purely formal criterion of nationality must therefore be adjusted, for it rests on an essentially legal and technical conception, and the strict application of such a criterion would be in contradiction to human reality and contrary to justice and morality.

When the Convention stipulates that the position of an enemy alien must not be considered solely in the light of his legal nationality, it in fact invites belligerents to take into consideration a whole set of circumstances which may reveal what might be called the " spiritual affinity " or " ideoloigcal allegiance " of a protected person. A State must decide whether the application of security measures is justified or not on the basis of these data and not by applying the superficial criterion of nationality. As has been very rightly stressed[1], there is justification for the assumption that nationals who enjoy the protection of their government and of its agent, the Protecting Power, sympathise with the cause of their country and may represent a danger to the safety of the country where they are living. In the case of refugees, on the other hand, the contrary is to be presumed ; the term refugee tends to imply that the persons concerned are opposed to the political system in force in their home country and have no reason to promote its success in any manner whatsoever.

The Article does not give refugees an absolute right to exemption from security measures. It is only an urgent recommendation to belligerents. The status of refugees does not of itself give anyone a right to immunity. It does not prevent the adoption of security measures, internment for example. There may conceivably be among the refugees people whose political convictions or activities represent

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, pp. 122-123.

a danger to the security of the State, which would then be entitled to resort to the necessary control measures to the same extent and subject to the same conditions as for any person protected under the Convention[1].

In view of the complexity of the problem and the variety of cases which may occur in practice, the Conference had to confine itself to laying down general rules of a sufficiently flexible character, leaving a great deal to the discretion of governments. In the absence of more detailed rules, which it did not appear either possible or advisable to lay down, it is to be hoped that belligerents will apply this Article in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees.

ARTICLE 45. — TRANSFER TO ANOTHER POWER[2]

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the

[1] See *Final Record*, Vol. II-B, pp. 411-413 and Vol. III, pp. 122-123.

[2] For the discussions leading up to this Article, see *Final Record*, Vol. I, p. 120; Vol. II-A, pp. 660-662, 764-765, 809, 826-827, 854-855; Vol. II-B, pp. 413-414; Vol. III, pp. 128-129.

outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

General

Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis, is considered as a transfer for the purposes of Article 45. The term " transfer ", for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities. On the other hand there is no provision concerning deportation (in French *expulsion*), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action. However, practice and theory both make this right a limited one : the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted.

Moreover, expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality. Persons threatened with deportation must be able to present their defence without any difficulty being placed in their way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed ; in such cases the Protecting Power must be notified.

Paragraph 1. — Prohibited forms of transfer

The meaning of this paragraph is clear : its object is to prevent a Party to the conflict from evading his obligations by transferring protected persons to a State which is not bound by the Convention. The words " Power which is not a Party to the conflict " mean any Power which has not ratified or acceded to the Convention or, as stated in Article 2, paragraph 3, any Power which refuses to apply its provisions.

The prohibition is general in character. It applies to all protected persons in the hands of a belligerent, whatever their status may be (protected persons who are not subject to restrictions on their liberty, internees or refugees) ; it cannot be lifted, even with the consent of

the persons concerned[1]. This is, in fact, a case in which Article 8, relating to the non-renunciation of rights, applies.

PARAGRAPH 2. — RESERVATIONS

Since Article 45 uses the word " transfer " in a very broad sense, provision is made for exceptions in order to allow for special cases.

Repatriation or transfer to a Power which is the country of origin of the people who are transferred has the effect of placing the transferees in the position of nationals. They thus lose their status as protected persons and cease to be protected under the Convention. The prohibition in the first paragraph therefore loses its *raison d'être* so far as they are concerned.

In the case of persons being returned to the country of residence, the rule laid down in paragraph 1 remains valid, as their return does not necessarily imply the loss of their status as protected persons. Nevertheless the position will be different when their transfer takes place in a period following the end of hostilities ; for, as is known, Article 6, paragraph 2, lays down that the application of the present Convention shall cease on the general close of military operations[2].

In any case it should be noted that none of the clauses in this Article can be placed in the way of the rights of protected persons, under Articles 35 to 37, to leave the territory at the outbreak of or during a conflict. Whatever the country to which they are proceeding, and even if it is not party to the Convention, the right to leave accorded by these Articles cannot be interfered with.

PARAGRAPH 3. — CONDITIONS FOR TRANSFER

The Power to which the protected persons are transferred, being a party to the Convention, is bound to respect and ensure respect for its provisions in all circumstances (Article 1). The paragraph under discussion nevertheless contains a number of additional safeguards.

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[1] See *Final Record*, Vol. I, p. 120; Vol. II-A, pp. 660-662, 764-765, 826-827; and *XVIIth International Red Cross Conference*, Stockholm, August, 1948, *Draft revised or new Conventions for the Protection of War Victims*, Art. 41, p. 172. The same absolute principle is embodied also in Article 12, para. 2, of the Convention relative to prisoners of war, where it was inserted by the Diplomatic Conference of 1949.

[2] Reference may be made in this connection to the last paragraph of Article 6, according to which " protected persons whose release, repatriation or re-establishment " takes place after the general close of military operations, shall " meanwhile continue to benefit by the present Convention ".

A. *Preliminary safeguard*

Before arranging to transfer protected persons the Detaining Power is bound to make sure that the Power which has agreed to receive them is both willing and able to apply the Convention. These two conditions, one based on subjective and the other on objective considerations, must both be satisfied. Protected persons cannot, for instance, be transferred if the Detaining Power has serious reason to believe that economic difficulties will prevent the receiving Power from providing for their maintenance, as required by the Convention, or if, again, the Detaining Power has reason to fear that certain categories among the persons transferred may be subjected to discriminatory treatment by the authorities of the country receiving them.

B. *Responsibilities* [1]

1. *Responsibility of the receiving Power*

The Article first lays down that responsibility rests with the Power which has agreed to receive the protected persons. That is the inevitable consequence of the transfer, and would apply even in the absence of an express mention, since Article 4 of the Convention lays down that any person who finds himself in the territory of a Party to the conflict of which he is not a national is a " protected person " ; and Article 29 lays down that " the Party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them by its agents ".

2. *Responsibility of the transferring Power*

The Power which has transferred the protected persons must not, however, cease to take an interest in their fate. Although they are no longer " in its hands ", it remains responsible for them in so far as the receiving Power fails to fulfil its obligations under the Convention " in any important respect ", provided that it is notified of such failure by the Protecting Power.

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[1] The question of division of responsibility between States taking part in a transfer of protected persons may be considered from various points of view : the responsibility of the transferring Power, the responsibility of the receiving Power and lastly, the joint responsibility of the two Powers concerned.

This last approach, which safeguards the legitimate interests of the protected persons the most fully, was that proposed in the Stockholm Draft ; a great many Delegations in the Diplomatic Conference would have liked to see it adopted ; in particular the United States Delegation pointed out that the principle involved was not new in international law, but corresponded to a practice which had been widespread during earlier conflicts, in regard to the treatment of both civilians and prisoners of war.

It would be pointless to try to make a list here of all the serious failures to fulfil obligations which might bring this clause into operation. As examples Articles 27, 28 and 30 to 34 may be quoted ; if the persons transferred are interned, which will most often be the case, a great many of the provisions in the chapter on internment will also have to be borne in mind, in particular those dealing with civil capacity, maintenance, food, clothing hygiene and medical attention, religious and intellectual activities, correspondence and relief. In the treatment accorded to protected persons, the application of all these provisions is essential.

In practice, intervention by the transferring Power will first take the form of verbal representations, reminding the Power to whom they are addressed of the obligations it has assumed by taking charge of protected persons. These representations may be accompanied by an offer to send food, clothing or medical or pharmaceutical supplies, when the failure to apply the Convention is caused by an absence of resources. Should its efforts remain in vain, the transferring Power may request the return of the protected persons in order to resume directly its obligations under the Convention. A State which received such a request would be obliged to comply with it.

PARAGRAPH 4. — PERSECUTION

The prohibition in this paragraph is absolute, covering all cases of transfer, whatever the country of destination may be and whatever the date. It is already implicit in the previous paragraphs which only permit transfers if the receiving State is a Party to the Convention and willing and able to apply it in practice. Since one of the fundamental principles proclaimed by the Convention is the prohibition of discrimination (Article 27, para. 3), it follows that the Detaining Power cannot transfer protected persons unless it is absolutely certain that they will not be subject to discriminatory treatment or, worse still, persecution. This clause, which was inserted in the Convention by the XVIIth International Red Cross Conference, should be compared with the preceding Article on refugees.

PARAGRAPH 5. — EXTRADITION

The meaning of this reservation is quite clear : it is intended to ensure that the system of extradition functions normally. The Convention was not the place to settle in detail the conditions on which extradition was to take place or the method of carrying it out ; such

cases must be decided in accordance with the laws and treaties in force.

It was nevertheless important to preserve the existing character of extradition as an act of penal procedure and to prevent it serving as a pretext for persecution. The Diplomatic Conference wished to exclude any extradition treaty concluded, for instance, under pressure from a victorious Power. It therefore stipulated expressly that the treaties referred to were those " concluded before the outbreak of hostilities "[1].

ARTICLE 46. — CANCELLATION OF RESTRICTIVE MEASURES

In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

PARAGRAPH 1. — MEASURES RELATING TO PERSONS

The words " close of hostilities " express a notion which has already been met with several times in the Convention : they mean the actual end of the fighting and not the official termination of a state of belligerency. The duration of restrictive measures does not therefore depend in any way on the date of conclusion of a peace treaty. This rule, which is in accordance with the usual practice among States, is justified by the fact that a fairly long time may elapse between the close of hostilities and the conclusion of a peace treaty ; during that time the continuation of security and control measures would no longer be warranted.

There are many restrictive measures—in particular those of a less severe character than internment or assigned residence—which cannot always, for one reason or another, be cancelled immediately hostilities end ; they are removed by stages as the law of the country is gradually adjusted to peacetime conditions. The Convention takes this fact into account when it lays down that States are to cancel restrictive measures " as soon as possible ". The clause must be

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 764-765 and 809.

regarded as an urgent recommendation to the Parties to the conflict to hasten the cancellation of restrictive measures and to allow protected persons to return to their normal way of life.

It should be noted, with special reference to internment, that a protected person who, as a result of circumstances, must continue to be interned as an exceptional measure after hostilities have ended is entitled to the benefits of the Convention up to the moment of his release[1].

This paragraph makes it quite clear that the close of hostilities is to be regarded as the ultimate reason and general signal for the withdrawal of restrictive measures, but that they must be withdrawn before then if the reasons for imposing them no longer exist. As has been seen the procedure for reviewing decisions, instituted by Article 43, provides that internment and assigned residence are to cease as soon as the reasons for adopting such measures no longer exist.[2].

PARAGRAPH 2. — MEASURES RELATING TO PROPERTY

The absolute rule laid down in regard to persons in paragraph 1 is extended to property by paragraph 2 (subject to the application of the laws of the Detaining Power).

This provision, which is to be compared with those prohibiting pillage and reprisals, is nevertheless somewhat foreign to the real purpose of the Convention. The Diplomatic Conference emphasized on various occasions that its object was to protect people and not property. Consequently the question of the treatment of enemy private property in the territory of a belligerent is still, in general, governed by usage and by the Hague Regulations of 1907, especially Article 23 *(g)* and *(h)*.

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[1] See Article 6, para. 4, on p. 64.

[2] See, in this connection, Article 133, para. 1, which lays down, in the same way, that " internment shall cease as soon as possible after the close of hostilities ".

SECTION III

OCCUPIED TERRITORIES

Section III (Occupied Territories) comprises Articles 47 to 78 of the Convention and deals with a very important subject—the treatment which the inhabitants of occupied territory must receive from the Occupying Power. It must be remembered, moreover, that Articles 27 to 34 on which comment has already been made apply equally to this Section and to the Section dealing with aliens in the territory of a belligerent.

With that addition Section III of the Convention represents the first attempt to codify the rules of international law dealing with occupation since the conclusion of the Hague Conventions of 1899 and 1907 concerning the laws and customs of war on land. The rules set forth in Section III will supplement Sections II and III of the Regulations annexed to those Conventions, by making numerous points clearer.

ARTICLE 47. — INVIOLABILITY OF RIGHTS [1]

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

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[1] For the discussions leading up to Article 47, see *Final Record*, Vol. I, p. 120; Vol. II-A, pp. 673, 773; Vol. II-B, p. 415.

1. *General*

The position of Article 47 at the beginning of the Section dealing with occupied territories underlines the cardinal importance of the safeguards it proclaims. During the Second World War whole populations were excluded from the application of the laws governing occupation and were thus denied the safeguards provided by those laws and left at the mercy of the Occupying Power. In order to avoid a repetition of this state of affairs, the authors of the Convention made a point of giving these rules an absolute character. They will be considered in the following pages in the order in which they occur in the Convention.

2. *Changes in the institutions or the government of the occupied territory*

During the Second World War Occupying Powers intervened in the occupied countries on numerous occasions and in a great variety of ways, depending on the political aim pursued; examples are changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities.

International law prohibits such actions, which are based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State. Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power. Such practices were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a *de facto* administrator[1].

This provision of the Hague Regulations is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the State, its institutions and its laws. This provision does not become in any way less valid because of the exist-

[1] The provision in question reads as follows: " The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ence of the new Convention, which merely amplifies it so far as the question of the protection of civilians is concerned.

Interference by the Protecting Power with the institutions or government of an occupied country has the effect of transforming the country's structure and organizations more or less radically. Such a transformation may make the position of the inhabitants worse, and the present Article is intended to prevent from harming protected persons measures taken by the Occupying Power with a view to restoring and maintaining law and order. It does not expressly prohibit the Occupying Power from modifying the institutions or government of the occupied territory[1]. Certain changes might conceivably be necessary and even an improvement ; besides, the text in question is of an essentially humanitarian character ; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such. The main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them. Consequently it must be possible for the Convention to be applied to them in its entirety, even if the Occupying Power has introduced changes in the institutions or government of the occupied territory.

3. *Agreement concluded between the authorities of the occupied territory and the Occupying Power*

Agreements concluded with the authorities of the occupied territory represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law ; the possibility of concluding such agreements is therefore strictly limited by Article 7, paragraph 1, and the general rule expressed there is reaffirmed by the present provision. It may thus be regarded as a provision applying the safeguards embodied in Article 7, which are valid for the whole Convention ; reference should therefore be made to the comments on that Article.

It should be noted, however, that the Diplomatic Conference wished to reaffirm that general rule by re-stating it at the beginning of the chapter dealing with occupied territory for a particular reason ; because there is in this case a particularly great danger of the Occupying Power forcing the Power whose territory is occupied to con-

[1] Article 43 of the Hague Regulations only contains a qualified prohibition stipulating as it does that the occupant is to respect, " unless absolutely prevented ", the laws in force in the country.

clude agreements prejudicial to protected persons. Cases have in fact occurred where the authorities of an occupied territory have, under pressure from the Occupying Power, refused to accept supervision by a Protecting Power, banned the activities of humanitarian organizations and tolerated the forcible enlistment or deportation of protected persons by the occupying authorities. Such stipulations are in flagrant contradiction with Articles 9, 39 and 51 of the Convention and are consequently strictly forbidden.

Lastly it will be noted that the same clause applies both to cases where the lawful authorities in the occupied territory have concluded a derogatory agreement with the Occupying Power and to cases where that Power has installed and maintained a government in power.

4. *Annexation*

As was emphasized in the commentary on Article 4, the occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty ; it merely interferes with its power to exercise its rights. That is what distinguishes occupation from annexation, whereby the Occupying Power acquires all or part of the occupied territory and incorporates it in its own territory[1].

Consequently occupation as a result of war, while representing actual possession to all appearances, cannot imply any right whatsoever to dispose of territory. As long as hostilities continue the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts.

And yet the Second World War provides us with several examples of " anticipated annexation ", as a result of unilateral action on the part of the victor to dispose of territory he had occupied. The population of such territories, which often covered a wide area, did not enjoy the benefit of the rules governing occupation, were without the rights and safeguards to which they were legitimately entitled, and were thus subjected to whatever laws or regulations the annexing State wished to promulgate.

Aware of the extremely dangerous nature of such proceedings, which leave the way open to arbitrary actions and decisions, the Diplomatic Conference felt it necessary to stipulate that actions of this

[1] The annexing State " succeeds " to all the sovereign rights of the dismembered State in the territory annexed.

nature would have no effect on the rights of protected persons, who would, in spite of them, continue to be entitled to the benefits conferred by the Convention.

It will be well to note that the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty. The preliminary work on the subject confirms this. In order to bring out more clearly the unlawful character of annexation in wartime, the government experts of 1947 proposed adding the adjective " alleged " before the word " annexation "[1]. Several delegates at the Diplomatic Conference, concerned about the same point, went as far as to propose cutting out the reference to a hypothetical annexation in this Article. The Conference eventually decided to keep it because they considered that these fears were unfounded and also felt that it was wiser to mention such a situation in the text of the Article, in order to be better armed to meet it[2].

A fundamental principle emerges from the foregoing considerations; an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory.

ARTICLE 48. — SPECIAL CASES OF REPATRIATION[3]

Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken in accordance with the procedure which the Occupying Power shall establish in accordance with said Article.

Under the terms of this Article and according to the general definition of protected persons in Article 4 those to whom this provision applies are aliens in occupied territory, that is nationals of belligerent and neutral countries, but not the nationals of the occupied country or of the Occupying Power and its allies. Persons of doubtful nationality and stateless persons are also covered by its provisions[4].

[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), p. 274.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 663 and 773-774.

[3] For the discussions leading up to this Article, see *Final Record*, Vol. II-A, pp. 663, 759; Vol. II-B, p. 193.

[4] See the commentary on Article 4.

For the procedure to be followed, Article 48 refers expressly to Article 35. Persons who wish to leave the occupied territory therefore enjoy the same safeguards as protected persons living in the territory of a party to the conflict, i.e. they will have the right to appeal to a court or administrative board and to ask for a Protecting Power to intervene. On the other hand, under paragraph 1 of Article 35, the Occupying Power is entitled to object to the departure of a protected person when its national interests make this absolutely necessary.

For further details reference may be made to the commentary on Article 35, since the procedure instituted by that Article is similar in every respect to the procedure stipulated in Article 48.

The text adopted differs from the draft submitted by the International Committee of the Red Cross [1] in that the courts appointed to consider applications to leave are not those already existing in the occupied territory but new ones set up by the Occupying Power. The Diplomatic Conference considered that the procedure instituted by the Power whose territory is occupied would have ceased to function once the occupation had begun and that the Occupying Power should be made responsible for making the necessary arrangements [2]. Since their deportation from the occupied territory is prohibited [3], the Occupying Power cannot simply make protected persons subject to courts it has itself established in its own territory under Article 35 ; it is bound on the contrary to institute a new procedure, independent of the first, to deal exclusively with applications to leave made by protected persons in the occupied territory.

ARTICLE 49. — DEPORTATIONS, TRANSFERS, EVACUATIONS [4]

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 120.

[2] *Ibid.* Vol. II-A, p. 759.

[3] See commentary on Article 49.

[4] For the discussions concerning this Article, see *Final Record*, Vol. II-A, pp. 664, 759, 809 ; Vol. II-B, p. 415.

military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Article 49 is derived from the Tokyo Draft which prohibited the deportation of the inhabitants of an occupied country [1]. As a result of the experience of the Second World War, the International Committee of the Red Cross submitted this important question to the government experts who met in 1947. On the basis of the text prepared by the experts the Committee drafted detailed provisions which were adopted in all their essentials by the Diplomatic Conference of 1949.

PARAGRAPH 1. — FORCIBLE TRANSFERS AND DEPORTATIONS

The first of the six paragraphs in Article 49 is by far the most important, in that it prohibits the forcible transfer or deportation from occupied territory of protected persons.

There is doubtless no need to give an account here of the painful recollections called forth by the " deportations " of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these " displaced

[1] See p. 4 above.

persons ", among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.

The authors of the Convention voted unanimously in favour of this prohibition, but there was some discussion on the wording. The draft submitted by the International Committee of the Red Cross reads: " Deportations or transfers of protected persons out of occupied territory are prohibited . . . " [1]; the Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorize voluntary transfers by implication, and only to prohibit " forcible " transfers [2].

The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2. It is, moreover, strengthened by other Articles in the cases in which its observance appeared to be least certain : in this connection mention may be made of Article 51, paragraph 2, dealing with compulsory labour, Article 76, paragraph 1, concerning the treatment of protected persons accused of offences or serving sentences and also under certain circumstances Article 70, paragraph 2, which deals with refugees.

The Hague Regulations do not refer to the question of deportation ; this was probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance. The events of the last few years have, however, made it necessary to make more detailed provisions on this point which may be regarded to-day as having been embodied in international law [3]. Consequently,

[1] See *XVIIth International Red Cross Conference, Draft Revised or New Conventions for the protection of War Victims*, Document 4a, p. 173.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 759-760.

[3] This view is not expressed in the Convention alone. The Charter of the Nuremberg International Military Tribunal laid down in its Article 6 *(b)* that " deportation to slave-labour or for any other purpose " was a " war crime " ; sub-paragraph *(c)* of the same Article includes " deportations and other inhuman acts done against any civilian population " among " the crimes against humanity ". In its judgment delivered on September 30, 1946, the Tribunal agreed that deportation was illegal. A great many other decisions by other courts which have had to deal with this question have also stated that the deportation of inhabitants of occupied territory is contrary to the laws and customs of war.

" unlawful deportation or transfer " was introduced among the grave breaches, defined in Article 147 of the Convention as calling for the most severe penal sanctions.

PARAGRAPH 2. — EVACUATION

As an exception to the rule contained in paragraph 1, paragraph 2 authorizes the Occupying Power to evacuate an occupied territory wholly or partly.

Unlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character, and is, moreover, often taken in the interests of the protected persons themselves. The clause may be compared with other provisions already commented upon, where the aim in view is similar, such as Articles 14, 15 and 17, which deal with hospital and safety zones, neutralized zones, and the evacuation of besieged or encircled areas. These provisions which apply to the whole population of countries engaged in a conflict are, of course, fully valid in occupied territory.

In order to protect the interests of the populations concerned, a number of safeguards are laid down with regard to evacuation, some of them in this paragraph and some in the next.

The first stipulation is that evacuation may only be ordered in two cases which are defined in great detail, namely when the safety of the population or imperative military reasons so demand. If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative ; if it is not imperative, evacuation ceases to be legitimate.

It is stipulated that evacuation must not involve the movement of protected persons to places outside the occupied territory, unless it is physically impossible to do otherwise [1]. Thus, as a rule evacuation must be to reception centres inside the territory.

The last sentence of the paragraph was added by the Diplomatic Conference [2] ; it stipulates that protected persons who have been evacuated are to be brought back to their homes as soon as the

[1] See in this connection *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 664, 759-760.

[2] See *ibid.*, Vol. II-A, pp. 759-760.

hostilities in the area have ended. This clause naturally applies both to evacuation inside the territory and to cases where circumstances have made it necessary to evacuate the protected persons to a place outside the occupied territory.

PARAGRAPH 3. — PRACTICAL ARRANGEMENTS

Evacuation with all it implies—leaving home, moving into an unknown environment, etc.—represents a radical change in the position of those concerned. The unfortunate consequences of evacuation should therefore be mitigated as far as possible by adding to the measure a minimum of humanitarian safeguards.

That is what this paragraph is intended to do. It represents a very strong recommendation to the Occupying Power. In the corresponding provision of the draft text put forward by the International Committee of the Red Cross the safeguards were expressed in the form of an absolute obligation[1]; but the Diplomatic Conference made the clause rather less rigid by inserting the words " to the greatest practicable extent "[2].

It must not be forgotten, however, that this wording is intended to cover the contingency of an improvised evacuation of a temporary character when urgent action is absolutely necessary in order to protect the population effectively against an imminent and unforeseen danger. If the evacuation has to be prolonged as a result of military operations and it is not possible to return the evacuated persons to their homes within a comparatively short period, it will be the duty of the Occupying Power to provide them with suitable accommodation and make proper feeding and sanitary arrangements.

Attention should finally be drawn to the last clause in the paragraph which stipulates that members of the same family are not to be separated from one another. This provision represents a very appropriate addition to those of Article 27 under which the Parties to the conflict are in general obliged to respect family rights. Like Articles 25, 26 and 82 it is essentially intended to keep the family united or to re-unite it if it becomes separated.

PARAGRAPH 4. — NOTIFICATION OF THE PROTECTING POWER

The importance attached in the Convention to evacuation taking place under the conditions defined above is underlined by the fact

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, pp. 120-121.

[2] See *ibid.*, Vol. II-A, pp. 759-760; Vol. II-B, p. 415.

that the Protecting Power is given the right to be informed of them.

The text proposed by the International Committee of the Red Cross read : " The Protecting Power shall be informed of any proposed transfers and evacuations. It may supervise the preparations and the conditions in which such operations are carried out."[1]

The Diplomatic Conference did not wish to make the prior notification of evacuation compulsory, as that would have made it more difficult to keep military operations secret. It therefore confined itself to providing that the information was to be given *a posteriori*[2].

The Protecting Power cannot therefore exercise its right of supervision during the preparations or when the moves themselves are taking place; it can, however, verify whether the Occupying Power fulfils the conditions which the Convention lays down with regard to the accommodation and other arrangements for the evacuees. The Protecting Power will take action to ensure that they are treated as humanely as possible and will help to improve their lot by co-operating with the competent authorities. The rights of supervision and check of the Protecting Power in regard to evacuation will, of course, apply not only inside the occupied territory but also outside it, in particular if the transfer is to a place within the territory of the Occupying Power.

PARAGRAPH 5. — RIGHT OF PROTECTED PERSONS TO MOVE FROM PLACE TO PLACE

This paragraph is based on a clause proposed by the International Committee of the Red Cross. The Conference decided to include it in each of the first 4 sections of Part III (Articles 28, 38 (4), 49, paragraph 5, and 83, paragraph 1).

It was pointed out in the commentary on Article 27 that the rule whereby individuals are free to move from place to place is subject to certain restrictions in wartime. Two such restrictions are mentioned here : the Occupying Power is entitled to prevent protected persons from moving, even if they are in an area particularly exposed to the dangers of war, if the security of the population or imperative military reasons so demand.

This clause is the result of the lessons drawn from the Second World War.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 120.

[2] See *ibid.*, Vol. II-A, pp. 759-760.

It will be enough to remember the disastrous consequences of the exodus of the civilian population during the invasion of Belgium and Northern France. Thousands of people died a ghastly death on the roads and these mass flights seriously impeded military operations by blocking lines of communication and disorganizing transport[1]. Thus, two considerations—the security of the population and " imperative military reasons "—may, according to the circumstances, justify either the evacuation of protected persons (paragraph 2) or their retention (paragraph 5). In each case real necessity must exist ; the measures taken must not be merely an arbitrary infliction or intended simply to serve in some way the interests of the Occupying Power.

PARAGRAPH 6. — DEPORTATION AND TRANSFER OF PERSONS INTO OCCUPIED TERRITORY

This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference[2]. It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words " transfer " and " deport " is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.

It would therefore appear to have been more logical—and this was pointed out at the Diplomatic Conference[3]—to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of " deportations " and " transfers " in that Article could have kept throughout the meaning given them in paragraph 1, i.e. the compulsory movement of protected persons from occupied territory.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 759-760.

[2] See *XVIIth International Red Cross Conference, Legal Commission, Summary of the Debates of the Sub-Commissions*, pp. 61-62 and 77-78.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 664.

ARTICLE 50. — CHILDREN

The Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

General

The indescribable tragedy which the Second World War brought into the lives of millions of children forms one of the most distressing chapters in the history of the conflict and one which arouses the greatest pity.

Children were the innocent victims of events which afflicted them all the more cruelly because they were young and weak ; they suffered hardships in violation of one of the most sacred of human laws—the law that children must be protected, since they represent humanity's future. Mankind will long bear the trace of the deficiencies and wrongs caused by wartime atrocities.

In the commentary on Article 24, mention was made of the action taken during the last war—in particular by the International Union for Child Welfare and the International Committee of the Red

Cross—to alleviate as far as possible the sufferings and distress of countless children who had been abandoned, separated from their families and transplanted, deported, enlisted in the armed forces or forced to work under compulsion. That action took various forms : in certain countries which had suffered particularly heavy devastation, children's homes were opened, a radio information service was organized to broadcast the names and description of children who were without news of their parents, proposals were put forward for an international code of rules for the identification of all young children by means of identity discs, parcels of relief supplies were despatched, etc. The International Union for Child Welfare and the Red Cross also studied the question of legal protection and, as has already been stated, a Draft Convention dealing with the subject had been prepared in 1939. The question was therefore regarded immediately after the war as one of the main objects of the future Geneva Convention relating to civilians.

Article 50 reproduces in a more detailed form the substance of the provisions which the International Committee of the Red Cross had embodied in the Draft Convention submitted to the Diplomatic Conference of 1949 and adopted with certain modifications[1].

PARAGRAPH 1. — INSTITUTIONS FOR CHILDREN

What should the word " children " be considered to mean for the purposes of Article 50 ? Although the conception of " children " has an important place in the Convention there is, as has already been pointed out, no general definition of the word. On the other hand the Convention has fixed various age limits in the provisions prescribing preferential treatment for children : fifteen years of age, in Articles 14 (hospital and safety zones), 23 (consignment of relief supplies), 24 and 38 (5) (measures relating to child welfare) ; twelve years of age in Article 24, paragraph 3 (identification) ; and, as will be seen, eighteen years of age in Articles 51, paragraph 2 (compulsory labour) and 68, paragraph 4 (death penalty).

Article 50, unlike those just mentioned, does not specify any age limit for the children to whom it refers, except in the last paragraph. Since, however, the establishments and institutions which paragraph 1 is intended to protect are generally for children and young people up to the age of fifteen, that appears to be a reasonable upper limit and might therefore serve here as a criterion. The application

[1] For the origin of the Article, see *Final Record*, Vol. II-A, pp. 664, 760, 809, and Vol. II-B, p. 416.

of Article 50, however, cannot depend on any formal and often too rigid rule ; its application must be governed by the degree of development of the physical and mental faculties of the persons concerned ; it may therefore be applied to young people until such time as they attain their majority. The meaning given to the term " children " will also, of course, depend on the legislation of the occupied country, particularly in respect of identification.

The obligation of the Occupying Power to facilitate the proper working of institutions for children is very general in scope. The provision applies to a wide variety of institutions and establishments of a social, educational or medical character, etc., which exist under a great variety of names in all modern States (e.g. child welfare centres, orphanages, children's camps, childrens' homes and day nurseries, " medico-social " reception centres, social welfare services, reception centres, canteens, etc.). All these organizations and institutions, which play a most valuable social role even in normal times, become of increased importance in wartime when innumerable children are without their natural protectors, who have fallen on the battlefield, or have been victims of bombing, conscripted to do forced labour, interned or deported. Children's hospitals and homes are also protected under the present Convention. It will be seen later that medical and hospital services are the subject of still other special provisions (Articles 56 and 57) and are also protected under that heading.

These various establishments, organizations and institutions must be respected whatever their status under the law of the country and whether they are privately run or under State control. The only criterion in deciding whether they are to be protected is whether they are devoted to the care and education of children.

The Occupying Powers must, with the co-operation of the national and local authorities, facilitate the proper working of children's institutions. That means that the occupying authorities are bound not only to avoid interfering with their activities, but also to support them actively and even encourage them if the responsible authorities of the country fail in their duty. The Occupying Power must therefore refrain from requisitioning staff, premises or equipment which are being used by such establishments and must give people who are responsible for children facilities for communicating freely with the occupation authorities ; when their resources are inadequate, the Occupying Power must ensure by mutual agreement with the local authorities that the persons concerned receive food, medical supplies and anything else necessary to enable them to carry out their task. It is in that sense that the expression " the proper working " of children's institutions should be understood.

This provision assures continuity in the educational and charitable work of the establishments referred to and is of the first importance, since it takes effect at a point in children's lives when the general disorganization consequent upon war might otherwise do irreparable harm to their physical and mental development.

PARAGRAPH 2. — IDENTIFICATION. PROHIBITION OF CHANGES IN PERSONAL STATUS AND OF ENLISTMENT

As has been seen, the arrangements for identification envisaged in Article 24 are not obligatory but take the form of an explicit recommendation to the Parties to the conflict. If a State has already adopted an identification system before its territory is occupied, the Occupying Power is bound to allow that system to continue and to facilitate its working.

On the other hand, if no steps have been taken, it is hard to imagine an Occupying Power itself organizing a complete system of identification. Consequently, the Diplomatic Conference merely laid down that the Occupying Power was to take all necessary steps to facilitate the identification of children and the registration of their parentage by the authorities of the occupied State [1]; in other words, the Occupying Power must not do anything to hamper the normal working of the administrative services responsible for the identification of children, in particular newly born infants. The register offices must therefore continue to play their part, which is essential to the legal life of the community and individuals and to the administration of the country (the drawing-up of official documents, preservation of original records and certificates, the keeping of registers of births, deaths and marriages, etc.).

Without repeating what was said in regard to Article 24, the extreme importance of having a system for identifying children, especially very young children, must be emphasized. That is the only way of preventing millions of them from being abandoned as a result of the events of war : exodus of the population, bombing raids, the destruction of towns, deportations or conscription for labour service. The responsibility for taking the necessary measures will rest with governments. Moreover, in addition to paragraph 2, there are further provisions in paragraph 4 of the Article concerning children whose identity the competent services of the occupied country have been unable to establish.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 760 and 828.

The second sentence of paragraph 2 forbids the Occupying Power to change the family or personal status of children, or their nationality. Both the children and the parents are thus provided with a most valuable safeguard. Expressed in this way, the principle of the inviolability of the child's personal status represents a most desirable addition to the essential principles enjoining respect for the human person and for family rights which were set forth in Article 27.

The clause forbidding the enlistment of children in formations or organizations subordinate to the Occupying Power is intended to prevent any repetition of the forcing of young people *en masse* to join various organizations and services, such as took place during the Second World War. Large numbers of children, victims of a practice of which international law disapproves, were during that conflict enlisted willy-nilly in organizations and movements devoted largely to political aims.

The question of compulsory enlistment in the armed or auxiliary forces of the Occupying Power is covered not by this clause, but by Article 51, paragraph 1.

PARAGRAPH 3. — ORPHANS AND CHILDREN SEPARATED FROM THEIR PARENTS

This paragraph should be compared with Article 24, which lays down that Parties to the conflict are to take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of a war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. The object of Paragraph 3 is to make clear what the position of such children would be if the territory in which they are living were occupied. It lays down expressly that even in the case of occupation it is the authorities of the country in question, implicitly designated by Article 24, who are in the first instance responsible for looking after children who are without their natural protectors.

The Occupying Power enters into the matter only when the local authorities have not carried out their duties and when there is no relative or friend who can provide for the maintenance and education of the children concerned. The Occupying Power is then bound to take the necessary steps; it may, for example, entrust the children who have been orphaned or separated from their family to some qualified person or institution. As laid down in Article 24, such

persons should, if possible, be of the same nationality, language and religion as the children entrusted to their care[1].

This provision is of even greater importance in occupied territory, where so many families are dispersed as a result of the enemy invasion and so many children abandoned, a prey to all the horrors of war. The maintenance and education of war orphans and other homeless children opens up yet another immense field of activity for the National Red Cross Society of the occupied territory and for other humanitarian bodies, whose fruitful activity in past wars has eased the lot of countless children.

PARAGRAPH 4. — OFFICIAL INFORMATION BUREAU

Provision is made, in accordance with paragraph 2 above, for the active co-operation of the Occupying Power in cases where the authorities of the occupied country are not successful in establishing a child's identity. Under paragraph 4 action is then to be taken by the " official Information Bureau " which, under the terms of Article 136, the Parties to the conflict must set up on the outbreak of hostilities or in case of occupation. The primary function of these Bureaux is, as will be seen, to transmit to the State of origin all available information concerning measures taken in regard to its subjects by the Power in whose hands they are. The official Bureau which the Occupying Power is thus bound to open in occupied territory is a valuable source of information of all kinds. It is in a position to render useful service, particularly in the case of children whose identity has not been established by the local services concerned.

Moreover, as the Bureau will form part of an information service covering the whole of the territory of the Parties to the conflict, the searches undertaken will not be confined to the occupied territory but may also take place in other countries. The Conference accordingly laid down that a special section of the official Bureau was to be responsible for this task and for taking all necessary steps to determine the personal status of children who had not yet been identified[2].

To this end it is laid down that any available particulars of their father and mother or other near relatives, such as the place and date of birth, nationality, last known domicile, special marks, etc., must always be recorded. This stipulation is certainly useful, as the identification of homeless children, who sometimes do not even know

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 828.

[2] See *ibid.*, Vol. II-A, pp. 760, 828.

their own name, is often a matter of almost insuperable difficulty. It is therefore essential that the smallest clues and indications should be carefully collected and recorded.

PARAGRAPH 5. — PREFERENTIAL MEASURES NOT TO BE HINDERED

Paragraph 5 covers persons who on account of their weakness are particularly deserving of protection and in general enjoy preferential treatment under wartime legislation. Such preferential treatment is accorded mainly in the respects mentioned in this paragraph, i.e. in regard to food (the issuing of supplementary ration cards, setting up of food centres, etc.), medical care (medical treatment, facilities for obtaining medicaments, etc.) and protection against the effects of war[1].

These are the provisions referred to in this paragraph when it stipulates that the Occupying Power is not to hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of the persons in question[2]. A belligerent who occupies the whole or part of a territory where such measures are in force, cannot on any pretext abrogate them or place obstacles in the way of their application. This rule applies not only to preferential measures prescribed in the Convention but to any other measures of the same nature taken by the occupied State.

It may be pointed out in conclusion that this is only one case of the application of the great principle, which dominates the whole of the law of occupation, that an Occupying Power, unless absolutely prevented, is bound to respect the laws in force in the occupied country.

ARTICLE 51. — ENLISTMENT. LABOUR[3]

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

[1] In Article 38, para. 5, of the Convention, on which comment has already been made, the Parties to the conflict are officially recommended to give preferential treatment to children under fifteen years, pregnant women and mothers of children under seven years.

[2] See *Final Record*, Vol. II-A, pp. 664 and 760.

[3] For the discussions leading to Article 51, see *Final Record*, Vol. I, p. 121 ; Vol. II-A, pp. 665, 776-777, 799-800, 809, 828-829 ; Vol. II-B, pp. 193-194, 416-417 ; Vol. III, p. 133.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

GENERAL

How far is an Occupying Power authorized to requisition the services of the population of the occupied territory ? In supplying the answer to that question, Article 51 distinguishes two kinds of service : military service, which is dealt with in paragraph 1 and civilian work, referred to in paragraphs 2 to 4, and in the next Article.

The Hague Regulations already laid down that requisitions of services were to be in proportion to the resources of the country and that they could only be demanded on the authority of the commander in the locality occupied [1]. These rules have often been broken

[1] Article 52 of the Regulations reads as follows : " Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

" Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

" Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. "

and the problem became a particularly difficult one during the Second World War, when an Occupying Power carried out in a systematic manner the forced mass enlistment of the inhabitants of occupied territory in order to provide manpower for its own economy. A proportion of these workers served on the spot but the immense majority, several million people, were sent abroad, in most cases to the territory of the Occupying Power.

Not only was the productive capacity of the occupied countries diminished as a result and their economy weakened to a dangerous extent, but the forcibly enlisted civilians—and this was particularly serious from the humanitarian standpoint—were deprived of all protection under any Convention. They were the victims of what might be described as a resurrected slavery and were often subjected to harsh coercive measures and forced to work under conditions which paid little regard to human dignity. The authorities which held them at their mercy allowed no interference in their relations with these workers, and it was only early in 1945 that the International Committee of the Red Cross was able, in spite of many obstacles, to do a little to relieve their distress by organizing a system of civilian messages [1], consignments of relief supplies, assistance to sick workmen, etc.[2]

Moved by the tragic fate of these civilians, the International Committee proposed new regulations governing the requisition of services, as it did not appear likely that their complete elimination would be agreed to by governments. The XVIIth International Red Cross Conference and the Diplomatic Conference adopted and amplified the International Committee's suggestions.

Paragraph 1. — Enlistment

Paragraph 1 contains a rule of cardinal importance to the population of an occupied territory. The Occupying Power is forbidden to force protected persons to serve in its armed or auxiliary forces.

The prohibition is not new, since a basic principle, universally recognized in the law of war, strictly prohibits belligerents from forcing enemy subjects to take up arms against their own country[3],

[1] See page 191.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 657 *sqq.*

[3] Article 23 of the Hague Regulations is quite definite on this point. The second paragraph of the Article reads as follows : " A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."

but that principle had often been violated during the two world wars, and it appeared necessary to reaffirm it in the new Convention. When doing so, the Diplomatic Conference specified that it was not only enlistment in the armed and auxiliary forces of the Occupying Power that was forbidden, but also all forms of pressure or propaganda aimed at securing voluntary enlistment.

The prohibition is absolute and no derogation from it is permitted. Its object is to protect the inhabitants of the occupied territory from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country. In Article 23 of the Hague Regulations it is only forced participation of nationals of the hostile party in operations of war directed against their own country which is prohibited. The Diplomatic Conference increased the scope of the prohibition and referred generally to all enlistment in the armed forces of the Occupying Power, whatever the theatre of operations and whoever the opposing forces might be—the armed forces of the non-occupied portion of the territory, of a government in exile, of an allied State, or of resistance movements operating within the occupied territory.

Certain delegations at the Diplomatic Conference did not hold propaganda aimed at securing the voluntary enlistment of protected persons in the armed or auxiliary forces of the Occupying Power to be unlawful; they proposed that the second sentence in paragraph 1 should be deleted. Their proposal was rejected. Remembering the painful impression left by certain propaganda during the last two world wars, the Conference decided to keep the prohibition as it was; they appear to have acted rightly, as it is difficult to distinguish between propaganda and a more or less disguised form of constraint[1].

As was seen when discussing Article 40, the rule laid down in paragraph 1 also applies to enemy aliens who are in the territory of a Party to the conflict when hostilities break out.

It should finally be noted that the Conference included the act of "compelling a protected person to serve in the forces of a hostile Power" among the grave breaches listed in Article 147, thus showing the importance it attached to this indispensable prohibition.

PARAGRAPH 2. — LABOUR

1. *First sentence — Age limit*

The exemption from compulsory labour of all protected persons under eighteen years of age is unconditional. It is valid for all the types

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 665, 776-777.

of work authorized by the Convention and should be included in the list of preferential measures in favour of children and protected persons who are minors[1], since young people must be protected by prohibiting once and for all such regrettable actions as the forcible enlistment of children and adolescents and their compulsory employment on work which is often beyond their physical capacity and in any case separates them from their parents.

2. *Authorized work*

A. Work necessary for the needs of the army of occupation

On this point the Convention does no more than endorse, in the same terms as the Hague Regulations, what has for a very long time been the normal practice.

The wording " work which is necessary for the needs of the army of occupation " is very comprehensive and its interpretation is open to discussion. It will be enough to note here that the clause covers a wide variety of services—those connected with billeting and the provision of fodder, transport services, the repairing of roads, bridges, ports and railways and laying telephone and telegraph lines. On the other hand it is generally agreed that the inhabitants of the occupied territory cannot be requisitioned for such work as the construction of fortifications, trenches or aerial bases. It is the maintenance needs of the army of occupation and not its strategic or tactical requirements which are referred to here. The distinction is essential and should be emphasized. It is confirmed by a provision, to be examined further on, laying down that the Occupying Power cannot compel protected persons to do work which would involve their participation in military operations.

As has been seen, the question of compelling protected persons to give information or to act as " guides " is dealt with in a special Article of the Convention, to which reference should be made[2].

The reference to " work necessary for the needs of the army of occupation " did not figure in the Stockholm Draft[3]; it was inserted by the Diplomatic Conference in order to bring the text adopted into line with the provisions of the Hague Regulations[4]. The importance of the clause, however, has been reduced considerably owing to the fact that modern armies are very largely self-contained and therefore

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[1] See page 184.

[2] See page 220.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 121.

[4] See *ibid.*, Vol. II-A, pp. 776-777.

much less dependent than they were on the services of the population of occupied countries.

B. *Work necessary to satisfy the needs of the population*

A second group of services is concerned with the needs of the population ; the right to requisition labour for work connected with these services belongs to the Occupying Power as the authority responsible for maintaining order and the living conditions of the population.

It will be remembered that work necessary for the public utility services was the only type of work mentioned in the corresponding Article in the draft submitted by the International Committee. The XVIIth International Red Cross Conference felt that the expression " public utility services " should be defined and therefore added the words " such as water, gas and electricity services, transport, health and similar services "[1]. Although the Diplomatic Conference did not keep this list of various examples, it is nevertheless clear that it had such services in mind and the words " public utility services " [2] should be understood in that sense.

Postal, telegraphic and telephone services are generally considered to be part of the " public utility services " and should therefore be added to the list of examples given above.

If order and normal living conditions are to be maintained in occupied territory it is essential for the public utility services to keep working properly ; any failure to do so is bound to have far-reaching repercussions on the whole population. It is primarily to protect the interests of the inhabitants, therefore, that the occupying authorities can and must exercise their right of requisition should the need arise. Such action would moreover be in accordance with Article 43 of the Hague Regulations which requires the occupant to take " all the measures in his power to restore, and ensure, as far as possible, public order and safety ". The same end is served by certain clauses in Article 54 of the Convention, concerning judges and public officials, which will be commented upon further on.

After referring to the public utility services, the Diplomatic Conference added a list of various forms of work which the Occupying Power might also compel protected persons to do—namely work which is necessary for the feeding, sheltering, clothing, transport or health of the population of the occupied country[3]. It will be remembered that

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

[2] In French " services d'intérêt public " ; the above interpretation is confirmed by the Final Record of the Conference (see *Final Record*, Vol. II-A, pp. 776-777).

[3] See *Final Record*, Vol. II-A, pp. 664-665, 776.

those were the five classes of work which a belligerent, under the terms of Article 40, may compel protected persons of enemy nationality who are in its territory to do.

Recognition of the Occupying Power's right to requisition the services of persons for the types of work mentioned above helps to ensure continuity in industrial production and also in agricultural production and mining[1].

Since work falling into the categories specified in this paragraph are of vital importance for the whole economy of the occupied countries and closely affect the interests of each individual person, they will normally continue to be carried out and the occupying authorities are unlikely to have to intervene except on rare occasions. The Occupying Power may not in any circumstances or in any manner whatsoever employ protected persons to serve its own national economy, and the types of work mentioned may only be made compulsory when it is necessary to do so, as the Convention emphasizes, to meet the needs " of the population of the occupied country ".

It may be mentioned, in conclusion, that the right to requisition the services of protected persons may be regarded as a counterpart to the extensive obligations which the Occupying Power assumes towards the population of the occupied country, particularly in connection with the provision of food supplies, public health and sanitation ; its obligations under these headings are laid down in Articles 55, 56, 59 and following of the Convention.

3. *Second sentence — Prohibition of the compulsory employment of protected persons on work which would oblige them to take part in military operations*

This injunction reproduces Article 52 of the Hague Regulations. It may also be compared with Article 40, paragraph 2, of the present Convention, which lays down that protected persons of enemy nationality who are in the territory of a party to the conflict may only be compelled to do certain types of work if that work " is not directly related to the conduct of military operations "—a wording drawn from the 1929 and 1949 Prisoners of War Conventions.

The prohibition in this sentence is even more general than that contained in Article 52 of the Hague Regulations ; for it does not only embrace work involving the participation of the inhabitants in " military operations against their own country ", but refers in a general way to any work " which would involve them in the obligation

[1] See *Final Record*, Vol. I, p. 121 ; Vol. II-A, pp. 665, 776-777.

of taking part in military operations ". The importance of the distinction will be realised if the mind is cast back to cases when the occupying authorities have tried to circumvent the law of war by pretending that they are no longer engaged in military operations against the home country of the persons whose services they are requisitioning. Although such arguments were not accepted by the courts which had to come to a decision on the subject after the Second World War, it is nevertheless wise that the new provision should prohibit, clearly and without any ambiguity, all work involving protected persons in any form of participation in military operations, whether directed against the home country or not.

The question of what work should be regarded as obliging protected persons to take part in military operations raises various difficulties—the same difficulties met with in connection with Article 42. It is quite certain, however, that the Occupying Power cannot demand that protected persons should revive the war industry of the occupied country, nor force them to produce war material. On the other hand it has a right to demand the services it needs for the upkeep of the army of occupation. Some examples of such services have been given above.

One point must not be forgotten : the Fourth Convention applies to civilians and civilians are by definition outside the fighting. Any action on the part of the Occupying Power which had the effect of involving them, directly or indirectly[1], in the fighting and so preventing them from benefiting by special protection under the Convention must be regarded as unlawful. The application of this clause depends very largely on the good faith of the occupant, who must judge in each individual case, with a full sense of his responsibility in the matter, whether or not the work demanded is compatible with the conditions here laid down.

4. *Third sentence — Protected persons may not be compelled to employ forcible means to ensure the security of the installations where they are performing compulsory labour*

This clause applies with equal force whether the work in question is carried out for the benefit of the army of occupation or for that of the population ; and it matters little whether the attacks are made by regular armed forces, by resistance movements or simply by saboteurs. In all these cases the occupying authorities are themselves responsible

[1] For example, to employ them as workmen in a munitions factory, liable to be bombarded as a " military objective ".

for ensuring the security of the place of work ; that is fully in accordance with their role as the guardians of public order and safety.

The clause represents a very welcome addition to Article 28 (danger zones) and Article 34 (the taking of hostages) with which it has a certain connection, as the Articles mentioned prohibit the use of protected persons to guard against actions for which they are not responsible and on which they have no influence.

The extent to which these considerations are subject to reservations in the particular case of the police force of the occupied territory will be seen later in the commentary on Article 54.

PARAGRAPH 3. — WORKING CONDITIONS

The stipulation that protected persons may not be employed on work outside the occupied territory is already contained, as has been seen, in Article 49, paragraph 1, which contains a general prohibition of all "deportations", but in view of the unhappy experiences of the last world war it seemed necessary to reaffirm that essential principle here.

The Convention lays down that persons whose services are requisitioned are to be kept, as far possible, in their usual places of employment, which will usually be where their family is living. In this respect the provision may be compared with Article 27, which affirms the principle of respect for family rights.

This paragraph contains a series of additional conditions which were the subject of detailed discussion at the Geneva Conference[1]. That does not mean that working conditions must remain unchanged throughout the period of occupation. The Diplomatic Conference recognized, on the contrary, that labour laws would probably be modified from time to time during the occupation, and that wages would in particular be liable to vary if prices increased to any appreciable extent ; the Conference considered that provision had been made for this contingency by the reference to the " legislation in force " in the occupied territory[2].

These very detailed provisions, which were elaborated at the Diplomatic Conference at the suggestion of the International Labour Organisation[3], provide protected persons with valuable humanitarian and social safeguards[4].

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 799-800, 809.

[2] See *ibid.*, Vol. II-A, pp. 776-777, 799-800 ; Vol. II-B, p. 416.

[3] See *ibid.*, Vol. II-A, pp. 665, 776-777 ; Vol. III, pp. 132-133.

[4] Paragraph 3 should be compared with Article 40, para. 3 (work of protected persons living in the territory of a Party to the conflict) and Article 95, para. 3 (work of internees) of the present Convention and with Article 51 (work of prisoners of war) of the Third Convention.

PARAGRAPH 4. — CIVILIAN STATUS OF WORKERS

This clause is drawn from the Stockholm Draft, which laid down in addition that requisitions of labour could only be of a temporary " nature ".

The Diplomatic Conference felt that such a stipulation might be detrimental to the execution of certain types of work useful to the economy of the country and that it was wiser to omit it. On the other hand the Conference emphasized that such requisitions must not eventually lead to a " mobilization of workers " by stipulating that groups of workers must not be organized on " military or semi-military lines ". Its object in so doing was to avoid the resurrection of organizations, formed during the last war, of a character quite incompatible with the civilian status of their members[1].

ARTICLE 52. — PROTECTION OF WORKERS[2]

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

PARAGRAPH 1. — RECOURSE TO THE PROTECTING POWER

As was demonstrated in the commentary on Article 30, anyone who is protected by the Convention is entitled to appeal to his Protecting Power.

The Occupying Power might find it advantageous to cut this link with the Protecting Power by forcing workers to renounce their rights in the matter. The present clause tries to meet that contingency by prohibiting any exception to the general principle, either in the case of protected persons who are compelled to work by the Occupying Power or in that of persons who have voluntarily entered the service

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[1] See *Final Record*, Vol. II-A, pp. 665, 776-777, 809.

[2] For the discussions leading up to this Article, see *Final Record*, Vol. I, p. 121 ; Vol. II-A, pp. 665, 761 ; Vol. II-B, p. 417.

of that Power. Any clause in a contract which abrogates this right or hinders its exercise is therefore null and void.

It may be noted that this provision is only one case of the application of the principle of the inviolability of the rights accorded to protected persons. That principle is laid down in Article 8 and dominates the whole Convention.

PARAGRAPH 2. — PROHIBITED MEASURES

This paragraph refers in particular to certain measures, taken during the Second World War, which had the effect of creating unemployment artificially or of lessening the possibility of finding work ; such measures included the setting up of employment monopolies, the closing down of industries, the creation of a shortage of raw materials necessary for production, etc.

By forbidding recourse to such practices, Article 52 strengthens the fundamental principle set forth in the preceding Article, that any compulsory labour must be carried out inside the occupied territory.

ARTICLE 53. — PROHIBITED DESTRUCTION [1]

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

1. *Object of the protection afforded*

The intention in the Stockholm Draft had been to cover only private property and to protect civilians by ensuring that the property in their possession as individuals and necessary for their existence (houses, clothing, food, tools and instruments needed in their work, means of transport, etc.) should be saved from destruction unnecessary for the pursuit of the war. Certain delegations at the Diplomatic Conference, having drawn attention to new conceptions concerning property, pointed out that the Hague Regulations, Article 23

[1] See *Final Record*, Vol. I, p. 118 ; Vol. II-A, pp. 719-721, 829, 856 ; Vol. II-B, pp. 417-418 ; Vol. III, p. 134.

(*g*) when referring to the destruction of " the enemy's property ", did not specify that the reference was to the property of enemy " nationals ". The Conference agreed with their view and consequently agreed to refer in this Article to property owned collectively or belonging to the State ; it must be agreed, however, that this extension gives the provision a character which does not altogether fit in with the general scope of the Convention.

In the very wide sense in which the Article must be understood, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of co-operative organizations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.

It should be noted that the prohibition only refers to "destruction". Under international law the occupying authorities have a recognized right, under certain circumstances, to dispose of property within the occupied territory—namely the right to requisition private property, the right to confiscate any movable property belonging to the State which may be used for military operations and the right to administer and enjoy the use of real property belonging to the occupied State.

The prohibition of destruction contained in the present Article may be compared with the prohibition of pillage and reprisals in Article 33.

2. *Scope of the provision*

In order to dissipate any misconception in regard to the scope of Article 53, it must be pointed out that the property referred to is not accorded general protection ; the Convention merely provides here for its protection in occupied territory. The scope of the Article is therefore limited to destruction resulting from action by the Occupying Power. It will be remembered that Article 23 (*g*) of the Hague Regulations forbids the unnecessary destruction of enemy property ; since that rule is placed in the section entitled " hostilities ", it covers all property in the territory involved in a war ; its scope is therefore much wider than that of the provision under discussion, which is only concerned with property situated in occupied territory.

3. *Reservation*

The prohibition of destruction of property situated in occupied territory is subject to an important reservation : it does not apply in cases " where such destruction is rendered absolutely necessary by military operations ". The occupying forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand.

Furthermore, it will be for the Occupying Power to judge the importance of such military requirements. It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless ; for unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention. The Occupying Power must therefore try to interpret the clause in a reasonable manner : whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.

A word should be said here about operations in which military considerations require recourse to a " scorched earth " policy, i.e. the systematic destruction of whole areas by occupying forces withdrawing before the enemy. Various rulings of the courts after the Second World War held that such tactics were in practice admissible in certain cases, when carried out in exceptional circumstances purely for legitimate military reasons. On the other hand the same rulings severely condemned recourse to measures of general devastation whenever they were wanton, excessive or not warranted by military operations. Article 6 (b) of the Charter of the International Military Tribunal describes " the wanton destruction of cities, towns or villages or devastation not justified by military necessity " as a war crime. Moreover, Article 147 of the Fourth Convention includes among the " grave breaches " liable to penal sanctions under Article 146, " extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly."

ARTICLE 54. — JUDGES AND PUBLIC OFFICIALS [1]

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or

[1] For the discussions on Article 54, see *Final Record*, Vol. II-A, pp. 774-775, 809, 829, 856 ; Vol. II-B, pp. 194, 418.

take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

This Article, like the preceding one, was not included in the Draft Convention prepared by the International Committee of the Red Cross. It was inserted in the Convention by the Diplomatic Conference in 1949 at the suggestion of the Belgian Delegation.

PARAGRAPH 1. — STATUS. PROHIBITION OF COERCIVE MEASURES

1. *The problem*

Public officials and judges are among the persons protected under Article 4 of the Convention. They therefore enjoy the same safeguards under the Convention as any other protected person. In view, however, of their special position as representatives of the national authorities invested with official power, the Conference felt that it was necessary to devote a special Article to their position. Their official status and their functions create a close relationship between them and the State.

It might be suggested that the fact of their continuing to carry out their duties after the territory is occupied indicates their personal support of the changes which have taken place. There may arise questions of conscience which were not always taken into account in actual practice under occupation, especially during the last world war. In their dealings with judges and public officials, the occupation authorities aimed at inducing them to support the Occupying Power's policies and to place themselves in opposition to the legal government to which they had sworn allegiance.

In the light of such experiences, the Diplomatic Conference decided to make the legal position of public officials and judges in occupied territory clearer by adopting a new Article dealing specifically with them.

Although the Hague Regulations contain no clause dealing expressly with the question, it is not new. It was the subject of detailed study both at the Brussels Conference in 1874 and at the first Hague Conference of 1899 when Draft Articles of a detailed nature were submitted[1].

[1] None of these texts were finally embodied in the Hague Regulations, however, as a result of the opposition—and this point is worthy of note—of the same country whose delegation at the Diplomatic Conference fifty years later proposed the adoption of the Article we are now studying.

2. *Status*

The clause begins by stipulating that the Occupying Power may not alter the status of public officials or judges in the occupied territories.

Since it contains no definition of the terms " public officials " and " magistrates ", the Convention must be taken to refer on that point to the public law of States. Although the sense given to the two terms in the legal terminology of different countries varies and they are not always exactly defined even within one and the same State, the term *public official* generally designates people in State or local government service, who fulfil public duties. The word *magistrat* in French is used in different senses, but it is normally used more especially of members of the judiciary, and that is its sense in the present Article, as shown by its translation into English as " judges ".

The principle that the status of public officials and judges may not be altered is one case of the application of a general principle implicitly contained in the Convention—namely that the personal status of all protected persons must be respected[1].

The purpose of the stipulation that public officials and judges must be allowed to retain their pre-occupation status is to enable them to continue carrying out the duties of their office as in the past, without being the object of intimidation or unwarranted interference. They must be in a position of sufficient independence to act according to their consciences and not to run the risk of being called to account for disloyalty when the national authorities resume their rights after the occupation ceases. An important point to be noted is that occupation does not involve a transfer of sovereignty and does not sever the ties of allegiance ; public officials and judges therefore continue to be responsible before national opinion for their actions.

The rule prescribing respect for the status of persons holding public posts is particularly important in the case of judges in the occupied territory. It means that the occupation authorities, so long as they keep them at their posts and do not set up their own courts, undertake to respect the principle of the independence of judges[2]. It will be seen, in the commentary on the last sentence of Article 54, however, that the rule that the status of public officials and magistrates must not be altered is subject to an important restriction.

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[1] An explicit application of this principle is contained in Article 50, which forbids the Occupying Power to change the personal status of children.

[2] See comments on Article 66.

3. *Prohibition of coercive measures*

The second half of the paragraph lays down that the Occupying Power may not apply sanctions or other coercive or discriminatory measures to public officials or magistrates when they abstain from fulfilling their functions for reasons of conscience. That is one way of expressing the principle that every public official or judge in an occupied territory retains the right to hand in his resignation.

It may be mentioned in this connection that public officials and judges act under the superintendence and control of the occupant to whom legal power has passed in actual practice and to whom they, like any other protected person, owe obedience. But this duty of obedience does not cancel out the duty of allegiance which subsists during the period of occupation. The occupation authorities may not, therefore, compel judges or public officials to swear allegiance to them, nor demand that they should exercise their functions or pronounce their decisios and sentences in the name of the Occupying Power. There is not in general any inconsistency between the two ideas, provided that the Occupying Power, in exercising its authority, keeps strictly to the Convention and to other rules governing occupation and that it demands nothing of public officials and judges which might constitute an act of treason towards their country. The position is still, of course, a very delicate one in practice ; for it is very difficult to avoid some conflict between these duties. It is for that reason that persons holding public posts are left free to abstain for reasons of conscience. In such cases the Occupying Power cannot hold it against them, nor apply sanctions or take any measures of coercion or discrimination.

PARAGRAPH 2. — RESERVATIONS

1. *General principles*

This paragraph begins with a clause whose object is to harmonize Article 54 with the second paragraph of Article 51. It has been seen that under that paragraph, the Occupying Power may compel protected persons over eighteen years of age to do " work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, clothing, sheltering, transportation or health of the population of the occupied country ".

In order to avoid the officials' right to resign from conflicting with the Occupying Power's right of requisition, the Diplomatic Conference made it quite clear that the prohibition to take coercive

measures against public officials and judges who abstain from fulfilling their functions does not prevent their services being requisitioned for work which is to be carried out under the conditions laid down in Article 51[1]. Does it imply that in this case the right of requisition has priority over the right of persons holding public posts to resign ? Can such persons be required to remain at their posts whenever the accomplishment of their duties is connected with the authorized classes of work ?

The reservation should be considered primarily in relation to the ideas of " public utility services " and it relates to public officials belonging to the various services concerned. Mention has already been made in the comments on Article 51 of the importance to the population of maintaining public services—such as the water, gas, electricity, transport, health services, etc.—the function of which would be seriously compromised by a general withdrawal of the officials employed in them. It may be reasonably considered that the Occupying Power would be justified in refusing the resignation of such officials and requisitioning their services in the same way as those of any protected person.

The same would apply to services connected with the other categories of work mentioned in Article 51, paragraph 2, namely those necessary for the feeding, sheltering, clothing, transportation or public health of the population of the occupied country[2].

Besides officials attached to public utility services or other services referred to in Article 51 there is a whole series of persons holding public posts who also fulfil an essential role in the life of the public, for example, of local, district and provincial officials, of mayors, of officials in the registry of births, deaths and marriages, of police officers, prison staff and social welfare officers. Judges and other members of the judiciary, for their part, are the natural guardians and protectors of the inhabitants of the country in their relations with the Occupying Power and their resignation might well paralyse the whole administrative and judicial machinery, in which case protected persons would be the first to suffer. It is therefore generally agreed that it is their moral duty to remain at their posts in the interests of their fellow citizens ; such a requirement is all the more justified as the non-political nature of their duties is generally such as to remove any conscientious scruples they might have.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 665, 829.

[2] In any case, except in countries where a large part of the economy has been nationalized, the persons employed in these various sectors are not public officials.

2. *Particular cases*

The reference to Article 51 relates not only to the list of different types of work, but also to the conditions and safeguards contained in that Article, in particular the prohibition on the use of compulsion to make protected persons take part in military operations. This is particularly important in the case of police officers, who cannot under any circumstances be required to participate in measures aimed at opposing legitimate belligerent acts, whether committed by armed forces hostile to the Occupying Power, by corps of volunteers or by organized resistance movements. On the other hand it would certainly appear that the Occupying Power is entitled to require the local police to take part in tracing and punishing hostile acts committed under circumstances other than those laid down in Article 4 of the Third Geneva Convention. Such acts may in fact be regarded as offences under common law, whatever ideas may have inspired their authors, and the occupation authorities, being responsible for maintaining law and order, are within their rights in claiming the co-operation of the police.

Since the application of the Convention to police officials is a particularly delicate matter, internal laws or regulations will probably be issued to define in greater detail the professional duty of such persons in wartime. It is essential that they should be able to carry out their duties with complete loyalty without having to fear the consequences, should the terms of the Convention be liable to be interpreted later in a manner prejudicial to them.

To this end the International Independent Friendship Federation of High Police Officers has prepared a draft " Declaration applying to Police Officers the Geneva Convention of August 12th, 1949, concerning the protection of civilians in wartime "[1].

[1] The Declaration reads as follows :

Point 1 : In pursuance of art. 70, para. 1, of the above-mentioned Convention Police officers shall not incur any administrative or judicial penalties at the instance of the Occupying Power by reason of the execution, prior to the occupation, or during a temporary interruption thereof, of orders of the government of the country, whether such penalty is imposed by legislative, administrative, or judicial methods, and in so far as their acts have not been contrary to the Human Rights as defined by the Universal Declaration.

Point 2 : In pursuance of art. 27 of the above-mentioned Convention Police officers shall not be required by the Occupying Power to carry out any orders contrary to their constant duty to respect Human Rights as defined in the Universal Declaration of 10 December 1948. They may not be required to search for or question, arrest, hold in custody, or transport, any persons subjected to these measures on the grounds of race, religion, or political convictions unless the said persons express their beliefs by acts of violence not permitted under the laws of war.

3. *Removal of officials from their posts*

The last sentence of Article 54 confirms the Occupying Power's right to remove public officials from their posts for the duration of occupation. That is a right, of very long standing, which the occupation authorities may exercise in regard to any official or judge, whatever his duties, for reasons of their own. It is an important exception to the rule enjoining respect for the status of persons holding public posts, set forth in paragraph 1.

The provision refers primarily to government officials and other political agents who are generally removed from their posts by the occupation authorities, if they have not resigned of their own accord. On the other hand the Occupying Power does not normally remove administrative officials, but on the contrary encourages them to continue their duties.

At all events the power to remove officials of any kind from their posts at any moment is a safeguard accorded to the Occupying Power. That safeguard helps to ensure the bona fide application of the present Article as a whole, since on the one hand it allows the occupying authorities to behave fairly generously, in the certainty that they have the power to put an end to any abuses ; on the other hand, it prevents public officials and judges who have been retained from using their authority in a manner detrimental to the Occupying Power, as they would otherwise be liable to be removed.

Point 3 : In pursuance of art. 51 of the above-mentioned Convention the Police may not be required to assist in the execution of orders designed to employ the population for military purposes, or for the promotion of military operations. The Police may only be required to maintain law and order for the protection of the rights of the civilian population as defined by laws and customs of war.

Point 4 : In pursuance of art. 54, 65 and 67 of the above-mentioned Convention, Police officers discharged from their duties by the occupying Power shall not be liable to any compulsory service and shall enjoy the benefits and security bestowed upon them by regulations applicable to them. These regulations may not be altered by the Occupying Power.

During or after the occupation, Police officers may in no case be subjected to penalty or compulsion by reason of the execution by them of an order of any authority which could in good faith be regarded as competent, especially if the execution of this order was a normal part of their duty."

(Translation supplied by the Federation.)

ARTICLE 55. — FOOD AND MEDICAL SUPPLIES FOR THE POPULATION [1]

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population ; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Article 55 is concerned exclusively with the question of food and medical supplies for the population of an occupied territory. The provisions relating to relief consignments will be discussed further on under Articles 59 to 62.

PARAGRAPH 1. — PROVISION OF FOOD AND MEDICAL SUPPLIES

Article 55 extends very considerably the responsibility of an Occupying Power in regard to the help to be given to the occupied territory. Article 43 of the Hague Regulations merely spoke of ensuring, as far as possible, public order and safety, while under the present Article the Occupying Power is placed under an obligation to ensure, to the fullest extent of the means available to it, the food and medical supplies of the population.

During recent conflicts thousands of human beings suffered from starvation during the occupation of the country. Their destitution was made still worse by requisitioning. The absence of food and medical supplies and unhygienic conditions encouraged the spreading of epidemics. The spirit behind Article 55 represents a happy return

[1] For the discussions on Article 55, see *Final Record*, Vol. I, pp. 121-122 ; Vol. II-A, pp. 666-668, 745-747, 829-830 ; Vol. II-B, p. 418 ; Vol. III, pp. 134-136.

to the traditional idea of the law of war, according to which belligerents sought to destroy the power of the enemy State, and not individuals. The rule that the Occupying Power is responsible for the provision of supplies for the population places that Power under a definite obligation to maintain at a reasonable level the material conditions under which the population of the occupied territory lives. The inclusion of the phrase " to the fullest extent of the means available to it " shows, however, that the authors of the Convention did not wish to disregard the material difficulties with which the Occupying Power might be faced in wartime (financial and transport problems, etc.) ; but the Occupying Power is nevertheless under an obligation to utilize all the means at its disposal.

Supplies for the population are not limited to food, but include medical supplies and any article necessary to support life.

The term " population " is general ; it is not confined to civilians but will on occasion include members of the armed forces detained in the occupied territory[1].

The duty of ensuring supplies is reinforced by an obligation to bring in the necessary articles when the resources of the occupied territory are inadequate. It should be noted that the Convention does not lay down the method by which this is to be done. The occupying authorities retain complete freedom of action in regard to this, and are thus in a position to take the circumstances of the moment into account.

What is essential is that the Occupying Power should, in good time and with the means available to it, take measures to procure the necessary food for the population of the occupied territory ; it does not matter whether it comes from its own national territory or from any other country—allied, neutral or even enemy.

In the absence of special provisions relating to these imports, rules similar to those laid down in the case of relief supplies would seem to be applicable ; supplies imported by the Occupying Power for the exclusive use of the population of an occupied territory should, for example, enjoy free transit, subject to the right of verification and regulation by the Power according such transit ; as has been seen in the comments on Article 23, a right of free passage must be granted, under certain circumstances, even to consignments intended for the civilian population of the enemy Power; that right is obviously even more more legitimate when assistance is being given to the population of an occupied country.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 745.

PARAGRAPH 2. — REQUISITIONING

1. *Conditions*

The occupying authorities not only have the right to requisition the services of the inhabitants of the occupied territory but also to make requisitions in kind. The decision to do so is a unilateral one and must be considered as being a form of expropriation, a form of requisitioning, which, like the requisitioning of services, was already recognized by Article 52 of the Hague Regulations[1].

The Hague text referred only to the needs of the army of occupation, but the Geneva Convention also includes those of the " administration personnel " ; at all events the Occupying Power's rights are clearly defined. It may not requisition supplies for use by its own population. On the other hand it may still obtain surplus food and provisions by means other than requisitioning, in order to supply occupied areas where food and medical supplies are inadequate[2].

As a general rule, the Occupying Power must take the " requirements of the civilian population " into account. By this stipulation the Convention endorses a rule already set forth in the Hague Regulations, according to which requisitions " shall be in proportion to the resources of the country ".

2. *Payment*

The second sentence of the paragraph lays down that fair value is to be paid for any requisitioned goods. That idea was already recognized in international law. It was expressed in Article 52 of the Hague Regulations, but the experience of two world wars showed that it was necessary to reaffirm it. The reservation in regard to the " provisions of other international Conventions " was adopted in order to avoid any danger of the provision conflicting with the Hague Regulations or any revised version which might be adopted.

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[1] The Article in question reads as follows : " Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

" Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

" Contributions in kind shall as far as possible be paid for in cash ; if not, a receipt shall be given, and the payment of the amount due shall be made as soon as possible."

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 745-747, 829-830.

It will be seen later that Article 57 of the Convention lays down special conditions in cases where civilian hospitals are requisitioned.

It should be noted lastly that Article 147 describes the " extensive appropriation of property, not justified by military necessity " as a grave breach of the Convention. That wording covers the case of requisitioning on an excessive scale.

PARAGRAPH 3. — PROTECTING POWERS

The last paragraph refers to verification by the Protecting Power of the state of food and medical supplies. This check freely carried out by a neutral agent is a valuable safeguard for the population of occupied territory. The assistance given by the Protecting Powers is not limited to mere supervision; it can extend to the measures taken by the occupation authorities to ensure the food and medical supplies of the population; the Protecting Powers may, for example, usefully lend their good offices for the importing of food and medicaments, such action being in conformity with their general mission under Article 9 of the Convention.

The only reservation on such activities by the Protecting Powers is when " temporary restrictions are made necessary by imperative military requirements " ; this wording shows clearly that supervision may only be suspended for a limited time. Restrictions are moreover only authorized as an exceptional measure. They may not at any time be of a general or permanent nature, as that would make the rule in regard to verification inoperative.

ARTICLE 56. — HYGIENE AND PUBLIC HEALTH [1]

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

[1] For the origin of the Article, see *Final Record*, Vol. I, p. 122; Vol. II-A, pp. 666-668, 747-748, 830, 851-857; Vol. II-B, pp. 194, 418-419, 421; Vol. III, pp. 135-136.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

GENERAL

The health conditions under which the inhabitants of occupied territory lived during the Second World War were often deplorable. Insufficient food, lack of medical supplies and the influx of refugees favoured the spread of epidemics, and the steps taken by certain belligerents to ease the plight of the inhabitants—the opening of new hospitals, out-patients' clinics and medical diagnosis and disinfection centres, the adoption of modern methods of control of epidemics, the supervision of hygiene and the adoption of preventive measures—were often only able to deal with the most urgent cases.

The International Committee of the Red Cross recommended, on the basis of the experience gained during the Second World War[1], that as soon as hostilities ended, specific measures should be taken to prevent any repetition of this state of affairs.

PARAGRAPH 1. — HYGIENE AND PUBLIC HEALTH

The reference in the Article to " the co-operation of national and local authorities "—a formula we have already seen in Article 50 in connection with children's institutions—shows clearly that there can be no question of making the Occupying Power alone responsible for the whole burden of organizing hospitals and health services and taking measures to control epidemics. The task is above all one for the competent services of the occupied country itself. It is possible that in certain cases the national authorities will be perfectly well able to look after the health of the population ; in such cases the Occupying Power will not have to intervene ; it will merely avoid hampering the work of the organizations responsible for the task. In most cases, however, the invading forces will be occupying a country suffering

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 710 et sqq.

severely from the effects of war ; hospitals and medical services will be disorganized, without the necessary supplies and quite unable to meet the needs of the population. The Occupying Power must then, with the co-operation of the authorities and to the fullest extent of the means available to it, ensure that hospital and medical services can work properly and continue to do so.

The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. Such measures include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the despatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres.

It will be remembered that Article 55 requires the Occupying Power to import the necessary medical supplies, such as medicaments, vaccines and sera, when the resources of the occupied territory are inadequate. It will also be able to exercise its right to requisition, and demand the co-operation not only of the national and local authorities but also of the population in the fight against epidemics. It has been seen that under Article 51, paragraph 2, the Occupying Power is entitled to order work which is necessary " for the public utility services " and " for the ... health of the population of the occupied country ". Consequently, it may, if it appears desirable, requisition the co-operation of any protected person within the limits set by that Article, should such co-operation be necessary for the efficient working of the health services or hospitals and medical installations.

The last sentence of paragraph 1 specifies that " medical personnel of all categories shall be allowed to carry out their duties ". The Occupying Power's duty of maintaining hospitals and medical services and establishments and also the public health and hygiene services necessarily involves measures to safeguard the activities of medical personnel, who must therefore be exempted from any measures (such as restrictions on movement, requisitioning of vehicles, supplies or equipment) liable to interfere with the performance of their duty.

" Medical personnel of all categories " should be taken to mean all people engaged in a branch of medical work : doctors, surgeons, dentists, pharmacists, midwives, medical orderlies and nurses, stretcher bearers, ambulance drivers, etc., whether such persons are or are not attached to a hospital. On that point the provision differs from Article 20 of the Convention, which refers only to hospital staff, who are alone authorized to wear the armlet bearing the red cross emblem.

PARAGRAPH 2. — HOSPITALS

In order to understand this paragraph fully, reference must be made to Articles 18, 20 and 21 of the Convention, according to which civilian hospitals and their staff, and transport carrying wounded or sick civilians, cripples or maternity cases, are entitled to display the red cross emblem. As was seen, that right is subject to a certain number of conditions, the most important being recognition by the State.

It is quite possible and even probable that it will become necessary to set up new hospitals in occupied territory. Like all hospitals, such establishments must be respected, protected and allowed to display the red cross on a white ground. What would happen if the competent body of the occupied State were no longer functioning and could not accord official recognition ? In such a case the Occupying Power would take the place of the national authorities and would issue the document according recognition and granting the right to display the red cross to new hospitals. The same thing applies to the issue of identity cards to the staff of new hospitals and to the question of responsibility for transporting wounded and sick civilians.

The Occupying Power will confer official recognition and authority to display the emblem only on hospitals, staff and medical transport which fulfil the conditions laid down in Articles 18, 20 and 21 of the Convention. The protection to which civilian hospitals are entitled may, in particular, be suspended if " they are used to commit, outside their humanitarian duties, acts harmful to the enemy " (Article 19).

PARAGRAPH 3. — MORAL REQUIREMENTS

The last paragraph provides protected persons with a further safeguard, in that any measure of public health and hygiene the Occupying Power feels it should take in order to comply with the above stipulations must pay due regard to the habits and customs of the population[1].

The purpose of the provision is to ensure respect for sentiments and traditions, which must not be disregarded. The occupation must not involve the sudden introduction of new methods, if they are liable to cause deep disquiet among the population. The provision should be compared with Article 27, which requires the Party to the conflict to respect, in all circumstances, the religious convictions and practices of protected persons, and also their manners and customs.

[1] There does not seem to be any real distinction between " moral " susceptibilities and " ethical " susceptibilities. The two terms appear to be synonymous. The most that could be said is that the word " moral " tends to emphasize the psychological aspect of the question.

ARTICLE 57. — REQUISITION OF HOSPITALS [1]

The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

PARAGRAPH 1. — HOSPITALS

In the Hague Regulations there are no special provisions dealing with the requisition of civilian hospitals: it was governed by the rules which applied to requisitions in general. Under Article 52, the Occupying Power was entitled to requisition private hospitals, municipal and State hospitals, which, like all other " institutions dedicated to religion, charity and education, the arts and sciences ", were placed on the same footing as private property.

The new provisions have not changed that rule in any way. As in the past, civilian hospitals in occupied territory are liable to be requisitioned, whether they are privately or publicly owned. Nevertheless in view of the essential rôle they play in maintaining the standard of health of the population, the Diplomatic Conference hedged about the right to requisition with a series of safeguards.

In the first place, civilian hospitals cannot be requisitioned otherwise than " temporarily ", and only in cases of " urgent necessity for the care of military wounded and sick ".

It follows that the Occupying Power will not be able to requisition civilian hospitals while its own medical establishments can cope with the wounded and sick of the army of occupation, nor can it under any circumstances requisition a civilian hospital for non-medical purposes—to turn it into billets for unwounded troops for example. By stipulating that hospitals can be requisitioned only temporarily, the Convention places the occupying authorities under an obligation to restore the hospital to its normal use as soon as the state of necessity ceases to exist, that is as soon as the medical services of the occupation forces are able to cope with the needs of their wounded and sick.

[1] For the development of Article 57, see *Final Record*, Vol. I, p. 122; Vol. II-A, pp. 666-668, 747-748, 830, 857; Vol. II-B, pp. 419-421.

Furthermore the second half of the paragraph makes the requisitioning of civilian hospitals subject to suitable arrangements having been made " in due time " for the care and treatment of the patients and for the needs fo the civilian population.

The Stockholm Draft laid down, by analogy with Article 15 of the First Convention of 1929 and the draft text revising it, that the Occupying Power could make use of civilian hospitals on condition of having previously ensured the care of the sick and wounded accommodated therein [1].

On the other hand the provision here goes further than the 1929 Convention ; for it requires the Occupying Power to make suitable arrangements, not only for people who are in hospitals at the time they are requisitioned but also for the civilian population as a whole. In thus obliging the Occupying Power to take due account of possible demands on hospital accommodation, the Diplomatic Conference drew the logical inference from Article 56, which lays down that medical and hospital establishments and services, public health and hygiene in the occupied territory are to be maintained.

PARAGRAPH 2. — MATERIAL AND STORES

Here again the Diplomatic Conference modified the formula " so long as they are necessary for the wounded and sick " which appeared in the Stockholm Draft by analogy with the First 1929 Convention [2]; it substituted the expression " so long as they are necessary for the needs of the civilian population ", thus adopting a broader criterion covering not only the immediate needs of the patients admitted to hospital but also the possible needs of the population [3].

A proposal that requisitioning of the material and stores of civilian hospitals should be absolutely forbidden was rejected by the Conference, since it was considered that a stipulation of that kind would have little chance of being respected ; it would moreover have been contrary to the spirit of the Geneva Convention, as the clause would have made a distinction in favour of those wounded and sick persons who were nationals of the occupied territory, such discrimination being frowned upon by the Conventions.

In case of necessity, the Occupying Power will therefore be entitled to use civilian hospital reserves (chloroform, blood plasma, etc.) for

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 116 ; *Commentary I*, Art. 33, p. 275.

[2] See *ibid.*, Vol. I, p. 116.

[3] See *ibid.*, Vol. II-A, pp. 747-748, 830 ; Vol. II-B, pp. 419-421.

the treatment of its own wounded and sick[1]. When so doing, it will take the needs of the population into account and it will replace the material used as soon as possible, usually by importing medical supplies in accordance with Article 55.

ARTICLE 58. — SPIRITUAL ASSISTANCE[2]

The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

This Article was inserted in the Convention by the Diplomatic Conference of 1949. It is very clearly worded and calls for little comment.

In ensuring that religious assistance may continue to be given and that books and other articles required for religious needs may be distributed, it insists on respect being shown for religious practices. This is a fitting addition to the earlier provisions dealing with food, health and hygiene ; the spiritual needs of the population are taken into consideration in the same way as the material needs.

Should the question of the nationality of ministers of religion be raised here ? As was seen, Article 50 lays down that the education and instruction of orphans are, if possible, to be entrusted to " persons of their own nationality ". The same arguments undoubtedly hold good so far as religious needs are concerned, and yet there is no similar clause here, the reason being that in occupied territory there are always enough ministers of the same nationality to meet the spiritual needs of persons of their religion, except in the very special case of the religion of minorities among the population. There would therefore be no justification for the Occupying Power imposing ministers of religion of its own nationality. It should be noted, however, that religious assistance must in no case serve as a pretext for political agitation against the Occupying Power. Should occasion arise, the Occupying Power would be entitled to take appropriate action, since the provision under discussion authorizes only spiritual assistance, and not activities which have nothing to do with religion.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 747-748; Vol. II-B, pp. 419-421.

[2] For the origin of the Article, see *Final Record*, Vol. II-A, pp. 748, 831; Vol. II-B, p. 421.

It will be remembered that Article 38 (3) contains a similar provision in favour of civilians in the territory of a Party to the conflict. The two clauses are merely cases of the application of the basic principle proclaimed in Article 27, which provides a general safeguard for the " religious convictions and practices " of all persons protected by the Convention.

ARTICLE 59. — RELIEF : COLLECTIVE RELIEF[1]

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

General

The wording of Articles 59 to 62 is very largely inspired by the large-scale relief action carried out in Greece by the International Committee of the Red Cross in collaboration with the Swedish Government and Swedish Red Cross Society from September 1942 to April 1945[2].

The work done by the International Committee of the Red Cross during the Second World War is well known. Unlike prisoners of war and civilian internees, who were covered by the 1929 Prisoners of War

[1] For the development of Article 59, see *Final Record*, Vol. I, pp. 121-122 ; Vol. II-A, pp. 666-668, 748, 831.

[2] See *Rapport final de la Commission de gestion pour les secours en Grèce sous les auspices du Comité internationale de la Croix-Rouge*, Athens, 1949.

Convention, the civilian population in occupied countries did not have the benefit of any treaty provision authorizing assistance to them.

There was thus no legal obligation on belligerents to accept relief consignments intended for the civilian population, nor to grant such consignments free passage through the blockade.

The attempts made in 1939 were on a modest scale to begin with. Later the work was expanded but it was always confined to certain countries and unfortunately never came near to meeting the needs which existed. These were immense and the obstacles due to the state of war were almost insurmountable. The International Committee therefore felt that one of its most important tasks was to translate the result of these attempts into legal terms. Its experience in this sphere was the deciding factor when drawing up the present rules, which are intended to provide relief workers with the legal basis they lacked[1].

PARAGRAPH 1. — GENERAL RULE

It is *collective relief* which is referred to here. The obligation on the Occupying Power to accept such relief is unconditional. In all cases where occupied territory is inadequately supplied the Occupying Power is bound to accept relief supplies destined for the population.

The Conference added the words " whole or part of the " before the words " population of an occupied territory " on account of experiences during the Second World War. Sanction is thus given not only to schemes of assistance to the population as a whole, but also to those which are intended either for the population in certain localities only, or for particular classes of the population, such as women and children throughout the territory.

The Convention not only lays down that the Occupying Power must " agree " to relief schemes on behalf of the population, but insists that it must " facilitate " them by all the means at its disposal. The occupation authorities must therefore co-operate wholeheartedly in the rapid and scrupulous execution of these schemes. For that purpose they have many and varied means at their disposal (transport, stores, facilities for distributing and supervising agencies).

This paragraph should be compared with that granting protected persons who have remained or have been retained in the territory of a Party to the conflict, the right to " receive the individual or collective relief that may be sent to them " (Article 38), and to the similar stipulation in favour of interned protected persons (Article 108).

[1] Detailed information on this subject will be found in the *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, Part IV, pp. 359-533.

PARAGRAPH 2. — QUALIFICATION FOR UNDERTAKING A RELIEF ACTION — NATURE OF RELIEF

Relief schemes may be undertaken either by States or by an impartial humanitarian organization such as the International Committee of the Red Cross. Only those States which are neutral—in particular the Protecting Power—are capable of providing the essential guarantees of impartiality.

The International Committee of the Red Cross or any other " impartial humanitarian organization " has the same right as a State to undertake relief schemes. This form of words, which, as has been seen occurs several times in the Convention (e.g. in Article 3 and 10), is general enough to cover any institutions or organizations capable of acting effectively and worthy of trust. The International Committee is mentioned both on account of its own special qualifications and as an example of a humanitarian organization whose impartiality is assured.

The Convention does not lay down any rule in regard to the donors ; the immensity of the needs will make it desirable to accept the co-operation of any person, organization or institution which can lend assistance, provided that such assistance is not used for purposes of political propaganda. During the Second World War innumerable gifts in kind and cash were made available to the Red Cross for this relief work, by States, governments in exile, National Red Cross Societies, charitable institutions, companies and private individuals.

The paragraph mentions in particular foodstuffs, medical supplies and clothing ; consignments need not be restricted to these items but must have the character of relief supplies. Three categories of relief have been mentioned specifically because they are of vital importance and the Occupying Power would be justified in refusing to accept any consignments not urgently needed to feed the population.

PARAGRAPH 3. — FREE PASSAGE

This paragraph, which reproduces word for word that in the Stockholm Draft, is the keystone of the whole system. Its importance will be realized if a moment's thought is given to the way in which consignments were interfered with during the Second World War by measures taken by certain belligerents with a view to striking at the economic power of the enemy. The economic and financial blockade of the European continent which was inaugurated on the declaration of war, the counter-blockade and the gradual extension of the meaning of " war contraband " until it covered almost anything, prevented

many relief schemes from being carried out. Other schemes could only be started after long delay and protracted and difficult negotiations with the authorities in charge of the blockade. The strictness of the regulations left no opening for any humanitarian consideration and almost any merchandise on its way to territory under enemy control was liable to be confiscated.

The principle of free passage, as set forth in this clause, means that relief consignments for the population of an occupied territory must be allowed to pass through the blockade ; they cannot under any circumstances be declared war contraband or be seized as such by those enforcing the blockade.

The obligation to authorize the free passage of relief consignments is accompanied by the obligation to guarantee their protection. It will not be enough merely to lift the blockade and refrain from attacking or confiscating the goods. More than that will be required : all the States concerned must respect the consignments and protect them when they are exposed to danger through military operations.

Paragraph 4. — Verification and supervision

The institution of measures for verifying and regulating the consignments follows logically from the foregoing provisions. Since the free passage of relief consignments represents an important exception to the measures enforcing the blockade, it is only right that the blockade authorities should have an opportunity of assuring themselves that the facilities granted are used only for strictly humanitarian purposes.

The State granting free passage to consignments can check them in order to satisfy itself that they do in fact consist of relief supplies and do not contain weapons, munitions, military equipment or other articles or supplies used for military purposes.

Their passage is regulated according to prescribed times and routes in such a way as to avoid hampering military operations and to conform to the maximum extent with security requirements. The practical arrangements for their transit will be the subject of special agreements between the Powers concerned. The conclusion of agreements of this kind is not expressly stipulated in the Article, but follows from Article 7 of the Convention, which invites States to " conclude special agreements for all matters concerning which they may deem it suitable to make separate provision ".

These safeguards, which were prescribed in the interests of the Powers granting free passage, must in no case be misused in order to make the rule itself inoperative or unduly delay the forwarding of relief.

The Power granting free passage will also have the right to be reasonably satisfied through the Protecting Power that the consignments in question are to be used for the relief of the needy population and not for the benefit of the Occupying Power. Belligerents will obviously be unwilling to grant the goods free passage—and the donors unwilling to make their contribution—unless they are certain that the relief supplies are distributed in the way arranged, and only to those persons for whom they were intended. That is a *sine qua non* of any relief action.

ARTICLE 60. — RESPONSIBILITIES OF THE OCCUPYING POWER [1]

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

1. *Continuing responsibility of the Occupying Power*

The Conference insisted that the Occupying Power would continue at all times to be responsible for supplying the population (Articles 55 and 56), in order that relief operations might retain their humanitarian character : relief consignments are not intended to represent the normal source of supply of the country ; they are made up of commodities offered for relief purposes and provide something extra for the classes of the population which are in greatest distress.

2. *Consignments not to be diverted*

The word " divert " must be understood in its broadest sense, as covering a change of destination of any kind, including requisition. Consequently articles sent as relief supplies cannot be requisitioned by the Occupying Power ; this represents an exception to Article 55, paragraph 2, of the Convention, which authorizes the occupation

[1] For the development of this Article, see *Final Record*, Vol. I, p. 122 ; Vol. II-A, pp. 666-670, 749-751, 809, 831-832, 857 ; Vol. II-B, pp. 153-154, 194, 421 ; Vol. III, pp. 135, 137.

authorities to requisition food and medical equipment and supplies in occupied territory under certain circumstances.

There is one exception to the rule, however. It was realized at the Diplomatic Conference that it could not be applied strictly in certain situations (when epidemics stopped in one town and started in another, or when insuperable transport difficulties prevented relief consignments from being sent to the area chosen) : under such circumstances it is reasonable to assume that relief consignments might be used on behalf of other persons.

In order to avoid any possibility of abuse, however, three cumulative conditions are laid down : the diversion of the relief consignments must be due to urgent necessity, it must be in the interests of the population of the occupied territory, and it can only take place with the consent of the Protecting Power.

The Protecting Power is mentioned here to prevent the taking of such a serious step from being left to the discretion of the occupation authorities. What is essential is that relief consignments should on no account be diverted for the benefit of the troops, administrative personnel or even the civilian population of the Occupying Power : they must be kept wholly and exclusively for the population of the occupied territory.

The diversion of relief consignments must remain an absolute exception. To invoke the reservation on a large scale would represent a violation of the Convention, whose authors wished to ensure that the intentions of the donors were followed as far as possible.

ARTICLE 61. — DISTRIBUTION[1]

The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the co-operation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

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[1] For the development of Article 61, see *Final Record*, Vol. I, p. 122 ; Vol. II-A, pp. 752, 832 ; Vol. II-B, pp. 422-423.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Article 61 contains the rules governing the carriage and distribution of the relief consignments mentioned in the preceding Articles (Articles 59 and 60).

Experience in this connection during the Second World War showed that the effectiveness of the relief given depended on the arrangements made for its carriage and distribution[1].

PARAGRAPH 1. — CO-OPERATION AND SUPERVISION

1. *Protecting Power*

The first sentence says that the relief supplies are to be distributed with the co-operation and under the supervision of the Protecting Powers. While the Convention assigns the leading rôle to those Powers, it will be seen later that other neutral States may also play a part under certain circumstances.

What will the duties of the Protecting Powers be ? The Convention merely states that they are to co-operate in the distribution of the relief consignments, which will take place under their supervision. It gives no details of the steps to be taken. This omission is reasonable, for a systematic set of regulations would hardly be appropriate in such a vast field. A certain number of basic principles have been laid down on the basis of which relief actions can be carried out with sufficient flexibility to meet any new contingency which may arise.

What is most important is that the supervision should be effective ; without strict, efficient supervision the whole work may be jeopardized. The relief supplies must reach the people for whom they are intended and every precaution must be taken to ensure that the recipients do not place them on the " black market " : frequent spot checking in storehouses, constant surveillance of the actual distribution and verification of the reports drawn up by the distributing bodies are among the measures which will make it possible to ensure that the supplies are used for their correct purpose.

The Convention does not prescribe any standard method of distribution. Experience has proved that the method of distribution will depend on a whole complex of factors (the political, economic and social conditions in the country to which assistance is given ; the extent and kind of relief). During the recent wars distribution was

[1] See *Report of the Joint Relief Commission of the International Red Cross, 1941-1946*, pp. 133-139.

carried out by the National Red Cross Societies, which received the consignments from abroad and then divided them among their local branches, while Delegates of the International Committee of the Red Cross gave their assistance and attended the actual distribution. Action by the National Red Cross Society often took place at the same time as that of other charitable organizations, and a co-ordinating committee then ensured that the arrangements worked properly.

2. *Delegation of the duty of supervision*

The second sentence gives the Protecting Power the option of delegating the duties referred to above. The agent to which they are delegated may be a neutral State other than the Protecting Power, or it may be the International Committee of the Red Cross or " any other impartial humanitarian body ".

There are two reasons why the International Committee of the Red Cross is mentioned here by name (as in Article 59) : firstly because of its past action and experience in this field ; secondly because of its character as a neutral intermediary.

The words " any other impartial humanitarian body " [1] recall the work done by a large number of humanitarian organizations during the Second World War.

The duties may only be delegated by agreement between the Occupying Power and the Protecting Power, not by unilateral action. The agreement of the two parties is an essential condition as a guarantee that the work will be done.

To co-operate in the distribution of relief and exercise efficient supervision, it is necessary to have a numerous and well-instructed staff. The humanitarian organizations called upon to replace the Protecting Power must not only offer every proof of being impartial, but must also have available the necessary qualified staff and material resources. This factor is certain to carry great weight when the Powers reach their decision. These provisions do not duplicate those contained in Article 11 concerning substitutes for the Protecting Powers. Article 11 deals with the automatic replacement of the Protecting Power, whereas Article 61 only considers the delegation by common accord, of certain limited tasks, whose delegation will not in any way affect the Protecting Power's other activities under the Convention. Article 11 presumes the absence of a Protecting Power, whereas Article 61, on the contrary, presumes its existence [2].

[1] National Red Cross Societies are naturally included.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 752 and 832.

PARAGRAPH 2. — EXEMPTION FROM CHARGES

1. *General rule*

In this clause the special and eminently humanitarian character of relief supplies is taken into account. It would be deplorable for people to be left without relief supplies because they were not in a position to pay the customs duty normally charged on imported articles. If such dues were paid by the donors, on the other hand, they would almost certainly be deducted from the total amount of relief supplied.

Consequently the Conference decided unanimously to exempt relief consignments in occupied territory from import and customs duties and also from all taxes. The extent to which there may be exemptions to this rule will be seen further on under 2.

It does not follow that the relief supplies must be given free of charge to the general public : the rule according to which individual relief consignments cost nothing is not applied to collective consignments for fear of disorganizing the economic system of the country to which they are sent. The fact that the Convention exempts individual relief consignments from duties and charges shows once more that the provisions of Articles 59 and 61 apply only to relief stores in the strict sense of the term, that is to say articles of prime necessity, essential for the subsistence and health of the population.

2. *Reservation*

The rule exempting relief supplies from all charges, taxes or customs duties is not absolute. The Diplomatic Conference entered a reservation to the effect that such charges may be levied on relief consignments when it is in the interests of the economy of the occupied territory. The purpose of the Conference in so doing was to allow for certain relief consignments not being gifts but being sent against payment, under a long-term arrangement between governments[1]. Whether this provision is justified or not, it is essential that belligerents should endeavour to regard it as absolutely exceptional, since to grant absolute exemption from all charges is really the only way of acting in the true spirit of relief actions and, in the great majority of cases, is in the real interests of the countries to which relief is sent.

[1] See *Final Record*, Vol. II-A, pp. 752 and 832 ; Vol. II-B, pp. 422-423.

3. *Distribution facilities*

The second sentence in paragraph 2 says that the Occupying Power is to facilitate the rapid distribution of the consignments. The effect of a relief scheme will depend above all on the time the consignments take to reach the recipients ; it is therefore important for the occupation authorities to take all necessary steps to facilitate their despatch and distribution (cutting out red tape, making transport available, granting permits allowing freedom of movement, facilities of all kinds for the staff of the distributing and supervising bodies, etc.).

PARAGRAPH 3. — TRANSIT

Article 61 emphasizes, lastly, that all Contracting Parties should endeavour to permit the transit and transport, free of charge, of relief consignments on their way to occupied territory.

The clause refers only to the financial aspect of the transit and transport of relief consignments, and not to the question of free passage (Article 59, paragraph 3). It does not lay an obligation on any State to permit the transit and transport of relief, free of charge, through its territory. The Conference considered that a provision of that nature might place an unfair burden on a small country through which large amounts of supplies were passing and that it might consequently delay the passage of those supplies. The clause inserted was not, therefore, made binding, but cast in the form of an urgent recommendation to all States whose lines of communication are used for relief consignments [1].

ARTICLE 62. — INDIVIDUAL RELIEF [2]

Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 832. It is worthy of mention in this connection that from 1940 onwards Switzerland, a country of transit *par excellence*, permitted the transport and transit, free of charge, of consignments intended for the civilian population in occupied territory.

[2] For the discussions leading up to the adoption of Article 62, see *Final Record*, Vol. I, p. 122 ; Vol. II-A, pp. 752-753, 832 ; Vol. II-B, p. 423.

Unlike the three previous Articles which refer to relief supplies for a group of protected persons (collective consignments), Article 62 deals with consignments addressed to individuals (individual consignments).

During the Second World War this class of relief was on a much smaller scale than collective relief, as the occupation authorities discouraged the sending of parcels addressed to persons by name. This restrictive tendency is explained by the fact that it was harder to supervise the distribution and verify the use made of individual consignments. Apart from these practical considerations there was one other of a social character of some although not decisive importance : namely that collective schemes allow the articles to be distributed according to the needs of the recipients, whereas individual parcels are sent with no regard to the extent of the distress or to the family responsibilities of the recipient, who merely has the good fortune to have relations abroad[1].

As experience had shown that the system of individual parcels was favoured by the public, the Diplomatic Conference of 1949, feeling that it was essential to utilize all available sources of relief, decided unanimously to make general provision for individual relief consignments.

Thus the fact that an Occupying Power agrees to the relief schemes referred to in Article 59 does not mean that it need not allow into its territory relief consignments addressed to individuals, but their acceptance is subject to one reservation : the occupation authorities have the right to refuse to receive individual relief consignments if imperative reasons of security so demand. A similar reservation in regard to collective relief was put forward during the preparatory work on Article 59, but was not adopted. The reservation was kept in Article 62 in order that efficient verification should not be rendered impossible by the arrival of huge quantities of individual parcels. Under such circumstances the Occupying Power could avoid importing articles detrimental to its security by limiting or temporarily forbidding the entry of individual relief supplies.

It must be emphasized, however, that the Occupying Power will not be able to make unjustified use of this reservation. Exceptions can only be based on important reasons of security and can only continue while the circumstances still exist which led to their introduction.

Article 62 should be compared with Articles 38 (protected persons within the territory of a Party to the conflict) and 110 (civilian internees).

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[1] See *Report of the Joint Relief Commission*, pp. 218-223 ; and *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, pp. 366-367.

ARTICLE 63. — NATIONAL RED CROSS AND OTHER RELIEF SOCIETIES [1]

Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power :

(a) *recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions ;*

(b) *the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.*

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

General

Article 63 supplies the answer to a question about which the Red Cross world has long been concerned : namely, how to make arrangements for the continued existence and work of National Societies in occupied territories. In 1939, on the recommendation of the XVIth International Red Cross Conference, a special commission was set up to study the subject [2], but the Second World War began before the commission could achieve anything concrete. Numbers of National Red Cross Societies were subjected to arbitrary interference by occupation authorities, who introduced changes in their structure, restricted them in their activities or even dissolved them.

In 1946 the question was raised at Oxford at the XIXth session of the Board of Governors of the League of Red Cross Societies, and again later at the preliminary Conference of National Red Cross

[1] For the discussions leading up to the adoption of this Article, see *Final Record*, Vol. I, p. 122 ; Vol. II-A, pp. 669-670, 744-745, 832-833 ; Vol. II-B, pp. 423-424 ; Vol. III, pp. 138-139.

[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*, pp. 115-116.

Societies at Geneva ; finally, in 1948, it was considered by the XVIIth International Red Cross Conference at Stockholm[1].

The International Committee of the Red Cross wished to see protection accorded in the text of a Convention to the National Red Cross Societies in occupied territory. During the war, the Committee had on various occasions regretted that there were no written provisions on which it could base the representations it made each time measures adopted by the occupation authorities were in its opinion detrimental to the activities of a National Society, especially when leading members of the Red Cross were arrested[2].

PARAGRAPH 1. — RESPECT FOR NATIONAL RED CROSS SOCIETIES AND OTHER RELIEF SOCIETIES. — RESERVATION

1. *Continuation of humanitarian activities*

The continuation of the activities of National Societies is subject to two conditions :

1. The National Society must have been duly recognized as a National Red Cross Society, which would imply that it had also been recognized by its government.

2. The activities of the Society must be in accordance with Red Cross principles " as defined by the International Red Cross Conferences ". This wording covers both the Geneva Conventions (of 1864, 1906, 1929 and 1949) and the conditions for the recognition of new Red Cross Societies ; it also includes the resolutions in general terms adopted by the various International Red Cross Conferences[3].

This conception of the mission of the Red Cross implies a very broad interpretation of the word " activities ". Whether the activities in question are the traditional activities of the Red Cross or some

[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*, pp. 115-116 ; *Handbook of the International Red Cross*, Geneva, 1953, pp. 448-450.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 169-170.

[3] These resolutions have been collected together in the *Handbook of the International Red Cross*. The principle of humanity—that is the idea that any suffering man must be assisted and treated humanely—the notions of equality as between men, due proportion between the relief given and the need for it, military, political, religious and philosophical neutrality, and the independence, impartiality, universality and equality of the National Societies form the basis of this system of rules. The whole work of the Red Cross must be linked with these fundamental conceptions. See on this subject : Max HUBER : *Principes, tâches et problèmes de la Croix-Rouge dans le droit des gens*, 1944 ; Jean S. PICTET : *Red Cross Principles*, 1955.

entirely new task, the only condition set by the Convention—and it is an essential one—is that they should be in accordance with the true Red Cross spirit. The reference to Red Cross principles guarantees that the action of Red Cross Societies will be of an essentially humanitarian character. So long as this is so, their activities cannot be interfered with by the occupation authorities.

Mention should also be made of the property of the National Society in occupied territory. As has been pointed out several times, the Convention is above all concerned with people; this particular provision, however, postulates that the occupation authorities must not paralyse National Societies by depriving them of the property and material means necessary for carrying out their task. It may be concluded from this that the property of the Societies will not be subject to requisition, except in case of absolute necessity and only as a temporary measure; in any case, such requisitioning cannot be allowed to interfere with the essential principle of the continuity of their humanitarian action[1].

2. *Non-intervention*

Sub-paragraph (b) contains another rule, forbidding the Occupying Power to insist on changes in the Society's personnel or structure which would prejudice their humanitarian activities.

The clause aims at prohibiting arbitrary removal of the directors of a Society, the introduction of new officials or, in general, any measures whose object is to make the Societies conform to the policy of the Occupying Power, without regard to the principles governing Red Cross work. By forbidding such changes in the personnel and structure of Red Cross Societies the Convention confirms that the *status quo* should be maintained.

National Red Cross Societies are specifically mentioned because of the preponderant part they play in the distribution of relief; but no method of alleviating suffering must be ignored. The Diplomatic Conference therefore also mentioned the other relief

[1] Reference may be made in this connection to Article 34 of the First Geneva Convention of 1949 which reads: "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."

It should be noted, however, that the provision relates only to property of the Societies which is used to help the wounded and sick of the armed forces, and not that used for other activities. See *Commentary*, Vol. I, pp. 278-279.

societies which should be permitted to carry out their humanitarian work in similar conditions[1].

The protection granted to Red Cross Societies and other relief societies in occupied territory places the directors and staff of the societies under an obligation to observe strict neutrality and take the utmost care to abstain from any political or military activities. Such behaviour on their part may not always be understood by public opinion in the occupied country, but if the Societies are to continue to be able to carry out their humanitarian activities in spite of the circumstances they must abide faithfully by this rule.

3. *Reservation*

The work of the National Societies may be suspended by " temporary and exceptional measures imposed for urgent reasons of security ". This reservation is made to protect the legitimate interests of the Occupying Power. It is placed at the beginning of the Article, and refers in particular to the possibility of relief societies being tempted to take advantage of their privileges in order to promote action hostile to the Occupying Power under cover of some humanitarian activity.

The Occupying Power may not use the reservation lightly. Its security must be threatened by some real danger. The nature of the measures it may adopt will depend upon the situation, and they will only continue as long as the circumstances leading to their adoption subsist.

It must be emphasized that under no circumstances may the occupation authorities invoke reasons of security to justify the general suspension of all humanitarian activities in an occupied territory[2].

PARAGRAPH 2. — SPECIAL ORGANIZATIONS

The protection granted to National Red Cross Societies and other relief societies is also extended to special organizations " of a non-military character "[3], provided such organizations have shown that they are capable of rendering certain services necessary to the popula-

[1] During the Second World War, large numbers of private societies and organizations rendered services of immense value by carrying out charitable work similar to that of the Red Cross.

[2] See also Article 30.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 670, 753, 833.

tion (civil defence, passive defence, civil security services, civil air defence, etc.).

Such services were most useful during the Second World War; they will undoubtedly be greatly expanded should another armed conflict break out, and their importance will be all the greater in view of the constantly growing destructive power of weapons. Their duties and those of relief societies are complementary in the taking of measures to mitigate the effects of bombing and in the organization of rescue work and also in the distribution of relief. This provision [1] may be compared with Article 56, which says that the Occupying Power has the duty of ensuring and maintaining medical and hospital establishments and services " with the co-operation of national and local authorities ".

The special organizations must be " of a non-military character ". If they were called upon to take part in resisting the enemy (commandos or parachutists, for example), they would come under the Third Geneva Convention (Prisoners of War), and not the Fourth; and the occupying authorities would be able to dissolve them and arrest their members.

ARTICLE 64. — PENAL LEGISLATION: I. GENERAL OBSERVATIONS [2]

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

[1] See *Final Record*, Vol. II-A, p. 753; Vol. II-B, pp. 423-424; Vol. III, p. 139.

[2] For the origin of the Article, see *Final Record*, Vol. I, p. 122; Vol. II-A, pp. 670-672, 771, 833; Vol. II-B, p. 424.

Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country " unless absolutely prevented ".

PARAGRAPH 1. — PENAL LAWS — COURTS OF LAW

1. *First sentence. — Penal legislation*

A. *The rule.* — The first sentence expresses a fundamental notion : that the penal legislation in force must be respected by the Occupying Power. This is an application of a basic principle of the law of occupation (Article 43 of the Hague Regulations, as quoted above)[1].

The idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory. The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts ; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.

The words " penal laws " mean all legal provisions in connection with the repression of offences : the penal code and rules of procedure proper, subsidiary penal laws, laws in the strict sense of the term, decrees, orders, the penal clauses of administrative regulations, penal clauses of financial laws, etc.

B. *Reservations.*—The principle that the penal laws in force in the occupied territory must be maintained is subject to two reservations.

The first relates to the security of the Occupying Power, which must obviously[2] be permitted to cancel provisions such as those concerning recruiting or urging the population to resist the enemy.

The second reservation is in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 672.

[2] See *ibid.*, pp. 670, 771 and 833.

This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.

These two exceptions are of a strictly limitative nature. The occupation authorities cannot abrogate or suspend the penal laws for any other reason—and not, in particular, merely to make it accord with their own legal conceptions.

2. Second sentence. — Courts of law

A. *The rule.*— Owing to the fact that the country's courts of law continue to function, protected persons will be tried by their normal judges, and will not have to face a lack of understanding or prejudice on the part of people of foreign mentality, traditions or doctrines[1].

The continued functioning of the courts of law also means that the judges must be able to arrive at their decisions with complete independence. The occupation authorities cannot therefore, subject to what is stated below, interfere with the administration of penal justice or take any action against judges who are conscientiously applying the law of their country.

B. *Reservations.*—There are nevertheless two cases—but only two—in which the Occupying Power may depart from this rule and intervene in the administration of justice.

1. As has just been said, the occupation authorities have the right to suspend or abrogate any penal provisions contrary to the Convention, and in the same way they can abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws[2].

2. The second reservation is a consequence of " the necessity for ensuring the effective administration of justice ", especially to meet the case of the judges resigning, as Article 56 gives them the right to do for reasons of conscience[3]. The Occupying Power, being the temporary holder of legal power, would then itself assume responsibility for penal jurisdiction.

For this purpose it may call upon inhabitants of the occupied territory, or on former judges, or it may set up courts composed of judges of its own nationality ; but in any case the laws which must be applied are the penal laws in force in the territory.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 771.

[2] See *ibid.*, pp. 670, 833.

[3] See *ibid.*, pp. 672, 771.

PARAGRAPH 2. — LEGISLATIVE POWERS OF THE OCCUPANT

The legislative power of the occupant as the Power responsible for applying the Convention and the temporary holder of authority is limited to the matters set out in a limitative list below.

(a) It may promulgate provisions required for the application of the Convention in accordance with the obligations imposed on it by the latter in a number of spheres : child welfare, labour, food, hygiene and public health etc.[1]

(b) It will have the right to enact provisions necessary to maintain the " orderly government of the territory " in its capacity as the Power responsible for public law and order.

(c) It is, lastly, authorized to promulgate penal provisions for its own protection. This power has long been recognized by international law[2]. The provision is sufficiently comprehensive to cover all civilian and military organizations which an Occupying Power normally maintains in occupied territory. The Convention mentions " the Occupying Power " itself besides referring to the members and property of the occupying forces or administration, so that general activities such as activities on behalf of enemy armed forces are covered.

The Occupying Power is entitled to use establishments and lines of communication for its own needs ; it is therefore entitled to take appropriate measures to ensure their security.

It will be seen that the powers which the Occupying Power is recognized to have are very extensive and complex, but these varied measures must not under any circumstances serve as a means of oppressing the population. The legislative and penal jurisdiction exercised by the occupation authorities, as holder of public power, is therefore hedged about with numerous safeguards set forth in the following Articles.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 672, 833.

[2] See *ibid.*, Vol. II-A, pp. 672, 833.

ARTICLE 65. — PENAL LEGISLATION: II. PUBLICATION. NON-RETROACTIVITY [1]

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

1. *Publication*

It may seem surprising that a whole Article of the Convention should be devoted to stating such an obvious principle, but the experience of two World Wars has shown that that principle is not always observed. Article 65 was adopted with a view to ensuring its observance in the future [2].

The Occupying Power must not, for example, rest content with merely broadcasting the information, for the broadcast may only be heard by a portion of the population. The full text of the legislation must be published. The Convention does not prescribe the mode of publication, which may be through the medium of the local press, in an " Official Gazette " specially issued for the purpose, or by posting notices in places specially set aside and known to the public. The Occupying Power will sometimes resort to all three methods simultaneously. The language used will, of course, be the official language of the country concerned, that is to say the language in which the laws of the State are published [3].

In all probability most armies of occupation will begin by promulgating the provisions of their military penal code dealing with offences committed against members of the armed forces or against military installations. That was what happened very often during the Second World War : as the armed forces advanced into enemy territory, they posted notices drawing the attention of the population to the measures which would be taken to punish unlawful attacks on military personnel and material.

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[1] For the origin of Article 65, see *Final Record*, Vol. I, p. 122 ; Vol. II-A, pp. 672-673, 765, 833 ; Vol. II-B, p. 424.

[2] See *ibid.*, Vol. II-A, pp. 672-673, 833.

[3] In countries which have more than one official language the Occupying Power will follow local practice and publish the penal provisions it enacts, in either one or more than one language, according to whether the country's legislation was published in one or in more than one language before the occupation.

If offences are committed against the occupation forces before such notices have been brought to the knowledge of the population of the occupied territory, the Occupying Power may punish them by having recourse to the military law of the territory which has been occupied. It may be noted, in this connection, that nearly all codes of military law provide some form of punishment for acts committed against members of the armed forces or against military installations.

2. *Non-retroactivity*

The clause stipulating that penal provisions cannot be made retroactive in their effect expresses a fundamental principle of law[1]. Its importance is underlined in another Article of the Convention (Article 67) according to which the Occupying Power's courts " shall apply only those provisions of law which were applicable prior to the offence."

The non-retroactivity of penal law is absolute : in exercising penal jurisdiction, the Occupying Power will not be able to depart from established practice ; that rule provides the population of the occupied territory with an important safeguard against persecution.

ARTICLE 66. — PENAL LEGISLATION : III. COMPETENT COURTS

In case of a breach of the penal provisions promulgated by it in virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

1. *General*

As has been seen, Article 64 authorizes the Occupying Power to subject the inhabitants of the occupied territory to whatever measures it considers necessary for its own security and to ensure that the present Convention is enforced and the territory properly administered.

Article 66 recognizes the right of the Occupying Power to bring offenders before its own military courts for the purpose of punishing offences against such measures, which may cover a very wide range.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 672-673, 833.

The legislative powers of the occupying forces are thus reinforced by judicial powers designed to make good the deficiencies of the local courts, should this be necessary.

2. *Conditions*

The powers referred to may only be exercised on certain conditions, the observance of which is imperative :

(a) The accused may only be brought before " military courts ", that is before courts whose members have military status and are subordinate to the military authorities[1]. These courts, dealing as they do with the offences committed by the army of occupation, will normally sit in occupied territory, and can therefore try cases involving other people in such territory. That is doubtless the reason why military courts have been prescribed, since it will be seen that another of the conditions on which the right to exercise jurisdiction depends, is that the court should sit within the occupied territory.

(b) The military courts must be " non-political ". This clause forbids certain practices resorted to during the Second World War when the judicial machinery was sometimes used as an instrument of political or racial persecution.

(c) The courts are to be " regularly constituted ". This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent. Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice.

It will be seen later (Article 71 and following) that the proceedings in such courts are governed by a set of extremely detailed provisions, providing protected persons with every guarantee of respect for the human person.

(d) A last condition, already referred to above, is that the courts in question should " sit in occupied territory ". If they are sitting, for any special reason, outside the occupied territory, they must move into it in order to try the cases mentioned here. This obligation is in accordance with the principle of the territoriality of penal jurisdiction. It prevents protected persons who are accused of an offence from being brought before a court in a country other than that in which the offence was committed and thus provides them with a safeguard of the utmost value. In the same way, the Convention lays down that protected persons against whom proceed-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 123 ; Vol. II-A, pp. 765, 833.

ings are taken are to be " detained within the occupied country " and, where necessary, " serve their sentence there ".

The Occupying Power is, on the other hand, free to decide whether or not the competent courts of appeal are to sit in occupied territory. The text itself states that they should " preferably " sit in the occupied country ; this would be likely to provide the protected persons with additional safeguards.

ARTICLE 67. — PENAL LEGISLATION: IV. APPLICABLE PROVISIONS [1]

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power.

Article 67 relates to the military courts before which the Occupying Power may bring accused persons under the terms of the preceding Article.

The objet of the provision is to limit the possibility of arbitrary action by the Occupying Power by ensuring that penal jurisdiction is exercised on a sound basis of universally recognized legal principles. The rule that penal laws cannot be retroactive, which is stated here in general terms, had already been mentioned at the end of Article 65. *Nullum crimen, nulla poena sine lege* is a traditional principle of penal law. There can be no offence, and consequently no penalty, if the act in question is not referred to in a law in force at the time it was committed and subject to punishment under that law.

The Article then makes express mention of the rule that the penalty is to be proportionate to the offence ; this was because of certain abuses committed during the Second World War, when heavy punishments, and even the death penalty, were inflicted for minor offences such as listening to enemy radio programmes or coming out on strike.

This clause may be regarded as a welcome addition to Article 33, which prohibits all measures of intimidation or terrorism, since penalties which were out of proportion to the offence would undoubtedly constitute a form of terrorism.

[1] For the origin of Article 67, see *Final Record*, Vol. I, p. 123 ; Vol. II-A, pp. 673, 765, 810, 833, 858 ; Vol. II-B, pp. 195, 424 ; Vol. III, p. 140.

The " general principles of law ", which are not set out individually here but are referred to as a whole, include the rule concerning the personal nature of punishments, under which nobody may be punished for an offence committed by someone else. This rule is also laid down in Article 33 mentioned above.

After mentioning these principles, the Convention makes an additional stipulation upon which it is desirable to dwell: before sentencing a protected person to any penalty the courts of the Occupying Power must take into consideration the fact that the accused is not its national and consequently does not owe it allegiance. An act which would be odious treachery if carried out by a national of the Occupying Power, in view of the offender's duties of allegiance to the State to which he belongs, is of an entirely different nature when it is committed by a person who is not a national of that Power. Not only can the perpetrator of the act no longer be regarded as a traitor, but, on the contrary, the patriotic sentiments which animate him and may have caused him to act in a manner detrimental to the enemies of his country, deserve consideration. His honourable motives must be taken into account when deciding on the penalty for an act which the laws of war authorize the Occupying Power to punish.

The same idea will be met with again in connection with Articles 68 and 118; it also occurs in the corresponding Articles of the Third (Prisoners of War) Convention[1].

ARTICLE 68. — PENAL LEGISLATION: V. PENALTIES. DEATH PENALTY[2]

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected

[1] See Third Convention, Articles 87, para. 2, and 100, para. 3.

[2] For the discussions leading to the adoption of this Article, see *Final Record*, Vol. I, p. 123; Vol. II-A, pp. 673, 765-768, 788, 810, 833, 858; Vol. II-B, pp. 195, 424; Vol. III, pp. 140-141.

persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

PARAGRAPH 1. — PENALTIES INVOLVING LOSS OF LIBERTY

1. *Offences*

Paragraph 1 deals with offences the consequences of which are not serious for the Occupying Power. Such offences are only punishable by " simple " imprisonment or internment, while those which have serious consequences for the Occupying Power may be punished by penalties of much greater severity, even the death penalty, subject to the conditions laid down in the three following paragraphs.

The minor offences must have been " solely " intended to harm the Occupying Power. The inclusion of the word " solely " excludes acts which harm the Occupying Power indirectly[1].

2. *Sanctions*

Internment is a preventive administrative measure and cannot be considered a penal sanction. It is nevertheless mentioned here under the same head as simple imprisonment, because the authors of the Convention wished to make it possible for the military courts of the Occupying Power to give persons guilty of minor offences the

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 765-768.

benefit of the conditions of internment provided for in Articles 79 et sqq. The provision was a humane one and was intended to draw a distinction between such offenders and common criminals.

As several delegations at the Geneva Conference pointed out, " simple " imprisonment was intended to mean imprisonment " of the least severe kind ". It will be seen, incidentally, in the comments on Article 76, that protected persons must always " if possible, be separated from other detainees ", that is from common criminals. The application of the paragraph under discussion provides a special opportunity for carrying out this recommendation.

It should be noted that internment and imprisonment are only mentioned as maximum penalties, and less severe penalties still, such as placing under arrest or fines, may be applied in the case of persons accused of minor offences.

Paragraph 2. — Death penalty [1]

1. *Offences*

In the Commentary on Article 5, it was noted that the Convention does not define the meaning of " espionage " [2] or " sabotage ". It is only " serious " acts of sabotage that are referred to here. This qualification was added by the Diplomatic Conference in view of the tendency of belligerents to interpret " sabotage " in a very broad sense. The destruction of an air base, or of a line of communication of strategic importance, is a serious act of sabotage ; on the other hand individual acts such as stoppage of work or refusing to obey orders when carrying out some imposed task cannot be punished by the Occupying Power as acts of sabotage, in spite of the damage they may cause it.

In view of the difficulty of defining, *a priori*, acts which may be described as serious acts of sabotage, it will be for the courts to make a decision in each individual case, objectively weighing all the circumstances.

The words " intentional offences which have caused the death of one or more persons " provide a clear indication of the difference between the serious offences under consideration and the offences referred to in paragraph 1, whose characteristic feature is, in fact, that they do not involve anyone's death.

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[1] See *Final Record of the Democratic Conference of Geneva of 1949*, Vol. II-A, pp. 765-768.

[2] For a definition of espionage, see p. 57.

2. *Reservation in regard to local legislation*

Use of the death penalty, which may only be imposed for three types of offence, espionage, serious sabotage, and intentional homicide, is subject to a condition : namely, that the death penalty was provided for similar cases under the law in force before the occupation began.

It was this clause, introduced by the XVIIth International Red Cross Conference, which caused the greatest conflict of opinion at the Diplomatic Conference in 1949 when the law of occupation was under discussion.

Those who opposed the reservation argued that it would create an inequality of treatment between the populations of different occupied territories, according to whether capital punishment already existed in a territory or not. They claimed that it would in any case be possible for the defeated side to promulgate a law or decree abolishing the death penalty at the last moment before their territory was occupied, thus depriving the Occupying Power of a most effective means of repression at a time when reprisals against individuals and the taking of hostages were forbidden. Those in favour of this most important safeguard, however, reminded the Conference of the crimes perpetrated under the cover of penal jurisdiction in certain occupied countries during the Second World War. They dwelt on the fact that patriotic agitation was ethically correct and that patriots guilty of offences which were punishable by death must not be hastily and irrevocably condemned. In their opinion this reservation in regard to national legislation would represent a valuable victory for the forces of humanity.

The clause in question was finally adopted after every aspect of the question had been discussed in detail and at great length ; but when the Conventions were signed several delegations made express reservations in regard to this point[1].

The Convention does not indicate the penalties which may be inflicted on persons guilty of serious offences for which the law of the country does not provide for the death penalty ; the courts will be completely free to decide the matter, having at their disposal the

[1] One was the delegation of the United States, which signed the following reservation : " The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins."

Similar reservations were made by the United Kingdom, Canada, New Zealand and the Netherlands. (See *Final Record*, Vol. I, pp. 346, 349, 352-353.)

penalties recognized by the legislation in force (long terms of imprisonment, solitary confinement, penal servitude)[1].

It should be pointed out that the words " law of the occupied territory in force before the occupation began " should be taken to mean the positive penal law of that territory as it existed at the time the occupation began, within the meaning of Articles 2 and 6 of the Convention. The expression includes wartime law, both when such provisions enter into force automatically on the outbreak of war and when special legislation has been promulgated by the government of the occupied territory. As is known, military penal codes sometimes contain Articles which are applicable only in wartime, or prescribe penalties of greater severity for certain offences when they are committed in wartime.

PARAGRAPH 3. — SPECIAL CONDITION

This clause may be compared with the provision in Article 67 which lays down that the courts of the occupying authorities are to " take into consideration the fact that the accused is not a national of the Occupying Power ". Consideration must, in fact, be given to the particular position in which the protected person finds himself. He is not a national of the Occupying Power, but on the contrary the inhabitant of a country which is suffering as a result of its invasion and occupation by its enemies. The judge should take these extenuating circumstances into account and reduce the penalty accordingly.

The words " duty of allegiance " constitute an acknowledgment of the fundamental principle according to which the occupation does not sever the bond existing between the inhabitants and the conquered State. Protected persons must nevertheless obey legitimate orders issued by the Occupying Power[2].

This provision is also to be found in Articles 87 and 100 of the Third Convention and in Article 118 of the present Convention.

PARAGRAPH 4. — AGE LIMIT

This clause originated in a proposal made at the XVIIth International Red Cross Conference by the International Union for Child

[1] Deportation cannot be inflicted, however, since Article 76 lays down that protected persons must serve their sentence in occupied territory.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 673-674.

Welfare[1]. It makes eighteen years the absolute age limit below which the death penalty may not be inflicted, even if all the other conditions which make that penalty applicable are present.

The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.

ARTICLE 69. — PENAL LEGISLATION: VI. DEDUCTION FROM SENTENCE OF PERIOD SPENT UNDER ARREST

In all cases the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment awarded.

This provision, which supplements the preceding Article, did not appear in the Stockholm Draft ; it was introduced by the Diplomatic Conference. It gives expression in terms of the law of occupation to a rule which is generally recognized in penal codes. It is of particular significance in occupied territory where the preliminary investigation in penal proceedings must often be carried out under difficult circumstances, which may involve delays and consequently extend the period spent under arrest.

The phrase " under arrest awaiting trial or punishment " must be taken to mean confinement before the preliminary investigation is concluded as well as confinement after its conclusion, before sentence is pronounced.

The words " in all cases " at the beginning of the Article show clearly that the Diplomatic Conference intended the deduction from the sentence of periods spent under arrest to be an absolute and binding rule, admitting of no exception, whatever the behaviour of the protected person under arrest may have been. If the prison sentence awarded is less than the period spent under arrest, the person sentenced must be released immediately. If the accused person is only fined, the judge, in imposing the fine, will be able to take due account of the period spent under arrest.

Certain countries where the option of deducting the period spent under arrest does not exist will have to adapt the law of their country

[1] See *Summary of the debates of the Sub-Commissions of the Legal Commission*, p. 79.

to meet this point. This has already been done by Switzerland, which has included in its federal law on penal procedure a general reservation covering all provisions of the Geneva Conventions which did not conform to that law (Article 214).

ARTICLE 70. — PENAL LEGISLATION: VII. OFFENCES COMMITTED BEFORE OCCUPATION [1]

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for the offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

PARAGRAPH 1. — ACTS COMMITTED BY PROTECTED PERSONS BEFORE OCCUPATION

1. *The principle*

The government experts who met in 1947 under the auspices of the International Committee of the Red Cross had already condemned certain punitive measures taken by an Occupying Power in respect of events which had occurred before the occupation or acts committed during a temporary interruption of the occupation [2]. The inhabitants of the occupied country had been punished for having helped their own country's troops or those of its allies, for having belonged to a political party banned by the occupying authorities and for having expressed in the Press or in broadcasts political opinions which conflicted with the occupant's views. The clause under discussion was

[1] For the background of this Article, see *Final Record*, Vol. I, p. 123; Vol. II-A, pp. 674, 768, 834; Vol. II-B, pp. 433, 479; Vol. III, p. 142.

[2] See *Commission of Government Experts for the Study of Conventions for the Protection of War Victims, Preliminary Documents submitted by the International Committee of the Red Cross*, Geneva, 1947, Vol. III, *Condition and Protection of Civilians in Time of War*, p. 19.

adopted in order to avoid such measures being taken in the future. It covers not only the action of private individuals, but also legal action taken by a magistrate or official of the occupied territory in carrying out his public duties. The rule limiting the jurisdiction of the Occupying Power to the period during which it is in actual occupation of the territory is based on the fact that occupation is in principle of a temporary nature[1].

The Occupying Power is therefore legally entitled to exercise penal jurisdiction in the occupied country in respect of acts which occur during occupation, and in respect of such acts only.

2. *Exception*

There is one very important exception to this rule: when a protected person is guilty of breaches of the laws and customs of war, the occupying authorities are entitled (and it is even, as will be seen, their duty) to arrest and prosecute him, irrespective of the date of the offence. This is the only case in which the Convention authorizes the Occupying Power to prosecute and punish a protected person for acts committed before the territory was occupied, or during a temporary interruption of the occupation.

The expression "laws and customs of war"[2] covers the whole of the rules relating to the conduct of hostilities and to the treatment of war victims, particularly under the Geneva Conventions, the Hague Regulations, and unwritten international law.

The following example will serve to illustrate the difference between offences in respect of which the Occupying Power may take proceedings and those for which it may not do so. The occupation authorities cannot bring penal proceedings against an official of the occupied country who before the occupation began had ordered the internment of enemy civilians residing in the territory provided that he has observed the rules laid down in the Convention when interning those concerned. On the other hand, if the official in question had given orders—also before the occupation of the territory—for enemy civilians (or prisoners of war) to be exterminated or ill treated, the occupying authorities could prosecute and convict him; for he would then have acted in violation of the laws and customs of war.

Repression in such cases is based on the principle that penal legislation relating to war crimes is of universal application. Whereas

[1] See p. 273.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 674, 768-769.

an ordinary criminal breaks only the law of the country, a war criminal breaks an international law or custom. The punishment of such crimes is therefore as much the duty of a State which becomes the Occupying Power as of the offender's own home country. The universal character of the law implies universal jurisdiction. It is, incidentally, by virtue of this essential principle that every Party to the Geneva Conventions of 1949 is under an obligation to " enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, . . . grave breaches of the present Convention ", to " search for persons alleged to have committed, or to have ordered to be committed, such grave breaches " and to bring such persons, " regardless of their nationality ", before its own courts (Article 146).

PARAGRAPH 2. — REFUGEES

1. *Object of protection*

The second paragraph relates to " nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State".

The clause is absolutely exceptional in character ; for Part III, like the whole Convention, except for Part II, is concerned only with non-nationals of the Occupying Power.

The paragraph refers to persons who fled from their home country before the outbreak of hostilities and found asylum in the occupied country ; they rank as refugees, which distinguishes them from other subjects of the Occupying Power who are in occupied territory and to whom this clause does not apply.

The clause should be compared with Article 44, which also deals with the position of refugees. The two texts are complementary : Article 44 deals with the refugees' relations with the authorities of the country which receives them ; Article 70 governs their position vis-à-vis their own country of origin when it becomes the Occupying Power.

The commentary on Article 44 showed the meaning attached to the word " refugee " in the Convention. Refugees are people who have left their home country to seek refuge on alien soil as a result of political events or under the threat of persecution. They are thus in actual fact without the protection normally afforded by the State to which they belonged, but are not yet entitled to the legal protection of the State which has given them refuge.

2. *Treatment*

The safeguard provided for refugees who are nationals of the Occupying Power is a clause prohibiting that Power from arresting, prosecuting, convicting or deporting them from the occupied territory. It is derived from the idea that the right to asylum enjoyed by them before the occupation began must continue to be respected by their home country, when it takes over control as Occupying Power in the territory of the country of asylum.

If the suffering of innumerable refugees in foreign lands who were subjected to acts of vengeance and persecution by the occupying authorities when those lands were invaded is called to mind, it is easy to understand the importance of giving refugees the status of protected persons.

There are two exceptions to the rule prohibiting the Occupying Power from arresting, prosecuting, convicting or deporting those of its nationals who rank as refugees.

(a) It does not apply to refugees who have committed offences " after the outbreak of hostilities ". In making this reservation the plenipotentiaries of 1949 wished to make allowance for the possibility of nationals of a belligerent, who had taken refuge abroad, having been guilty in wartime of action prejudicial to their home country (propaganda broadcasts, attacks in articles of the press, etc.). If such acts have been committed before the outbreak of hostilities, those responsible for them cannot be prosecuted by the occupation authorities. They are then guilty only of political agitation. Once war has broken out, however, such agitation becomes treason and the higher interests of the State take precedence over the protection of the individual.

(b) The second exception concerns nationals of the Occupying Power who have committed ordinary criminal offences before the outbreak of hostilities and have taken refuge in the occupied territory in order to avoid the consequences of their action.

This reservation will be readily understood. Its object is to draw a clear distinction between two classes of persons: on the one hand, refugees, who are rightly entitled, as such, to humanitarian safeguards, and, on the other hand, common criminals who have no right at all to such protection. When criminals again fall into the hands of their State of origin, as a result of the occupation of the territory in which they are living, they must answer for their actions ; the occupying authorities may therefore arrest them, take them back to their home country and bring them before its courts, provided always that the

law of the occupied State would have justified their extradition in time of peace. It is thus the legislation of the occupied State, and not that of the Occupying Power, which serves as a criterion for the definition of " offences under common law ".

Municipal law usually authorizes extradition for ordinary criminal offences only, as distinct from offences of political, religious or military character, for which extradition is nearly always refused ; refugeees accused of offences which fall into the latter category can under no circumstances be arrested, prosecuted or deported by the occupation authorities ; they are completely covered by the immunity accorded.

The problem—often a difficult one—of " connected offences " or " combined offences ", that is offences which exhibit features of a political offence and at the same time those of an offence against ordinary law, must also be settled by reference to the law of the occupied State.

The reference to " the law of the occupied State " provides a further important safeguard : the occupation authorities will not be able to arrest and deport refugees in an arbitrary fashion, but only if they can produce proof that the charges against them are sufficient to warrant such action. Most domestic legislation and international treaties dealing with extradition contain a clause stating that the State applying for extradition must show a *prima facie* case ; that is a normal judicial safeguard. It follows that an Occupying Power cannot take refugees into custody and send them back to its territory by merely alleging that they are guilty of ordinary criminal offences committed before the outbreak of hostilities ; it must furnish adequate proofs in support of its allegations.

The express reference in the Article to the extradition laws which applied *in peacetime* is designed to meet the case of an Occupying Power which is tempted to apply pressure to the authorities of the occupied territory to persuade them to modify the provisions of their national legislation.

ARTICLE 71. — PENAL PROCEDURE: I. GENERAL OBSERVATIONS [1]

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand,

[1] For the background to this Article, see *Final Record*, Vol. I, p. 123 ; Vol. II-A, pp. 674, 769, 834 ; Vol. II-B, pp. 150, 155, 438 · Vol. III, p. 143.

of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars :

(a) *description of the accused ;*
(b) *place of residence or detention ;*
(c) *specification of the charge or charges (with mention of the penal provisions under which it is brought) ;*
(d) *designation of the court which will hear the case ;*
(e) *place and date of the first hearing.*

The penal procedure laid down (Articles 71 to 78) is based on the same principles as in the Prisoners of War Convention ; the safeguards provided apply to persons interned not only in occupied territory, but also, by analogy, in the territory of any Party to the conflict (Article 126).

PARAGRAPH 1. — REGULAR TRIAL

The inclusion in the Convention of the express rule that no sentence may be pronounced by the competent courts of the Occupying Power except after " a regular trial " introduces into the law of war a fundamental notion of justice as it is understood in all civilized countries[1].

The safeguards provided in the Articles dealing with penal legislation, which we have just discussed, and those prescribed elsewhere, particularly in Article 32, which prohibits torture and all other forms of brutality, obviously represent conditions which must be fulfilled if a trial is to be regular ; but there are other rules relating to penal procedure which are not expressly laid down in the Convention, but

[1] See, in particular, the Universal Declaration of Human Rights, Paris, 10 December 1948, and the Convention for the Defence of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

must nevertheless be respected as they follow logically from its provisions. One is the principle that any accused person is presumed to be innocent until he is proved guilty. This essential rule remains fully valid in occupied territory.

The idea of a regular trial is so important that it also finds expression, as has been seen, in Article 3, which prohibits at all times and in all cases whatsoever " the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples ", and in Article 147, where the fact of wilfully depriving a protected person of " the rights of fair and regular trial prescribed in the present Convention " is included among the grave breaches listed in that Article which call for the severest penalties.

The safeguard is absolutely general. It applies to all accused persons, even those who are charged with having contravened the Geneva Conventions themselves[1].

Paragraph 2. — Charge. Intervention by the Protecting Power

1. *First sentence : Charge and preliminary investigation*

The nature and grounds for the charge must be notified to the accused without delay ; the protected person accused must know the reasons for his arrest in time to prepare his defence. The notification must give full particulars in a language the person concerned can understand and in writing, in order to avoid the possibility of changes being made in the charge preferred.

The accused is to be brought to trial as rapidly as possible. This provision is of the utmost importance in time of occupation when delays in the preliminary investigation may tend to prolong the period spent under arrest awaiting trial.

2. *Second and third sentences : Intervention by the Protecting Power*

The competent judicial authority of the Occupying Power is bound to inform the Protecting Power whenever the charges may involve the death penalty or imprisonment for two years or more. The occupation authorities must make the notification automatically, without being asked to do so by the Protecting Power.

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[1] See commentary on Article 146, para. 4.

The Protecting Power may follow the case and also " any other proceedings " instituted by the Occupying Power against protected persons.

" Any other proceedings " means cases of a less serious nature, involving less severe penalties, which the Occupying Power is not required to notify *proprio motu* to the Protecting Power. In such cases, however, the Protecting Power has the right to request particulars, but they are not furnished to it except at its express request.

PARAGRAPH 3. — NOTIFICATION TO THE PROTECTING POWER

The third paragraph lays down a series of rules relating to the transmission and contents of the notifications which the occupying authorities have to send to the Protecting Power. It reproduces, *mutatis mutandis*, the provisions of Article 104 of the Third Convention.

In providing a minimum time limit of three weeks before the first hearing, the Conference wished to make sure that the Protecting Power would have time to study the case and to arrange to be represented at the court hearing, which it is entitled to attend under Article 74.

At the opening of the trial evidence must be produced to prove that the provisions of this Article have been complied with and in particular that formal notification has been made within the required time limit to the Protecting Power. If this has not been done, the hearing is to be adjourned. The particulars given in the notification to the Protecting Power must include exact details of the place of residence or detention of the accused. This last item is particularly useful, as under Article 76 the persons detained are entitled " to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross ".

The fact that the list of particulars which are to be given in the notification to the Protecting Power is not limitative in character is clearly shown by the use of the words " shall include ". The Occupying Power is therefore free to add further particulars in order to make easier the task of the representatives of the Protecting Power.

By making a third Power responsible for supervising the scrupulous observance of the jurisdictional safeguards laid down by the Convention, the text provides protected persons with a valuable protection, which may well prevent a repetition of the abuses made possible during the Second World War through the anonymous character of the repressive measures in certain occupied territories.

ARTICLE 72. — PENAL PROCEDURE: II. RIGHT OF DEFENCE[1]

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have at any time the right to object to the interpreter and to ask for his replacement.

The rules laid down in this Article are based closely on the provisions of Article 105 of the Third Convention.

PARAGRAPH 1. — EVIDENCE. — COUNSEL FOR THE DEFENCE

The calling and examination of witnesses is one of the main means of defence. The wording of the Article indicates clearly that the accused may use all other methods of proof such as the production of documents or other written evidence. In addition to this right, he has the not less important one of being assisted by a "qualified" advocate or counsel of his own choice.

With regard to the relationship between the accused and his advocate or counsel, the words used ("the necessary facilities") are the same in the corresponding provisions of the Third Convention (Article 105). The defending counsel must be given by the judicial authorities concerned all the facilities and freedom of action necessary for preparing the defence. Above all, he must be allowed to study the written evidence in the case, to visit the accused and interview him without witnesses and to get in touch with persons summoned as witnesses.

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[1] For the background to this Article, see *Final Record*, Vol. I, p. 123; Vol. II-A, pp. 674-675, 770, 834; Vol. II-B, p. 438.

It will not always be easy for these rules to be observed during an occupation, in view of the psychological atmosphere, but they must nevertheless be observed scrupulously in all circumstances and in all places.

Article 105 of the Third Convention instructs the Detaining Power that the prisoner of war should be advised of his rights " in due time before the trial "[1]. There is no such provision in respect of civilians accused by an Occupying Power, but an obligation to do the same in their case may be deduced by analogy, in view of the similarity between the two situations and the general spirit of the text.

PARAGRAPH 2. — DEFENDING COUNSEL OR ADVOCATE EX OFFICIO

If the accused fails to choose a defending advocate or counsel, and the Protecting Power has been unable to provide him with one [2], the Occupying Power must itself provide the advocate or counsel. However, this obligation is restricted to cases where the accused is faced with a serious charge. The Convention does not go into detail as to what should be understood by "serious charge", but, obviously, this idea covers penal prosecution which may involve sentence of death or a minimum of two years imprisonment and in this case Article 71 provides that the Protecting Power should be notified. Finally, the Article lays down the rule that the defending counsel shall not be imposed on the prisoner against his will. He always has the right to refuse the help of a counsel in whom he has no confidence and of conducting his defence himself.

The defending counsel or advocate nominated by the Protecting Power or the Occupying Power, must enjoy all the rights and prerogatives necessary for preparing the defence under the same conditions as a defending counsel or advocate chosen by the accused himself.

PARAGRAPH 3. — INTERPRETER

The right to call on the services of an interpreter applies during the preliminary investigations as well as during the hearing in court.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, p. 267.

[2] The Protecting Power must be given reasonable time for this purpose. Article 105 of the Third Convention envisages a period of at least one week and the same length of time should be considered as a minimum in the case of civilians. The defending counsel may be either an officer in the army of occupation or an advocate or counsel from the occupied territory itself.

If the accused at any time considers that the interpreter, through lack of either professional skill or objectivity, is no longer deserving of his confidence, he can enter an objection or ask for his replacement.

Thus the description of the penal procedure to be followed confirms the principle already stated with regard to penal legislation proclaimed by the Occupying Power, by virtue of which such legislation must be published in the language of the people of the occupied territory (Article 65).

ARTICLE 73. — PENAL PROCEDURE: III. RIGHT OF APPEAL[1]

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

PARAGRAPH 1. — APPEAL

The French wording of this Article is not very precise and the meaning can be better understood from the English version.

The word " appeal " found in this paragraph must be taken to mean any recourse to law aimed at obtaining the quashing or alteration of the sentence. It could take the form of an ordinary appeal, an appeal to the High Court or possibly a petition for a review of the sentence. This is very clearly shown by Article 106 of the Third Convention.

PARAGRAPH 2. — APPEAL PROCEDURE

Certain legal systems, particularly those of Anglo-Saxon countries, do not provide for an appeal procedure on penal matters. However, those systems insist that the sentence before becoming final must be confirmed by the military command. This is what is meant in the

[1] For the background to this Article, see *Final Record*, Vol. I, p. 124; Vol. II-A, pp. 675, 770, 837; Vol. II-B, pp. 438, 476-477.

second paragraph when the possibility is mentioned of the " right to petition to the competent authority of the Occupying Power "[1].

According to the English text, a convicted person must also be informed of the legal methods of appeal and the possibility of petitioning the competent authorities as well as of the time limit within which he must act.

In countries where the law makes no provision for appeal either in or outside the Courts, an extra-judicial appeal procedure should be instituted.

It should be added that this right to petition an executive authority with certain jurisdictional functions must be distinguished sharply from the right to petition for pardon under Article 75 of the Convention.

ARTICLE 74. — PENAL PROCEDURE: IV. ASSISTANCE BY THE PROTECTING POWER[2]

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera *in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.*

Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71 and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgment has been received by the Protecting Power.

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[1] The text submitted to the Plenary Assembly by the Third Committee mentioned a " right of petition ", but the Conference deleted the phrase, which it considered inadequate from the legal point of view, and substituted the present wording. See *Final Record*, Vol. II-A, p. 859 ; Vol. II-B, pp. 438-439.

[2] See *Final Record*, Vol. I, p. 124 ; Vol. II-A, pp. 675, 770, 810, 835, 859 ; Vol. II-B, pp. 155, 196, 439 ; Vol. III, p. 144.

PARAGRAPH 1. — ATTENDANCE AT COURT HEARINGS

The representatives of the Protecting Power shall have the right to be present at the hearings of any court trying a person under their protection. They therefore have this right in every case whether it is a serious one, involving notification under Article 71, or not.

However, there is a proviso attached to this rule in order to take into account the security needs of the Occupying Power. As an exception and for serious reasons, the hearing can take place *in camera*, a fact of which the Protecting Power must be informed. It is possible also that access to the Court may be forbidden to representatives of the Protecting Power only during part of a trial, when matters involving military secrets are being dealt with.

In obliging the Occupying Power to notify the Protecting Power of the place and date of the opening of the hearing, this provision supplements Article 71, which envisages notification only for cases which may lead to sentence of death or imprisonment for two years or over. This clause will enable the Protecting Power to be present not only in serious cases (except where its presence during the proceedings might jeopardize military security), but also in cases of lesser importance[1].

PARAGRAPH 2. — COMMUNICATION OF SENTENCES

On the other hand, it is laid down that only judgments involving a sentence of death or imprisonment for two years or more should be communicated to the Protecting Power. This is a logical counterpart to Article 71.

The judgment must be communicated whether the representatives of the Protecting Power have been present at the hearings or not.

An indication of the place where the sentence is to be served in case of imprisonment or internment is necessary to allow the Protecting Power to exercise its right under Articles 76 and 143 of the Convention to visit those detained (or interned).

In the case of sentences involving penalties less severe than two years imprisonment, the paragraph makes it clear that they must be recorded by the Court. They are not, therefore, communicated to the Protecting Power[2], but the representatives of the Protecting Power will have the right to examine the records.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 835.

[2] The Stockholm Draft envisaged the communication of all judgments to the Protecting Power. See *Final Record*, Vol. I, p. 124.

Thus the Protecting Power will be able to take cognizance of all sentences on protected persons and to make sure that the provisions of the Convention have been respected.

In the case of sentence of death or imprisonment for two years or more, the time limit allowed for appeal shall begin only when the Protecting Power has had the sentence communicated to it.

Nothing is said concerning less serious cases. The Convention therefore relies on the good faith of the authorities involved, but obviously the moment from which the time limit for appeals must run should not be fixed before the protected person has been advised of the sentence, if it is pronounced in his absence.

ARTICLE 75. — PENAL PROCEDURE: V. DEATH SENTENCE [1]

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

PARAGRAPH 1. — PETITION FOR PARDON OR REPRIEVE

This paragraph gives protected persons condemned to death the right to appeal, a right granted by law in nearly all countries to those sentenced to death.

The right to petition for pardon or reprieve is of particular importance during a period of occupation, when so many factors combine to make the normal course of penal justice more difficult and to increase the risk of judicial errors.

[1] For the origins of this Article, see *Final Record*, Vol. I, p. 124 ; Vol. II-A, pp. 771, 835.

The Convention does not regulate the procedure for petitions, which is left to the discretion of the Occupying Power. National law generally reserves the right of granting pardon or reprieve to Parliament or an executive authority, usually the Head of State. In wartime, for persons condemned under the military penal code, the right of pardon or reprieve rests with the Commander-in-Chief.

Appeals for pardon or reprieve may be made in respect of sentences other than the death sentence, but it is only in regard to capital punishment that the Occupying Power is under an obligation, since only death is irrevocable.

PARAGRAPH 2. — TIME LIMIT BEFORE SENTENCE IS CARRIED OUT

The provision that there should be a six-month period of suspension of the death sentence after the final sentence has been communicated to the Protecting Power or after a refusal to grant a pardon or reprieve has been notified to that Power, is a final guarantee against a judgment based on the circumstances of the moment, too often affected by emotional considerations[1].

During this time the Protecting Power can make any representations to the Occupying Power it may deem expedient in behalf of the condemned person.

PARAGRAPH 3. — RESERVATION

This principle is, however, subject to an important reservation. The six-month period of suspension of the death sentence may be reduced in circumstances of grave emergency involving an organized threat to the security of the Occupying Power. Mere agitation or threats would not be sufficient. The circumstances must be particularly serious and critical and the threat to which the Occupying Power or its forces are exposed must be " organized ", i.e. it must result from the action of several persons acting in common accord. Furthermore, the execution of the person condemned must be really necessary for the repression of the disturbances, in that, for example, it deprives the rebellion of its leader and thus prevents the sacrifice of further human lives.

The strictly exceptional character of this reservation is shown by the fact that it can only be invoked " in individual cases "[2]. The

[1] Article 101 of the Third Convention also stipulates that a period of six months shall elapse after a prisoner of war has been sentenced to death before the penalty is executed.

[2] " Dans certains cas précis " in the French text.

Occupying Power could not, therefore, decree a general reduction in the period of suspension of the death sentence. It may only reduce that period in regard to certain persons, and furthermore it is obliged to advise the Protecting Power of such reduction in order to enable that Power to make representations to the occupation authorities concerned in " reasonable time ".

Thus the Protecting Power, even in exceptional cases, will remain able to make representations before any sentence of death is carried out.

ARTICLE 76. — TREATMENT OF DETAINEES [1]

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

PARAGRAPH 1. — GENERAL PRINCIPLES

The provision under which any sentence of imprisonment must be served in the occupied territory itself is based on the fundamental principle forbidding deportations laid down in Article 49.

The recommendation that protected persons convicted should be separated from other detainees takes into account the fact which has often been emphasized [2], that persons guilty of offences against the penal

[1] For the origins of this Article, see *Final Record*, Vol. I, p. 124 ; Vol. II-A, pp. 675, 771-772, 790, 835 ; Vol. II-B, p. 439.

[2] See in particular p. 342.

law of Occupying Powers have often acted for patriotic reasons and could not be considered as similar to ordinary criminals. The words " if possible ", however, admit that exceptional cases may occur where for material or practical reasons such separation would not be practicable.

The conditions of food and hygiene of the detained persons must be sufficient to keep them in good health and will at least be equal to those obtaining in prisons in the occupied country, but the treatment given to protected persons in detention must take into account the principles of humanity and respect for human dignity in all places and all circumstances. Thus local conditions must not serve as a basis of comparison unless they conform to the requirements of humanity. That, in any case, follows from the general provisions of Article 27.

The rules laid down in this paragraph are made more precise and extensive by the six following paragraphs, granting detained persons a number of rights and guarantees which must be respected in all circumstances and consequently incorporated in national legislation. What was said with regard to Article 5, which allows of certain exceptions in individual cases, should be recalled here.

PARAGRAPH 2. — MEDICAL ATTENTION

This paragraph[1] brings the law of war into conformity with a principle which finds acceptance in the penal legislation of all civilized States.

It should be recalled that Article 16, which grants special protection to the wounded and sick, to invalids and to pregnant women, is general in scope. It is also applicable when those categories of person are detained.

Article 108 of the Third Convention contains an almost identical provision for the protection of prisoners of war.

PARAGRAPH 3. — SPIRITUAL ASSISTANCE

This clause reaffirms the principles laid down in Articles 27 and 58 (respect for religious convictions and practices, rights of ministers of religion). It corresponds to Articles 33 and 34 of the Third Convention.

PARAGRAPH 4. — TREATMENT OF WOMEN [2]

This provision should be compared with Article 27, paragraph 2, which states that " women shall be especially protected against any

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 439.

[2] See *ibid.*, Vol. II-A, p. 835.

attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault ".

The obligation to give women separate quarters is also contained in Article 25 of the Third Convention.

PARAGRAPH 5. — TREATMENT OF MINORS

The provisions laid down are based in particular on the guarantees contained in Article 50.

PARAGRAPH 6. — VISITS

The assistance of the Protecting Power, which may be given immediately the investigation begins and during the Court proceedings, is here extended to cover the period during which the sentence is served until the release of those detained.

In addition to their right to be visited by the representatives of the Protecting Power, those detained may also be visited by delegates of the International Committee of the Red Cross, who will have access to prison establishments on the same basis as the representatives of the Protecting Power.

The humanitarian activities of the International Committee are of particular importance when those detained have not the benefit of assistance from a Protecting Power to safeguard their interests and ensure that the provisions of the Convention are carried out[1].

The paragraph states that the right to be visited shall be " in accordance with the provisions of Article 143 ", an Article which lays down detailed regulations concerning the right of visit and envisages among other things, the possibility of visitors being able to converse with those detained without witnesses.

PARAGRAPH 7. — RELIEF

These provisions correspond to the rights laid down in Articles 59 and 62 (collective relief and individual relief) and represent a valuable guarantee for those detained, and one which may improve their lot.

One parcel per month is laid down as lower limit. It is recommended that the Occupying Power should allow a higher number of parcels in view of the exclusively humanitarian character of the relief. It should, however, be recalled that the allowing of relief parcels does not in any way mean that the Occupying Power is not called upon to

[1] See Commentary on Article 11 (Substitutes for Protecting Powers).

supply the minimum amount of food and attention mentioned in the first paragraph of this Article.

It should be added that the Diplomatic Conference did not consider it necessary to insert a provision specifically giving those detained the right to carry on correspondence with their families, since it was thought that the matter was already dealt with in Article 25[1].

ARTICLE 77. — HANDING OVER OF DETAINEES AT THE CLOSE OF OCCUPATION

Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

This provision is of prime importance ; the absence of such a rule would have allowed an Occupying Power with not too many scruples to take detained persons with it in its retreat and thus to circumvent the prohibition on deportation in Articles 49 and 76.

The Convention states expressly that persons detained by the Occupying Power shall be handed over at the close of occupation to the " authorities of the liberated territory." This is an absolute obligation and no exception is permitted.

The " authorities " mentioned will be those who in fact take over legal power in the territory abandoned by the Occupying Power, whether they are the government existing before the invasion of the country or another, newly formed, government.

It is made clear that the provision covers both persons " accused of offences " (in preventive detention) and those " convicted by the courts " and serving their sentences.

The obligation to hand over the " relevant records " at the same time is more important than it would seem at first sight. Indeed the prospect of having to hand over these documents may lead the Occupying Power to pay more scrupulous respect to the judicial guarantees laid down by the Convention. During the occupation, the Protecting Power will doubtless not have the time to study all cases closely, but after the relevant papers are handed over, it can go through them and determine whether the Occupying Power has acted according to the due forms of law.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 771-772.

The Convention does not lay down any rules concerning the practical arrangements for handing over detainees, because they will depend on circumstances and on whether the liberation of the occupied territory is accompanied by fighting or not, and whether the local administration has been able to continue to function or not. There again the intervention of the Protecting Power and the International Committee of the Red Cross will prove most useful.

ARTICLE 78. — SECURITY MEASURES. INTERNMENT AND ASSIGNED RESIDENCE. RIGHT OF APPEAL [1]

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

GENERAL

Article 78 may be compared with Articles 41 and 42, dealing with the internment and assigned residence of protected persons within the territory of a party to the conflict. All three provisions are based on the general reservation permitting " such measures of control and security as may be necessary as a result of the war." (Article 27, fourth paragraph).

In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict ; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security ; there can be no question of taking collective measures : each case must be decided separately.

[1] For the background to Article 78, see *Final Record*, Vol. I, p. 124 ; Vol. II-A, pp. 772-773, 835-836, 860 ; Vol. II-B, pp. 441-442, 486.

PARAGRAPH 1. — ASSIGNED RESIDENCE. — INTERNMENT

Unlike the Articles which come before it, Article 78 relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action.

The security measures envisaged are " assigned residence " and " internment ", which have already been considered in detail in connection with Articles 41 and 42.

It will suffice to mention here that as we are dealing with occupied territory, the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported ; they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself. In any case, such measures can only be ordered for real and imperative reasons of security ; their exceptional character must be preserved.

PARAGRAPH 2. — PROCEDURE

The second paragraph sets forth the procedural safeguards which are designed to ensure that the principles of humanity will be borne in mind when people are interned or placed in assigned residence[1].

It is for the Occupying Power to decide on the procedure to be adopted ; but it is not entirely free to do as it likes ; it must observe the stipulations in Article 43, which contains a precise and detailed statement of the procedure to be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence.

The persons subjected to these measures are not, in theory, involved in the struggle. The precautions taken with regard to them cannot, therefore, be in the nature of a punishment.

The acknowledged right of those concerned to appeal against any decision to intern them or place them in assigned residence is a further safeguard, and an important one. The details given concerning the practical application of the appeal procedure—including the recommendation that decisions which are upheld should be reviewed every six months [2]—show that the authors of the Convention took every possible care to prevent any form of abuse. They did, however, leave

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 772, 835-836.

[2] See *ibid.*, Vol. II-B, pp. 440-441.

it to he Occupying Power to entrust the consideration of appeals either to a " court " or a " board ". That means that the decision will never be left to one individual. It will be a joint decision, and this offers the protected persons a better guarantee of fair treatment.

PARAGRAPH 3. — ADDITIONAL SAFEGUARDS

The reason for this last provision is the same as for Article 39, to which it refers, and the second paragraph of Article 41 : namely, to ensure that people who are obliged to leave their domiciles, without enjoying internee status (Part III, Section IV, of the Convention), shall have some means of existence.

SECTION IV

REGULATIONS FOR THE TREATMENT OF INTERNEES

The regulations for the treatment of internees are contained in Section IV of Part III, Articles 79 to 135.

In the Tokyo Draft [1] there were only two Articles dealing with internment. Having laid down the general rule that internment camps for enemy civilians shall be separate from internment camps for prisoners of war and that they were not to be set up in unhealthy districts (Article 16), the Draft merely said (Article 17): " Furthermore, the Convention of July 27, 1929, relative to the treatment of prisoners of war is by analogy applicable to civilian internees. The treatment of civilian internees shall in no case be inferior to that laid down in the said Convention".

The Diplomatic Conference considered, as the XVIIth International Red Cross Conference had done, that the Tokyo Draft was inadequate in this respect and that the Fourth Convention should incorporate special regulations concerning civilian internment, omitting any provisions which could apply only to members of armed forces (respect for rank, saluting, pay, etc.), and adding clauses applicable to civilians. Consequently the regulations concerning the treatment of internees comprise no fewer than fifty-seven Articles, or about one third of the Convention.

In general, however, the regulations applicable to civilians reproduce almost word for word the regulations relating to prisoners of war. This is in accordance with wartime experience and with the views expressed during preliminary discussions on the new Conventions. In particular, at the Preliminary Conference of Red Cross Societies, which met in Geneva in 1946, the regulations for both prisoners of war and civilian internees were discussed by the same Committee.

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[1] See page 4.

Nevertheless several Articles—e.g. Articles 114 (management of property), 115 (facilities for preparation and conduct of cases) and 116 (visits)—have no counterpart in the Prisoners of War Convention, for they are intended to lessen the hardships of detention in the case of civilians who, not being subject to military discipline, may in certain instances be treated less strictly than prisoners of war. A further difference of prime importance in connection with labour conditions deserves notice. Whereas prisoners (with the exception of officers) may be forced to do work, internees need only work if they so desire. Apart from the fact that it is entirely voluntary, the work of internees is governed by the same rules as that of prisoners of war.

Chapter I

General Provisions

ARTICLE 79. — CASES OF INTERNMENT AND APPLICABLE PROVISIONS

The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

Articles 41, 42 and 43 deal with the case of aliens who are in the territory of a Party to the conflict when hostilities break out. They lay down the general rule that internment or placing in assigned residence are the most severe measures of control which can be applied to protected persons; they specify, moreover, that any protected person who has been interned or placed in assigned residence is entitled to have his case reconsidered " as soon as possible " by an appropriate court or administrative board designated for the purpose by the Detaining Power.

Articles 68 and 78 deal with the position in occupied territory. The first of these Articles lays down that internment may be ordered for offences intended to harm the Occupying Power but not constituting a grave collective danger; the second provides the same safeguards as those laid down in Articles 41, 42 and 43 for aliens in the territory of a Party to the conflict, with the one difference that the six-monthly review of decisions concerning internment, which is compulsory in the case of internees in the actual territory of a belligerent, is optional in occupied territory.

An account should be given here of the experience in this field during the Second World War. On the outbreak of war the International Committee of the Red Cross approached the governments and proposed that they should apply the Tokyo Draft : the only result obtained was that persons of " enemy nationality " interned on the outbreak of war, in the territory of one of the belligerents, could " by analogy " receive the benefit of the Prisoners of War Convention. Thanks to the action thus taken some hundred and sixty thousand civilians received correspondence and relief supplies and their camps were visited by delegates of the International Committee. Since many countries were occupied, however, such internees only represented a very small minority of the civilians subjected during the war to restrictive measures of varying degrees of severity. Whenever the question arose of interning civilians in occupied territory, the only safeguards available to them were the brief provisions contained in Section III of the Hague Regulations of 1907. The new Geneva Convention represents a great advance in that these civilians will in future enjoy a status similar to that of prisoners of war and regulated by a Convention. It may seem paradoxical to consider that placing civilians on the same footing as members of the forces in time of war represents progress. The truth of the matter is that modern war makes demands on the whole nation. The whole economic system of a State is placed at the service of national defence. The engineer or workman is as necessary as the officer or soldier, and every individual may have his part to play in the war ; that fact justifies the security measures which each of the Parties to the conflict may take in regard to individuals of enemy nationality in their territory, or which the Occupying Power may take in regard to the inhabitants of occupied territory. Such measures should at least conform to the laws of humanity, and that is the assurance given to protected persons by Article 79. Their internment both in the territory of the Parties to the conflict and in occupied territory is subject to rules which would have provided millions of human beings with protection if they could have been applied during the Second World War.

Satisfactory as they may be, the results achieved are not yet complete ; for the Convention, we must remember, does not apply to the relations of a State with its own " nationals "[1]. It conforms to the traditional conception of international law. A person is only a legal subject within a State and the provisions concerning the protec-

[1] Except for the fourteen Articles in Part II which refer to the establishment of safety zones, the protection of hospitals, the transmission of family news and the reuniting of dispersed families, and are, as we have said, absolutely general in scope.

tion of civilians in time of war take no account of disputes which may exist between the State and its own citizens. That is a serious matter, in view of the arbitrary action of certain governments during the last world war. Charitable organizations which may wish to plead the cause of the nationals of such countries have no legal arguments on which to rest their case. Nevertheless, their essential humanitarian character does not allow them to remain indifferent. It is well known what the International Committee of the Red Cross, in collaboration with various National Red Cross Societies, was able to do during the last war for thousands of unfortunate people, under particularly difficult circumstances, and no one can prevent the Red Cross, even in the absence of treaties, from demanding humane treatment for persons who are not " protected ". To support their demands it would obviously be best to refer to the regulations concerning internment contained in the Convention.

It is possible that a doctrine which is today only beginning to take shape may acquire authority in international law tomorrow and one day provide the basis for establishing the rights of the individual in relation to the State of which he is a " citizen ". The Universal Declaration of Human Rights is doubtless as yet only a " common standard of achievement for all peoples and all nations ", but just as the protection afforded by the humanitarian Conventions applied first to the wounded and sick on the battlefield, and was then extended to prisoners of war and finally to civilians (with the exception of nationals), it may well end by covering the " citizens " of a country themselves, and so embody in law the original guiding idea of the Red Cross, that suffering should be relieved wherever it exists, without political considerations of any kind, in the name of the respect due to the human person.

Two important Expert Conferences convened by the International Committee of the Red Cross and composed of persons eminent in international law or in the Red Cross movement have already stated that that is their view[1]. It is to be hoped that governments will concur in the conclusions of the experts and consider that it is in the interests of humanity and in accordance with the requirements of civilization that humanitarian safeguards—in particular those defined in the present Convention—should apply to people with whom their own government is in dispute for political or social reasons.

[1] The first of these Conferences was convened to consider the question of political prisoners. It met at Geneva from June 9 to 11, 1953, its report being published in the *Revue internationale de la Croix-Rouge*, July 1953. The second was concerned with the question of the application of humanitarian principles in the event of internal disturbances. It met at Geneva from October 3 to 8, 1955. Its report was published in the *Revue internationale de la Croix-Rouge*, October 1955.

ARTICLE 80. — CIVIL CAPACITY

Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

1. *General*

This wording was adopted at the Diplomatic Conference without discussion. It differs from the Stockholm Draft only in regard to one detail, the expression " as far as may be compatible with their internment " having been replaced by the words " such .... as may be compatible with their status ". One delegation had suggested emphasizing the idea of surveillance to which the activities of internees must be subject, on account of the danger which the mere fact of their existence represents for the Detaining Power. The change in the wording might perhaps be explained, therefore, as an attempt to take some slight account of that suggestion. At all events the Conference did not adopt it in all its harshness. Article 80 is one more affirmation of the principle, expressed in Article 27, that protected persons are entitled under all circumstances to respect for their honour and family rights. It is one of the Articles which give particular application to the general precept, contained in Article 6 of the Universal Declaration of Human Rights, that " everyone has the right to recognition everywhere as a person before the law ".

The provision has the advantage of emphasizing that internment is not a punishment and involves no slur on the honour of the person concerned. That is what distinguishes internment from all penalties involving loss of liberty.

2. *Retention of civil capacity*

Both Article 80 and the corresponding provision in the Third Convention (Article 14, paragraph 3) are derived from the second paragraph of Article 3 of the 1929 Convention which laid down the rule, in a form new in positive law, that prisoners of war " retain their full civil capacity ".

The Hague Regulations had already specified that " the right of belligerents to adopt means of injuring the enemy is not unlimited " (Article 22), and among the prohibitions which followed from that rule there was one forbidding anyone " to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the

nationals of the hostile party" (Article 23 *(h)*), but apart from the fact that the rule is more clearly expressed in a positive and general form in the 1929 and 1949 Conventions, the scope of the latter is wider as the clause no longer refers only to " nationals of the hostile party " but to all " protected persons ", which also includes neutrals (as soon as they no longer have normal diplomatic representation with the State in whose hands they are) and stateless persons.

It should be noted, however, that the new Geneva Conventions add a reservation, both in the case of prisoners of war and internees, to the principle laid down without any qualification in 1929, by stating that in future the full civil capacity of the persons concerned may only be exercised in so far as it may be compatible with the measures necessary for the security of the Detaining Power ; in other words it is limited by the requirements of captivity in the one case and by the internment in the other.

The status of the internees does not depend merely on the rules concerning the treatment of internees, as laid down in Part III, Section IV, which includes Article 80, but also in the whole of Part III, which defines the status and treatment which must be accorded to protected persons. The Article does not say, as in the case of prisoners of war, that the persons concerned will retain the full civil capacity which they enjoyed at the time they were interned ; but the term "shall retain" seems plain enough and the absence of such an addition circumvents a difficulty which in the text applicable to prisoners of war can only be removed by interpretation. It is quite certain that a combatant who is made prisoner before attaining his majority cannot be deprived of the rights attendant upon ceasing to be a minor. It must be realized, in fact, that the civil capacity of internees continues to be governed by the laws which applied to them before they were interned. That means that circumstances which modify it or cancel it in normal times (divorce, lunacy, etc.) continue to produce the same effects.

3. *The exercise of attendant rights*

The considerable difference which exists between the position of prisoners of war and that of internees means that different problems arise in each case in regard to the exercise of civil capacity.

In most cases prisoners of war are transferred to a foreign country, while internees remain in a country where they are settled. In both cases their civil rights may be exercised both in their home country and where they are detained ; but whereas prisoners of war will normally act in the former and occasionally in the latter (especially

in connection with their work), the opposite is true of internees. Both enemy civilians detained in the territory of a belligerent Power and nationals of an occupied territory who have been interned by the Occupying Power, will in the majority of cases be still in the country where they have their chief ties : their domicile, families, property and interests.

Hence in the case of prisoners of war most of their legal business will be done by proxy and what is important for them is the steps taken in their home country to arrange for marriages, the recognition of children and adoption by proxy, whereas in the cases of internees action is as a rule taken direct. For that purpose the internees will take advantage of the facilities which can be given them as internees. Certain such facilities are, incidentally, mentioned expressly in the Convention, whereas no corresponding provisions exist in the regulations for prisoners of war [1].

It should be noted that the civil capacity of internees in the territory of a belligerent will in most cases be restricted to an appreciable extent by war legislation, especially so far as enemy property is concerned. In nearly all countries engaged in a war, property belonging to enemy subjects is put into the hands of a Custodian of Enemy Property and no longer remains at the disposal of its owners. As a result civilian internees in the territory of a belligerent will, in actual fact, be unable to exercise one essential right, that of managing their property. Besides, the fact that they are enemy subjects will prevent nationals of the Detaining Power from having any relations with them, particularly of an economic nature.

In occupied territory, on the other hand, internees will not normally be subjected to measures of this kind ; as a general rule their property, which cannot be regarded as enemy property, will continue to be at their disposal.

It should be noted, finally, that restrictions on the freedom of action of internees can be claimed either by them or by their representatives as constituting a case of *force majeure* which frees them from certain obligations. That is the logical counterpart of the drawbacks of their internment ; for it would not be fair if their civil capacity, having been preserved in their interests, had an effect prejudicial to them because of the limits within which it was exercised. Article 115 of the Convention (facilities for preparation and conduct of cases) confirms this interpretation and describes its application to a specific case.

[1] See the Articles concerning the management of property (Article 114) and the visits they may be allowed to receive or to make (Article 116).

ARTICLE 81. — MAINTENANCE

Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependants are without adequate means of support or are unable to earn a living.

The first two paragraphs of this text reproduce word for word the draft Article submitted by the International Committee of the Red Cross to the Stockholm Conference, which adopted it without amendment.

The third paragraph was added by the Diplomatic Conference as being a logical consequence of the duty incumbent upon the Detaining Power of providing for the maintenance of the internees.

PARAGRAPH 1. — MAINTENANCE OF INTERNEES

When persons are interned they are made to live in abnormal conditions, which may have very serious repercussions, irrespective of their financial and other circumstances. The internee is no longer free to go where he wants or occupy his time as he wishes ; he cannot go to his normal work or conduct in the ordinary way his business relations if he is engaged in industry or trade, or his relations with his clients if he has a profession. Even if he has an income from investments, it may be blocked as a result of wartime legislation. He thus becomes incapable of paying for what he needs and especially of procuring such medical services as he may require. Now internment is not a punishment and it would therefore be wrong not to alleviate, so far as possible, its unpleasant consequences.

As internment is ordered by the Detaining Power—and should only be resorted to for imperative reasons of security (Article 42) —it is only fair that the cost of maintenance and medical services should be the responsibility of that Power. Maintenance must be understood to mean the supplying of everything necessary for the life and physical health of the internees. The various services which it is necessary to provide are dealt with in separate Articles ; accommodation (Article 85), hygiene and medical attention (Article 91),

food (Article 89) and clothing (Article 90). The special reference to medical attention in paragraph 1, which expresses a general principle, is designed to underline the fact that such attention is indispensable, its absence having sometimes made the conditions in certain cases of internment inhuman.

PARAGRAPH 2. — PROHIBITION OF DEDUCTIONS FROM ALLOWANCES, SALARIES AND CREDITS

Deprived of the resources produced by their normal activities, internees sometimes undertake certain work or their own free will. They may also have to undertake certain tasks prescribed by the Detaining Power : compulsory work carried out by the general public under wartime legislation, tasks connected with the administration or maintenance of the places of internment or professional assistance to the other internees. In all these cases, they are entitled to draw a salary, the principle and method of establishing which are the subject of express provisions in the Convention. Article 98, paragraph 2, also lays down that internees " may receive allowances from the Power to which they owe allegiance, the Protecting Powers, and the organization which may assist them or their families ". Lastly, since they retain full civil capacity, the internees remain entitled to receive money owing to them. It might be thought that certain sums might be deducted from the internee's allowance, salary, or receipts, to meet the cost of his maintenance. The authors of the Convention, at the suggestion of the International Committee of the Red Cross, decided otherwise. They considered that these resources (in any case uncertain) should be wholly devoted to improving living conditions which were already fairly hard to bear compared with the internee's former position.

Article 15 of the Third Geneva Convention, which deals with the maintenance of prisoners of war, contains only one paragraph, whose wording is similar to paragraph 1 of Article 81. It states that the Detaining Power is bound to provide for the maintenance and medical care of prisoners, but it does not afford the additional safeguards which civilians enjoy under paragraphs 2 and 3 of Article 81.

In the case of paragraph 2, there are other provisions, in particular those concerning pay for prisoners' work, which to a certain degree limit the freedom of action of the Detaining Power, but there is nothing in the Third Convention which corresponds to paragraph 3, which relates to the maintenance of dependants.

This difference is due to the fact that a prisoner of war is a soldier in the service of a State and the duty of maintaining his family,

should it be necessary, may be regarded as incumbent on that State. Its legislation is designed to deal with that necessity. The situation of a civilian internee is not the same and the gap must therefore be filled by laying an obligation on the Power which ordered and benefits by the internment.

PARAGRAPH 3. — MAINTENANCE OF FAMILIES

Whereas members of the families of prisoners of war usually reside in their country of origin and may, if necessary, be assisted by the public authorities of that country, the same is not true of internees' dependants. They usually live in normal times in the actual territory of the country of internment. It is therefore the public authorities or occupation authorities in that country which should be responsible for providing for the maintenance (and, by analogy, although the Article does not say so explicitly, for medical care) of people who are dependent on internees. The reasons are the same as they were in the case of the internees themselves. The obligation is only assumed, however, in cases where the beneficiaries are in poor circumstances or unable to earn their living.

ARTICLE 82. — GROUPING OF INTERNEES

The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes on enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

In view of the fact that conflicts may last for years, the morale of the internees becomes of great importance. It is a humanitarian

duty to alleviate to the greatest possible extent the effect of internment on the mind and spirits of the internees.

The information collected concerning conditions of internment during the Second World War led the experts convened by the International Committee of the Red Cross from 1947 onwards, cordially to support the idea of including in the Draft Convention relative to the Protection of Civilian Persons in Time of War, a clause dealing with this aspect of the problem. This clause served as a basis for the negotiators in Geneva in 1949, who made it more precise and added several items.

PARAGRAPH 1. — GROUPING OF INTERNEES

This paragraph corresponds to paragraph 3 of Article 22 of the Convention relative to the Treatment of Prisoners of War. It states, but in less mandatory form, the principle that internees should be grouped, adding the words " as far as possible " which do not occur in the Prisoners of War Convention. Indeed, prisoners of war generally fall into groups of the same nationality as a natural consequence of being captured together and grouping can be organized to a certain extent automatically. The grouping of civilians, on the other hand, who are taken into custody separately and sometimes coming from places distant from one another, presents some difficulties. It is better in certain cases to leave the internees near their families rather than to send them to a distance, in order to reunite them with persons of the same language and nationality. It is for this reason that Article 82 of the Fourth Convention is not mandatory.

The moral solidarity which unites the citizens of a particular country takes precedence over the differences which may exist between them, particularly as regards language. For this reason, it is stated clearly that in spite of the rule that internees should be grouped according to language, which occurs in the first sentence, people from the same country but of different languages may be grouped together. Even this does not go so far as some delegations suggested : they proposed that it should be obligatory to group together all internees from a particular country.

PARAGRAPHS 2 AND 3. — FAMILY LIFE

The experience of the Second World War showed that internment was far less difficult to bear whenever internees could be grouped together in families. In India, Rhodesia, Kenya, Uganda, Tanganyika,

Eritrea and France (at Vittel), such groups were successfully organized and the morale of the internees was better in those places than in other places of internment. Children benefited from the presence of their parents and were able to attend the school set up inside the camp. It is to the results of this experience which paragraphs 2 and 3 try to give permanent form in accordance with the recommendations of the experts.

The text makes it clear that exceptions to this rule may result from the need to give medical treatment or to enforce the penal provisions of Chapter IX, but adds that the separation in these cases must only be temporary.

The report of the Third Committee indicates that the addition of the words " without parental care " is intended to show that if only one of the parents is interned, he or she would not have the right, under the Convention, to demand the internment of a child being cared for by the other parent. On the other hand, the father and mother would have the right to demand such internment if they were interned together. It had been proposed that only children under sixteen years of age should be interned at the request of their father or mother, but since the text does not make it strictly obligatory to grant such a parental request, it was not thought necessary to add this detail. It is for the Detaining Power to assess each case fairly, paying particular attention to the age of the child.

Finally, paragraph 3 takes into consideration a suggestion by the International Committee of the Red Cross that family camps should be set up " wherever possible ", following the example of an internment camp in India, where each family had a separate bungalow. The discussions of the experts of 1947 made it quite clear that what was intended was a real family life for the internees and not the establishment of mixed camps where men and women are both interned, or even less, the establishment of contiguous camps where men and women meet for several hours a day and are then sent back to their own camps.

This provision establishes a system which is more favourable than that applicable to prisoners of war, but the difference is justified, since prisoners have taken up arms against the Detaining Power before capture and, furthermore, were already separated from their families and unable to engage in their customary occupations. The case of internees is completely different. In their case there is not even a presumption of aggressive feelings. They are detained simply as a precaution. It is therefore necessary to ease the rigours of internment, particularly where such a course is possible, by the maintenance of family life.

Chapter II

Places of Internment

ARTICLE 83. — LOCATION OF PLACES OF INTERNMENT. MARKING OF CAMPS

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

PARAGRAPH 1. — CHOICE OF SITE

This paragraph did not occur in the text of the corresponding Article in the Stockholm Draft, because its substance had already been embodied in a special Article, applicable to all protected persons and worded as follows: " No protected person may at any time be sent into or retained in an area particularly exposed, nor may his presence be used to protect certain points or certain areas against military operations." The Diplomatic Conference preferred to delete this draft Article and to divide it into two parts. The prohibition on using the presence of protected persons to render certain points or areas immune from military operations is stated in Article 28, whereas the obligation, where possible, to remove non-combatants from areas exposed to the dangers of war concerns the civilian population both in the territory of a party to the conflict (Article 38, para. 4) and in the occupied territory (Article 49, para. 5). The internees have been treated here by analogy with the prisoners of war. Since the obligation to place prisoners of war outside danger areas had already been set forth in the 1929 Geneva Conventions[1] it was all the more necessary to give the benefit of a similar clause to civilians detained as a mere precautionary measure.

[1] Convention of July 27, 1929, Article 9, para. 4.

PARAGRAPH 2. — NOTIFICATION OF PLACES OF INTERNMENT

The principle of notifying places of internment was also accepted for prisoners of war (Third Convention, Article 23, paragraph 3) and represents an important step forward.

During the Second World War, the International Committee of the Red Cross tried in vain to persuade the belligerents to exchange information on the geographical position of prisoner-of-war camps. It did succeed, however, in some cases, with regard to civilian internment camps[1].

PARAGRAPH 3. — MARKING OF INTERNMENT CAMPS

The marking of camps is intended to protect internees against bombing. It will be seen that the text of paragraph 3 refers to internment *camps* whereas the previous paragraph refers to *places* of internment. This distinction, writes the Rapporteur of the Co-ordination Committee[2], is intentional, for it was regarded as unreasonable to require the marking, for example, of places where internees are kept merely in temporary custody pending transfer to a place of permanent internment, or the marking of hospitals or institutions simply because internees are being treated there.

At the very beginning of hostilities during the Second World War, the International Committee of the Red Cross appealed to belligerents to mark their prisoner-of-war camps to protect them against bombing. Fearing that this would provide landmarks for the enemy air force, the Powers rejected the appeal[3]. However, prisoners adopted the habit of displaying markings during the day consisting of large panels bearing the letters PG or PW. This method was approved by the Diplomatic Conference. It is, however, subject to an important reservation drafted in the same way in the case of prisoners of war and of civilian internees: " whenever military considerations permit ". This means that in the case of civilian internment camps, the daytime marking by means of the letters IC could be discontinued if the Detaining Power feared, for example, a parachute drop of arms to help the internees to revolt.

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 306-308.

[2] Mr. Haksar (India), see *Final Record*, Vol. II-A, p. 836.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 254.

The stipulation that no place other than an internment camp shall be marked as such is of prime importance. If this means of marking could be used for other purposes it would lose all its protective value.

ARTICLE 84. — SEPARATE INTERNMENT

Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

The importance of this Article should be emphasized. It corresponds to Article 16 of the Tokyo Draft, which restricts itself to stating that civilian internment camps should be separate from internment camps for prisoners of war, in accordance with the fundamental distinction in humanitarian law between combatants and non-combatants. As suggested by the International Committee of the Red Cross in the Stockholm Draft, the Diplomatic Conference of 1949 went further and accepted the idea that political prisoners should be kept separate from offenders against ordinary law. It is a matter of congratulation that this principle has been proclaimed[1].

The result is that neither prisons nor penal establishments could be used as places of internment.

This provision shows once more that the detention of internees is quite different in character from that of prisoners of war or common criminals. Internment is simply a precautionary measure and should not be confused with the penalty of imprisonment.

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[1] This idea should be kept in sight for the development of humanitarian law. Obviously, in view of what was said in the commentary on Article 79, no provision of this Convention can be applied directly or by analogy to the relations between a government and those of its nationals interned for political reasons, so long as in the country in question no struggle is taking place which would enable the application of the provisions of Article 3 concerning civil wars. But, as Professor Castberg, a member of the Norwegian delegation to the Diplomatic Conference pointed out, quoting a legal opinion which the Norwegian Red Cross had communicated to the International Committee of the Red Cross, there is reason to hope that every Power bound by the Convention and pledged to apply, in conformity with international law, certain well-defined and deeply humanitarian measures for the treatment of prisoners of enemy nationality, will wish to treat its own citizens, interned for security reasons, in exactly the same way. This would be an extra-judicial consequence of Article 84, and could bring about an evolution in some aspects of municipal law in accordance with the same humanitarian principles as those which have led to this development of international law.

ARTICLE 85. — ACCOMMODATION. — HYGIENE

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

This long Article repeats, for the benefit of civilian internees, the same provisions as those contained in Articles 22, 25 and 29 of the Prisoners of War Convention.

However, there are two slight differences characteristic of civilian internment. In the first place, it is stated that accommodation and sanitary conditions must be satisfactory from the outset of internment, whereas the provisions relating to prisoners of war tacitly admit that some time is necessary in certain cases to fulfil the conditions laid down. This is because the number of internees is in general very

much less than the number of prisoners of war[1]. Their number is in any case always known in advance and it is therefore easy to plan their accommodation at the same time as deciding to intern them.

In the second place, it should be noted that the bedding and the number of blankets supplied should take into account the age, sex and state of health of the internees. This provision has no equivalent in the Prisoners of War Convention, since prisoners are all by definition fit for service in the forces and it is therefore unnecessary to make the same distinctions between them[2].

Apart from these two exceptions all the provisions applicable to prisoners of war in the matter of accommodation and hygiene are reproduced in the Civilians Convention. As in the case of all provisions dealing with the status of internees, supervision is ensured through the visits and activities of representatives of the Protecting Power or delegates of the International Committee of the Red Cross (Article 143).

PARAGRAPH 1. — HYGIENE AND HEALTH

Could the term " buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war " be taken to mean camps made up of tents ? This practice is allowed in the case of prisoners of war where the Detaining Powers follow the same procedure for their own troops. During the Second World War it proved satisfactory in certain climates when some essential improvements had been carried out (cement floors, brick walls, stone paths and access roads)[3]. The same latitude, however, could hardly be granted with regard to civilian internees and it seems clear that " buildings or quarters " must be taken to mean structures of a permanent character.

The term " unhealthy areas or districts the climate of which is injurious to the internees " refers to areas unsuitable for human habitation in general. It is, however, possible that a site acceptable for persons of average physical strength might be dangerous for other persons. In such cases, the medical examinations mentioned in Article 92 will reveal the inability of the internee to bear the physical

[1] On occasions whole armies have been captured or have surrendered at the same time and the same place.

[2] However, Article 3 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War states that " women shall be treated with all consideration due to their sex ".

[3] See *Report on the Work of the Conference of Government Experts*, pp. 135-136.

conditions of his internment, and individual measures will be recommended to the detaining authorities, which would be obliged to put them into effect as soon as possible.

PARAGRAPH 2. — SLEEPING QUARTERS

The text of this paragraph is modelled on that of paragraphs 2 and 3 of Article 25 of the Third Convention. That is why the statement that premises " shall be . . . lighted, in particular between dusk and lights out " has been retained. This item was recommended by the Government Experts in the case of prisoners of war, so that they could take advantage of the only leisure time they had available after a day's work. It should be noted, however, that the provision must not clash with the black-out regulations applicable to the population as a whole[1].

PARAGRAPH 3. — SANITARY CONVENIENCES

The term " sanitary conveniences " should be taken to mean primarily the latrines, in conformity with the similar provision contained in paragraph 2 of Article 29 of the Third Convention. These conveniences should be so constructed as to preserve decency and cleanliness and must be sufficiently numerous. They should be inspected periodically by the health authorities.

During the Second World War prisoners of war were sometimes forbidden to leave their quarters during the night[2]. The Convention relative to the Protection of Civilian Persons in Time of War, like the Prisoners of War Convention, stipulates that internees should have sanitary conveniences for their use day and night.

The Government Experts had wished to lay down definitely the frequency with which baths could be taken[3]. This idea was not accepted, but one bath or shower per week can be considered reasonable.

With regard to the washing of clothes, the International Committee of the Red Cross advocated, during the Second World War, the establishment of collective laundries in prisoner-of-war camps. Experience showed, however, that prisoners preferred to launder their own clothes. The same facility has been granted to civilian internees.

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[1] See *Report on the Work of the Conference of Government Experts*, pp. 135-136.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 263.

[3] See *Report on the Work of the Conference of Government Experts*, pp. 144-145.

PARAGRAPH 4. — SPECIAL PROVISIONS CONCERNING WOMEN

This text corresponds to paragraph 4 of Article 25 of the Prisoners of War Convention. In the Second World War a great number of women served in the armed forces and the Diplomatic Conference therefore considered it necessary to develop the principle already set forth in Article 3 of the 1929 Convention and to include more details with regard to women prisoners. The same applies to women civilian internees. This paragraph is a case of a particular application of the general principle laid down in Article 27, paragraph 2, concerning the respect due to women's honour.

ARTICLE 86. — PREMISES FOR RELIGIOUS SERVICES

The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

In the Stockholm Draft this text had been incorporated in the extensive Article dealing with religion which will be found below (Article 93).

The Diplomatic Conference thought it preferable to mention in the statement of rules concerning the housing of internees, the obligation laid on the Detaining Power to provide premises suitable for religious services.

It does not seem essential that these premises should be set aside exclusively for religious services. The parallel text in the Prisoners of War Convention (Article 34, paragraph 2) speaks of " adequate " premises. In both cases, it should be understood that the premises where services are held should be sufficiently spacious and clean and so built as to give effective shelter to those attending the services.

ARTICLE 87. — CANTEENS

Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

PARAGRAPH 1. — PRINCIPLE

Whereas the establishment of canteens for prisoners of war is obligatory (Third Convention, Article 28, paragraph 1), civilian internees will only be provided with canteens where other suitable facilities are not available. Indeed, there could be no question of establishing canteens if, for example, the internees were permitted to go to local shops to make purchases. Where canteens are installed, the text makes it clear that the prices should not be higher than local market prices. This provision was introduced at the Stockholm Conference, in order to avoid any repetition of certain abuses which occurred in prisoner-of-war camps during the Second World War despite the clear provisions of the 1929 Convention[1].

It will be noted that the list of ordinary articles with which canteens should be supplied contains soap, although Article 85, paragraph 3, lays an obligation on the Detaining Power to supply soap in sufficient quantity and free of charge to the detainees. The text under discussion is aimed above all at " sustaining the morale " of the internees and giving them the opportunity of buying, for example, a particular kind of soap of their own choice in place of a corresponding amount of the kind supplied by the Detaining Power.

PARAGRAPH 2. — CANTEEN PROFITS, WELFARE FUNDS

The welfare fund is to be made up exclusively of canteen profits. In this connection, the Rapporteurs [2] explained that paragraph 2 was

[1] Article 12, para. 2 : "... prisoners shall be able to procure, at the local market price, food commodities and ordinary articles ".

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 827.

so drafted as to suggest that monies other than canteen profits might appropriately be allocated to general welfare purposes. The term " welfare fund " leaves the administrative authorities of the Detaining Power a wide freedom of interpretation on the use to be made of what is available, which can be divided between the recipients in unequal parts, taking into account the need to help those among the civilian internees most in need. There can indeed be very wide variations in the situation of internees. The guarantees of serious and impartial management which the internees can in any case claim, are given by the " right to check " granted to the Internee Committee called for under Article 102[1]. However, this right to check, like that exercised by the same body over the whole administration of the canteens, leaves the Detaining Power itself the power of decision in regard both to the management of canteens and to the distribution of welfare funds.

PARAGRAPH 3. — DISPOSAL OF A CREDIT BALANCE OF THE WELFARE FUND IF A PLACE OF INTERNMENT IS CLOSED DOWN

The Stockholm Draft reserved the balance of the welfare fund, if a place of internment was closed down, to internees of the same nationality. The Geneva Conference proved less categorical and did not exclude the use of the funds on behalf of internees of other nationalities.

The Third Geneva Convention (Article 28, paragraph 3) envisaged that when a prisoner-of-war camp was closed down the credit balance of the special fund should be handed to an international welfare organization to be employed for the benefit of prisoners of war of the same nationality. The idea was not adhered to in the case of civilian internees, because in general they are less numerous and of more diverse nationalities than prisoners of war, so that in some cases it would doubtless be difficult to make a fair distribution of the balance of the welfare fund on the sole basis of the nationality of the beneficiaries.

On the other hand, the provision making allowances for a general release of the internees is exactly the same as in the case of the repatriation of prisoners of war. The Detaining Power is to keep the profits from the canteens subject to any agreement to the contrary between the Powers concerned, made in accordance with the procedure laid down in Article 6 of the Third Convention and Article 7 of the Fourth Convention.

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[1] In any case, it would be permissible for the Detaining Power to entrust the management of the fund to the Internee Committee itself.

ARTICLE 88. — AIR RAID SHELTERS. — PROTECTIVE MEASURES

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

PARAGRAPH 1. — AIR RAID SHELTERS

During the Second World War, the International Committee of the Red Cross had occasion to express the opinion that "the employment of prisoners of war on non-combatant anti-aircraft defence was not a contravention of security guarantees, if such employment was restricted to the defence of the prisoners' own quarters "[1]. This opinion was endorsed by the Diplomatic Conference and gave rise to this paragraph and the corresponding paragraph of the Convention relative to the Treatment of Prisoners of War (Article 23, paragraph 2).

It should be noted that civilian internees, like prisoners of war, must also be given the benefit of any protective measures taken in favour of the population.

In rural districts, where in general there are no permanent shelters and the inhabitants can only flee from their houses during the bombing, the protection of internees and prisoners of war may even seem superior to that of the local population. The advantage thus given to them is designed to compensate for their inability to seek safety in flight.

It should be noted that the beginning of this paragraph is so worded as not to force States which consider themselves out of reach of enemy action to provide shelters against air raids[2].

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 313.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 837.

PARAGRAPH 2. — FIRE PRECAUTIONS

This provision arises from the general obligation to safeguard internees under the control of the Detaining Power.

It becomes of extreme importance when the buildings used for internment are huts or old buildings, particularly if they are made of timber and are not fire-proof.

Chapter III

Food and Clothing

ARTICLE 89. — FOOD

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs.

PARAGRAPH 1. — NORMAL RATION

The Government Experts who met in 1947 at the instance of the International Committee of the Red Cross gave detailed consideration to the provision of food for prisoners of war and civilian internees.

The 1929 Prisoners of War Convention laid down that the food ration of prisoners of war was to be equivalent in quantity and quality to that of depôt troops, but experience had shown that the term " depôt troops " was too vague to be of any real use as a basis of comparison. It was then suggested that the ration for prisoners of

war and internees should be required to be equivalent to that of the civilian population. The experts, however, remembering that the official rations of the civilian population in wartime are nearly always supplemented from sources which would not be available to men deprived of their liberty, considered that this form of words would have no practical value and considered that it was better merely to recommend the provision of food rations sufficient to keep protected persons " in a good state of health ". This expression and the " good health " mentioned in the Third Convention (Article 26, para. 1) call for some clarification.

It might perhaps have been possible to refer to the calorific value of the food. Such a solution was considered, but rejected because of the difficulty of fixing a value which would be suitable in all latitudes and also because of the difficulty of giving sufficient details regarding the distribution of the calories to meet all cases. The Diplomatic Conference accordingly abandoned the suggestion by the Stockholm Conference that the Convention should include the sentence : " International standards bearing on nutrition that may be adopted shall be applied to internees."

A completely general wording was decided upon. It leaves the Detaining Power some latitude on condition that the state of health of the internees is checked at intervals at the inspections provided for in Article 92. It will thus be the actual needs of the internees which will determine the amount of the ration, depending on the particular requirements of each internee and on the living conditions : climate, altitude, amount of work required, etc. The second sentence of paragraph 1 was inserted in view of experience gained during the Second World War. Visits to internees' camps had shown how necessary it was for the food to be in accordance with the national tastes of the internees. In the United States, Japanese complained that their food was cooked according to the American taste and that they only had rice eighteen times a month, whereas Americans imprisoned in Japan suffered from inadequate rations, although they were equivalent to the normal rations of the Japanese population. This clause was inserted in paragraph 1 in order to overcome such drawbacks so far as possible. Paragraph 2 was included for the same reason.

PARAGRAPH 2. — ADDITIONAL FOOD

This clause corresponds to Article 26, paragraph 4, of the Prisoners of War Convention. It was considered advisable to give members of the forces in captivity the right to prepare, themselves, any additional food in their possession : the arguments in support of such

a course apply even more strongly to civilians who are less accustomed than soldiers to community feeding.

In the case of internees the source of this additional food may be purchased with money they have earned by working, or gifts received from relations or charitable organizations.

PARAGRAPH 3. — WATER. — TOBACCO.

This provision is based on Article 11, paragraph 3, of the 1929 Prisoners of War Convention. The obligation which it lays on the Detaining Power is a most important one, particularly in desert areas. On a number of occasions during the Second World War, the International Committee of the Red Cross arranged searches for springs and the laying down of pipes in order to supply internee camps with water[1]. Drinking water must be "supplied" by the Detaining Power: but the same is not true of tobacco, which is, however, listed among the articles which must be stocked in canteens (Article 87, para. 1). It is mentioned here, although it is not a foodstuff, because experience has shown that for many prisoners tobacco is as necessary as food. Tobacco is not an article of prime necessity; it is even to some extent a poison: many people do completely without it while others may be suddenly deprived of it without suffering physical inconvenience, and even with advantage to their health. But it is a fact that from a psychological point of view tobacco plays a very important part in the life of men in confinement. It calms the nerves of the smokers and helps them to bear their suffering, while it provides non-smokers with a valuable form of currency which enables them to procure other advantages in exchange. Tobacco is not harmful in the way that alcohol is, and the Convention, in placing it among the things like water which are essential for the internees, recognizes the important part played by this harmless narcotic in soothing men's minds and nerves.

PARAGRAPH 4. — SUPPLEMENTARY RATIONS

Work, and in particular the manual work with which we are concerned here, may have a bad effect on the health of the internees if the ration of food they receive is not commensurate with the hardness of the work done. Observance of the rule laid down in paragraph 1 concerning the maintenance of a good state of health requires that additional efforts made shall be matched by additional food supplied.

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 581-582.

PARAGRAPH 5. — WOMEN AND CHILDREN

Paragraph 5 lays down that children and expectant and nursing mothers are to be provided with additional food. In their case deficiency diseases would be particularly deplorable, as they would affect future generations[1].

The International Union for Child Welfare formally supported an amendment submitted by the United Kingdom Delegation at the Diplomatic Conference and insisted on children being protected against the danger of nutritional deficiencies, in order that they might achieve " normal growth ".

The children to be protected were defined as those under the age of fifteen, the clause, which was not included in the Stockholm Draft, being introduced in order to bring the text into line with Part II (Article 24) in regard to the classes of person who were to receive preferential treatment. Comparison of the texts leads to the conclusion that international usage has now settled on an age limit of fifteen years as defining what is meant by " children " when no further description is given.

Formerly it was customary to consider girls or boys of twelve years and under to be " children ". E. Gurlt gives many examples of this practice in his collection of texts relating to the care of the sick and wounded in wartime, where he quotes the terms of various Conventions concerning the exchange of prisoners[2].

In the International Conventions prepared by the International Labour Office the age of fourteen years was originally mentioned as being that below which children could not be employed on certain types of work regarded as being too heavy for them: viz., industrial work[3] and maritime labour[4]. The age limit was raised to fifteen when the Conventions were revised a short time before the Second World War.

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[1] When visiting civilian internees' camps during the Second World War, delegates of the International Committee of the Red Cross always paid particular attention to the quantity of milk supplied to young children. In Dutch Guiana the International Committee's delegate arranged to have a number of cows brought to a camp from neighbouring farms (see *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 581).

[2] A Treaty between France and the Netherlands, May 21, 1675; Cartel between Denmark and Sweden, August 16, 1777 ; Cartel between Brandenburg and Sweden, August 28, 1678 ; Treaty between France and Spain, April 11, 1691, etc., cited by E. GURLT : *Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege*, Berlin, 1873, pp. 14 *et seq.*

[3] Convention No. 5, entered into force on June 13, 1921, revised in 1937.

[4] Convention No. 7, entered into force on September 27, 1921, revised in 1936.

The International Union for Child Welfare had suggested that the age limit in this Article should be raised to sixteen years ; but the authors of the Convention thought it better to keep to the age limit of fifteen years which was generally recognized [1] and represented a considerable advance on former usage [2].

ARTICLE 90. — CLOTHING

When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

PARAGRAPH 1. — OBLIGATIONS OF THE DETAINING POWER

Whereas prisoners of war must be provided with clothing, underwear and footwear by the Detaining Power (in accordance with a principle laid down in Article 12 of the 1929 Prisoners of War Convention and reaffirmed in Article 27 of the Third Convention of 1949) [3], civilian internees have to provide their own clothes.

They are generally interned in the country in which they had settled and it would therefore seem possible for them to provide themselves with sufficient clothing when they are arrested, provided they are allowed to do so ; and, subject to the same proviso, they should be able to send for anything else they need.

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[1] In white countries at least. In others puberty often occurs earlier, but it was thought preferable, in the interests of this category of persons in need of special protection, to retain the higher age limit.

[2] An age limit of fifteen is nevertheless to be found in the texts of certain old treaties. Cf. Cartel between Denmark and Sweden, April 30, 1719, quoted by E. Gurlt, *op. cit.*, p. 19.

[3] This is only reasonable since before their capture prisoners of war, being servicemen, were clothed and equipped by the State in whose service they were.

Experience has shown, however, that this assumption may not always be realized in practce[1]. The Convention accordingly lays down that should they not have sufficient clothing, account being taken of the climate, the Detaining Power is to provide them with it free of charge.

PARAGRAPH 2. — CLOTHING NOT TO BEAR RIDICULOUS OR IGNOMINIOUS OUTWARD MARKINGS

These provisos are connected with Article 27 of the Convention stating that protected persons are entitled, in all circumstances, to respect for their persons and their honour. It is essential to prevent internees from being forced to wear convicts' uniforms or other uniforms of a similar nature, as was the case in certain concentration camps of hateful memory. The plenipotentiaries were unanimous in 1949 in disapproving of such practices and although paragraph 1 had already, as it were, implied that disapproval, they felt that they should reaffirm it explicitly at this point. It must, indeed, always be remembered that internment is not a punishment and cannot in any way besmirch anyone's honour.

PARAGRAPH 3. — WORKING OUTFITS

Internees are not obliged to work. Article 95 of the Convention lays down that the Detaining Power shall not employ internees as workers unless they so desire. If they do wish to work, the Detaining Power is obliged to provide them with the necessary working outfit.

The outfit must in particular include suitable boots or shoes and also protective clothing when the work is connected, for example, with navvying in marshy ground or is likely to spoil the personal clothing of the worker. This last clause concerning protective clothing was added to the Stockholm Draft by the Geneva Conference as it was considered in keeping with the general spirit of the Article, according to which an internee must always have a proper suit of clothing in his possession.

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[1] In occupied France, in the Compiègne camp for example (Front-stalag 122), the delegate of the International Committee of the Red Cross had found that 60% of the internees were without a complete set of clothing, 90% lacked underclothes and socks and 40% had no overcoat. It is true that they had not been given every facility at the time of their arrest to provide themselves with the necessary clothing.

Chapter IV

Hygiene and Medical Attention

ARTICLE 91. — MEDICAL ATTENTION

Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

It will be remembered that under Article 81 the Detaining Power is bound to provide free of charge for the maintenance of internees, and specific mention is made of the necessity of granting them medical attention. When all is said and done, the health of the internees is the best indication of the way in which the Detaining Power has fulfilled its international obligations in regard to them. The five paragraphs of Article 91 concern the practical fulfilment of the obligations mentioned.

PARAGRAPH 1. — INFIRMARY

The first step in providing adequate medical care will obviously be the establishment of infirmaries in the places of detention. They must not be established merely for show; the text of the Article requires each infirmary to be under the direction of a qualified doctor.

In certain cases medical treatment includes the provision of a diet designed to help the patient's recovery. If the diet cannot be followed in the internees' ordinary living quarters, they must be admitted to the infirmary.

Because of the danger of diseases spreading, particularly in view of the conditions under which the internees live, it is laid down that isolation wards shall be set aside for contagious cases. The same provision appeared in the Stockholm text, but the words " if necessary" accompanying it might have been taken as reducing the force of the obligation laid on the Detaining Power, and the International Committee of the Red Cross accordingly proposed omitting those two words in order to avoid all ambiguity[1]. The Diplomatic Conference fell in with their views and added the further obligation of isolating mental patients. Segregation may seem somewhat cruel in this case, especially when it is remembered that internment itself may have been the cause of mental affliction (or have aggravated an already disturbed mental condition); the decision of the Conference nevertheless commands approval, for the crowded living conditions in internee camps made the adoption of such a solution absolutely necessary in the interests of the internees as a whole.

PARAGRAPH 2. — MATERNITY CASES. SERIOUS DISEASES

The infirmary mentioned in paragraph 1 will only be suitable for the treatment of illnesses which can be readily cured. In cases where a surgical operation becomes necessary, internment must not be allowed to prevent it being performed. In order to fulfil its international obligations the Detaining Power should arrange for internees suffering from serious illnesses to receive care not inferior to that provided for " the general population". This rule will moreover be applied with due allowance made for the social status of the internees whenever there is any variation in the treatment accorded to different classes of the population. It must be remembered that internment is not a punishment. It is a precautionary measure adopted in the

[1] See *Remarks and Proposals* submitted by the International Committee of the Red Cross, Geneva, 1949, pp. 46, 79.

interests of the Detaining Power. It cannot be allowed to cause serious prejudice to the persons interned and the fact of not being able to receive the care required would cause such prejudice.

The reference to maternity cases was inserted in the text at the request of the International Union for Child Welfare. Such cases can obviously receive greater and more methodical care in special maternity homes than in internment camps.

It should furthermore be noted that the establishments referred to in paragraph 2 may, unlike the infirmary, be outside the place of internment and even at some considerable distance from it. The difficulties which arise in moving prisoners of war do not exist in the case of civilians ; it is reasonable to suppose, therefore, that if contagious or mental diseases treated in the infirmary were to become serious or chronic, requiring " special treatment ", the internees concerned should be taken from the infirmary to one of the institutions described in paragraph 2.

PARAGRAPH 3. — NATIONALITY OF THE DOCTOR IN CHARGE OF THE CASE

The stipulation that internees shall, for preference, have the attention of medical personnel of their own nationality applies mainly to medical treatment which can be given in the infirmary, for there may be one or more doctors among the internees and their services may be called upon for their fellow-countrymen. In spite of the honourable traditions of the medical profession, patients naturally prefer to be looked after by a compatriot rather than by some other doctor, if only because he speaks the same language. The interests of the patient demand that he should be able to make himself clearly understood by his doctor.

This statement of preference in no way invalidates the principle of the neutrality of doctors in face of suffering, a principle on which the Red Cross and the First Geneva Convention are founded. It in no way relieves the doctor provided by the Detaining Power from his obligation to care for the sick without discrimination, and it does not authorize him to neglect to give care to an interned enemy while awaiting the arrival—perhaps not certain—of a doctor of the patient's own nationality.

When the treatment has to be given in one of the institutions referred to in paragraph 2, perhaps at some distance from the place of internment, it is still preferable for medical personnel to be of the same nationality as the internees ; but the preference is necessarily less binding.

PARAGRAPH 4. — MEDICAL EXAMINATION

Although the fact is not mentioned in this paragraph, a daily medical inspection will take place in places of internment. This follows, as will be seen further on, from Article 125. Internees will thus be able to report sick when they are ill, so as to receive medical attention without delay.

The provisions of paragraph 4 are of particular importance in deciding questions of responsibility in case of accident or sickness. In order to receive the benefit, should occasion arise, of grants payable by insurance companies under private contracts or by private persons or the State in accordance with the law, it is necessary to be in possession of a medical certificate. In the absence of such a certificate, the man concerned, being unable to prove his entitlement, would be liable to have payment refused. It was therefore essential to relax the strict conditions of surveillance, whenever necessary, to allow internees to have themselves examined by a doctor. The Convention does this and goes still further by obliging the medical authorities of the Detaining Power to issue an official certificate with all necessary details of cases submitted to them. It will be noted that the obligation is laid on " the medical authorities of the Detaining Power ". To safeguard the interests of the patient, the Central Agency provided for in Article 140 is to receive a duplicate copy of the medical certificate. The duplicate will be kept in a neutral country and the person concerned will be able to produce it after the close of hostilities in order to obtain redress, should he have been unjustly deprived of his rights or of the means of proving them.

PARAGRAPH 5. — DENTURES, SPECTACLES AND OTHER ARTIFICIAL APPLIANCES

During the Second World War the International Committee of the Red Cross noticed when visiting prisoner of war camps that the absence of artificial appliances inflicted the greatest discomfort on men who had undergone operations. Even when temporary artificial limbs were provided, arrangements were not always made to educate the wounded in their use. Some regulations permitted the issuing of dentures only to prisoners who had lost at least fifteen teeth while in captivity; this led to numerous cases of gastric trouble due to insufficient mastication[1]. Spectacles are also needed, for without

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 266.

their help some people are unable to read, and reading is an important safeguard against the boredom arising from inaction. Taking account of the experience thus gained, the Conference made it incumbent on the Detaining Power to provide internees with permanent artificial appliances. Relief societies will undoubtedly try to assist the Detaining Power to fulfil this obligation by supplying, in particular, dentures and spectacles (they set an example in this respect during the Second World War) ; it was nevertheless essential, in the interests of internees, that the responsibility of the Detaining Power in this matter should be clearly laid down.

ARTICLE 92. — MEDICAL INSPECTIONS

Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of the weight of each internee and, at least once a year, radioscopic examination.

Medical inspections are designed to check on the standard of hygiene in the camps and the state of health of the internees. The cleanliness of premises occupied by large numbers of people is essential to the physical well-being of the inmates and it was important for its supervision to be placed in the hands of the medical authorities themselves.

The medical inspections might well have been arranged at more frequent intervals. The International Committee had, for example, suggested that mobile medical teams should be responsible for them. The Government Experts considered, however, that monthly inspections would suffice, provided that attention was directed to the detection of the main contagious diseases—tuberculosis, venereal diseases and malaria [1]. Their view was endorsed by the Diplomatic Conference.

A person's weight is a very reliable indication of his state of health [2] ; checking of weight was therefore expressly mentioned as being a duty of the inspecting doctors.

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[1] See *Report on the Work of the Conference of Government Experts*, pp. 148-149.

[2] See Commentary on Article 89.

Radioscopic examinations, the results of which are so helpful in making or confirming medical diagnoses, were merely recommended by the experts and the International Committee. The Diplomatic Conference, wishing to emphasize their importance, stipulated that they should take place at least once a year.

Chapter V

Religious, Intellectual and Physical Activities

ARTICLE 93. — RELIGIOUS DUTIES

Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and belonging to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid down by the Detaining Power in the interests of discipline and security.

GENERAL REMARKS. HISTORICAL BACKGROUND

From the very first days of the Red Cross Henry Dunant had raised the question of " the moral welfare of prisoners of war ".

Morale always exerts a physical effect, but it is more acute in the case of people who have lost their freedom, because their inner life tends to grow in importance.

Even before the Geneva Prisoners of War Convention had been drawn up, Article 18 of the Hague Regulations had stated the following principle: " Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities ".

The same principle was again proclaimed in similar terms in Article 16 of the Geneva Convention of 1929 which added that: " Ministers of religion, who are prisoners of war, whatever may be their denomination, shall be allowed freely to minister to their co-religionists."

It was logical to use the reasoning applied in the case of prisoners of war in that of civilian internees. The International Committee of the Red Cross did so in the memorandum which it addressed to all the belligerent Powers on July 14, 1943. The memorandum [1] noted that after a long period of confinement the prisoners and internees increasingly sought spiritual help from religious directors and pointed out that in order to be able to carry out their task, these men ought to enjoy the facilities generally granted to members of the medical staff of the camps (permission to leave camp regularly, permission to write more frequently, etc.). The request was well received in most quarters, and when the International Committee undertook to draw up a draft Convention for the protection of civilians, it convened in Geneva, to obtain the benefit of their experience and advice, an expert commission composed of representatives of the various charitable organizations which had co-operated with it in bringing spiritual or intellectual aid to victims of the war. The expert commission included representatives of the following organizations: the World's Young Women's Christian Association, World's Alliance of Young Men's Christian Associations, Caritas Internationalis, World Jewish Congress, World Council of Churches, World's Student Christian Federation, Pax Romana, Catholic Relief,

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 275.

and War Relief of National Catholic Welfare Conference. It helped to prepare a draft text which, after being adopted with certain additions by the XVIIth International Red Cross Conference, was taken as a basis for discussion by the Diplomatic Conference.

At the Diplomatic Conference the Delegation of the Holy See undertook to redraft the text and submit it " in a clear, systematic and accurate form ", as some of the clauses adopted at Stockholm appeared to overlap other provisions of the Convention, or to be redundant[1]. When submitting his amendment—which was exactly the same in the case of prisoners of war and civilian internees—the Delegate of the Holy See stated that it represented the views of various religious organizations which had studied the Convention. The amendment was modified in some particulars by the committee responsible as it applied to the Prisoners of War Convention, but was adopted almost as it stood in the case of civilian internees. The resultant divergence between the two Conventions will be pointed out in the commentary on the third paragraph.

PARAGRAPH 1. — PRINCIPLE

Paragraph 1 is very nearly a word-for-word reproduction of Article 18 of the Hague Regulations, to which reference has been made. The expression "measures of order and police" has however been replaced by the words "disciplinary routine" which imply a rather less strict supervision. There is no longer any question of special police regulations relating to religious observances, but only of general rules for the maintenance of discipline. The change of wording had been recommended by representatives of religious organizations consulted by the International Committee of the Red Cross[2].

It should be noted that religious services do not merely involve the use of " suitable premises " for which official provision is made in Article 86, but also the use of prayer books and various other objects. During the last World War the International Committee of the Red Cross was sometimes obliged to apply for censorship or police regulations to be waived to allow their import[3]. Religious practices may also refer to those of a physical character, methods of preparing food, periods of fast or prayer, or the wearing of ritual adornments ; all

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 331.

[2] See *Report on the Work of the Conference of Government Experts*, p. 149.

[3] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 276.

these special requirements should, subject to the maintenance of routine discipline, be facilitated by those administering places of detention. It should finally be mentioned that Article 130, paragraph 1, places Detaining Powers under an obligation to ensure that internees are honourably buried, if possible according to the rites of the religion to which they belonged.

PARAGRAPH 2. — MINISTERS OF RELIGION

The free exercise of their ministry by interned ministers of religion for the benefit of their co-religionists is stipulated in a series of provisions which the International Committee recommended as a result of its experiences during the Second World War. The Committee had observed that in certain prisoner-of-war camps there was a surplus of priests or clergymen, while in others there were too few ; as a result representations were made with a view to securing a better distribution of ministers of religion. Such representations were, as a rule, well received. The idea of equitable allocation was adopted in the Convention, but it was also necessary for ministers of religion to be relieved of certain restrictions resulting from their internment, to enable them to minister freely to their flock. To this end they are granted facilities for moving from one place of internment to another (or for going outside places of internment to visit hospitals where the sick are undergoing treatment). They also enjoy facilities for corresponding with the ecclesiastical authorities, either in the country of detention or even, where this is possible, outside it. Since this correspondence is connected with their ministry and concerns interests bearing no relation to their own individual position, it was reasonable not to make them subject to possible restrictions under Article 107 (2 letters and 4 cards per month, on the official forms). On the other hand, since an international religious authority might be unaware of the rules laid down in the Convention [1], correspondence with that authority had to remain subject to the censorship provided for in Article 112.

In these provisions a certain analogy exists between ministers of religion and the representatives of prisoners of war. Since the internees' regulations make no provision for such representatives— but only for the election of Internee Committees (Article 102)— it is all the more necessary to interpret the facilities granted to ministers of religion for the practice of their ministry as including

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 838.

a fortiori some of the facilities expressly stipulated in the case of representatives of prisoners of war. Libraries, reading rooms or the circulation of a newspaper may, for example, be most useful to ministers of religion. It was not necessary to lay down that they were to be exempted from work, since work is not compulsory in the case of internees (Article 95) ; on the other hand, the task of carrying out their ministry, which often demands arduous effort, may be regarded as actual work and as entitling the minister to pay. This pay might, by analogy with the provisions of Article 62 of the Prisoners of War Convention, be provided out of the welfare fund administered by the Detaining Power and made up of canteen profits in accordance with Article 87, paragraph 2, which has already been discussed.

PARAGRAPH 3. — SUBSTITUTES

Provision had to be made for the possibility of there being no ministers of religion, or too few of them. The commission of religious experts convened by the International Committee of the Red Cross in 1947 had advocated recourse being had to the services of ministers appointed, with the agreement of the Detaining Power, by the local religious authorities. They had thought that as religion is a spiritual matter, knowing no frontiers, as it were, the wisdom of the religious authorities could be relied upon for avoiding friction resulting from the difference of nationality between the congregation and their minister. The idea met with the approval of the Diplomatic Conference and was accepted without objection in the case of civilian internees, but the Committee responsible for the Prisoners of War Convention considered that if the Detaining Powers were to have any part in the appointment of ministers there might be a danger of political propaganda being spread under the cloak of religion. In order to avoid such a danger it was decided that their appointment, while continuing to be subject to the approval of the Detaining Power, would only be made " with the agreement of the community of prisoners concerned." That provision has no counterpart in the Fourth Convention. There is on that point an important difference between the position of prisoners of war and that of civilian internees, the explanation being that internment generally takes place in the country where the internee resides and that intervention in religious matters by local religious authorities of the same denomination is therefore normal. The position is different in the case of prisoners of war, whence the reservation introduced in their case.

That does not mean that all necessary steps have not been taken, from the strictly religious point of view, to prevent the local religious

authorities from making a choice of ministers which shocks the conscience of those to whom they minister. The religious authorities on whom the choice rests must be " of the same faith " as the internees and the minister appointed must be " of the internees' faith ". It is only in case of such an appointment being impossible, and if such a course is feasible from a denominational point of view, that a minister of similar religion or a qualified layman may be chosen.

According to the actual text of the Article, the local religious authorities " may " appoint the substitute in question. They are not obliged to do so. Internees who have no minister of religion at their disposal simply have the option of asking the local authorities to appoint one and the authorities have the option of granting their request or even of taking the initiative in the matter. The question arises of what would happen if the local authorities did nothing or if they refused to make an appointment. It is reasonable to suppose that in that case the Protecting Power (or if there is none, the International Committee of the Red Cross) would be able to take action, for the Protecting Power must not merely supervise the application of the Convention but must assist in its application.

A further question arises. Could the precautions aimed at guaranteeing the internees the right to exercise their religion have gone further ? The Stockholm Convention contained an additional provision, stipulating that " in the official reports sent to the Governments on the condition of internees, explicit mention shall be made of the religious assistance by which they benefit ". The International Committee of the Red Cross had considered, however [1], that the clause would prove a serious hindrance to Protecting Powers or charitable organizations when they were drafting their reports. The Committee pointed out that they had always tried, in their reports on camp visits, to give the fullest possible attention to the spiritual affairs of prisoners of war, but would prefer to see the proposed provision omitted, as they were on occasion obliged, for particular reasons, to devote a report entirely to one subject. This view was endorsed by the Delegation of the Holy See at the Diplomatic Conference and, on the proposal of that Delegation, by the Conference itself.

[1] See *Remarks and Proposals*, pp. 47-48.

ARTICLE 94. — RECREATION, STUDY, SPORTS AND GAMES

The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practical measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured. They shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playing grounds shall be reserved for children and young people.

The principle established by Article 94 is a corollary of the one set forth in the previous Article. Internees are entitled to have their religious aspirations respected and to practise their religion, and they may also find intellectual activities a help to their morale. Whereas a healthy frame of mind helps internees to maintain their physical health, it is no less true that a reasonable amount of physical exercise has a favourable effect on their mental balance. It was therefore quite right to include the provisions dealing with these two subjects in one and the same Article.

That was what the authors of the 1929 Convention had done. Article 17 of that Convention reads : " Belligerents shall encourage as much as possible the organization of intellectual and sporting pursuits by the prisoners of war. "

This wording, however, appeared inadequate to the Government Experts consulted by the International Committee of the Red Cross in 1947. They pointed out that Detaining Powers could, without violating it in flagrant fashion, simply adopt a passive attitude and that it was desirable to require them to make a greater effort by laying more definite obligations on them.

Moreover, experience during the Second World War had shown that detaining authorities were generally ready to welcome the co-operation of relief societies, especially by authorizing them to provide detained persons with books and games. Article 94 takes this fact into account, and should be read in conjunction with Article 142, which lays down that relief societies, and in particular the Inter-

national Committee of the Red Cross, are to receive " all facilities for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes " and for assisting internees in organizing their " leisure time " within the places of internment.

PARAGRAPH 1. — POSSIBILITY OF THE INTERNEES ENGAGING IN STUDY AND SPORTS AND GAMES

The general rule is accompanied by an important proviso. The internees are to be *free* to take part or not in the intellectual, educational, and recreational pursuits, sports and games encouraged by the Detaining Power. It was essential that such activities should not be diverted from their original purpose, under certain influences, and used for propaganda. The best means of avoiding this danger was to allow the internees to take no part in any activity whose spirit might offend them[1].

In order to carry out its commitments in good faith, the Detaining Power must take " all practical measures " including, therefore, the measures implied by the application of Article 142 on the assistance given by relief societies. Experience has shown that with the best will in the world belligerents could not always make available such things as, for example, books written in the language of the persons detained. If such works were to be sent to them from outside, serious security problems would arise ; for whereas the dignity of the internees demands that the Detaining Power abstain from all propaganda in its dealings with them, it is no less certain that that Power must have the means of blocking any move directed against itself. With a view to finding the best possible solution of this difficult question, the German Government and the British Red Cross agreed, during the last World War, to entrust the International Committee of the Red Cross with the task of forming an " Advisory Committee on Reading Matter for Prisoners." Books recommended by this body, which began its work in February 1940, and consisted of several denominational or secular organizations[2], presided over by the

[1] The amendment suggested for this purpose by the British and Netherlands Delegates at the Diplomatic Conference is in the same terms as the draft submitted by the International Committee of the Red Cross (*Remarks and Proposals*, p. 80).

[2] World's Alliance of Young Men's Christan Associations, International Bureau of Education, World Commission for Spiritual Aid to Prisoners of War, European Student Relief, International Federation of Library Associations, and Swiss Catholic Mission for Prisoners of War.

International Committee of the Red Cross, were generally accepted and the International Committee itself sent nearly a million and a half books to prisoner-of-war and internee camps, after first sorting, classifying and even repairing them[1].

The Detaining Power must provide the internees with " suitable premises ", in particular properly heated libraries, reading rooms and class-rooms, and also gymnasiums and games rooms in cases where physical exercises cannot take place outside as recommended in paragraph 3 of this Article. The use of wireless is certainly restricted by the spirit underlying this paragraph. The fact that all belligerents use wireless for propaganda purposes makes it very unlikely that broadcasts would not lead to criticism from one quarter or another.

Finally, it should be pointed out that however useful and desirable the assistance of relief societies may be, their co-operation cannot relieve the Detaining Power of the obligations laid upon it under this Article. If such societies gave no assistance at all, the Detaining Power would nevertheless be bound to use all practical means to encourage intellectual, educational and recreational pursuits, sports and games among the internees.

PARAGRAPH 2. — STUDIES

Paragraph 2, which has no counterpart in the corresponding Article of the Prisoners of War Convention (Article 38), has nevertheless been largely drafted on the basis of results obtained, mainly in military prisoner-of-war camps, during the Second World War. The " Camp Universities " which were started in 1914-18 developed very considerably in 1940. In Germany, for instance, one such centre had as many as 3,000 student prisoners, divided among faculties of theology, law, literature, science and medicine. There were also laboratories, and the International Committee of the Red Cross was allowed to send them measuring instruments and research equipment. In the United Kingdom the prisoners received monthly publications issued by the Reich Ministry of Education, while in America a regular correspondence was carried on between certain universities and the prisoner-of-war camps. The International Committee received the manuscripts of scientific works from various places of detention and forwarded them to the home countries of the prisoners concerned, the copyright being protected for them. Examinations were held

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 278, and Vol. III, pp. 288 ff.

in the camps, and many universities and technical schools recognized their validity[1].

If such facilities could be granted to members of enemy armed forces, it was essential that they should not be refused to civilian internees, who, it must once more be pointed out, have not engaged in armed hostilities. Internees are men normally associated with the work of the country where they are detained, who have only been removed from their usual activities as a precautionary measure; their internment must not become in any way a punishment. For that matter enabling these people to improve their education during their captivity would be in the interests of everyone.

The same line of reasoning can be applied even more strongly to the case of internees' children, when they share their parents' internment. Those children represent the future and it is important that the future should be safeguarded. This provision is one more proof of the interest shown by the Geneva Conventions in child welfare. It represents a most useful addition to the provisions contained in Article 50, which is one of the Articles (14, 17, 24, 26 etc.) laying down exceptions to the ordinary regulations in favour of children and contains special provisions dealing with their care and education.

PARAGRAPH 3. — PHYSICAL EXERCISE

The internees must be given opportunities for physical exercise, which must not however be compulsory. The brevity of the provision in the 1929 Prisoners of War Convention gave a loophole for persecution of the prisoners, who were sometimes forced to double on an empty stomach round exercise yards[2]. It was advisable to make express provision against any such danger. There is a general obligation on the Detaining Power to provide the internees with " open spaces " for outdoor games. The clause applies to " all " places of internment without exception.

The reference to special playgrounds and consequently separate dressing rooms for children and adolescents is due to the same feeling of respect for childhood, which we have already mentioned—a feeling expressed in many places in the Convention.

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[1] See *Report of the International Committee otf the Red Cross on its activities during the Second World War*, Vol. I, pp. 279-280.

[2] See Maurice BRETONNIÈRE: *L'application de la Convention de Genève aux prisonniers français en Allemagne durant la seconde guerre mondiale*. Thesis. Paris, p. 114.

ARTICLE 95. — WORKING CONDITIONS

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power, due regard being paid to the obligation of the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees, thus detailed, shall not be inferior to those applicable to work of the same nature in the same district.

PARAGRAPH 1 — THE PRINCIPLE : VOLUNTARY WORK

The first paragraph sets forth a rule which marks an essential difference between the working conditions of internees and those of prisoners of war.

Prisoners, with the exception of officers, are liable to compulsory work, whereas the Detaining Power may only give internees work of their own free will[1]. That rule is based on the idea of the work of the internees being arranged in their own interest to keep them as far as possible in good physical and mental condition and to provide them with some additional financial resources with which to supplement the arrangements the Detaining Power makes for their maintenance. The preliminary discussions on the Convention, in particular those of the Government Experts of 1947, bring out this intention quite clearly. It was based on experience gained during the Second World War, during which the International Committee's delegates had even, when visiting internee camps, recommended that the internees should be extricated from an idleness which was, in the long run, dangerous to their physical and mental health. When certain internees had shown some scruples about accepting work, for fear of helping the war effort of the Detaining Power to the detriment of their home country, the International Committee on several occasions negotiated with the two governments concerned to obtain their permission for the internees to carry out by agreement various tasks which had no direct connection with military operations. In Germany, for instance, they were able to take part in a general scheme for paid work, which had been drawn up by the German Government and consisted mainly in carpentry and the manufacture of toys and other articles made of wood[2]. In Australia, the United States and Canada internees were mainly engaged on market gardening and forestry work, for which they received some wages.

Having agreed upon the general rule, the Geneva Conference felt that there should be certain reservations to ensure that internees could in no case fail to enjoy the general safeguards under the Convention to which they were entitled as protected persons. It would have been wrong to allow the Detaining Power to take advantage of their desire to do something active and earn some money, in order to make them work, with their apparent consent, under conditions which the Convention prohibited in the case of other protected persons.

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[1] Since internment is not a punishment it cannot entail forced labour. A spokesman for the International Committee of the Red Cross at the Diplomatic Conference pointed out that the intention of the authors of the Stockholm Draft, in proposing the adoption of that rule, had been to remove any temptation from the Detaining Power to increase the numbers of interned persons in the interests of its own economy. See *Final Record*, Vol. II-A, p. 680.

[2] Reference here is only to civilian internees in the strict sense of the term, and not to the inmates of concentration camps who enjoyed no protection whatsoever. See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 591.

That is the point of the second sentence in the paragraph ; it was added to the original draft which merely laid down the rule that work must be voluntary. The provision refers to the Articles of the Convention which deal with interned aliens in the territory of a party to the conflict (Article 40) and interned persons in occupied territory (Article 51). In both these cases, the internees can only be put to work—with their consent—to the same extent as the inhabitants of the country of detention and under the same conditions, and only where there is no direct connection between the work and the conduct of military operations.

A further reservation, also added to the Stockholm Draft, aims at prohibiting " in any case " work of a degrading or humiliating character. This reservation may seem unnecessary at first sight, since it is always understood that the work of internees can only be voluntary and it is difficult to imagine an internee voluntarily undertaking a task which he finds degrading or humiliating. During the last war, however, there were so many examples of a decline in morale that there is certainly good reason to protect those detained under all circumstances against a weakening of their own will.

PARAGRAPH 2. — RIGHT TO GIVE UP WORK

The second paragraph stresses the voluntary nature of the work done by internees. As it is possible that they may have acted in good faith but over-hastily, or that they may have over-estimated their own strength, they have been given the right to change their minds. In order, however, that this new change of mind might not damage the interests of an employer who had acted in all fairness, it was necessary to give him time to find substitutes for workers who did not wish to continue. The draft text prepared by the International Committee of the Red Cross had made provision for a waiting period of three months ; this was reduced by the Conference to six weeks, a compromise between the original proposal and the waiting period of three weeks on which certain delegates wished to settle.

PARAGRAPH 3. — RESERVATION : WORK DONE ON BEHALF OF THE INTERNEES THEMSELVES

The principle of voluntary work appears to be broken by the third paragraph, which gives a list of certain tasks which the Detaining Power may, if need be, force internees to carry out against their will. In reality the provisions of this paragraph are designed to achieve the same object as those of paragraph 1, namely, to promote the

well-being of the internees as a whole and to ensure, in the best possible way, their protection against bombing.

The commentary on Article 91 showed that internees must for preference be treated by medical personnel of their own nationality, and Article 88 refers to detained persons taking part in the protection of their quarters. The fact is that nobody could work more zealously on this task than the internees themselves. Such tasks represent work of human fellowship which they are bound to carry out on behalf of their companions. If they sought to avoid it they would be failing in an elementary duty and it would be right to force them to do it.

A similar line of argument led to the inclusion of administrative work and domestic tasks (work in the kitchen, cleaning and camp maintenance) among the duties which internees may be forced to carry out. It was thought that this reduction to a minimum of the daily contacts between internees and representatives of the Detaining Power would help to make their internment less hard to bear. It must never be forgotten that internees are still civilians, and only suspects—not criminals or ex-belligerents. In their case less strict supervision can be tolerated than in the case of prisoners of war ; it is in the interests of the internees that they should have the benefit of any easing of their conditions which may be possible, and for the sake of this general interest the possible resistance of a single individual cannot be tolerated.

Provision is made for only one exception, i.e. where the internee is physically unsuited to the task ; but he must be declared unsuited by a doctor. The text of the Article says " by a medical officer ". The proceedings of the Conference give no indication as to whether this term can be understood to mean a doctor on the medical staff of the Detaining Power. That would certainly be the meaning if there were no doctor among the internees ; but if there is one, he would probably form part of the medical staff of the camp and in accordance with Article 91, it would preferably be he who would be responsible.

Paragraph 4. — Responsibility of the Detaining Power

Paragraph 4 is intended to define the responsibility of the Detaining Power for internees who work.

The Detaining Power's responsibility is general ; it covers " all " working conditions, medical attention, compensation for occupational accidents and diseases, and the payment of wages, irrespective of the type of work undertaken by the internee.

All this follows from the fact that although the internee is working so that he can earn something for himself, in accordance with the rule

laid down in Paragraph 1, he is also serving the interests of the Detaining Power, whether he is working for that Power or for an outside employer, for the employer's activities will form part of the general war economy. If an internee were only to work, for the sake of his health, on gardening within the camp, he would be considered as working for the Detaining Power, all the more so if he were employed permanently on camp maintenance. It is therefore both simple and perfectly legitimate for the Detaining Power to assume responsibility in all cases for the working conditions of the internees. The Convention has laid down as a criterion of whether the Detaining Power is faithfully carrying out its obligations that the working conditions of the internees should not be inferior to those obtaining in the district for work of the same nature. There was, however, one point of difficulty of which the Diplomatic Conference was fully conscious—namely the question of wages. Should it be laid down that internees were to be paid exactly the same as local workmen ? " This ", wrote the Rapporteurs of Committee III, " might lead to fantastic results, the internee being, unlike the ordinary worker in the district, a person who has been divested of all normal financial responsibilities "[1]. The authors of the Convention were therefore content to make provision for " fair " wages. Whether the work is done for the Detaining Power (including camp maintenance work) or for an outside employer, the wages are to be decided by agreement with the internees, bearing in mind the fact that the latter have no living expenses to defray. If they do not consider the remuneration given them to be fair, they are entitled to appeal to the Protecting Power, as laid down in Article 101.

ARTICLE 96. — LABOUR DETACHMENTS

All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 839.

Even if the work is not done in the actual place of internment, the internees are entitled to protection under the Convention. For that reason it was desirable to define the responsibilities of the Detaining Power and to make provision for ensuring that the protection is in fact given.

1. *Responsibility*

All labour detachments will come under the authority of the commandant of the place of internment.

It will be seen in the commentary on Article 99 that the appointment of a camp commandant is governed by very definite rules. The Detaining Power may only give the post to an officer or official chosen from the *regular* military forces or *regular* civil administration.

It is not, however, merely a question of the responsibilities of that officer or official : the text of the Article also refers to the competent authorities of the Detaining Power. That means not only his subordinates, the supervisory staff on the spot (the training of which would appear to be a responsibility of the commandant according to Article 99, paragraph 1) but by all the authorities to whom the commandant of the place of internment is himself subordinate. In the same way the corresponding Article of the Prisoners of War Convention (Article 56) refers to the military authorities and the camp commander. This provision implies, therefore, that if the commandant fails in his duty, the State is still responsible.

This is without prejudice to the question of individual responsibility as defined in Articles 146 to 149. The question was dealt with explicitly by the Diplomatic Conference of 1949 when adopting the corresponding provision concerning prisoners of war[1]. The responsibility of the Detaining Power in no way absolves its agents from their responsibility for offences committed by them against the internees[2].

2. *Supervision*

The checking of the fulfilment of these responsibilities is a duty of delegates of the Protecting Power or its substitute as defined in Article 11. Apart from supervision in the strict sense of the word, the Protecting Power, the International Committee of the Red Cross and other approved humanitarian organizations, as defined in Articles 30, 142 and 143, have an acknowledged right of inspection.

In order to exercise that right, these various authorities and organizations must know where all labour detachments without

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 276-277.

[2] This is one case of the application of the rule laid down in Article 29.

exception are to be found. Hence the obligation also on the commandant concerned to supply an up-to-date list. The provision is intended to avoid difficulties such as were encountered by delegates of the International Committee of the Red Cross when visiting certain labour detachments (particularly of prisoners of war) during the Second World War. On various occasions a list of labour detachments could not be obtained from the camp commandant and it was necessary to refer to higher military authority, which meant long delays.

The present provision is clear, so far as the Detaining Power and the International Committee of the Red Cross are concerned. The lists communicated to them must at least show the exact position of the labour detachments and the number of internees in each. The other humanitarian organizations, as was seen in connection with Article 30, are those which the Detaining Power has duly authorized to visit camps. Article 142, paragraph 2, allows the Detaining Power to limit the number of societies and organizations authorized to carry out their activities in its territory. On the other hand, camp commandants are bound to communicate the list of labour detachments to any delegate who has been so authorized.

Chapter VI

Personal Property and Financial Resources

ARTICLE 97. — VALUABLES AND PERSONAL EFFECTS[1]

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

[1] This Article corresponds to Article 18 of the Third Convention.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

PARAGRAPH 1. — RESPECT FOR PROPERTY

Articles of personal use do not merely comprise clothes, linen, blankets and toilet requisites, but also books, perhaps a portable typewriter, medical supplies or anything, speaking generally, which is used in daily life. Cameras should no doubt be regarded as an exception, because of the Detaining Power's special interest in removing anything which might promote espionage or perhaps be used for unfavourable propaganda. This right of the internees to keep their personal property once again emphasizes the fact that internment is merely a security measure and must affect personal rights and privileges as little as possible.

The Detaining Power is free, however, to protect itself against efforts to put the resources retained by the internees—and above all their financial resources—to a use prejudicial to its interests. The Detaining Power wishes to prevent escapes and must consequently take away from the detained persons all possibility of bribing their guards ; it must also try to prevent any subversive propaganda and for these reasons it seems reasonable that internees should be deprived of sums of money, cheques, bonds, negotiable belongings and articles of value in their possession at the time of their internment. It is essential, however, that these things should be taken from them in accordance with an established procedure and that the internees should not be liable to be despoiled by the first-comer. The responsibility of the Detaining Power must on the contrary be legally established. To this end the text proposed by the International Committee

of the Red Cross laid down that articles might not be taken from the internees except by the order of an officer or of a civilian official of equivalent status. That wording was similar to the one referred to in connection with the labour detachments and to the one given in Article 99 dealing with the selection of camp commandants. It is a matter of some regret that this safeguard was not embodied in the text of the Convention and that the Geneva Conference replaced it by a somewhat vague reference to " established procedure ". The Rapporteurs of the Committee concerned explained that the object of that wording was to give this text, which concerned civilians, a less military character than the Stockholm Draft, which followed very closely the text relating to prisoners of war[1]. The reference in question, vague as it is, originally sprang, it will be remembered, from the Tokyo Draft, which suggested that the Prisoners of War Convention should be considered applicable by analogy to civilian internees, on the understanding that the treatment accorded " should in no case be inferior to that prescribed in the said Convention ".

The detailed receipt referred to at the end of a paragraph is distinct from the account provided for in Article 98. The receipt will remain in the possession of the internee, while the account will be kept and filed by the detaining authorities. The receipt will serve as a voucher when the accounts are made up, that is at the end of the period of internment.

PARAGRAPH 2. — SAFEGUARDS AGAINST THE CONVERSION OF CURRENCY

Sums of money taken from an internee are to be paid into his account. The stipulation is simple enough if the sums in question are in the currency of the country of internment, but if they are in foreign currency, their conversion may be equivalent to confiscation, because of the danger of depreciation which threatens the currency of a country at war ; hence the clause safeguarding the internees against such conversion. It must be recognized, however, that the safeguard in question may be rendered illusory by the reservation referring to the " legislation in force in the territory ". Past experience has shown, indeed, that exchange controls and other exceptional wartime measures often make conversion into the currency of the country concerned compulsory, such conversion taking place at an arbitrary rate of exchange, often very much below the real value.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 839.

PARAGRAPH 3. — ARTICLES WHICH HAVE A PERSONAL VALUE

This paragraph is not a separate, independent provision, as its place in the Article might suggest. It is connected with the first paragraph, in which it might well have been incorporated.

The essential part of the clause is the words " above all ". The clause formulates an exception to the right of the Detaining Power to take articles of value from internees ; that exception applies to articles which have above all a personal or sentimental value. That means that the importance attached to their possession does not depend on their commercial value, but rather on what they represent in the sentimental sphere. A wedding ring would be one such example —a plain golden ring which costs little ; its sale would not furnish the owner with large resources with which to make preparations for an escape or to take part in subversive propaganda. On the other hand jewels of great commercial value may be taken away, in spite of their sentimental value. It will be for the Detaining Power to judge in all fairness the appropriate course to take. It must be in accordance with the stipulation of paragraph 1 (in accordance with established procedure and against a receipt).

The paragraph corresponds to a similar provision in the 1949 Prisoners of War Convention (Article 18, para. 3). It is based on the general principles of the protection of the human person, as set forth in Articles 27 to 34. It is an application of those principles and aims at ensuring respect for the inner feelings of the internees.

PARAGRAPH 4. — THE SEARCHING OF WOMEN

In the same way, paragraph 4 contains what the Rapporteurs called " a further safeguard in favour of women internees ". This is a case of the application of the principle expressed in Article 27, paragraph 2.

PARAGRAPH 5. — WINDING-UP OF ACCOUNTS

This paragraph must be read in part in conjunction with Article 35 (right to leave the territory), for even when protected persons are repatriated at the end of a war the " established procedure " will probably, in actual fact, cause delays during which the provisions of Article 97 will apply. The case of repatriation may therefore with good reason be considered as similar to that of release, and the procedure for winding up accounts in particular will be the same.

The text of the Article describes that procedure in detail. It stipulates that sums of money, cheques, bonds, and articles of value are to be returned, with the exception of those which the Detaining Power withholds by virtue of the legislation in force in that country. This provision refers especially to banknotes and gold, in the form of coins or in gold bars, which are generally the subject of an official embargo under wartime legislation. The reason for such an embargo in regard to enemy property (and the property of the internees will usually be enemy property) is the Detaining Power's hope of seizing it for reparations when the war ends. Such valuables would then be deducted from the amount of compensation to which the enemy Power had agreed, and the latter—and not the Detaining Power—would then be accountable for it to the owner. The rule of respect for private property, laid down in Article 46 of the Hague Regulations, has thus been followed. In order that the internee concerned may receive compensation where applicable, from the Power finally responsible, he must be in possession of the detailed receipt which must be issued by the Detaining Power according to the Convention.

PARAGRAPH 6. — IDENTITY PAPERS

Paragraph 6 corresponds to Article 18, paragraph 2, of the Prisoners of War Convention, which has been introduced since the 1929 Prisoners of War Convention on the basis of experience gained during the Second World War. It was proposed by the International Committee of the Red Cross. When the Detaining Power took away their army books (Army pay book and service record), basing their action on their right to confiscate all military documents, the prisoners of war in question were usually deprived of their only identity paper. Being unable to prove their identity they were liable, especially if they attempted to escape, to be treated as spies and so lose the benefit of their prisoner-of-war status.

The same reasoning applies to internees. It may be in the interests of the Detaining Power to confiscate certain identity documents (driving licence, for example, to make escape more difficult), but when withdrawing such documents it should on all occasions leave the internee with the means of proving his identity. The internees are accorded two safeguards : (1) a receipt is to be given for any identity document taken away from its owner ; (2) an official identity document may possibly be issued by the Detaining Power itself. It might take the form of a duly certified duplicate of the internment card for which provision is made in Article 106.

PARAGRAPH 7. — POCKET MONEY

The final paragraph should make possible the application of Article 87, paragraph 1, concerning the buying of certain foodstuffs. The Stockholm Draft indicated that the reference was to food, tobacco and toilet requisites. The Diplomatic Conference deleted this, regarding it as a repetition ; but it is well to remember the correspondence between the two Articles[1].

It follows that the amount of money in question will be fairly small. If the Detaining Power considers that it must for security reasons limit very strictly the amount of cash held by the internees, it should provide them with purchase coupons of sufficient value to enable them to make purchases in the canteens it runs.

ARTICLE 98. — FINANCIAL RESOURCES AND INDIVIDUAL ACCOUNTS

All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.) but may not be allocated by that Power or distributed by the Detaining Power on the basis of discriminations between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and other dependants. They may draw from their

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 839.

accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power, on request, and shall accompany the internee in case of transfer.

PARAGRAPH 1. — ALLOWANCES FROM THE DETAINING POWER

The allowances referred to in this paragraph are in fact the pocket money mentioned in the last paragraph of the preceding Article. Deprived by internment of the resources obtained through their normal activities, those of the internees who have nothing in reserve would soon be reduced to such poor circumstances that in order to procure the slightest additional comfort over and above their maintenance, for which the Detaining Power is responsible, they would be compelled to work, and that is contrary to the rule laid down in Article 95. In order to avoid such a contingency, the first paragraph of Article 98 lays down that the Detaining Power is to pay them regular allowances, which, although modest, will enable the poorest among them to purchase at least the minimum considered necessary to sustain their morale and enable them to preserve their personal dignity. Those who have private means will also draw the allowances, since it was thought better not to draw attention to differences in the financial position of different internees by treating them differently.

PARAGRAPH 2. — ALLOWANCES FROM OTHER SOURCES

Internees may also receive money from other sources.

1. *Allowances from the Power of Origin or from the Protecting Power*

Internees have nearly always been interned because of their nationality. They fall foul of wartime legislation because they are citizens of an enemy State ; it is therefore only fair that the Power to which they owe allegiance (or failing it, the Protecting Power) should help them to bear the consequences. The Detaining Power, for its part, is bound for reasons of humanity to authorize allowances from these sources. The principle that this form of aid should be authorized is, moreover, embodied in Article 39, paragraph 3, of this Convention, an Article which applies to protected persons in general.

It was thought desirable, however, that the allocation or distribution of these remittances should not be influenced by political con-

siderations. It should be noted that the ban on preferential treatment for particular internees or groups of internees applies both to the Power of Origin and the Detaining Power. In the case of the latter the prohibition may be considered normal, since it refers to a protected person, but in the case of the Power of Origin the Convention interferes here in the relations between a State and its own citizens. This is a bold provision, though a wise one, which represents an exception to the rule that the protection of persons does not apply to their relations with the State to which they owe allegiance.

All discrimination contrary to Article 27 is prohibited. On the other hand implicit authority is given for the discrimination permitted by that Article for humanitarian reasons, in order to favour classes of people who are in particular need of help (the infirm, the sick, pregnant women, etc.)[1]. All this is an example of the application of the principle of non-discrimination, as understood in humanitarian law—that is to say the rule which forbids all differentiation based on race, political opinions, religion or social class, but at the same time demands that the different degrees of suffering should be alleviated by different degrees of assistance.

2. *Allowances from families or from charitable organizations*

Internees are also entitled to receive assistance from their families or from " the organizations which may assist them ". This is another case of the application of the principle set forth in Article 39, paragraph 3. In this instance, the reservation in regard to non-discrimination is not made, as each family should obviously be allowed to favour its own members. The question is more difficult in the case of charitable organizations. Will religious societies, for example, be permitted to favour members of their own religion or denomination ? Yes, undoubtedly they will, provided that all such societies are treated on the same footing and if it causes no major difficulty of discipline. The same argument applies as for families. If charitable organizations, however, draw their resources from public collections organized independently of any religious body, it is conceivable that the rule of non-discrimination imposed on the public authorities should also apply to them. That, in any case, is the rule by which the International Committee of the Red Cross is guided, in accordance with its own statutes, and the same should apply, it seems, to any other non-denominational social welfare organization.

[1] This does not necessarily mean that the Power of Origin is bound to pay allowances to all internees, whether they need them or not. The situation here is different from that described in paragraph 1 in regard to allowances.

3. *Income on property*

Internees who have private means are authorized to receive the income on their property in accordance with the law of the Detaining Power. Sequestration under wartime legislation suspends the free disposal of enemy property ; but the income from that property continues to be drawn and it may be agreed, for reasons of humanity, that it should be at the owner's disposal within the limits authorized by the Detaining Power.

PARAGRAPH 3. — ACCOUNTS

Paragraph 3 gives detailed rules concerning the keeping of an account for each internee. The Detaining Power is responsible for this, and no other authority. The Internee Committees mentioned in Article 102 have rights in the matter and since wartime legislation will usually deprive the internees of certain facilities which they would have in normal times[1], it is desirable that the Detaining Power should, as it were, take the place of a bank, so far as the keeping of their accounts is concerned.

The various items on the credit side of the account are those defined in the preceding Articles and in paragraph 2 of Article 98 : wages for any work done (Article 95), sums of money taken away at the time of internment and entered on a detailed receipt kept by the internee concerned (Article 97), allowances and income. On the debit side there are the withdrawals made by the internee for his personal expenses or the maintenance of his family, within the limits prescribed by wartime legislation.

It may be mentioned in this connection that in this Convention there is no provision corresponding to Article 63 of the Prisoners of War Convention, which envisages the possibility of funds being transferred abroad to keep people who are dependent on those in captivity. The reason is that a civilian internee is, with certain exceptions, normally settled in the country where he is detained and that it is, consequently, in that same country that his obligations in regard to the maintenance of dependants must lie.

It is for the internee himself to verify that his account is being properly kept—as he would do when dealing with a bank—provided that his requests in this connection remain within " reasonable " limits : the facilities granted for this purpose should not be made a pretext for demands which might unduly complicate the task of the

[1] With the exception of those which may be granted them specifically for the management of their property. See the commentary on Article 114.

Detaining Power. Nevertheless, to ensure that the interests of the internees are not prejudiced, the Protecting Power is also authorized to inspect the account, and the internee is always entitled to approach the Protecting Power under the terms of Article 101.

Finally, wartime circumstances may make it necessary for internees to be transferred. In that case it may be difficult for the Detaining Power to keep the accounts. Nevertheless continuity in this financial stewardship is of such importance for every internee that the Convention is careful to stipulate that a statement of account shall accompany the internee in case of transfer. The Detaining Power is thus wholly responsible and the internee is entitled to compensation if his account is lost or inaccurately kept.

Chapter VII

Administration and Discipline

ARTICLE 99. — CAMP ADMINISTRATION. POSTING OF THE CONVENTION AND OF ORDERS

Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must, likewise, be given in a language which they understand.

PARAGRAPH 1. — COMMANDANT OF PLACE OF INTERNMENT

The provisions in paragraph 1 are based on experience gained during the Second World War. On December 7, 1939, the International Committee of the Red Cross sent a memorandum to the belligerent Powers calling their attention to the fact that civilian internees should, as a rule, be subject to the ordinary penal laws of the country in which they were detained. The British, German and United States Governments accepted this proposal in principle. They also accepted the principle vital to the application of disciplinary regulations that civilian internee camps should not be under military authority[1]. The German authorities, however, reserved the right to make an exception to this rule in the case of camps in areas occupied by their troops. It is important, however, to point out that even if the camp commandant of a place of internment is a member of armed forces, disciplinary punishment must not be ordered according to military rules. The basis of the discipline to which internees are subject is not military disciplinary law, but the regulations of the place of internment.

Whether the commandant is a civilian or a member of the forces he must be a regular, that is to say he cannot be selected from the ranks of organizations specially set up to meet the State's responsibilities in this respect. Internees like prisoners of war[2] are in the hands of the State. The State alone is responsible for the application of the Convention. Consequently only a regular (civilian or military) representative of the State can meet these responsibilities and validly undertake commitments on behalf of the Government. Moreover, the traditions of regular officers and civil servants ensure that the commandant of a place of internment will be capable of undertaking the heavy responsibility of ensuring the application of the Convention honourably, without breaking the laws of humanity.

The first obligation laid on him is to know the exact wording of the Convention. He must therefore have a copy in the official language of the Power he represents (or in one of the official languages if there should be more than one).

This paragraph, however, also lays down that the administrative measures adopted in each country to ensure the application of the Convention shall be studied by the staff in control of the internees. A knowledge of these measures is therefore required of the commandant and the supervisory staff. The text further implies that the commandant of the place of internment will be responsible for giving

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, General Activities, p. 600.

[2] See Third Convention, Article 12, para. 1.

the staff in question the necessary instruction. The Committee of the Diplomatic Conference which considered this question dwelt on the necessity for giving camp staff clear instructions concerning the interpretation of the Convention in matters of administration rather than insisting on knowledge of the text itself[1]. Finally it should be noted that the commandant exercises direct authority over the internees—even when they are out with labour detachments (Article 96). He must always be present in the place of internment and carry out his duties himself. He cannot, except in cases of *force majeure*, delegate his duties as a whole to one of his subordinates. This means that in principle the Detaining Power cannot put several places of internment under the authority of a single commandant. There may however be special reasons, perhaps connected with the interests of the internees, why the State should wish to put several places of internment in the same district under the authority of a senior commandant. It should then appoint an officer or official with the authority and qualifications required by this Article to each of the places of internment which will be under the authority of the senior commandant.

Paragraph 2. — Posting of the Convention and of special agreements

The commandant of the place of internment must have an exact knowledge of the provisions of the Convention but that is not enough. The internees must themselves know the exact extent of their rights and their duties. These rights will be the basis for any complaint they may make to the detaining authorities or for their appeals to the Protecting Power under Article 101. Their duties will entail a reasoned discipline which will make it unnecessary for the Detaining Power to resort to punishments, or even force, in order to maintain order.

Under Article 144, of course, the High Contracting Parties undertake to disseminate the text of the Convention as widely as possible, even in peacetime ; but it is obviously necessary to remind those concerned of provisions as detailed as those contained in the regulations for internees. This paragraph, which refers to the fact that the internees themselves must be informed, lays down that they must have access to the Convention translated into a language " which they understand ". That language will most often be that of the country where they are detained, since the internees were working and living in that country beforehand ; but where necessary a version

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 839.

of the Convention in a foreign language must be posted up. A possible solution is given for cases where the multiplicity of languages makes it difficult to post all the versions required ; in such cases the Internee Committee is to be placed in a position to supply those concerned with the necessary details. In such cases the Internee Committee would be given a copy of the Convention (and of any special agreements) for the use of the internees.

It is incumbent on the Detaining Power to prepare the texts which are to be posted. It is nevertheless desirable—especially if there is more than one official language in the same country—for the Power to which the internees owe allegiance to send the Internee Committee a copy of the Convention in the mother tongue of those detained. This should be done through the good offices of the Protecting Power or the International Committee of the Red Cross as soon as war broke out. It should be mentioned here that under Article 145 the High Contracting Parties are obliged to communicate to one another the official translations of the Convention [1] (in peacetime through the Swiss Federal Council and, during hostilities, through the Protecting Powers).

PARAGRAPH 3. — POSTING OF REGULATIONS ISSUED IN APPLICATION OF THE CONVENTION

It is necessary that internees should know the regulations, both the general provisions issued in application of the Convention and special measures to which circumstances give rise. In this case, too, the Detaining Power is responsible for posting the regulations concerned in such a way that they can be known and understood.

PARAGRAPH 4. — INDIVIDUAL ORDERS

In the same way it is essential that orders addressed to internees individually should be intelligible to them. It is only on that condition that discipline can be reasonably accepted.

ARTICLE 100 — GENERAL DISCIPLINE

The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include

[1] Attention is drawn to the fact that the International Committee of the Red Cross has in its possession translations prepared by governments. In case of need it too could undertake the duty of communicating them.

regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manœuvres, or the reduction of food rations, are prohibited.

This article, which was adopted without discussion at the Diplomatin Conference, reproduces the corresponding Article of the Stockholm Draft. It is based on experience gained during the Second World War and prohibits the inhuman practices which went on at certain concentration camps. Those practices have incidentally already been condemned under Article 27.

PARAGRAPH 1. — RESPECT FOR THE HUMAN PERSON

The principle laid down here in the regulations for internment is simply the application to a particular case of the general principle, valid for all protected persons, that they are entitled " in all circumstances to respect for their persons " and must " at all times be humanely treated ". The significance of these essential principles was stressed in the commentary on Article 27 of the Convention.

Even if the attitude adopted by internees results in the infliction of punishment—a subject dealt with in Article 117 and those which follow it—it is formally stipulated that " in no case shall disciplinary penalties be inhuman ". There was all the more need to establish the fact that the regulations governing discipline in places of internment could not be such that their mere implementation, without any fault on the part of the internee, might be equivalent for them to an inhuman punishment.

It must again be stressed that internment is not a punishment. The various respections which it places on the internees' freedom to exercise their rights are only justified by conditions affecting the Detaining Power's security, and anything which attacks the internees' personal dignity without being necessary for security reasons, is to be banned as inhuman. Certain measures which would probably facilitate the task of surveillance, such as tattooing the detainees, are prohibited because of their serious effect on the dignity of the person.

PARAGRAPH 2. — EXAMPLES OF PROHIBITED MEASURES

In order to make the provision clearer, paragraph 2 gives some examples of measures which are prohibited. Besides tattooing, men-

tioned in the previous paragraph, it indicates provisions which it is essential to omit from any regulations. (The list cannot be considered exhaustive, as the inclusion of the words " in particular " shows). Physical exercise is prohibited if it is of a " punitive " nature, that is to say if it is organized in such a way as to affect the health or the dignity of those concerned ; military manœuvres are also prohibited (they are particularly out of place in the case of civilians). Reduction of food rations, again, is obviously a punishment and must be prohibited in regulations which are governed by the provisions of the Convention relating to penal and disciplinary sanctions (Article 117 and those which follow it).

ARTICLE 101. — COMPLAINTS AND PETITIONS

Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

General Remarks

The right of complaint is an indispensable guarantee that the provisions of the Convention are being duly applied. It is a corollary of the provisions of the preceding Articles designed to ensure that the internees have a chance to study the text of the Convention in detail.

This right was not included in the Hague Regulations concerning prisoners of war. It was during the First World War that the custom was established of allowing prisoners to put forward complaints under certain circumstances. An agreement concluded between Germany and France, on March 15, 1918, authorized prisoners, through welfare

committees, to put their complaints and petitions before the camp commandants who could attach their comments before transmitting them to the Protecting Power. On the strength of this precedent, the authors of the 1929 Convention relative to the Treatment of Prioners of War inserted the principles in Article 42 which were repeated in the 1949 Convention[1]. They were (1) the right to petition the Detaining Power ; (2) the right to complain to the Protecting Power ; (3) the stipulations that such complaints and petitions should be transmitted immediately and should never, in any circumstances, give rise to any punishment.

The regulations concerning internees are based on the same principles.

Paragraph 1. — Right of petition

" Petitions " differ from " complaints " in that they do not constitute allegations that the Convention has been violated. They are comments or requests dealing exclusively with conditions of internment and submitted to the detaining authorities. The plural in this case means that while the person to whom the petition must be presented in the first instance is the commandant of the place of internment—by virtue of his personal responsibility for the execution of the Convention under Article 99—it may fall within the competence of his superiors, in which case his duty is to transmit it as stated in paragraph 3 of this Article.

The Convention does not state in detail the procedure for submitting petitions, but obviously it must be compatible with the normal requirements of discipline and the administration of the place of internment and petitions must not be used for purposes other than those arising under the Convention. It will be for the commandant of the place of internment to issue regulations concerning the exercise of this right, and particularly to say whether petitions can be submitted orally or in writing and in what form.

Paragraph 2. — Complaints

" Complaints ", unlike petitions, are of a contentious nature. They may be made because the detaining authorities have not given satisfaction or have not replied to a petition, but they may also, independently of any prior petition, constitute an appeal against an alleged violation of the provisions of the Convention.

As already seen, the procedure established during the First World War for the transmission of complaints called for the inter-

[1] See Third Convention, Article 78.

vention of " welfare committees ". The text under discussion makes reference to a similar institution—the Internee Committees. This action through an intermediary may present certain advantages, particularly if the Committee adds appropriate comments in support of the complainant, but it may also in certain cases hinder the free expression of the complaint and it was wished to give the internee the opportunity of applying direct, if he so desired, to the Protecting Power. It must be emphasized that complaints, like petitions, must be strictly concerned with conditions of internment, failing which they would not be accepted.

An important question arises in connection with this paragraph, a question not dealt with in the text. May internees submit their complaints to the International Committee of the Red Cross ? In practice, during the Second World War, particularly when as a result of the events prisoners of war were deprived of a Protecting Power, the International Committee of the Red Cross often received complaints and transmitted them. The Committee's intervention was not of the same nature as that of the Protecting Power, which ordinarily restricted itself to arranging with the Power of Origin to make diplomatic approaches to the Detaining Power. Now it was noted that the publicity given to these diplomatic steps and their official character was not always very advantageous to the prisoners, whereas the discreet and less circumscribed action of the International Committee of the Red Cross was frequently effective[1]. It is important that the benefit of this experience should not be lost and as Article 143 of the Convention concerning supervision mentions the International Committee of the Red Cross by name and says that the Committee's delegates shall enjoy the same prerogatives as the delegates of the Protecting Power, it may be deduced from this that internees' complaints may also be addressed to the International Committee of the Red Cross. The reason why the Committee is not named in Article 101 is precisely to avoid any stigma of contention attaching to any intervention it might undertake. Thus allowance is made for the susceptibilities of the Detaining Power and in many cases this will make successful approaches easier.

PARAGRAPH 3. — TRANSMISSION — IMMUNITY

The transmission " forthwith " of complaints and petitions and the absence of punishment even when they are not well founded is in

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 341-342.

conformity with the procedure established with regard to prisoners of war during the two world wars.

The Fourth Convention of 1949 has introduced a particularly important idea by stating that the transmission shall take place " without alteration ". This wording was rejected by the authors of the Third Geneva Convention in order to respect the Detaining Power's right of censorship. The discussions at the Diplomatic Conference concerning the Fourth Convention showed that there was a specific wish to avoid any suggestion of censorship with regard to civilians. It was nevertheless said that some supervision by the Detaining Power must be allowed " for security reasons "[1].

The prohibition of punishment for making even unfounded complaints and petitions finds ample justification from the humanitarian point of view. Internees often find themselves in conditions so distressing that they may commit errors of judgment under the influence of ideas hostile to the Detaining Power. It is therefore only reasonable to be indulgent towards them, even if they are mistaken. Furthermore, if they were to fear any sort of punishment as the result of the steps they were taking, they would be deprived of a right which in part guarantees respect for the person and which constitutes one of the four fundamental freedoms mentioned in the Preamble to the Universal Declaration of Human Rights[2].

Paragraph 4. — Reports of Internee Committees

It is in order to appreciate with full knowledge of the facts the truth of any complaints submitted that the Protecting Power needs to be informed as exactly and regularly as possible of internment conditions. It will thus be able to find out whether the facts of which it is informed are exceptions or are the consequences of malpractices which should be set right. Some of the Government Experts who met in 1947 had envisaged making it obligatory to transmit periodically to the Protecting Power reports drafted on a model form. This opinion did not prevail in the sense that it was given mandatory form ; the idea of periodical reports was retained, but the Convention leaves it to the Internee Committees to submit their reports when and how they think fit.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 681-682.

[2] " Whereas . . . the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . . " (Universal Declaration of Human Rights, Preamble, para. 2).

These reports are intended for the Protecting Power but in many cases the information which they contain will be of greater interest to the relief organizations. It will therefore be part of the duty of the Protecting Power to transmit as rapidly as possible any information of interest to the institutions capable of assisting those concerned. Thus the Protecting Power should make the fullest possible use of this source of information ; it will act itself if diplomatic action is needed and will approach the relief organizations if the assistance to be given to the detained is within the scope of their activities.

ARTICLE 102. — INTERNEE COMMITTEES: I. ELECTION OF MEMBERS

In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

General Remarks and Historical Survey

In the war of 1870, the International Prisoners of War Agency established under the auspices of the International Committee of the Red Cross, had already suggested to the belligerents that a " person of trust ", appointed by the prisoners themselves, should have the task in each camp of distributing relief supplies. During the First World War, the custom of appointing such persons of trust took definite shape and the Franco-German agreement of March 15, 1918 provided that, in all camps and in work detachments comprising 100 prisoners or more, they could submit to the camp commandant for his approval " welfare committees " to take delivery of and distribute collective relief supplies.

The 1929 Convention codified these results. Article 43 provided for the appointment of representatives to correspond with the International Committee of the Red Cross and other relief societies ; their activities as intermediaries between the prisoners and the authorities or charitable institutions were destined to expand enormously.

By analogy, in the civilian internment camps during the Second World War internees' representatives played a very important rôle. In many cases they assumed even wider responsibility than did the prisoners' representatives, whose status was defined in the Convention. Their sphere of activities varied from country to country but was almost always quite large. Often they had the powers of a camp leader and were responsible for order, discipline and the application of the regulations. In some countries, civilian internees had appointed several of their comrades to a camp court, which inflicted punishments for breaches of the regulations (attempts to escape, insubordination, games of chance, trafficking in foodstuffs) [1].

This system, however, was not entirely satisfactory. The appointment of camp leaders aroused in some cases such rivalries that disturbances broke out, and sometimes the persons appointed misused their authority. The International Committee of the Red Cross therefore proposed the establishment of councils with several members, on which various tendencies or nationalities among the internees could be represented. Like the experts consulted in 1947 [2], the authors of the Convention supported this suggestion.

The system provided for in the 1949 Conventions takes into account this experience. The provisions are not identical therefore in the case of prisoners of war and civilian internees. While prisoners' representatives are still mentioned (Third Convention, Article 79) in the case of prisoners of war, and more detailed explanations have been included in the Article, the system laid down for civilian internees calls only for the corporate action of an Internee Committee whose members are elected by their comrades, but no single one of whom is entitled to exercise dominant authority as a camp leader. This difference between the two systems corresponds to the difference between being a civilian and essentially an individual, and being a prisoner of war still subject to military discipline.

PARAGRAPH 1. — ELECTIONS

Elections are provided for each place of internment. They will also be held in work detachments, athough these are not expressly mentioned in this paragraph. A note to this effect was made by the Rapporteurs [3] and is confirmed by paragraph 3 of Article 104 relative

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 601.

[2] See *Report on the Work of the Conference of Government Experts*, pp. 197-199.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 840.

to the facilities for correspondence of committee members in work detachments.

Secret ballot is a guarantee of the freedom of elections. The fact that they are held regularly gives the internees the means of checking the work of their delegates, and re-electing them or not in consequence.

If several hundred internees are in the same camp, the elections may be preceded by some sort of electoral campaign, and some help from the Detaining Power will be necessary to make the material arrangements. In any case, such help from the Detaining Power must always be given impartially, any pressure, whatever its source, being contrary to the spirit of the Convention.

Their representative character enables the Internee Committees to act on behalf of the internees in dealings with the Detaining Power and the Protecting Power or with relief organizations such as the International Committee of the Red Cross, without, however, this intervention being essential. As stated, for example, in the commentary on Article 101, the right of complaint may be exercised either directly or through the Internee Committee.

It should be noted that the Convention does not mention the number of members in the Internee Committees. The spirit of the Convention is that the various trends among the internees should be represented as fairly as possible. The fact that the text does not mention numbers will, however, permit the Detaining Power to fix the number of representatives to be elected as it wishes. It might also refer the matter to the internees themselves. If, in any case, the regulations for the elections appeared to the internees to be too restrictive, they could always take advantage of the right of complaint granted them by the previous Article and approach the Protecting Power (or the International Committee of the Red Cross), in order to fix, by agreement, a larger number of members for the Internee Committee.

Paragraph 2. — Approval of the Detaining Power

The approval of the detaining authorities is necessary if the Internee Committee is to carry out its work. This condition, which is attached to all systems of representation of prisoners of war, is obviously essential for the maintenance of discipline. It does not, however, authorize the Detaining Power to exert pressure on the internees to elect a particular candidate and still less to postpone the elections in so far as the candidates have not been approved. It is obvious, although there is no formal provision to this effect, that the elections must take place as soon as possible. If the results of the

elections arouse any objections from the Detaining Power, that Power must inform the Protecting Power and give its reasons. This procedure tends, on the one hand, to restrict the arbitrary action on the part of the detaining authorities and, on the other, to allow for new elections in better conditions when the internees have been informed impartially by the Protecting Power of the reasons against the election of those first elected.

The same reasoning is valid for allowing the Detaining Power to remove, during the year, one or more members of the Internee Committee, while restricting as much as possible the arbitrary aspect of such a decision.

ARTICLE 103. — INTERNEE COMMITTEES: II. DUTIES

The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

This Article does not describe in detail the various duties of Internee Committees, but rather indicates the spirit in which those duties should be carried out and gives a specific instance.

PARAGRAPH 1. — PURPOSE OF THE COMMITTEES

The main purpose of the Convention is to keep protected persons in good morale and in good physical health and it is in this spirit that Article 103 is written.

The word used is worth noticing : the Internee Committees are to " further " the well-being of the internees. Their activities will therefore merely be complementary to those of the Detaining Power which has the task, under the Convention, of providing for the internees' maintenance and to the activities of the doctors and ministers of religion responsible for medical and religious matters.

The Internee Committees, therefore, do not assume responsibility for the physical and moral well-being of the internees. They merely lend their assistance to those who bear that responsibility in its entirety. Obviously, however, members of Internee Committees recruited among the internees themselves are better placed than the

Detaining Power for knowing the requirements of their companions and the proper means of furthering their welfare, making due allowance for their habits and mentality. This general clause could therefore be regarded as giving the Internee Committees the right to take any action likely to further the internees' well-being. In the same way as the camp leader in the prisoner-of-war camp enjoys considerable latitude in assisting his comrades and is allowed to correspond with relief organizations, subscribe to newspapers, organize concerts and theatricals, initiate study courses, set up a legal advice bureau, transmit legal documents and suggest the sending to hospital or repatriation of certain men, so the Internee Committees have the general task of ensuring the application of the Convention on behalf of their fellow-internees. Of course, this task should be carried out in accordance with the principles of the Convention, without arbitrarily preferential treatment or discrimination contrary to the provisions of the Convention[1].

PARAGRAPH 2. — MUTUAL ASSISTANCE

The experience of two world wars has shown that the activities of the camp leaders have made it possible for the poorest of prisoners of war to be helped by their own comrades. In some cases the camp leader organized collections and his office became a real social welfare bureau.

The second paragraph adapts the results of this experience to the case of internees and in particular gives the Internee Committees the task of organizing a mutual assistance scheme. In view of the variation in conditions and resources among the internees, such a scheme can be very useful, for among them there will certainly be heads of family who, in losing their normal work, will have left their dear ones in serious difficulty.

Some of the other special tasks mentioned in the text have already been discussed—i.e., Articles 87 (running of the canteens) and 101 (transmission of complaints and petitions) and reference should also be made to those dealt with in Articles 109 (collective relief), 118 (judicial proceedings instituted against internees), 125 (handing over to the infirmary perishable goods contained in parcels addressed to internees undergoing disciplinary punishment) and 128 (transport of the internees' community property and luggage).

[1] Article 2 of the Draft Regulations concerning Collective Relief annexed to the Convention provides that the distribution of the relief " in accordance with a plan drawn up by the Internee Committees, ... shall always be carried out equitably ".

ARTICLE 104. — INTERNEE COMMITTEES: III. PREROGATIVES

Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

The prerogatives of members of the Internee Committees are the same as those of the prisoners' representatives (Third Convention, Article 81). As was said in the commentary on Article 103, the Committee is corporate not personal in nature, but it was important that the Committees should be able to render the same services to the internees as prisoners' representatives to the prisoners of war.

For this purpose, each of the members of an Internee Committee is given individually the same prerogatives as a prisoners' representative. It is understood that he will use these prerogatives in all cases as the representative of the Committee, for under the Convention no delegation of authority is permitted which might give one of the members of the Committee greater authority than his colleagues.

PARAGRAPH 1. — EXEMPTION FROM WORK

The desire to make this Convention parallel to the Prisoners of War Convention has led in this paragraph to a somewhat illogical

result, which was pointed out during the discussions in Geneva[1]. In the case of prisoners of war who may be made to work under the provisions of the Convention, it is reasonable that camp leaders should be given exemption ; but is a similar provision necessary in the case of civilians who are covered by Article 95 stating that they may not be compelled to work ?

The reply was that Article 95 also contains a clause exempting maintenance work in the camp, which internees may be compelled to do, so that paragraph 1 would be justified as referring to this. Whether the detail is necessary or not, it is certainly not useless. It lays emphasis on the importance of the tasks of the Internee Committees by stipulating that the Committee's members may devote themselves merely to those tasks without any hindrance resulting from other work.

PARAGRAPH 2. — ASSISTANTS

Like prisoners' representatives members of Internee Committees may be helped by deputies, advisers or assistants. This will apply particularly to interpreters in places of internment where persons of various nationalities are detained.

It should be noted, with regard to the " freedom of movement " which is mentioned, that the text says " a certain freedom ", not " complete freedom ". Article 3 of the Draft Rules concerning Collective Relief annexed to the Convention in a way provides a commentary on this provision by stating that members of Internee Committees shall be permitted to go to stations or other arrival points near their place of internment where the relief supplies are sent.

Unlike the provision in the similar Article concerning prisoners of war, this permission does not extend to their deputies.

The mention of visits to labour detachments implies that the Internee Committee will have its headquarters in the principal place of internment and will represent the whole of the detached groups. It will be seen, however, that the following paragraph provides for the possibility of one or more members of an Internee Committee being permanently with the labour detachments.

One of the " material facilities " to be provided for these visits or journeys will certainly be means of transport, although the text does not say so, in the same way as means of transport are provided for ministers of religion carrying out their religious duties (Article 93).

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 682.

PARAGRAPH 3. — CORRESPONDENCE

The large scale on which relief consignments may be sent to places of internment, judging by the scale on which they were sent to prisoner-of-war camps during the Second World War, justifies the granting of correspondence facilities to members of the Internee Committees, who deal particularly with the reception and distribution of such relief.

The first of these facilities is that correspondence should be post-free in the same way as the ordinary correspondence of the internees. Furthermore, as stated expressly in the last sentence of this paragraph, this correspondence must not be limited or considered as forming a part of the minimum quota of two letters and four cards per month allocated to every internee. Another concession that must be made is to grant them exception to the rule that internees should write in their mother tongue (Article 107, para. 3); this correspondence may be drafted in another language suitable in the particular instance, when writing to the Detaining Power, the Protecting Power, the International Committee of the Red Cross or any other relief society.

It is not stated that these communications are free from censorship. However, the granting of " all facilities " lays an obligation on the Detaining Power, if it subjects this correspondence to censorship, to ensure that delays do not occur to the disadvantage of the internees.

With regard to labour detachments, the facilities are restricted to correspondence with the main place of internment and do not extend outside the country of internment. This means that if the members of an Internee Committee who are working in a labour detachment wish to correspond with relief societies, for example, they must send their messages via the Internee Committee in the principal place of internment.

PARAGRAPH 4. — TRANSFERS

The functions of the Internee Committees and the development of their various activities and their correspondence demand a continuity useful for the internees' welfare. It was therefore right to provide that, in the case of transfer to another place of internment, the members of these Committees should be allowed a reasonable time to acquaint their successors with the position.

With regard to prisoners' representatives in prisoner-of-war camps, the 1929 Convention (paragraph 3 of Article 44) provided that, in case of transfer, the " time necessary " should be allowed for

acquainting the new representative with his duties. Despite this provision, some camp commandants during the Second World War refused to grant more than an hour for handing over authority. The word " reasonable " has been added to the previous text with a view to inducing those responsible to take into account the extensive duties of a prisoners' representative and to show themselves liberal in the question of transfers. It is in this same spirit that the identical provision relating to the members of the Internee Committee should be interpreted.

Chapter VIII

Relations with the Exterior

ARTICLE 105. — NOTIFICATION OF THE MEASURES TAKEN

Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Power shall likewise inform the Parties concerned of any subsequent modifications of such measures.

The 1929 Convention relative to the Treatment of Prisoners of War merely stated (Article 35) that the belligerents " shall publish " measures concerning the relations of prisoners with the exterior. The experience of the First World War had led the International Committee of the Red Cross to suggest a more exact wording on this point. The Committee had indeed received a great number of requests for information and complaints from public authorities and from private individuals insufficiently well informed of the measures taken to transmit mail to prisoners of war.

To avoid further uncertainties arising, the Committee put forward a text very similar to that of this Article in terms which are almost identical for prisoners of war and civilian internees.

The text referring to civilians was adopted with little discussion. It contains an amendment to the draft of the International Committee of the Red Cross. This amendment, put forward by the World Jewish Congress, adds that the Protecting Power must be notified, in order to protect persons who are out of touch with their

country of origin and have become stateless or are of doubtful nationality.

The measures taken will be notified to the internees themselves by posting notices in accordance with paragraph 3 of Article 99. The country of origin and the Protecting Power will be notified once only, unless any amendments to the regulations are made later; these must be duly notified immediately and in the same form.

ARTICLE 106. — INTERNMENT CARD

As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

Internment, it must be emphasized once more, is not a measure of punishment and so the persons interned must not be held incommunicado.

Once more, the authors of the Convention considered that internees should have the advantage of the experience gained in the case of prisoners of war. The system of capture cards established for prisoners of war by Article 70 of the Third Convention has been adapted for use by civilian internees who will have available internment cards enabling them to advise their families, if they had not already been informed, and the Central Information Agency set up in a neutral country in accordance with Article 140. It should be noted, furthermore, that the internee concerned will " be enabled " to fill in the internment card. He therefore remains entirely free to do so or not.

At the suggestion of the International Committee of the Red Cross, the authors of the Convention gave the Agency the duty of making such notification, providing that it was not likely to harm the persons concerned or their families. In general, indeed, their political activities may make the position of civilians in internment more complicated than that of members of the armed forces captured in battle and obstacles which do not exist in the latter case may stand in the way of revealing the situation in which civilian internees

may find themselves. It was therefore preferable to leave the Agency the task of judging whether or not to transmit any information received, after consultation, if need be, with those concerned[1].

The internment cards can be used in cases of transfer from one place of internment to another. It is reasonable to suppose that the internees will then use the facilities afforded them under Article 128, paragraph 1, and will send the cards before even leaving for their new place of internment.

The text also provides that internment cards can be used " in cases of sickness ". Minor forms of sickness will not, in general, involve the application of this provision, for in most cases they will not entail the transfer of the internees. The specimen internment card annexed to the Convention shows that the provision refers to changes of address as a result of sickness. It will therefore be for a doctor to judge the seriousness of the case. It will seemingly be only in the case of sickness involving the sending of the patient to hospital outside the place of internment that the use of internment cards duly filled in and addressed to the family and the Central Agency will be required. What is important, indeed, is that the internee should be able to advise the Agency and his family of any change of address, even provisional[2].

As to the wording and format of the cards, the Article says that they shall be similar, if possible, to the model annexed to the present Convention. This model, drawn up by the International Committee of the Red Cross, contains only spaces for entering information essential for identification capable of being supplied rapidly and without trouble; the use of this format and this arrangement of headings would allow the cards to be inserted in card-indexes of uniform size, thus making handling and reading easier[3].

The last provision of Article 106 refers to the need for forwarding internment cards as rapidly as possible. It is a reasonable inference that in time of war the hindrances to land and sea communications

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[1] This provision is based on the experience of the Second World War. Many civilian internees objected to their names being transmitted to their country of origin, something which does not occur in communicating prisoner-of-war lists. See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 577.

[2] The specimen internment card annexed to the Convention explains clearly, under the heading " IMPORTANT ", the meaning of this measure. See below, p. 648.

[3] It will be noted, furthermore, that the model annexed to the Convention is designed essentially for the Central Information Agency, and contains some information already known to families. It was thought, however, that the use of identical documents would make censorship easier and thus assist more rapid communication.

automatically make air mail the only suitable way of conforming to this clause. As for censorship to which no formal objection is made, the brief particulars always presented in the same order on the internment cards can reduce censorship to an extremely rapid scanning of the cards[1].

ARTICLE 107. — CORRESPONDENCE

Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly ; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch ; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

PARAGRAPH 1. — LETTERS AND CARDS

Correspondence is an essential means of maintaining the morale of the prisoners. Thus Article 107 takes into account the results achieved, usually after intervention by the International Committee of the Red Cross, during the Second World War. Several belligerents, indeed, showed themselves ready to facilitate internees' correspondence as much as possible and treated it in practice in almost the same

[1] One of the methods of censorship often used is to delay forwarding mail for several weeks without even looking at it, in order that any information which might be given therein will lose its value. This method would, of course, be inadmissible in forwarding internment cards.

way as that of prisoners of war. This paragraph adapts in favour of internees the ideas found in Article 71 of the Third Convention[1].

The right of internees to carry on correspondence is absolute. Restrictions may be imposed on it in certain circumstances, but the right must never be completely suppressed. The Detaining Power, however, retains its right to censor internees' correspondence, as stated expressly in Article 112. It follows that censorship formalities might possibly delay the forwarding of letters indefinitely if there were too many of them. It is understandable, therefore, that the possibility is considered of limiting the volume of correspondence to take into account military needs and allow for the state of communications and in the interest of the internees themselves.

The mail sent by the internees and that received by them must be considered separately. As was pointed out during the discussions at the Geneva Conference[2], the essential thing is not that the detainees should be able, in theory, to write so many letters and postcards every month, but that such letters or cards should actually reach their destination. The minimum of two letters and four cards per month laid down by the Convention seems to be best suited to the possibilities of rapid censorship. This is the minimum which, after representations by the International Committee of the Red Cross, most of the belligerents had accepted from December 1940 onwards. It remained the same until the end of hostilities. The results of this experience are embodied in the Convention, but it goes without saying that these figures represent only a minimum and that if it can be done without overtaxing the normal capacity of the postal service they can be exceeded. As for the form of letters and cards sent by internees, obviously the models annexed to the Convention can be modified. In their present form, however, they are, in the experience of the International Committee of the Red Cross, the most suitable for ease of censorship and, as a result, for speedy forwarding of the mail.

As regards the mail received by the internees, a limitation can also be ordered either because of lack of transport or to enable censorship to be carried out, provided that the forwarding of family news

[1] It will be noted that this provision does not deal with the important question of exemption from postal charges. Prisoners of war benefit from post-free mail by virtue of Article 16 of the Hague Regulations and the principle is recalled in Article 74 of the 1949 Prisoners of War Convention. The corresponding article of the Fourth Convention, Article 110, differs considerably from the Stockholm Draft on this point. The question is discussed further in the commentary on Article 110.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 334.

is not seriously affected thereby. If there are limitations at all, however, they should be ordered by the country of origin, after the Detaining Power has indicated its wishes. Indeed, it would give false hopes to families and put an unnecessary burden on the postal services if letters were allowed to be sent which would be held back before distributed. Obviously, the Detaining Power cannot restrict the rights of correspondence of persons residing outside its territory.

The Convention provides that the letters and cards which the internees are authorized to send and receive should be delivered with " reasonable despatch ". The wording makes allowance for the various factors concerned—i.e., the need for censorship and the wish to speed up correspondence as much as possible. The belligerents will fulfil this obligation best if they use air-mail [1].

One last point to emphasize in this first paragraph is that the retention of internees' correspondence for disciplinary reasons is prohibited. During the First World War the belligerents frequently instituted a temporary ban on correspondence as a disciplinary measure. This punishment, which is of great moral cruelty, was forbidden by the 1929 Convention, (Article 36), a provision which was not always observed during the Second World War. The 1949 Conventions are therefore categorical in this respect as regards both prisoners of war and civilian internees.

The disciplinary measures which may be applied to internees are listed in Article 119 and the list includes, under paragraph 1 (2) " the discontinuance of privileges granted over and above the treatment provided for by the present Convention ". In applying this provision, the Detaining Power might be tempted, as an individual or collective disciplinary measure, to prohibit the sending of a volume of correspondence greater than the minimum provided for in this paragraph. This interpretation, however, cannot be accepted because of the categorical statements of Article 107.

With all the more reason, internees undergoing disciplinary punishment and serving their sentence must not be deprived of all right of correspondence. Indeed, Article 125, paragraph 4, expressly guarantees them the benefit of Article 107.

According to the letter of the text, the position of internees sentenced by due process of law is different, since Article 76, which is

[1] It should be recalled, in this connection, that in November 1942 the International Committee of the Red Cross suggested to the German Government that for the transport of prisoner-of-war mail it should use an air line from Stuttgart to Lisbon ; the establishment of this line was immediately followed, as was natural, by the setting up of a Lisbon-London air service. (See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 350-135).

applicable to them [1] mentions, in its last paragraph, only the right to receive at least one relief parcel a month. This is a divergence from the corresponding provision of the Third Convention (Article 108, paragraph 3), which provides that " prisoners of war sentenced to a penalty depriving them of their liberty .... shall be entitled to receive and despatch correspondence and to receive at least one relief parcel monthly ". The authors of the Convention adopted the Stockholm Draft on this point without discussion and the difference may therefore be considered to be due to oversight. All prison systems provide for a right to correspondence. Furthermore, Article 25, which guarantees the right to exchange family correspondence is general in scope. Finally, by virtue of the principle that the system applied to internees must not be less favourable than that applied to prisoners of war, it must be concluded, in the spirit of the Convention, that despite this omission internees serving sentence retain the right to correspondence.

PARAGRAPH 2. — TELEGRAMS

Article 38, paragraph 3, of the 1929 Convention relative to prisoners of war already provided that " prisoners may, in cases of recognized urgency, be authorized to send a telegram on payment of the usual charges. "

The present paragraph reproduces this provision but adds some details. There were in the two World Wars many examples of long separations and enormous distances between members of the same family. In certain cases the rules governing correspondence for internees might well have become illusory if those internees had been forbidden to use the telegraph. However, because of the high cost of telegraphic communications there could be no question of allowing it free of charge and the obligation to pay the normal charges is a means of preventing abuse of the right to telegraphic communication.

Furthermore, in order to encourage as much as possible the use of the telegraph without overburdening the telegraphic systems or involving excessive cost for the internees, the Diplomatic Conference of 1949 had considered annexing to the Convention specimen telegram forms using code-words [2]. It contented itself, however, with adopting a resolution inviting the International Committee of the Red Cross

[1] In accordance with the provisions of Article 126.

[2] During the Second World War, a system of telegraphic messages in simplified code-words was instituted at the suggestion of the Vatican between Italy and North Africa. See, in this connection, *Final Record*, Vol. II-A, p. 335.

to draft a series of specimen messages to be submitted later to governments for their approval[1].

To avoid internees being unable to send telegrams in such circumstances for financial reasons, the Convention provides that the fees shall be paid by them in the currency at their disposal, the responsibility for conversion—in accordance with the postal conventions in force—being laid upon the Detaining Power.

PARAGRAPH 3. — LANGUAGES

This paragraph adapts to the needs of internees the provisions of Article 36, paragraph 3, of the 1929 Convention.

The use of a language different from the mother tongue may be necessary to facilitate censorship. To understand the need for such a clause, it is enough to recall the difficulties which occurred in the Far East during the Second World War, when the censorship authorities were completely ignorant of the European languages spoken by the prisoners[2]. It may also happen that the persons with whom the internees wish to maintain correspondence do not know the internees' own language. In both instances it was necessary to provide for the possibility of corresponding in another language.

However, the use of the internees' mother tongue remains the rule and is in general in the best interests of the internees themselves. It should, moreover, be noted that in no case may the Parties to a conflict impose on internees for their correspondence any language other than their mother tongue.

ARTICLE 108. — RELIEF SHIPMENTS: I. GENERAL PRINCIPLES

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

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[1] See for the discussion, *Final Record*, Vol. II-A, p. 335 ; and for the text of the Resolution, *Final Record*, Vol. III, p. 175.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 452-455.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

General Remarks

Article 108 and the four Articles which follow it deal with the question of material relief, one of the oldest activities of the National Red Cross Societies. Because of the blockade and the difficult food position resulting from it in many countries during the last war, the question of relief became one of prime importance. The relief received by prisoners of war and internees in those countries was of decisive help in maintaining their health and has left a lasting impression. The experts who studied the draft conventions therefore devoted particular attention to the question and most of their suggestions were endorsed by the Diplomatic Conference.

It should be noted, however, that these five Articles do not exhaust the subject. Moral assistance to internees is dealt with in Articles 93 and 94 (religion, recreation, education, sports and games), and to a certain extent in Article 142 (relief societies and other organizations). Furthermore, the sending of money, which falls within the category of material relief, is dealt with specially in the second paragraph of Article 98 (financial resources and individual accounts).

It should be added that Articles 108 to 112 inclusive deal primarily with the question of relief from the point of view of those who receive it, i.e. the internees. The rôle of the givers and of the organizations authorized to distribute relief is defined in Article 142 (relief societies).

Paragraph 1. — Individual parcels, collective shipments

The 1929 Prisoners of War Convention (Article 37), mentions only individual postal parcels. The experience of the Second World War led to an extension of this idea.

The 1949 Conventions, in the case of prisoners of war (Third Convention, Article 72) and internees (the present Article), speak of

individual parcels or *collective shipments* received by post *or by any other means*. During the Second World War it was noted that despite its indisputable advantages, the sending of individual parcels was not without its drawbacks. For instance, it was bad for the morale of those who did not receive such parcels ; they were difficult to check because of the variety of the contents, and difficult to distribute because of transfers of internees. However, the possibility of sending individual parcels has been retained because of the important effect on the morale of the recipient of the maintenance of such direct relationships with his family.

Collective shipments may be divided into a number of anonymous parcels of small size. They can also be made in the weights and sizes far exceeding those which can be carried in international postal traffic. In such cases, the shipments are sent by the same means of transport and under the same conditions as bulky goods.

The 1929 Convention restricted the contents of parcels to articles of food and clothing (Article 37) and books (Article 39). Experience had shown the need of extending these provisions, particularly to enable the sending of medicaments, and medicaments were therefore added to the former list and by making the wording as general as possible (objects of a devotional, educational or recreational character), the Convention obviously covers musical instruments, scientific equipment and sports outfits, expressly mentioned in Article 72 of the Third Convention.

The right to relief having been thus solidly established, it was important to avoid a possible interpretation of this right as laying an obligation on the country of origin to furnish the relief and to the same degree discharging the Detaining Power of its responsibilities for the internees' maintenance and care. The Convention states in very exact terms that this is not the case, and in this connection reference should be made to Articles 81 and those which follow it, which set out in detail the obligations of the Detaining Power with regard to internees.

PARAGRAPH 2. — POSSIBLE RESTRICTIONS. NOTIFICATIONS

The Detaining Power may only limit the quantity of shipments for reasons of military necessity. This should be understood to mean cases where operations may be hindered through the blocking of means of communication by large consignments of relief supplies. In that case, the Protecting Power and the relief societies must be notified ; the societies must indeed be able to regulate the frequency

of consignments themselves and thus avoid perishable goods being held up. In the case of the Protecting Power, the notification is to enable it to discuss whether the restrictive measures are justified ; as the military operations develop, the measures in any case must only be temporary and can be justified only by exceptional strain on transport or communications. These words, which are contained in paragraph 3 of Article 72 of the Third Convention, also apply to shipments for internees, although the regulations for internees are different in this respect from those concerning prisoners of war. As regards prisoners of war, the limitations on the sending of the relief can only be imposed at the suggestion of the Protecting Power or the relief societies. However, the reasons which lead these bodies to restrict consignments will be based on the same needs. In the long run, the interests of the recipients themselves are safeguarded, for it would be regrettable if relief supplies were lost through poor transport conditions.

PARAGRAPH 3. — SPECIAL PROVISIONS

The third paragraph, unlike the preceding one, is identical with the corresponding provision in the Third Convention (Article 72, paragraph 4). The Detaining Power in general checks all the individual relief parcels or collective consignments before they are delivered to the internees. This checking takes all the longer if the parcels differ from one another in weight, size, composition and packing. Thus the donors themselves during the last world war came round to the idea of forwarding standard parcels[1]. This experience led to the belief that it would be preferable to settle the conditions governing the sending of relief by agreement between the Powers concerned, mainly in order to speed up checking. These are the agreements mentioned in the text, which itself mentions two regulations governing consignments. Parcels of clothing and foodstuff must not contain books, so that they will not be delayed for censorship, and medical supplies, as a rule, will only be sent in collective parcels[2]. It would, indeed, be dangerous to let the internees themselves decide what medicaments to use. For preference they should only be used on medical advice.

[1] Furthermore, they often used the services of the International Committee of the Red Cross which, because of its special position, afforded a moral guarantee and itself exercised some control over parcels in order not to jeopardize the whole system.

[2] « As a rule » was inserted because it was not wished to prohibit, as an exceptional case, the inclusion in a family parcel of a medicament required because of the state of health of the recipient and which might not be included in collective medical relief.

ARTICLE 109. — RELIEF SHIPMENTS: II. COLLECTIVE RELIEF

In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients.

Nor shall such agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Article 109 is based on the experience of relief societies and particularly the International Committee of the Red Cross during the Second World War, which led to a general preference for the sending of collective shipments rather than of individual parcels. The reasons for this were mentioned in the commentary on paragraph 1 of Article 108.

PARAGRAPH 1. — REGULATIONS ANNEXED TO THE CONVENTION

Regulations concerning the receipt and distribution of relief supplies obviously depend on the circumstances ruling at the time and in a particular place, which are difficult to forecast in every detail. This led to the idea of special agreements being concluded between the Parties to the conflict. However, the suggestion made by the International Committee of the Red Cross and retained in the Stockholm Draft, was approved without amendment by the Diplomatic Conference, so that Annex II of the Convention contains Draft Regulations concerning Collective Relief for Civilian Internees. The Parties, of course, retain the right to adapt these Draft Regulations to circumstances, but it is stated expressly that if they fail to agree, the regulations annexed are those which will be applied. It will be in the Parties' interest to observe these regulations, for the measures envisaged are based on long experience and have proved satisfactory.

It should be noted that the annexed regulations go beyond the question of receipt and distribution of relief supplies. As will be seen

in the commentary on the text[1], certain provisions, particularly the one relating to purchases of goods on the territory of the Detaining Power (Article 7), or the direct distribution of collective relief by representatives of the Protecting Power or the International Committee of the Red Cross (Article 8), proclaim additional rules of great importance.

There is, however, one question which is not covered by the regulations and on which a few words should be said: the question of receipts. The 1929 Convention, which envisaged only individual parcels, provided that the parcels should be delivered to the recipients against a receipt. Nothing like that is said in the case of collective relief supplies. However, in view of the value and volume of such supplies, those who forward them incur a responsibility towards the donors from which they should be discharged by the production of a receipt in due form. In the case of prisoners of war, the question of receipts is settled by the last paragraph of Article 125[2]; a similar clause is not included in the corresponding Article of the Fourth Convention (Article 142 concerning relief societies). It seems that this gap could be filled, however, by reference to Article 3 of the annexed Regulations concerning the " detailed reports " to be made out " for the donors ". It should not be forgotten also that the donors and still more the Powers whose citizens they are, can obtain every guarantee required, quite apart from receipts, either through the Protecting Powers or through the International Committee of the Red Cross, whose special position is expressly recognized in the Convention[3].

PARAGRAPH 2. — THE ROLE OF THE INTERNEE COMMITTEES

In view of the freedom retained by the Parties to the conflict to settle the question of collective relief by means of special agreements, which more or less provide for exceptions to the annexed regulations, it was necessary to take precautions to avoid the special agreements running counter to the meaning of those regulations, the principles of which had been accepted by the Diplomatic Conference. For that reason, this paragraph recalls the inalienable right of Internee Committees to receive and distribute collective relief.

[1] See below, p. 644.

[2] " As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war or very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners."

[3] See particularly Article 142, para. 3.

This right in no way implies that the members of the Internee Committees acquire personally any right of ownership over the relief. The relief supplies remain common property and, where divisible, they become the property of the internees themselves after distribution. The Internee Committees should be considered as responsible only for reception and distribution, in carrying out which they must only be guided by the general interest of the internees.

PARAGRAPH 3. — ROLE OF THE SUPERVISORY AND RELIEF BODIES

The special agreements which can be concluded between the Parties to a conflict must not invalidate in any way the rôle assigned in the Convention to the Protecting Power and to the International Committee of the Red Cross (or any other organization for assistance to internees) in the reception and distribution of collective relief supplies.

However great the effort of the Internee Committees to be fair in the distribution of relief, it is to be feared that under the influence of the personal character of their members or even under pressure from the Detaining Power, there may be discrimination against some internees contrary to the intentions of the donors. Thus, it was considered necessary to reaffirm, in case of need, the control of distribution by the Protecting Power or by an impartial body capable of swearing that the relief is being given in accordance with regulations, fairly and in conformity with the donors' wishes.

The commentary on Article 142 will explain what is meant by " any other organization giving assistance to the internees ". It can be stated here, however, that this can only be a humanitarian body which affords every guarantee of impartiality and competence, like the International Committee of the Red Cross, and which is thus duly authorized by the Detaining Power to check the distribution of parcels.

ARTICLE 110. — RELIEF SHIPMENTS: III. EXEMPTION FROM POSTAL AND TRANSPORT CHARGES

All relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the

Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this effect, in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

This Article corresponds in general to Article 74 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War. Unlike that Article, however, it does not expressly mention correspondence and for that reason it has been placed under the heading of relief shipments.

PARAGRAPH 1. — IMPORT, CUSTOMS AND OTHER DUES

This paragraph repeats the provisions of Article 16 of the Hague Regulations and Article 38 of the 1929 Convention, both of which concern prisoners of war. It covers customs duties, implicitly included in the phrase " all import and other duties " which occurs in both treaties. The rule is quite clear : exemption is complete and applies to all dues of any kind whatsoever levied on goods entering a country from abroad.

PARAGRAPH 2. — EXEMPTION FROM POSTAL CHARGES

The Stockholm Draft (Article 96), identical with the text relating to prisoners of war, said : " Correspondence, relief shipments and remittances of money addressed to prisoners of war or despatched by them through the post office .... shall be exempt from any postal

dues, both in the countries of origin and destination and in intermediate countries ".

The text adopted by the Diplomatic Conference differs from this in two respects. First of all, the reference to correspondence has disappeared, and secondly, the words " from other countries " have been inserted between " addressed " and " to internees or despatched by them ".

It is to be concluded from this that the Convention nowhere mentions the principle of exemption from postal charges on mail, since it is not mentioned in Article 107, which deals specifically with correspondence, and Article 110 is concerned only with consignments of relief and states that exemption is not granted on such consignments unless they come from countries other than the country of internment ?

It would perhaps be a little hasty to do so. Indeed, the marginal notes inserted to make the Convention easier to read, are not binding on the signatories. It is true that in this particular case one delegation expressed the opinion that internees' correspondence was of an entirely different nature from that of prisoners of war, since it was addressed in general to persons in the country of internment and the internees should be able to pay the ordinary postal charges [1] ; but it is also true that the Conference, when discussing this provision had in mind Article 52 of the Universal Postal Convention of 1947 [2], which is concerned mainly with correspondence. Furthermore, the Report of Committee III, without however further explanation, states that the Committee thought that internees should be given the right of free postage for their own correspondence within the territory where they are detained [3]. There remains, however, some obscurity in the text of the Convention with regard to internees' correspondence. The resulting difficulty was eliminated on the suggestion of the Universal Postal Union which, in its revision of the Universal Postal Convention in 1952, succeeded in having a clause adopted under which correspondence from internees is post-free wherever it is addressed, whereas the correspondence addressed to internees is only exempt from postal charges if it comes from countries other than the country of internment. In short, the restrictive wording of this provision as it applies to

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 682-683.

[2] An amendment supported by several delegations even suggested mentioning this Article expressly in the text of the Convention. See *Final Record*, Vol. II-A, p. 682.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 841.

relief shipments has been extended to cover correspondence[1]. The internees can therefore write free of charge to persons in the country of internment but those who write to them in that country must pay the ordinary postal charges. It may be wondered whether it would not have been better for internees' correspondence, whether incoming or outgoing, to be completely exempt from postal charges. In view of the fact that internment must never be considered as a punishment and that it would be humane to alleviate its hardships as much as possible, a generous decision on these lines would have been preferable.

The same comment applies to relief parcels sent by post from places in the country of internment itself.

Relief sent by post from countries other than the country of internment or sent by the internee to any destination would be exempt under this provision. This rule applies to all consignments whose weight does not exceed the limits accepted in international postal traffic[2].

It should be noted that the obligation to grant exemption applies also to any States parties to the Convention which have not agreed to certain arrangements with regard to parcels under the Universal Postal Union.

With regard to the reference to the Universal Postal Convention, the present paragraph merely extends to all protected persons subjected to internment the right to exemption laid down in the Postal Convention on behalf of civilians of enemy nationality detained in civil camps or prisons. The Diplomatic Conference wished to avoid too close a concordance between the new text and the provisions of the Universal Postal Convention in force, to avoid the creation of insurmountable difficulties through the fact that the signatories to the two treaties are not the same. Furthermore, the Universal Postal Convention only covers international postal traffic and the authors of Article 110, as already stated, were anxious to cover postal traffic in the country of internment also[3]. Moreover, in order to remove any

[1] The text of Article 37, para. 2, of the Postal Convention as revised in 1952 and applicable from July 1, 1953 is given in full in the commentary on Article 141 of this Convention.

[2] Article 37 of the Postal Convention (Record of the Universal Postal Union, Brussels 1952) provides among other things: " . . . (5) Parcels are admitted free of postage up to a weight of 5 kgs. The weight limit is increased to 10 kgs. in the case of parcels whose contents cannot be split up and of parcels addressed to a camp or the prisoners' representatives there . . . for distribution ". Furthermore, according to the record of the discussions at Brussels, this exemption also applies to parcels sent C.O.D. (Documents of the Brussels Congress, Volume II, 4th Commission, 30th meeting).

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 841.

ambiguity concerning the application of the Universal Postal Convention, it is stated expressly that countries which have not acceded to the Postal Convention but have acceded to the Fourth Geneva Convention of 1949 are nevertheless bound to grant internees the exemptions laid down, and under the same conditions.

PARAGRAPH 3. — RELIEF CONSIGNMENTS NOT SENT THROUGH THE POST OFFICE

Consignments which are not sent through the post office—i.e., as a rule, collective relief shipments—are sent carriage free in all the territories under the control of the Detaining Power. This means not only the metropolitan territory of the Detaining Power, but its colonies, mandated territories and dependencies of every kind, as well as territories it has occupied. Exemption is granted in the same way on the territory of other Powers or on territories controlled by them and situated on the transport route[1].

It should be noted that the word used is " territories ". This paragraph does not, therefore, cover transport by sea, to which exemption does not therefore apply. Coastal shipping, however, should be considered as covered by this paragraph.

Whatever the mode of transport used on the territory of the Powers party to the Convention—railway, lorry or aeroplane—exemption from carriage charges must be granted at the expense of the State—i.e. if these means of transport are the property of private companies, the State must make the necessary arrangements, in agreement with the companies, to exempt the relief shipments from all payment for carriage.

PARAGRAPH 4. — SUNDRY EXPENSES

The cost of transport by sea and the cost of transport in the territory of a Power not party to the Convention together with the import and other dues levied by such a Power are not covered by the preceding provisions. These various expenses could be dealt with by special arrangements between the Powers concerned but if this is not done they will be charged to the sender. However obvious this may seem, the authors of the Convention considered it better to state it expressly in view of the disputes which have arisen in the past or might arise in the future.

[1] The obligation on transit countries to authorize the passage of relief shipments is based on Article 111, as will be seen in the commentary on that Article.

PARAGRAPH 5. — CHARGES FOR TELEGRAMS

In the commentary on paragraph 2 of Article 107, it was seen that internees in certain cases were authorized to send telegrams " the charges being paid by them ". The Diplomatic Conference was not unanimous on the expediency of allowing this form of correspondence ; whereas some wished to regard it as an exceptional privilege justified only in certain specific cases and always limited by the cost of telegrams, others were inclined to encourage its use through reduced tariffs or even exemption. This opinion prevailed but the provision was not made mandatory, merely expressing a wish which it was left to governments to comply with or not. It is in this spirit that the present provision was drafted, which is reproduced in Article 141 concerning the correspondence of the national Information Bureaux and the Central Information Agency. A similar recommendation can be inferred from Resolution 9 annexed to this Convention, which requests the International Committee of the Red Cross to prepare a series of specimen messages for submission to Governments which would enable the transmission of family and other news in the form of brief coded messages at low cost. The XVIIIth International Red Cross Conference (Toronto 1952) referred to this Resolution and the provisions of the Convention, and the International Telecommunication Conference held soon after in Buenos Aires adopted a recommendation that a future Conference should consider the idea of complete exemption[1].

[1] Indeed, Recommendation No. 3 of the Buenos Aires Conference of 1952 entitled " Application of a special Telegraph Tariff for Prisoners of War and for Civilians interned in Wartime ", refers not only to the Geneva Conventions but also to Article 35 of the International Telecommunication Convention of Buenos Aires (1952), which reads as follows : " The provisions regarding charges for telecommunication and the various cases in which free service is accorded are set forth in the Regulations annexed to this Conventions." Recommendation No. 3 " Recommends the next International Telegraph and Telephone Conference :

(1) to consider sympathetically whether, and to what extent, the telegraph franking privileges and the reductions in telegraph charged envisaged in the Geneva Conventions mentioned above could be accorded ;

(2) to make any necessary modifications to the International Telegraph Regulations."

Since in general Conferences are held every five years, the next one will probably take place in 1957 or 1958.

ARTICLE 111. — SPECIAL MEANS OF TRANSPORT

Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey :

(a) *correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136 ;*

(b) *correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.*

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The cost occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited thereby.

General Remarks and Historical Survey

This Article is based mainly on the active part which certain national Red Cross Societies and, in particular, the International Committee of the Red Cross were led to take in the transport of relief during the Second World War.

The efforts made by the belligerents during the conflict to isolate their adversaries, paralyse their communications and destroy their means of transport, had seriously interfered with the application of the guarantees contained in the humanitarian conventions concerning

the shipment of relief. In such conditions, agreements negotiated between States did not seem to give more than partial results. The special position of the International Committee of the Red Cross, on the other hand, allowed it to put forward suggested solutions of general interest and to take practical steps on behalf of all victims of the war whatever their nationality. Having succeeded in concluding the necessary agreements with the belligerents, the International Committee established and used, under the protection of the Red Cross emblem, an international fleet for transporting medical equipment and relief to civilian populations. In the same way, it brought together and operated several thousand railway wagons and organized road transport in lorries which were particularly useful in enabling it to revictual internee camps during the last phase of the war, when the general disorganization of transport made it impossible for the Detaining Power to provide for the internees' maintenance.

It is on the lessons learnt as a result of this experience that the present Article is based.

The methods and established procedures used and the conditions to which this form of transport was subjected could perhaps have been codified or extended in the Convention or in annexed regulations. However, during the preparatory work and during the Diplomatic Conference, it was thought better merely to state the essential principles governing special means of transport. It was rightly considered that methods should be worked out to meet practical problems and to suit individual cases, where appropriate on the basis of solutions found in the past[1].

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[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, pp. 124-200.

The relief forwarded and distributed through the International Committee to prisoners of war and civilian internees during the Second World War can be summarized as follows :

(1) Large-scale, regular shipments to about two million Allied prisoners of war and civilian internees in Europe between 1939 and 1945 comprising more than 400 million kg worth about 3000 million Swiss francs. In addition, relief in smaller quantities was sent to Allied prisoners and civilian internees in the Far East.

(2) Occasional shipments in all cases of an urgent nature to about 1 million Italian and German prisoners of war and civilian internees out of a total of between 2½ and 3 millions.

(3) Consignments to about 300,000 deported and detained civilians of every sort.

(4) 40 vessels, 3 of them belonging to the International Committee of the Red Cross, carried about 470,000 tons of sundry relief supplies, i.e. more than 32 million parcels valued at 3 thousand million Sw. francs.

(5) 474 motor vehicles covered 2,831,840 km and carried 8,602,570 kg of goods.

PARAGRAPH 1. — PRINCIPLE

The transport operations envisaged at the expense of the " Powers concerned", i.e. belligerents as well as the neutrals whose territory is used in transit and which are concerned with the forwarding of internment cards (Article 106), internees' correspondence (Article 107), relief shipments (Article 108), and legal documents such as powers of attorney and wills (Article 113), are of such importance for the maintenance of humanitarian guarantees—the aim of the Convention—that it was necessary to provide a substitute for the ordinary means of transport if they were seriously disorganized as a result of " military operations ".

This last term must be understood in a very broad sense. It refers not only to the movement of armies but to the consequences of that movement and, in general, the circumstances of active war. It should be noted that in this case the Powers concerned are not released from their obligation to ensure that these transport operations can take place, but when they find it impossible to fulfil that obligation satisfactorily, they are in duty bound to assist possible action by the Protecting Power or by bodies such as the International Committee of the Red Cross with a view to remedying the situation.

The problem of safe-conducts, particularly navicerts, which during the last war played an important rôle in the running of the Red Cross sea transport activities, has not been resolved by the insertion of obligatory provisions, as the International Committee of the Red Cross would have wished, but in a manner which emphasizes its importance[1].

Of course, every guarantee must be given to the Powers concerned that this special transport shall not be used for war contraband or to assist espionage in any way. The system has been placed under the responsibility of the Protecting Powers and bodies such as the International Committee of the Red Cross, which, by reason of its traditions and its long experience, was judged worthy of this confidence. Some delegations, during the discussions at the Geneva Conference, even wanted the International Committee to be the only organization mentioned apart from the Protecting Power[2]. In any case, it is stated that all other bodies must be " duly approved " by the Parties to the conflict[3].

[1] The Draft submitted to the Stockholm Conference said, with regard to means of transport, that " the High Contracting Parties undertake to grant the safe-conducts required for such transports ".

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 730.

[3] There can only be question here of " any other organization giving assistance to internees ", to use the wording generally found in the Convention, particularly in Article 109 concerning collective relief shipments.

It should further be noted that, while the Convention authorizes such organizations to take the initiative in arranging special transport, it emphasizes by its use of the terms " may undertake to ensure ", that this action will not necessarily be successful. Success cannot be demanded in every case nor may those who do " undertake to ensure " the transport be held responsible for failure unless they commit serious faults.

Finally, it should be noted that the Convention does not tackle the very important question of the protection of special transport against the effects of war. It follows that among the tasks which the approved organizations are expected to undertake is the negotiation of special agreements like the arrangements made by the International Committee of the Red Cross with the belligerents during the Second World War. These agreements will cover the routes to be followed, the emblems to be used and the various conditions to be observed if the necessary protection is to be enjoyed.

Paragraph 2. — Conveyance of mail

If military operations have led to a stoppage of the carriage of mail, relief supplies and legal documents concerning the internees, the same will apply to the various documents addressed to the Information Bureaux or to the Central Agency and to the reports coming from representatives of the Protecting Power or of the International Committee of the Red Cross. If special transport is organized, these documents should obviously benefit from it too. It is just as essential that they should be transmitted as it is that relief supplies and mail should be forwarded and this forms one of the humanitarian guarantees given to internees. The nature of these documents frees them from any suspicion on the part of the belligerent Powers. However, since in this difficult matter the list of categories of consignments entitled to benefit from special transport is strictly limitative, it was right to add to the statement in the previous Article in this manner.

Paragraph 3. — The possibility of the Parties to the conflict arranging special transport

However scrupulously the special transport system is administered, it does nevertheless constitute a breach in the war-waging capacity of the Parties to the conflict since it entails the partial lifting of blockade measures or other steps taken in the interests of national defence. It should not, therefore, be a matter of astonishment that

the Parties to the conflict wished to supervise very strictly the implementation of the clauses on special transport. That is why this paragraph leaves them the possibility of themselves organizing special transport, as for example when the transport system organized by the Protecting Power or the relief societies has led to abuses, and, in any case, of laying down conditions for the issue of safe-conducts. These reservations only confirm the responsibility of the Powers concerned for the transmission of the mail and relief supplies mentioned in the previous two paragraphs.

PARAGRAPH 4. — APPORTIONMENT OF EXPENSES

This paragraph deals with the expenditure involved in the use of special transport but not the expenditure incurred in setting up the special transport system.

On this latter point, the Convention says nothing that is not contained in paragraph 1 of this Article—i.e., that the Contracting Powers will make every effort to procure the means of transport. It is therefore to be supposed that these expenses will be covered by agreement between the body which takes the initiative in the matter and the Power concerned.

As for running costs, the rule is simple. They will be apportioned between the Powers whose nationals have the benefit of special transport and *pro rata* to the size of the consignments. The expenses will be apportioned by the organization which sets up the transport system.

The Fourth Convention, unlike the Third (Article 75, paragraph 4), does not mention the possibility of special agreements granting exemption from this rule of proportional payment if a belligerent, through lack of financial means, is against the use of special transport, while the adverse party is ready to take over the expenditure completely. There is nothing, however, to prevent the same reasoning being applied by analogy to internees and there is no reason why, therefore, any special agreement concluded on this subject between the body entrusted with the special transport and the Powers concerned should not be considered legitimate and in the spirit of the Convention.

ARTICLE 112. — CENSORSHIP AND EXAMINATION

The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual and collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

This Article adds very little to the provision of Article 40 of the 1929 Convention relative to the Treatment of Prisoners of War. In view of the fact that censorship and examination of telegrams, letters, parcels, cannot possibly be avoided, the best way of helping the internees was to make the delays resulting from it as short as possible. The measures authorized by Article 107 with regard to a possible restriction of the volume of correspondence also aim at removing any excuse for delaying the delivery of mail or relief consignments for reasons of censorship. Restricted, if need be, to certain limits, mail and relief consignments must be examined " as quickly as possible ".

PARAGRAPH 1. — CENSORSHIP OF CORRESPONDENCE

The use in correspondence of languages which are little known in the country of internment may cause delay in the forwarding of mail. The Conference of Government Experts called in 1947 by the International Committee of the Red Cross therefore noted the following request submitted by one delegation with regard to prisoners of war : " In the event of belligerents being unable to provide a sufficient number of their own nationals to ensure prompt censorship of letters, they shall endeavour to obtain, either from the International Committee of the Red Cross or from neutral countries, such additional qualified censors as will enable correspondence to reach prisoners of war with the least possible delay " [1]. This idea was rejected by the

[1] See *Report on the Work of the Conference of Government Experts*, Geneva, 1947, p. 194.

Diplomatic Conference in respect of internees and of prisoners of war alike. However, during the discussion, it was accepted that if it should be necessary to recruit extra censors, the Protecting Power would be asked to appoint them[1].

PARAGRAPH 2. — EXAMINATION OF CONSIGNMENTS

Parcels which cannot be examined by the Detaining Power in the presence of the internee, would be examined in the presence of a fellow-internee duly delegated by him. This measure is intended to prevent any misappropriation. In general, the fellow-internee duly delegated by the addressee will be the member of the Internee Committee entrusted with the task of receiving and distributing relief supplies in accordance with Article 109. A reference to the competence of the Internee Committee was, however, avoided in the Convention, because it was wished to leave the person concerned the opportunity of appointing someone as his delegate who was not a member of the Internee Committee, to cover cases where he did not have complete confidence in any of its members[2]. This is a subtlety which should be noted as illustrating the anxiety of the authors of the Convention to respect individual feelings as far as possible.

PARAGRAPH 3. — SUSPENSION OF CORRESPONDENCE

This rule, which was already contained in the 1929 Convention relative to the Treatment of Prisoners of War, was not often invoked during the Second World War[3]. It has been retained to cover cases of military or political necessity but may only be applied as an exceptional and temporary measure. Suspension of this nature should be regarded more as the equivalent with regard to internees of a general measure affecting the whole population because of particularly serious circumstances, like the suspension of correspondence in Great Britain for a brief period in 1944 before the landing in France.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 288.

[2] There have been cases of political factions being formed in camps, laying down the law and persecuting in various ways internees or prisoners of war of contrary opinions.

[3] See M. BRETONNIÈRE, *op. cit.*, p. 244.

ARTICLE 113 — EXECUTION AND TRANSMISSION OF LEGAL DOCUMENTS

The Detaining Powers shall provide all reasonable facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Power shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

The restrictions placed on the freedom of action of internees by the internment system to which they are subjected must not detract from the principle that they " retain their full civil capacity " as stated in Article 80. To enable them to exercise this capacity despite the restrictions of internment it was important to give them every facility for drawing up and transmitting wills, powers of attorney and other documents essential for their family relationships or for the conduct of their affairs.

A similar provision was included in the 1929 Convention relative to the Treatment of Prisoners of War (Article 41) and during the Second World War veritable legal departments were organized in a great many camps under the direction of the camp leader.

PARAGRAPH 1. — TRANSMISSION OF DOCUMENTS

By analogy with the system for prisoners of war, the Stockholm Draft envisaged the transmission of legal documents only by the Protecting Power or the Central Agency provided for in Section V of Part III of the Convention. As the Rapporteurs remarked[1], generally speaking, the wills of internees will be executed in the country of detention itself. Thus, it is not absolutely essential that the Protecting Power or the Central Agency should intervene in the same way as for prisoners of war, and such action might indeed give rise to legal or practical difficulties. For that reason, the authors of the Convention stated that documents could be transmitted " as otherwise required " instead of being necessarily sent through the Protecting Power or the Central Agency. It was important, however, that these

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 841.

facilities for the transmission of documents should not serve as a pretext for the giving of information for subversive purposes ; hence the wording " all reasonable facilities ", which enables suspicious correspondence to be eliminated. It is reasonable to suppose that with regard to wills in particular, they could be drawn up by an agent approved by the Detaining Power and sworn to professional secrecy : a solicitor or barrister stationed in the camp or nearby and consulted by the person concerned as envisaged in paragraph 2. They would then be transmitted in a sealed envelope under the responsibility of the agent to a solicitor in the country of internment. With regard to the transmission of documents to other countries, especially the country of origin of the internees, recourse should be had to the services of the Protecting Power or the Central Agency[1].

PARAGRAPH 2. — AUTHENTICATION

The conditions necessary for the drawing up of legal documents intended for internees or to be despatched by them depend on national laws. A suggestion put forward at the 1949 Diplomatic Conference, proposing to subject this procedure to the principles of private international law, i.e. to the rule of *locus regit actum* was not approved by the members of the Conference [2] ; the result is that documents dealing with the affairs of internees can give rise to very complicated formalities, particularly, as the Rapporteurs also remarked[3], in the case of documents which have to be made effective in countries other than that in which they are drawn up. Furthermore, in wartime special legislation is often enacted which is in general not well known to the internees. It is for that reason that the Convention expressly grants them the right to consult a lawyer.

A sufficiently wide interpretation could be given to this provision : the lawyer could be another internee or a barrister or solicitor who is a national of the Detaining Power. If the internee requiring the consultation belongs to a labour detachment, whereas the person he wishes to consult is in the main place of internment, he will be given permission to go there. It will also be possible for him to consult a lawyer residing outside the camp under conditions considered reasonable by the Detaining Power. The same would apply to a consultation

[1] The example given refers to solicitors ; obviously, the essential thing is to enable the internee to act in accordance with the law which governs the act at the moment when it is made.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 288.

[3] See *ibid.*, pp. 841-842.

by letter of a lawyer residing outside the country of internment, subject to the provisions of Articles 107 and 112 concerning internees' correspondence and the censorship of their mail. This consultation could also take place through the Protecting Power, which would certainly have an important part to play in this domain.

ARTICLE 114. — MANAGEMENT OF PROPERTY

The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

Internment, it must be insisted, is not a punishment. It would therefore be unjust if, through the restrictions on freedom which it imposes, it involved disastrous consequences for the internee himself and the members of his family. In this respect, the granting of permission to internees to manage their property is of major importance.

This Article, however, must not be interpreted in such a way as to give the internee a privileged position by making him not subject to the war regulations relating to enemy property. Clearly, a person delegated by him could not have greater power than himself and it is for this reason that the text expressly mentions the application of the laws in force.

This reservation apart, the solution adopted is quite liberal, since it goes so far as to authorize in certain circumstances the internees to leave the place of internment. This facility has no equivalent in the Prisoners of War Convention. It underlines the difference between civilian internees and prisoners, since the former to a certain degree are free to take a personal part in the management of their property, whereas the prisoners can take legal action less frequently and in a less direct manner.

It, however, remains a rule that the internee may act only by delegating his powers, since as one delegation to the Geneva Conference declared, "it would not be reasonable to expect that an internee should be enabled to conduct a whole business from his place of internment"[1]. In this case again, the Protecting Power will often have its services in demand.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 684.

ARTICLE 115. — FACILITIES FOR PREPARATION AND CONDUCT OF CASES

In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

The International Committee of the Red Cross had proposed settling the point at issue in Article 115 by means of two provisions, one establishing a moratorium on behalf of the internee and members of his family, and the other suspending, at the request of the internee and for the duration of his internment, cases in which he is concerned.

The authors of the Convention were of the opinion that these two measures went too far and that the first, in particular, gave the internees preferential treatment [1].

A moratorium, it was said, might mean the denial of the rights of legitimate creditors (e.g. alimony to members of the family itself) and it did not take sufficiently into account the facilities which could be granted internees to enable them to be represented before the courts. Furthermore, it was wished to safeguard the Occupying Power's rights of requisition.

What it was important to avoid was to injure the interests of the internees by legal measures taken as a result of a judgment in default, if such default were caused by internment. To achieve this end, it was considered that it would be enough to give them every facility for the preparation and conduct of cases in which they were involved. It is certain that this provision is an improvement on the one which called for the suspension of law-suits.

ARTICLE 116. — VISITS

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 684.

During the last World War the regulations concerning visits by members of their families to internees differed not only from country to country but from camp to camp inside one country, since it depended in fact on the decision of camp commandants.

This Article, suggested by the International Committee of the Red Cross, takes into account its wide experience and the numerous and often successful representations which the Committee made to permit internees as far as possible to receive that support for their morale which comes from interviews with parents and friends.

It should be noted that this text does not cover visits by delegates of the Protecting Power or by delegates of the International Committee of the Red Cross, or the visits of ministers of religion or representatives of relief societies, these being dealt with either in Article 30 or in Article 143.

In its present form, Article 116 corresponds to the Stockholm text. It was adopted without discussion by the Diplomatic Conference.

PARAGRAPH 1. — VISITS TO INTERNEES

The frequency of visits was not stated because it was important to leave the detaining authorities discretion to appraise their security needs. Experience in the last war showed the advantage of monthly or bi-monthly visits which, in places of internment far away from urban centres, could last from one to three days. It is not only members of their families who are allowed to visit internees. In Kenya, for example, internees without a family had been authorized, at the request of the delegate of the International Committee of the Red Cross, to have visits from friends to whom they were in no way related. The results of this experience are embodied in the wording of this paragraph.

It should be noted that the position will be quite different according to whether the internees are detained near their usual residence or not, in their own country—occupied—or in the enemy country. In any case, the particular wording of the Article (" every internee . . . .") does not prevent the Detaining Power from arranging for visits on fixed dates in every place of internment and for all internees.

PARAGRAPH 2. — VISITS MADE BY INTERNEES OUTSIDE THEIR PLACE OF INTERNMENT

In the same way as the internee, in urgent cases and if circumstances permit, may be authorized to leave his place of internment to manage his property, he may also receive permission to leave his

internment for family reasons. This is a provision which has no parallel in the Prisoners of War Convention. It should be noted, however, that the facility is only granted " as far as is possible " ; it will therefore be restricted in practice to internees whose families reside in the country of internment itself. For those who are separated from their families by frontiers—not to speak of theatres of operations—such meetings would obviously give rise to insoluble problems.

Chapter IX

Penal and Disciplinary Sanctions

ARTICLE 117. — GENERAL PROVISIONS. APPLICABLE LEGISLATION

Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishment only.

No internee may be punished more than once for the same act, or on the same count.

Articles 117 to 126 should be read together with Articles 64 to 78 which deal with penal legislation applicable to all protected persons on occupied territory.

When they are interned in occupied territory, internees obviously do not thereby lose the benefit of protection. Internees detained in the territory of a Party to the conflict are covered by Article 126, which declares Articles 71-76 applicable to them. These two parts of the Convention are therefore complementary and must not be considered separately.

PARAGRAPH 1. — MAINTENANCE OF THE LEGISLATION IN FORCE

The idea of maintaining in force the penal laws of the country of internment corresponds, in the case of occupied countries, to the

principle laid down in Article 43 of the Hague Regulations that the laws in force in the country must be respected unless the occupant is absolutely prevented. The same principle is embodied in Article 64 of this Convention. The most humane decision, as far as internees or the inhabitants of an occupied territory are concerned, would certainly consist in considering them as subject to the same laws and the same courts as before the events. In fact, Article 115, which deals with the facilities granted to internees in case of litigation, covers all legal proceedings " in any court " and thus postulates by implication that the regulations and procedures in force must be maintained, in both penal and civil cases.

Caution with regard to new situations not covered by the laws in force is quite understandable, however, and the Convention aims at settling such cases.

PARAGRAPH 2. — DISCIPLINARY PUNISHMENTS

This provision reproduces word for word the text of paragraph 2 of Article 87 of the Third Convention. It was drawn up to restrict the effect of exceptional laws passed under pressure of circumstances. With particular regard to relations between prisoners of war and the women of the country of detention, certain States had taken very serious steps, going so far in some cases as to proclaim capital punishment as a means of enforcing the absolute prohibition of sexual intercourse. While leaving the Detaining Power the right to protect itself against the consequences of special and novel situations, there was a justified desire to limit the severity of repression. In such cases, the Detaining Power will only be able to inflict disciplinary punishments. These punishments are not those authorized under ordinary law, but those inflicted for infractions of the internment regulations. A restrictive list is given in Article 119.

PARAGRAPH 3. — " NON BIS IN IDEM "

This clause simply reproduces paragraph 3 of Article 52 of the 1929 Convention relative to the Treatment of Prisoners of War.

Worth noting, in this connection, is a comment made by one delegation to the Geneva Conference, to the effect that in penal law certain sentences can be reconsidered in the interest of the accused if fresh evidence comes to light, whereas severer punishment cannot be inflicted as a result of such evidence [1].

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 684-685.

ARTICLE 118. — PENALTIES

The courts or authorities shall in passing sentence take as far as possible into account that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention[1] *undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.*

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

PARAGRAPH 1.— EXTENUATING CIRCUMSTANCES

This paragraph is the only part of the Article which aroused any discussion during the preparatory work. Drawn up by the International Committee of the Red Cross on the same basis as the corresponding text applying to prisoners of war (Third Convention, Article 87, paragraph 2), it met with opposition from those who considered the situation of civilian internees as being very different in this respect from that of prisoners of war. They pointed out that internees, in general, lived and worked in the territory of the Detaining Power, drawing their livelihood and that of their family from it. These factors laid upon them a certain obligation of loyalty towards that power, although they were not, in the full meaning of the term, its nationals. It was pointed out, furthermore, that the freedom given to the courts or the authorities to vary the length of sentence was contrary to several national legal systems which would have to be amended if this principle were upheld[2]. Despite these objections, the Geneva Conference adopted the same rules with regard to internees as with regard to

[1] *Translator's note.* " Preventive detention " in English is used of a sentence inflicted on an habitual criminal. A better rendering would have been : " The length of time for which an internee is kept in custody awaiting hearing shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced ".

[2] See *Remarks and Proposals*, p. 82.

prisoners of war, as the International Committee of the Red Cross had suggested.

This generous decision was based on the principle, already stated several times, that internees should not be treated less favourably than prisoners of war. Moreover, despite some valid objections, the fact of being an internee can certainly diminish the guilt of an offender. In general, penal codes all agree that the judge shall determine the sentence according to the degree of guilt of the offender and taking into account his motives, antecedents and personal situation [1]. The application of this legal idea led naturally to acceptance of the notion that extenuating circumstances may be pleaded in favour of internees, such as, among others, the desire to serve the interests of their country of origin (an honourable motive) which can be taken into consideration in order to reduce the punishment [2]. While the expression of favourable opinions regarding enemy interests can be prohibited by a State in the case of its own nationals, it could not, without being excessively severe, be as strict with regard to persons who were not its nationals. A foreign civilian internee must not, in any case, be prosecuted and punished in the same way as a national of the country of internment. Internment is a means by which a Detaining State can guard its own security, and is damaging enough to the internees by itself without an attempt being made to add to their burdens.

The authors of the Convention went very far in their anxiety to make allowances for the internees' situation. In penal law, when an Act leaves the judge free to reduce the punishment, he is nevertheless obliged to abide by a legal minimum punishment for each type of offence ; the Convention, on the contrary, provides that the judges and authorities shall be free not only to reduce the punishment for an offence but even to award less than the minimum sentence for the particular category of infraction [3].

Paragraph 2. — Prohibition of cruel treatment

This provision reproduces almost in its entirety the third paragraph of Article 46 of the 1929 Convention relative to the Treatment of Prisoners of War. Articles 76, 124 and 125 of this Convention also

[1] See particularly the Swiss Penal Code (Articles 63 and 64).

[2] It is in the same spirit that in occupied territory those who commit some offences are interned and not imprisoned. See the commentary on Article 68 of this Convention.

[3] Several systems of legislation have been modified already to take this provision into account. This has been the case particularly with Switzerland and Yugoslavia.

prohibit the imprisonment of internees in premises without daylight. It should be understood that the light must be sufficient to enable the detainee to see the things around him clearly and to enable him to read and write without difficulty.

The prohibition of any form of cruelty is a very general provision which we have already met with in Article 32 and which will be found again in Article 119 which deals specially with disciplinary punishments.

PARAGRAPH 3. — RETURN TO NORMAL CONDITIONS OF INTERNMENT

When they have undergone their punishment, whether by order of court or as a disciplinary measure, internees must go back completely to the conditions in which they were living before their punishment. This attitude is compulsory for the Detaining Power as a result of the system already accepted for prisoners of war under Article 48, paragraph 1, of the 1929 Convention reproduced textually here.

The case of internees again detained after attempted escape must be excepted, however, and paragraph 2 of Article 120 expressly states that in such cases Article 118 is not applicable.

PARAGRAPH 4. — THE DEDUCTION OF DETENTION WHILE AWAITING TRIAL FROM SENTENCES OF IMPRISONMENT

This again is a provision in the interests of the accused. The penal codes in general leave this matter to the judgment of the magistrate. The Convention has gone further by insisting that in all cases detention while awaiting trial shall be deducted from any disciplinary or judicial penalty involving confinement. This is a confirmation of the principle stated in Article 69.

PARAGRAPH 5. — INFORMING THE INTERNEE COMMITTEES

This provision enables the Internee Committees to play their part as internees' representatives in a most important particular, since punishments are involved. Moreover, action by the Internee Committee may be necessary to ensure, where applicable, that Article 101 is observed, providing for the transmission of complaints and requests from internees to the Protecting Power. Indeed, no reference was made to Article 101 in Article 125, which deals with the essential safeguards in cases of disciplinary punishment, nor to Article 76, which applies to judicial penalties, and a doubt may have arisen in

this respect[1]. Furthermore, the Internee Committees have the task, under Article 102, of representing the internees with the authorities of the Detaining Power itself. When informed of judicial proceedings taken against internees, they may also make sure that such proceedings are properly carried out and that the accused are assured of judicial guarantees even without having to forward a request to the Protecting Power.

ARTICLE 119. — DISCIPLINARY PUNISHMENTS

The disciplinary punishments applicable to internees shall be the following:

(1) *A fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of no more than thirty days.*
(2) *Discontinuance of privileges granted over and above the treatment provided for by the present Convention.*
(3) *Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.*
(4) *Confinement.*

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of the internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

PARAGRAPH 1. — RESTRICTIVE LIST

Disciplinary penalties are aimed at repressing minor breaches such as offences against discipline or internment regulations. Since they are not designed to punish ordinary offences against the law, they must not be as serious as judicial punishments.

During the Second World War, an empirical system was adopted to ensure the keeping of discipline in camps for civilian internees. To

[1] This doubt does not exist with regard to prisoners of war, since Article 108 expressly reserves their right to put forward complaints or requests during the time of imprisonment.

begin with, there was a tendency for the belligerents to subject internees to the same rules as prisoners of war by applying to them the " laws, regulations and orders in force in the armed forces of the Detaining Power " (1929 Convention, Article 45, paragraph 1). However, the subjection of civilians to military discipline soon proved a mistake and when the International Committee of the Red Cross, in a memorandum dated December 7, 1939, pointed out the anomaly of the situation, the belligerents agreed in general not to subject civilians to a military system of discipline. It would have been too much, however, to make them subject to the penalties of ordinary law for mere infractions of discipline in the internment camps. The detaining authorities therefore often entrusted the camp leaders with the task of seeing that the regulations were applied. In some countries, the civilian internees had appointed several of their comrades to a " camp court ". This court inflicted sentences for breaches of the regulations (attempts to escape, insubordination, failure to obey instructions concerning games of chance, trafficking in the food supplies distributed by relief societies). The punishments inflicted depended on the breach of regulations and ranged from 3 to 28 days in the cells, to a prohibition on receiving parcels, the suspension of walks for a certain time, the forbidding of correspondence or newspaper reading, etc. Surveillance was carried out, according to the country and the circumstances, by the army, the police or men chosen by the internees themselves. This empirical system gave rise to abuses and the Government Experts convened in 1947 by the International Committee of the Red Cross recommended the incorporation in the Convention of a clear and restrictive list of disciplinary punishments. That is the origin of this paragraph.

The authors of the Convention even reduced the penalties laid down in the Stockholm Draft, although this is not necessarily to the advantage of the internees. Fines, for example, which, according to the Draft, could not exceed 50 per cent of a month's allocation or wages, may now only be levied on wages. This means that internees who do not work cannot be punished in this manner and in its place other punishments, often more unpleasant, are inflicted on them.

The system of internment as provided for in the Convention is a minimum, but there is nothing to prevent the Detaining Power, so far as is compatible with its own security, from improving living conditions in places of internment. Whether the corresponding advantages are based on official regulations or on customs established under the personal responsibility of the camp commandant, it is certain that these privileges may be withdrawn as a disciplinary punishment without infringing the terms of the Convention.

The duration of fatigues has been restricted and it has been specified that they may only consist of useful work on camp maintenance. Thus, every possibility has been removed of abuses arising through the use of disciplinary punishments as a pretext to obtain extra work free of charge from the internees in the interests of the Detaining Power.

By imprisonment must be understood the loss of liberty for disciplinary reasons as opposed to deprival of liberty as a statutory punishment. The severity of imprisonment, which by analogy with the Prisoners of War Convention is the severest disciplinary punishment which may be inflicted on internees[1], is restricted by Article 125 which provides, among other things, for the right to exercise and to stay in the open air for at least two hours daily as well as permission to read and write.

Do these various restrictive measures leave a camp commandant sufficient powers of deterrence to ensure camp discipline[2] ? This is not an idle question for if the disciplinary punishments provided for in the Convention proved ineffective, the detaining authorities might be induced to use other means of maintaining order and thus to act outside the limits of the Convention. Taken singly, these disciplinary punishments are not severe but there is nothing to prevent several being given together. The commandant thus has at his disposal a number of disciplinary punishments ranging up to as much as 30 days imprisonment in accordance with paragraph 3, during which internees could be subjected at the same time to fines, to the discontinuance of privileges granted over and above the provisions of the Convention, and to fatigue duties not exceeding two hours daily.

PARAGRAPH 2. — PROHIBITION OF CRUELTY

It is hard to see in what way the light punishments listed in the previous paragraph could possibly be made inhuman, brutal or dangerous for the health of the internees. This paragraph, however, contains supplementary guarantees ; it reaffirms the humanitarian ideas contained in Articles 27 and 32, and thus underlines the need never to lose sight of these essential principles. The restrictive list of disciplinary punishments is based on a wish to limit as far as possible the sufferings of the internees; but as, in the long run, the responsible authorities will always need to ensure that discipline is kept, it is important above all to be able to count on a wish on their part

[1] By analogy with the 1929 Convention, Article 54.

[2] See *Remarks and Proposals*, p. 58.

to act, whatever the circumstances, in the humanitarian spirit which inspires the Convention.

PARAGRAPH 3. — RESTRICTION ON THE DURATION OF DISCIPLINARY PUNISHMENTS

The maximum duration mentioned in this paragraph is in line with the generally accepted practice in matters of discipline and it was contained in the 1929 Convention relative to the Treatment of Prisoners of War (Article 54, paragraph 2), as was the reference to several breaches of discipline whether connected or not. This maximum must not be exceeded where several offences have been committed " when the case is dealt with ". If after this sentence and before or during his serving of it, the internee committed a further breach of regulations, he would be subject to a further penalty under the conditions laid down in paragraph 4 of Article 123.

ARTICLE 120. — ESCAPES

Internees who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape or attempt to escape shall be liable on this count to disciplinary punishment only.

PARAGRAPH 1. — ATTEMPTING TO ESCAPE

The principle that escape or attempt to escape may only be punished by disciplinary measures, even in the case of a second or subsequent offence, is laid down in the Hague Regulations of 1907 (Article 8, paragraphs 2 and 3).

Since a prisoner of war can be considered as morally bound to rejoin the army of which he was a member as soon as he has the opportunity, it would be unjust to treat escape or attempt to escape

as a crime. It is, however, a breach of the prisoner-of-war regulations and as such calls for disciplinary punishment.

The same reasoning may be followed with regard to the civilian internee. Doubtless he will not be subject in most cases to military obligations, which expressly bind him to rejoin the army of his country of origin, but there is between his country and himself a bond of moral solidarity which makes the patriotic gesture of escaping from the authority of the Detaining Power quite understandable. Furthermore, a wish to escape the severities of internment can be considered legitimate. It should be noted that the reference here is to internees " who are recaptured " ; attempted escape, therefore, implies that the escape had actually begun and mere preparation for escape cannot be treated in the same way as escape itself, unless it involves a series of acts of a somewhat grave nature, such as the misappropriation of tools, maps and provisions, the making of a tunnel, etc. The Detaining Power, in applying the disciplinary punishment, must take into account these matters and, of course, repeated offences.

PARAGRAPH 2. — SPECIAL SURVEILLANCE

Article 48, paragraph 2, of the 1929 Convention was in the main very similar to this one. During the Second World War, however, the system of discipline had been so harsh in some prisoner-of-war camps that the physical and mental health of the prisoners was affected. For that reason, the Diplomatic Conference wished, on behalf of civilian internees and of prisoners of war, to add to the provisions in force special mention of the health of the detainees and the obligation to make them carry out their punishment in the prisoner-of-war camps or places of internment themselves and not in prison.

It is therefore necessary to insist on the principle that any strengthening of surveillance must consist primarily of a strengthening of the guard and not in any restriction placed on the detainee's rights.

As for the guarantees mentioned at the end of the paragraph, special importance will be attached to the opportunity for the Protecting Powers to visit the internees and to the application of Articles 101 (complaints and petitions), 107 (correspondence) and 143 (supervision by the Protecting Power).

Can the Detaining Power apply the special surveillance system as it pleases ? Such a system of political surveillance had been applied during the Second World War to certain persons because of their rank or their functions in the country of origin. There is no doubt

that the present paragraph forbids similar methods and limits the cases in which special surveillance can be enforced to those internees punished as a result of an escape or attempted escape. The paragraph refers, indeed, to the special system applicable to the internee *after* he has served his sentence. It is this which is underlined by the words "Article 118, paragraph 3, notwithstanding". The text mentions no limit of duration to this exception. The special system, which is not a punishment but a measure of surveillance, may therefore be prolonged until the end of internment.

Paragraph 3. — Accomplices

The punishment of accomplices in a breach of regulations is dealt with it in ordinary law by penal legislation. The particular case of escape or attempt to escape calls for a different rule. Since the breach of regulations itself may be punished only by a disciplinary sanction, it is logical to provide that the accomplice or accomplices shall themselves be subject only to disciplinary punishment.

ARTICLE 121. — CONNECTED OFFENCES

Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

Paragraph 1. — Escape or attempt to escape not an aggravating circumstance

When escaping, an internee may be led to commit certain offences, for instance actual or constructive burglary, stealing clothes or money or even killing or wounding in self-defence. How should these offences be punished ?

Since they are offences against ordinary law, it might be thought that judicial penalties are required under the general principles proclaimed in Article 117, but in view of the fact that they are connected with escape and have only been committed because of it,

it may be considered that the judge should be called upon to decide whether they should be punished as offences against the law or as breaches of discipline.

Above all it was important to settle the point that escape does not constitute an aggravating circumstance, since any possibility of it being considered as such would have run counter to the aim of using to the full in favour of the accused the absence of intent to commit an offence and the honourable motive which led to escape. Of course, if one or several premeditated murders were committed during an attempt to escape, it could not be argued that there was no intention to commit an offence and ordinary law would apply in accordance with Article 117.

PARAGRAPH 2. — EXTENUATING CIRCUMSTANCES

Article 52 of the 1929 Convention had already stated that the competent authorities should exercise the " greatest leniency " in considering whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measures. The spirit of the Article left no doubt as to the intentions of the authors of the Convention, but practical experience showed that it needed amplification. For that reason, Article 93 of the Third Convention states that " offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, the wearing of civilian clothing, shall occasion diciplinary punishment only ". A similar text to cover internees had been included in the Stockholm Draft, but the Diplomatic Conference rejected it. The discussions showed that there was a wish to reserve to the Detaining Power the right to punish offences against public property by judicial penalty if they amounted to serious sabotage. Doubtless, it would have been easy to specify " minor offences against public property " as the International Committee of the Red Cross suggested ; but the Conference preferred to retain the general wording of the 1929 text. One delegation pointed out that by trying to protect the internees too much, there was a risk of harming them, because the Detaining Power would seek to protect itself through stricter surveillance, thus making the conditions of internment more harsh[1].

Whatever the truth of the matter, the solution adopted in the case of prisoners of war throws light on the meaning of this paragraph.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 687.

It must be considered that whenever connected offences are not serious, they may only be punished as breaches of discipline. If there is any doubt, the authorities should give the accused the benefit of it.

ARTICLE 122. — INVESTIGATIONS. CONFINEMENT AWAITING HEARING

Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured internees shall be handed over to the competent authorities as soon as possible.

In case of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

PARAGRAPH 1. — IMMEDIATE INVESTIGATION

Escape or attempted escape, if connected offences are disregarded, constitute only an offence against discipline. While an investigation to establish the facts must always precede the infliction of a punishment, it will not in this case have the complicated character of a judicial enquiry. The principle of immediate investigation had already been laid down in the 1929 Convention relative to the Treatment of Prisoners of War (Article 47, paragraph 1).

With regard to handing over the recaptured internee to the " competent " authorities, this text should be compared with paragraph 2 of Article 92 of the Third Convention, which provides that an escaped prisoner of war must be handed over to the competent military authorities. In both cases the competent authorities are those directly responsible for the person concerned before the escape—i.e. either the camp commandant (or the commander of the labour detachment), or the commandant of the place of internment. In short, the competent authority is the authority entitled to inflict a disciplinary punishment on the internee. In the case of internees, the conditions under which disciplinary punishments can be inflicted are specified in paragraph 1 of Article 123.

PARAGRAPH 2. — CONFINEMENT AWAITING HEARING

This text is the same as that of paragraph 2 of Article 95 of the Third Convention. This maximum of fourteen days' confinement awaiting hearing for disciplinary offences was laid down to prevent the abuses of which some prisoners of war had been victim. Whatever the circumstances, then, an internee accused of a disciplinary offence must be released after fourteen days' confinement if sentence has not yet been passed. This time, it should be noted, equals half the maximum sentence of imprisonment applicable. The release obviously does not prejudice the ultimate sentence but even if the internee is sentenced to the maximum, the days passed in confinement awaiting hearing will be deducted and so the remaining period of imprisonment will in no case exceed the time he has already spent in confinement.

PARAGRAPH 3. — PREMISES IN WHICH INTERNEES ARE CONFINED AWAITING HEARING

Articles 124 and 125 deal with the premises to be used and the guarantees essential for those detained.

This provision is not the same as the one covering prisoners of war (Third Convention, Article 95, paragraph 3). Its object is to prevent the repetition of the abuses committed during the Second World War, such as detention in special camps to which camp leaders and Protecting Powers were not admitted, the withdrawal of privileges and essential guarantees, etc.[1]

This solution, moreover, is logical and conforms to the traditional procedure in penal matters. Deprivation of liberty while awaiting trial indeed takes place before the guilt of the accused has been established. Detention must not, therefore, be harsher for a man who is merely accused than for a guilty person.

ARTICLE 123. — COMPETENT AUTHORITIES. PROCEDURE

Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

[1] See M. BRETONNIÈRE, *op. cit.* p. 313-314; *Report on the Work of the Conference of Government Experts*, pp. 208-209.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

PARAGRAPH 1. — COMPETENCE OF THE COMMANDANT OF THE PLACE OF INTERNMENT

By virtue of Article 99, every place of internment must be put under the authority of a responsible officer chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer must have in his possession a copy of the Convention and is responsible for its application. He must therefore issue all necessary regulations to achieve this end and disciplinary powers are vested primarily in him.

In very large places of internment, however, the need to place before the commandant every case involving disciplinary punishment would lead to delays and complications. The Government Experts had already noted this [1] and, at their suggestion, the Stockholm Draft included a provision that disciplinary powers could be delegated. This delegation of powers, authorized in the paragraph under discussion, does not however absolve the commandant from his own responsibility nor his duty of supervision. Since, under Article 99, he is responsible for the application of the Convention, he assumes responsibility for any abuses of which his subordinates might become guilty in exercising the disciplinary power he has delegated to them.

The official or officer to whom this power is delegated must be in a position to assume it under the same conditions as the commandant. For this purpose, he also must be a member of the regular military

[1] See *Report on the Work of the Conference of Government Experts*, pp. 220-221.

forces or of the regular civil administration and must possess a text of the Convention.

The reservation concerning the competence of courts and higher authorities at the beginning of this paragraph is intended as a reminder of the fact that the competence of the responsible commandant, however extensive it may be, is neither universal nor without appeal. Indeed, it covers only cases not submitted to the courts. Now, the cases which are brought before them will not all call for judicial punishment. Certain cases examined with the leniency prescribed in Articles 118 and 121 may entail only disciplinary punishment. In such cases it is for the court to decide on the penalty. Furthermore, if the higher authority receiving complaints or petitions in accordance with Article 101 considers that the decisions of the camp commandant have gone beyond the limits laid down by the Convention, those decisions can be either rescinded or amended.

PARAGRAPH 2. — DEFENCE OF THE INTERNEE

This text is an adaptation in behalf of internees of the provisions relating to prisoners of war (Third Convention, Article 96, paragraph 4). These provisions, which were not included in the 1929 Convention, are intended to put a stop to arbitrary decisions resulting from the absence of common rules of disciplinary procedure in the various countries. Prisoners of war suffered from this arbitrary treatment too often during the Second World War[1]. The authors of the Convention therefore decided that it was necessary to specify the procedural guarantees granted to civilian internees in regard to disciplinary punishments.

The first guarantee is that the accused must be given " precise information " regarding the charges against him. The words used indicate clearly that vague and general information is not enough. Moreover, the obligation to carry out " an immediate " investigation in accordance with Article 122 implies an interrogation of the accused, who will thus know precisely the offence of which he is charged.

The second guarantee is the right of the accused to defend himself. This right includes the hearing of defence witnesses and recourse to the services of a " qualified " interpreter. This implies that a professional interpreter should be appointed who offers every guarantee of impartiality. If a non-professional interpreter has to be used, he must be approved by the accused.

[1] See *Report on the Work of the Conference of Government Experts*, pp.215-216.

The third guarantee is based on the announcement of the decision in the presence of the accused and of a member of the Internee Committee. The internee will thus be enabled to exercise directly or through the Internee Committee the right of complaint bestowed upon him by Article 101. He will also have the benefit of any other form of appeal provided for in internment regulations but (unless, of course, the regulations provide otherwise) the making of a complaint would not have power to suspend application of the sentence.

PARAGRAPH 3. — PERIOD BETWEEN THE AWARD OF PUNISHMENT AND ITS EXECUTION

This provision emphasizes that a disciplinary offence must be punished quickly. After one month has elapsed, the penalty will become void and the internee cannot then be punished for the same offences. Sentence of imprisonment inflicted during a transfer may only be carried out on arrival or when normal conditions for the serving of such a sentence are present. This follows from the provisions of Articles 118, 124 and 125 in particular.

PARAGRAPH 4. — PERIOD BETWEEN TWO PUNISHMENTS

This is a reproduction of paragraph 4 of Article 54 of the 1929 Convention, and the guarantee contained therein supplements the guarantee given in paragraph 3 of Article 119, which prohibits any disciplinary confinement for more than thirty consecutive days. The reference here is to the possibility of a punishment incurred between the announcement and carrying out of one punishment or during or immediately after the carrying out of the punishment.

In all cases, if the punishment exceeds ten days, a period of three days must elapse before the internee can again be imprisoned. This is a period of respite imposed by humanitarian considerations.

PARAGRAPH 5. — RECORD OF DISCIPLINARY PUNISHMENTS

This provision was not included in the 1929 Convention. It allows the higher authorities to check on the way the commandant exercises his disciplinary powers and it is therefore absolutely essential. The Article also states that a check may be made by the Protecting Power.

The keeping of the record depends on national regulations. It should be stated, however, that the register should mention the exact names of those convicted, the nature and duration of the punishment, the date and place in which it was carried out, the motives for it, the

name of the authority which took the decision, and the signature of the commandant, since it is his personal duty to keep the register. Furthermore, the register should include a reference to the enquiry file, to facilitate thorough study of any possible complaints.

ARTICLE 124. — PREMISES FOR DISCIPLINARY PUNISHMENTS

Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements; they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

PARAGRAPH 1. — SPECIAL PREMISES

This provision deals only with punishment by confinement since the other disciplinary penalties listed in Article 119 in no way imply the use of special premises.

It is indisputable—and the Conference of Government Experts recognized this [1]—that penitentiary establishments very often afford better material conditions than a place of confinement in an internment camp. However, the authors of the Convention considered that detention in such establishments and the consequent mixing with ordinary criminals was an affront to the dignity of the person concerned and was not appropriate in the case of punishments for breaches of discipline [2].

Such punishments must be undergone in a place of internment. There is nothing, however, against transferring an offender from one place of internment to another to undergo his sentence, if the Detaining Power considers that the premises are more suitable there, provided that the guarantees laid down by the Convention are observed.

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[1] See *Report on the Work of the Conference of Government Experts*, pp. 218-219.

[2] The 1929 Convention relative to the Treatment of Prisoners of War embodied the same conclusion in paragraph 1 of Article 56.

PARAGRAPH 2. — SANITARY REQUIREMENTS

The obligation to carry out sentences of imprisonment in a place of internment will nearly always raise problems which are quite difficult of solution. The usual method will doubtless be to set aside a hut or part of a hut for the purpose and to fit out a number of cells there. Too often, during the Second World War, cells designed for one or two prisoners were occupied by four or five at the same time[1].

The first drawback of such overcrowding is the danger to health. It is quite clear that in such cases the provisions of Article 85, which are nevertheless referred to expressly here, will be difficult to observe. The Detaining Power must therefore see that prisoners undergoing imprisonment shall be enabled to keep themselves clean, particularly since inadequate premises may lead the detainees to become careless of cleanliness. Furthermore, the provisions mentioned in paragraph 2 of Article 118 on the need for detainees to have daylight should be remembered. This clause is applicable *a fortiori* in the case of imprisonment for disciplinary offences.

PARAGRAPH 3. — WOMEN

This provision should be compared with paragraph 2 of Article 27 which states that " women shall be especially protected against any attack on their honour ".

Whatever the added difficulty it may entail in arranging for premises for disciplinary punishments, this provision must be scrupulously observed since it is intended to ensure respect for the honour and modesty of women detainees. Moreover, there is nothing to prevent the Detaining Power arranging for women a system of disciplinary detention less harsh than that for men and in less uncomfortable premises.

ARTICLE 125. — ESSENTIAL SAFEGUARDS

Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

[1] See M. BRETONNIÈRE, *op. cit.* pp. 380-381.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

This Article has the advantage of laying down uniform regulations for the application of disciplinary punishments. In view of the divergences which may exist between the laws of various countries, this codification of the essential safeguards is of considerable importance.

Moreover, the subject is not a new one. The 1929 Convention dealt with it in practically identical terms : Article 56, paragraph 4, for the first paragraph, Article 58, for the second paragraph and Article 57 for the third.

PARAGRAPH 1. — EXERCISE IN THE OPEN AIR

This clause, which may be compared with paragraph 3 of Article 94, is essential for the fitness and health of the internees. " Exercise " must be taken to mean at least the opportunity to walk, which means that a sufficiently large space must be put at the disposal of the detainees. It should be made quite clear, moreover, that exercise in the open air is a possibility offered to the internee ; whether he takes advantage of it or not is according to his wishes. It would not be right, indeed, if, under the pretext of applying this rule, certain commandants of places of internment made the punishment more severe by compulsory exercise, keeping the internees in the full sun or the snow for two hours at a stretch as sometimes happened during the Second World War.

PARAGRAPH 2. — MEDICAL INSPECTIONS

Article 91, paragraph 4, provides that the internees " may not be prevented from presenting themselves to the medical authorities for examination ". It does not, however, mention the frequency of the medical inspections. It was only logical to consider that the Detaining Power should arrange in every place of internment for a daily medical inspection and this paragraph makes this important point quite clear.

This does not mean, however, that internees must necessarily be examined every day by the doctor. The guards will not be entitled

to forbid the internees to present themselves for daily medical examination ; if the request to go on sick parade turns out to be groundless and upsets the maintenance of discipline, the offence may be considered as calling for disciplinary punishment by the commandant of the place of internment on the basis of the doctor's report.

PARAGRAPH 3. — CONFISCATION OF PARCELS AND REMITTANCES OF MONEY

Permission to write and receive letters and to read lessens greatly the severity of detention. In addition to the uncomfortable nature of the premises, the main part of the punishment could therefore be a temporary withholding of remittances of money and parcels. The preliminary draft of the 1929 Convention mentioned restrictions on food and deprivation of alcohol and tobacco as a means of increasing punishments. This idea was not accepted but it seems that restrictions of that type, provided they do not harm the health of the internee, could be resorted to by the Detaining Power in cases of need, in order to give to disciplinary imprisonment the severity which is likely to encourage respect for discipline.

The intervention of the Internee Committee, which may hand over to the infirmary the perishable goods contained in the parcels, was not mentioned in Article 57 of the 1929 Convention relative to the Treatment of Prisoners of War. This provision tends to strengthen the supervision by the Internee Committee of the distribution of relief parcels.

PARAGRAPH 4. — RESERVATION WITH REGARD TO CORRESPONDENCE AND VISITS

This text is similar to the last sentence of paragraph 1 of Article 98 in the Third Convention which refers to Articles 76 and 126 of that Convention. Now these two Articles correspond to Articles 101 (complaints and petitions) and 143 (supervision by the Protecting Power) in the Fourth Geneva Convention. It may be wondered, therefore, whether Article 107 was not mentioned here in error for Article 101. The Final Record of the Diplomatic Conference does not give any information on the subject, but merely states that no amendments or observations were submitted in regard to Article 115 (II-A, page 687) and quotes the opinion of the Rapporteur who says simply " the text remains as drafted at Stockholm " (II-A, page 843). Now the Stockholm text deals in effect with the Article on correspondence (Article 96 of the Draft), and not the Article reproducing the

substance of Article 101, i.e. complaints and petitions (Article 90 of the Stockholm Draft). The confusion therefore, if confusion there is, is due to the Stockholm text. Whatever the truth of the matter, it seems that the right to make complaints and petitions is too important, particularly in the case of men undergoing disciplinary punishment, for the authors of the Geneva Convention to have intended to deprive internees of it, while giving prisoners of war the benefit of it. If that had been their wish, there would have been a discussion on the matter, as there was with regard to Article 121, which does not contain the same details regarding internees as the corresponding Article concerning prisoners of war (Third Convention, Article 93, paragraph 1). Furthermore, the right to send or receive letters is expressly mentioned in paragraph 3 of this Article and so the reference to Article 107 has no meaning. Finally, if the principle is applied that the system of internment must be at least as favourable as the system for prisoners of war, we must include here among the essential safeguards, the right to make complaints and petitions in accordance with Article 101.

It may therefore be deduced that the last paragraph refers to Article 107 in error for Article 101.

ARTICLE 126. — PROVISIONS APPLICABLE TO JUDICIAL PROCEEDINGS

The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

Articles 71 (Penal procedure, general observations), 72 (Right of defence), 73 (Right of appeal), 74 (Assistance by the Protecting Power), 75 (Death sentence) and 76 (Treatment of detainees) refer to the law applicable to protected persons when they are subject to judicial proceedings in occupied territory. In the commentary on Article 117 it was seen that these Articles were supplementary to Chapter IX, on the status of internees with regard to penal and disciplinary measures, whenever internment has taken place in occupied territory. However, since the internment regulations also apply to persons interned in occupied territory and in the national territory of the Detaining Power, it was necessary, if conditions were to be equal for the two categories of internees, to make the rules contained in those Articles applicable to internees detained in the national territory of the Detaining Power. That is the reason for this provision.

Chapter X

Transfers of Internees

ARTICLE 127. — CONDITIONS

The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If as an exceptional measure such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

Articles 127 and 128 contain a series of provisions relating to the transfer of internees. It should not be forgotten, however, that as protected persons internees benefit from the general provisions of Article 45 concerning the transfer of protected persons to another Power. In consequence, if a belligerent wished to transfer civilian internees to another Power, he would be obliged to comply with Article 45, as well as with Articles 127 and 128.

PARAGRAPH 1. — MEANS OF TRANSPORT

The text of paragraph 1 refers primarily to the transfer of internees from one place to another inside the same territory. What the authors of the Convention wished to avoid was a return to the " death marches ", of which there were far too many examples during the Second World War, especially in its last phase, during the hurried evacuation of certain concentration or prisoner-of-war camps[1]. This is the reason for making it obligatory to carry out transfers in humane conditions. The conditions under which the forces of the Detaining Power are transferred have been taken as a criterion. It is stated expressly that transfers on foot are only permissible in exceptional cases and if the internees are in a fit state of health. It is not the physical fitness of the majority of the internees which is to decide whether the transfer will be made on foot or not. The fitness of each individual must be considered and those who cannot walk must be taken in some sort of transport.

Transfers inside the national territory of the Detaining Power are not, however, the only transfers covered by this Article, as will be seen in the commentary on the second paragraph.

PARAGRAPH 2. — PROVISIONS FOR THE JOURNEY.—SAFETY

The obligations listed in this paragraph are similar to those incumbent on the Detaining Power under the general provisions of the Convention and are implicit in the first paragraph.

If the transfer takes place individually or in a group but has not been made necessary by a critical military situation, being the result of an administrative decision taken by the Detaining Power in normal circumstances, it goes without saying that the Detaining Power's obligations in regard to the maintenance and care of the internees cannot be affected; a more difficult question arises in the case of a transfer ordered in grave and unforeseen circumstances and which may affect suddenly all the detainees in a particular place of internment. In such a case, the provisions of this paragraph must be taken as the minimum compatible with the humane treatment which must be given to protected persons " at all times " (Article 27).

One delegation to the Diplomatic Conference suggested adding in the second sentence of this paragraph after " shall take all suitable precautions to ensure their safety during transfer ", the words "especi-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 268-270.

ally in case of transport by sea or by air ". The Committee which dealt with this matter at the Conference rejected this suggestion on the grounds that the mention of particular means of transport might lessen the scope of the general principle[1].

Nevertheless, the obligation, before a transfer has begun, to draw up a complete list of the internees transferred, was drafted with sea transport particularly in mind. Indeed, during the Second World War several convoys of prisoners of war were sunk by the forces of the army to which they belonged or its allies. At the Diplomatic Conference suggestions put forward by the International Committee of the Red Cross for the establishment of a special system of protection for convoys of prisoners of war [2] were rejected on the grounds that these convoys would thus have received better treatment than those transporting troops of the Detaining Power[3]. It was thought necessary, however, to prescribe that a list must be drawn up of the persons transferred in the case of prisoners of war and of civilian internees alike, so that whatever happened trace of them should not be lost. Obviously, this precaution is of the same importance whatever means of transport is used. This paragraph lays full responsibility on the Detaining Power by insisting that it shall not neglect any precaution in its power. This will apply, in particular, to precautions against attacks from the air.

PARAGRAPH 3. — THE SICK

Article 25 of the 1929 Convention stipulated, with regard to sick or wounded prisoners of war, that they should not be transferred if their recovery might be prejudiced by the journey " unless the course of military operations demands it ". For this idea, which was too often interpreted as granting permission to the Detaining State to transfer sick persons when it appeared that military operations might enable them to escape from its power[4], the 1949 Conventions have substituted, in the case of civilian internees and prisoners of war, a provision based on ensuring the safety of the sick persons concerned. This idea is made clearer in the following paragraph.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 268-270, 843.

[2] See *Remarks and Proposals*, pp. 49-50.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 268-270.

[4] See *Report on the Work of the Conference of Government Experts*, pp. 166-170.

PARAGRAPH 4. — SAFETY

This text is based on the tragic experience of the Second World War and it covers not only the wounded and sick, but all internees whether able-bodied or not. The responsibility for determining whether internees run more risk if evacuated than if they remain where they are will rest with the commandant of the place of internment. In order to lessen the risk as much as possible, he will apply the provisions concerning markings listed in paragraph 3 of Article 83. In accordance with paragraph 2 of the same Article, the Detaining Powers must give the enemy Powers, through the intermediary of the Protecting Powers, all necessary information regarding the geographical position of places of internment ; the commandant of the place of internment must also try, as soon as he can, to get in touch with the advanced elements of the enemy in order to avoid any transfer near to the fighting lines. However painful it may be for the pride of the Power concerned to abandon to a victorious enemy those detained in a place of internment, humanitarian principles require that this solution be adopted rather than that of exposing the internees to extreme danger during transfer.

PARAGRAPH 5. — RESERVATION CONCERNING REPATRIATION

This paragraph was introduced in an amendment to the Stockholm Draft. In the explanatory matter which accompanied the amendment, the delegation proposing it called it " an appeal to the good faith and to the very conscience of all civilized nations "[1]. It must be deduced that if the obligation to take into account prospects of repatriation were to conflict with the obligation to ensure for the internees treatment in conformity with the Convention, the general provisions of the Convention would take precedence over the recommendations in this paragraph, since the Detaining Power must not shelter behind the need to make allowance for the possibility of repatriation at an uncertain date as an excuse for keeping the internees in places in which it is impossible completely to respect their rights.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 289.

ARTICLE 128. — METHOD

In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

PARAGRAPH 1. — NOTICE

It would be inhumane to transfer internees without previous notice so that they had no time either to collect their luggage or to inform their usual correspondents of their change of address. The 1929 Convention therefore contained a provision (Article 26) that prisoners of war to be transferred would be advised officially and in advance of their new destination. A similar clause was adopted in behalf of internees with new details added concerning the time limit for previous notification. The Rapporteur on this paragraph explained, however, that the second sentence of this paragraph should be interpreted as meaning " despatch a notification to . . . " and not as meaning that the advance notice must be sufficient for the family to receive such notification before transfer begins [1].

Since the indication of the place of detention might raise objections from the Detaining Power for reasons of military security, the authors of the Convention gave up the idea and merely mentioned " the postal address " of the detainees which, for the forwarding of correspondence, has the same effect as the previous wording without its disadvantages.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 844.

PARAGRAPHS 2 AND 3. — ACCOMPANIED LUGGAGE. MAIL AND PARCELS TO BE FORWARDED WITHOUT DELAY

These two paragraphs are complementary. It is quite understandable that it may be impossible to send all their luggage with the internees themselves at one time. The essential is that all arrangements should be made to have the luggage forwarded and this is the subject of paragraph 4. At least, the internees have the benefit of an important guarantee in that it is stated that they will be entitled in any case to have twenty-five kilograms of luggage taken with them. This means that they will never be deprived of the toilet requisites, garments, blankets or articles of common use essential in daily life.

PARAGRAPH 4. — SUBSEQUENT FORWARDING OF LUGGAGE

The internees' community property is the responsibility of the Internee Committee. It consists of foodstuffs, medicaments, blankets, handicraft equipment, books and sports requisites, which may form part of the collective relief mentioned in Article 109. There should also be included the credit balance of the welfare fund made up of canteen profits, as stated in Article 87. It is for the Internee Committee, which has a right to supervise the management of this fund, to make all the necessary arrangements to transfer the balance. It will act in the same way with regard to the forwarding of community property and any luggage belonging to the internees which may possibly remain.

Chapter XI

Deaths

ARTICLE 129. — WILLS. DEATH CERTIFICATES

The wills of internees shall be received for safe-keeping by the responsible authorities ; and in the event of the death of an internee his will shall be transmitted without delay to the person whom he has previously designated.

Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

PARAGRAPH 1. — WILLS

It was seen in Article 113 that in every case the Detaining Power would facilitate the execution and the authentication in due legal form of wills. These documents will be handed to the responsible authorities i.e. to the commandant of the place of internment or, on the responsibility of the commandant, to a public notary who will ensure their safe-keeping.

This system differs in two respects from the scheme suggested at Stockholm. It leaves those concerned the task of deciding what form to give to their wills (after consultation with a lawyer, if need be, as laid down in Article 113) [1] and it makes it clear that the will must be forwarded to the persons appointed by the testator immediately on his death. The forwarding of the will therefore implies an official notification of death and is designed, together with the provisions of paragraph 3 of this Article to avoid the property of the deceased remaining unclaimed.

PARAGRAPH 2. — DEATH CERTIFICATE

The death certificate is the responsibility of the medical authorities and the present paragraph contains a guarantee that the internees will be duly assisted even in death itself on the responsibility of the Detaining Power. As they will preferably be treated, as already mentioned [2], by medical personnel of their own nationality, the

[1] If the will is to be executed in the country of internment, it may be advisable to draft it in due legal form according to the same regulations as those in force for the general population. If it is to be executed in a country other than the country of internment, it may be preferable to draw it up in holographic form or in the form of a deed executed and authenticated by a notary with clauses different from those used in the country of internment, although the rule " locus regit actum " is of wide application. The Rapporteurs of the Committee of the Diplomatic Conference concerned with this question insisted on a precise wording. (See *Final Record*, Vol. II-A, p. 844.) It should be noted, furthermore, that in the second case this provision will correspond to Article 120 of the Third Convention, which states that the wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin.

[2] See above, Article 91, para. 3.

certificate and the report on the causes of death and the conditions under which it occurred can certainly be drawn up by a doctor from among their compatriots. He would, however, be well advised to have his statements countersigned by the medical authorities of the Detaining Power. Indeed, in the spirit of paragraph 4 of Article 91, which obliges those authorities to send on request an official certificate stating the nature of an internee's illness or injury, such a request should be welcome and this countersigning could be useful if the report on the causes of death and the conditions under which it occurred were to be cited one day by the heirs of the deceased person in support of an application for compensation or for other purposes.

PARAGRAPH 3. — OFFICIAL RECORD OF DEATH

It is unnecessary to dwell on the legal importance of an official death certificate. Without such a document the family of the deceased, quite apart from the moral anguish of uncertainty, might find itself in great material distress, especially as regards the disposal of his property. If the spouse wishes to remarry, the death certificate is essential. For such a document to be valid, it is necessary and sufficient that it be drawn up according to the law of the country where death takes place. Transmission of a death certificate, like the forwarding of wills mentioned in paragraph 1, must be made without delay for the same reasons.

The assistance of the Detaining Power is necessary to guarantee that the document is not lost and the sending of a copy to the Central Agency, as well as offering a further guarantee that the certificate will be kept, will enable the file of the deceased to be brought up to date for the Agency's purposes.[1]

ARTICLE 130. — BURIAL. CREMATION[2]

The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

[1] See Commentary on Article 140.

[2] This Article may be compared to Article 17 of the First Convention. See *Commentary I*, pp. 175-183.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

PARAGRAPH 1. — RESPECT FOR GRAVES

Respect for the dead is one of the most ancient ideas of civilization. In codifying humanitarian law, the 1929 Convention relative to the Treatment of Prisoners of War proclaimed this principle in Article 76, paragraph 3. The present text, however, adds two notions to the text of 1929 : the recommendation that the dead should be buried according to the rites of the religion to which they belonged and the obligation to mark graves in such a way that they can always be found again.

The first idea is the subject of a recommendation only, since it may happen that the observation of some rites may be particularly difficult [1], or that the maintenance of public order might be made difficult if certain rites are carried out which may provoke hostile reactions among the people. However, tolerance is the very spirit of the Geneva Conventions, and it may be hoped that with encouragement from Governments [2], this spirit will spread more and more among the masses so that this recommendation on a point very important for the honour of families can always be observed.

The necessity to put clear and permanent markings on places of burial corresponds to the just desire of the relatives of the deceased to visit his grave or to remove his mortal remains as soon as circumstances permit. The Convention does not state how graves should be marked. The practice of placing individual markings on the grave

[1] In the case of animal sacrifice, or the use of rare substances.

[2] It may be recalled that the High Contracting Parties, in Article 1 common to all the Conventions, undertake to respect and ensure respect for the Conventions in all circumstances.

showing the surname, first name and date of birth of the dead person in detail and in a durable fashion, is, however, particularly to be recommended to belligerents wishing to fulfil their obligations. The same applies to ashes in the case of cremation, as mentioned in the following paragraph.

PARAGRAPH 2. — COLLECTIVE GRAVES. CREMATION

However desirable it may be to have individual graves properly marked, advocated as the general practice by the Convention, the Article does allow of exceptions. These would be valid for reasons of *force majeure*, during an epidemic, for example, if the death of an excessively large number of persons created a danger of infection which did not allow time for the digging of individual graves, or again if warlike operations obliged the Detaining Power to retreat and before retreating and from lack of time it undertook collective burials in the interests of public health.

Similarly, the general rules for burial do not apply in case of cremation. The preparatory work on the Convention shows, however, that cremation is thought of as an exceptional measure, since the opinion of the experts was in general against the practice[1]. For that reason, cremation is only compatible with respect for the Convention if certain very strict conditions are observed. It must be based on reasons of public health, or the expressed will of the deceased person, or the customs of his religion. The reasons must be explicitly stated on the death certificate. In the same way as the previous paragraph provides for the maintenance and marking of graves, the Detaining Power must preserve and mark ashes, which must be kept for transfer to the family of the deceased. Ashes in general will be placed in urns which will bear, clearly marked, all the information which should normally be placed on a grave. These urns will be placed in a suitable spot and protected against any sacrilegious act.

PARAGRAPH 3. — EXCHANGE OF INFORMATION

This Article is designed to give effect to the previous two paragraphs. The 1929 Convention relative to the Treatment of Prisoners of War did not provide for information being transmitted until after the end of hostilities, whereas the present text states that the information must be transmitted as soon as circumstances allow. This sanctions the practice during the Second World War, when informa-

[1] See *Report on the Work of the Conference of Government Experts*, p. 19.

tion was generally transmitted during hostilities, sometimes even by telegraph, when the slowness of mail and the distance of places of internment justified such a measure [1].

The services of the Information Bureaux provided for in Article 136 are particularly useful for notifying families of the distinguishing features of the graves. It will be understood that notification of death through diplomatic channels will only contain very brief information concerning the grave. It is for the Power of which the members of the family are nationals to inform them, with the help of the Agency, so that the provisions of the Convention on the marking and maintenance of the graves can be observed.

ARTICLE 131. — INTERNEES KILLED OR INJURED IN SPECIAL CIRCUMSTANCES

Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

During the Second World War there were cases of prisoners of war being killed during disturbances which had led to the guards losing their composure. Some governments as a result even concluded agreements to make guards and sentinels more careful by threatening them with prosecution.

The experts consulted in 1947 by the International Committee of the Red Cross, decided to recommend the adoption of a special clause in the draft Conventions in order to protect the internees against this danger [2]. Their solicitude for the internees' welfare even extended to cases of brawls between the detainees themselves or to any death or

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 301.

[2] See *Report on the Work of the Conference of Government Experts*, p. 249.

serious injury suspect in origin. The Diplomatic Conference made no difficulty about adopting the provisions inserted in the Stockholm Draft at the suggestion of the experts [1].

PARAGRAPH 1. — OFFICIAL ENQUIRY

This text obliges the Detaining Power to open an official enquiry in case of death or serious injury of unknown cause.

What is meant by "serious injury"? During the discussion of the corresponding text concerning prisoners of war, one delegation suggested that it should be made clear that what was referred to was a wound as a result of which a prisoner required in-patient treatment in a hospital or an infirmary [2]. This definition was considered too rigid and was therefore not inserted in the Convention, but it could usefully be adopted in most cases.

As has already been stated, this text protects internees not only against the misuse of authority by agents of the Detaining Power (guards or sentinels) but also against violence from any other person, particularly their companions in internment. It therefore opens the way for the Detaining Power to repress disturbances which might arise in places of internment as a result of political or other divisions. The maintenance of order and the protection of the life and limb of the internees is thus dealt with at one and the same time.

An official enquiry will also be opened in the case of death from unknown causes. This may refer to an unexplained illness as well as to violent death.

In what should the enquiry consist? Since its object is to discover who was responsible with a view to punishing the crime, the victim must be very thoroughly examined, if necessary by an expert in forensic medicine, and all witnesses must be heard.

PARAGRAPH 2. — COMMUNICATION TO THE PROTECTING POWER

As soon as the enquiry is opened and before the results are even known, the Detaining Power must advise the Protecting Power to enable it to follow the enquiry and perhaps to ask for permission to be present at the cross-examination of witnesses. Among these, fellow-internees are not specially mentioned, as are fellow-prisoners in the corresponding provision of the Third Convention, but the

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 377.

[2] See *ibid.*, Vol. II-A, p. 298.

expression " evidence of any witnesses " obviously covers the other internees.

The Article does not oblige the Detaining Power to send the files on the case to the Protecting Power, although the latter should receive a circumstantial report concerning the results of the enquiry and it is stated that this report must contain the evidence of any witnesses.

PARAGRAPH 3. — PROSECUTION

If the enquiry leads to responsibility being laid at the door of one or more persons, whoever they may be, they must be prosecuted before a court of law. If they are nationals of the Detaining Power, that Power will not be able to exempt them from prosecution before its own civil or military courts. In the case of internees, they will be prosecuted in accordance with the laws in force in the teritory where they happen to be (Article 117, paragraph 1).

Although it is not expressly stipulated, it is reasonable to suppose that the Detaining Power must inform the Protecting Power of the punishments inflicted on the guilty.

Chapter XII

Release, Repatriation and Accommodation in Neutral Countries

ARTICLE 132. — DURING HOSTILITIES OR OCCUPATION

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

PARAGRAPH 1. — GENERAL RULE CONCERNING RELEASE

Expressed in very general terms, this rule forms the counterpart to the principle stated in Article 42—i.e., that internment may be

ordered only if the security of the Detaining Power makes it absolutely necessary.

Article 15 of the Tokyo Draft tried to limit the cases in which the State would be entitled to intern (where the enemy civilians are eligible for mobilization, where the security of the Detaining Power is involved, where the situation of the enemy civilians makes it necessary). This list of categories was not adopted by the authors of the Convention who preferred to keep to the completely general wording of Article 42. They do help, however, to interpret this paragraph. If, for example, an internee is detained because he is of military age, the reason ceases to be valid as soon as he has passed the age limit for military service in his country of origin.

The experience of the Second World War should be quoted here[1]. In general, States have tended to intern nationals of enemy Powers in their territories automatically. In the long run, many of these internments have entailed heavy expense for the Detaining Power and have inflicted useless suffering on individuals, since, with some exceptions, public safety was not threatened by the persons interned. Old people, women and children, for example, could in most cases be released if their maintenance could be ensured in one way or another. Thus with or without the help of the International Committee of the Red Cross, many internees were repatriated during hostilities under arrangements between the belligerents. Such exchanges of nationals took place in Lisbon, in September 1943, between German and Italian civilian internees ; at Goa, in September and October 1943, between Japanese and Allied civilians ; at Barcelona in May 1944, between German civilian internees and British and American civilian internees ; at Lisbon, in July-August 1944, between German civilian internees from South Africa and British civilian internees ; at Göteborg, in September 1944, between German civilian internees and British civilian internees. In all these operations, which formed part of more extensive exchanges of medical personnel or wounded or sick prisoners of war, the International Committee had the task of supervising the vessels or the trains carrying the repatriates.

Of course, the very general wording used in the Convention leaves the Detaining Power discretion in law to decide on the advisability of exchange or repatriation. The experience mentioned, however, proves that the rule is capable of wide application. The

[1] In France, for example, during the Second World War, the Occupying Power interned Americans only up to the age of 60, whereas British subjects were interned up to the age of 65 and 70. These decisions were based on the principle of reciprocity with the treatment of Germans in Great Britain and the United States.

real interests of the Detaining Powers often, indeed, coincide with respect for humanitarian principles and thus enable internees to be released from detention in agreement with their country of origin. Moreover, it should be recalled that aliens interned in the territory of a Party to the conflict have the benefit " at least twice yearly ", under Article 43, of a reconsideration of their case, to see whether or not they should be kept in internment. The same applies, although the six-monthly frequency is not explicitly laid down, to those interned in occupied territory (Article 78). In cases where aliens interned on the territory of a Party to the conflict agree to the communication of their names to the Protecting Power (Article 43, paragraph 2), and in the case of all internees in occupied territory, the Protecting Power, with the co-operation and under the scrutiny of which the Convention is to be applied (Article 9, paragraph 1), may urge on the Detaining Power the desirability of decisions as favourable as possible to the internees being taken as a result of the periodic reconsideration of cases.

If internment ceases, the internees are back in the situation mentioned in Article 36 which, it will be recalled, explicitly refers to the conclusion of special agreements between the Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

It should be noted that exchange and repatriation, while the most frequent reasons for internment ceasing, are nevertheless not the only ones. Hospital treatment in a neutral country is also provided for by the Convention, at the expense, it seems, of the country of origin, and the Detaining State is left to decide whether merely to release the internees, who are thus put back in the situation obtaining before internment. Aliens interned on the territory of a Party to the conflict, moreover, retain the right conferred upon them by Article 42, to apply voluntarily for internment through the representatives of the Protecting Power if their situation should render such a step necessary.

Paragraph 2. — Special agreements

Paragraph 2 deals with the special agreements which belligerents may conclude during hostilities in order to give effect to the rule stated in the previous paragraph. It does not imply that the Powers are obliged to conclude such agreements, but merely makes an urgent recommendation based on experience. To give some examples, it quotes the main cases in which there are humanitarian reasons for the conclusion of such agreements. In accordance with the Stockholm

Draft, those benefiting from the agreements will consist of the sick and wounded and internees who have been detained for a long time[1]. The text also mentions children, in the spirit of a number of Articles containing provisions in their favour (Articles 25, 38, 50, 82, 89, 94, etc.) because of what children represent for the future of humanity. Furthermore, and for the same reasons, the authors of the Convention mentioned pregnant women and mothers of infants and young children.

Here again, emphasis should be laid on the rôle which can be played by the Protecting Power in suggesting and inspiring such agreements. The Protecting Power is well placed, especially when it acts simultaneously on behalf of both parties, to understand the deplorable seriousness of certain situations. The argument of reciprocity can be invoked to further, and sometimes even almost to compel, the conclusion of special agreements concerning, for instance, exchanges of internees. Naturally, the International Committee of the Red Cross can also play a rôle in this. It has already done so, as has been said, and would not hesitate to do so again if necessary.

Voluntary Repatriation—The Stockholm Draft contained a third paragraph which stated: " Throughout the course of hostilities or occupation, no internee may be removed to a country where he may have reason to fear persecution for his political opinions or religious beliefs. " Placed under the heading of repatriation, this text prohibited any repatriation of a person claiming to be stateless or a refugee, but claimed as a national by his country of origin.

The Diplomatic Conference deleted the paragraph because it considered that the question had already been settled under the terms of Article 45 (paragraph 4), applicable to transfers of protected persons interned in the territory of a Party to the conflict, and Article 49 (paragraph 1), applicable to transfers of internees in occupied territories. In reality, repatriation is a special case of transfer. While the transfers referred to under Articles 45 and 49 only involve the wishes of the internee himself and of the Detaining Power, repatriation also brings into consideration the wishes of the country of origin of the internee, and if those wishes were contrary to those of the internee, there would be a danger, if there were no explicit safeguards, of the individual being sacrificed to the State. Of course, the whole spirit of the Convention makes it unlikely that such a contingency would arise, especially since the Conference considered the clause as repeti-

[1] The word " captivité " used in the French text of the Convention seems to have been used inadvertently, the provision having been modelled very closely on the corresponding clause in the Convention relative to the Treatment of Prisoners of War (Article 109, Third Convention).

tive[1], but when it is recalled that extremely serious difficulties of interpretation arose during the Korean war concerning the voluntary repatriation of prisoners of war[2], it becomes a matter for regret that the principle of voluntary transfer was not repeated here in regard to the repatriation of internees, as had been suggested by the International Committee of the Red Cross[3].

ARTICLE 133. — RELEASE AFTER THE CLOSE OF HOSTILITIES

Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

PARAGRAPH 1. — IMMEDIATE RELEASE

Subject to what has just been said with regard to voluntary repatriation, it is as a rule important for civilian internees as for prisoners of war that internment should cease as soon as possible after the close of hostilities.

The expression " the close of hostilities " should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities. The similar provision concerning prisoners of war speaks of " the cessation of active hosti-

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 688, 735-736.

[2] Although the Geneva Conventions were not systematically applied during the Korean conflict, the interpretation to be given to Articles 7 and 118 of the Third Convention played a predominant part in the discussions on the Korean problem in the Security Council of the United Nations. It would appear to be reasonable to look upon the armistice of July 1953, which put an end to hostilities, as supporting the principle of voluntary repatriation of prisoners of war, particularly by its introduction of explanatory conferences.

[3] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 672, and *Report on the Work of the Conference of Government Experts*, pp. 233 and 244-245.

lities " and the wording of the paragraph here should be understood in the same sense.

However, this does not mean, in spite of the urgent wish thus expressed, that internment can always be brought to an end shortly after the end of active hostilities. The Rapporteurs of the Committee of the Diplomatic Conference which dealt with this question even explained that it did not even mean that no one could be interned after hostilities had ended[1]. The disorganization caused by war may quite possibly involve some delay before the return to normal. What it was wished to avoid, and what this Article will avoid if it is applied in good faith, is the indefinite prolongation of situations such as those of which many prisoners of war in some countries were victim in that they were retained under various provisions in the service of the Detaining Power; that is something against which the International Committee of the Red Cross has constantly fought.

It should be noted, finally, that this paragraph only repeats, with special application to internment, a principle stated in general fashion in Article 46, according to which restrictive measures taken regarding protected persons are to be cancelled as soon as possible after the close of hostilities[2]. It also follows logically from paragraph 1 of Article 132. Since hostilities are the main cause for internment, internment should cease when hostilities cease.

PARAGRAPH 2. — RESERVATION

The case of offenders against the ordinary law nevertheless calls for a reservation, since it would not be just if immediate release after the end of hostilities hindered prosecution or prevented the carrying out of judicial penalties inflicted before or during internment.

Following the Second World War, certain Powers released only those prisoners of war whose sentence did not exceed a certain number of years. Other countries released, and even repatriated, prisoners of war undergoing long sentences and forwarded the record of the case to the Power of origin for that Power to make whatever use of it it considered expedient. During the preparatory work for the Convention, some thought of prescribing a general review of sentences, in view of the harshness usual in time of war and the sometimes unjust classification of certain offences as offences against ordinary law. Since, however, it did not seem possible to reach agreement on satis-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 844.

[2] This comment was made during the discussions at the Diplomatic Conference. See *Final Record*, Vol. II-A, pp. 688-689.

factory wording in view of the extreme diversity of circumstances, the present clause was drawn up, which leaves the Detaining Power wide discretionary powers in this matter.

PARAGRAPH 3. — SEARCH FOR DISPERSED INTERNEES

The rule stated in paragraph 1 may remain ineffective if the disorganization caused by operations during the final stage of the war makes it impossible to have a complete list of internees or to discover their whereabouts. The idea of setting up committees to make the necessary searches was suggested by the International Committee of the Red Cross and adopted without opposition. Obviously, these committees must be established by agreement between the Detaining Power and the other Powers concerned since neither the assistance of the former nor the moral authority of the latter could be dispensed with.

ARTICLE 134. — REPATRIATION AND RETURN TO LAST PLACE OF RESIDENCE [1]

The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

This Article is based on the following provisions of the Stockholm Draft:

Return to domicile, emigration : The High Contracting Parties shall endeavour upon the close of hostilities or occupation, to facilitate the return to their domicile, or the settlement in a new residence, of all persons who, as the result of war or occupation, are unable to live under normal conditions at the place where they may be.

The High Contracting Parties shall, in particular, ensure that these persons may be able to travel, if they so desire, to other countries and that they are provided for this purpose with passports or equivalent documents.

The Diplomatic Conference was of the opinion that this Draft imposed on signatory States in respect of their nationals or even of aliens in general, obligations going beyond those which could be imposed by a Convention [2].

[1] It is interesting, in this connection, to read the account of the discussions in Committee III of the Diplomatic Conference (47th meeting, *Final Record*, Vol. II-A, p. 791). See also on the same subject, Annex 227, *Final Record*, Vol. III, p. 115.

[2] See *ibid.* Vol. II-A, p. 844.

This is regrettable since in the narrow framework now given to it, Article 134 merely touches on the very wide problems raised by the existence of large numbers of refugees and displaced persons. If the Stockholm Draft had been adopted, certain inequalities which have very often shocked humanitarian sentiment in the application of regulations concerning refugees could perhaps have been avoided. Indeed, the empirical definition in the Draft of persons to be assisted would not have permitted any discrimination between men in equal distress as a result of events.

Whatever the case may be, the Article as it stands recommends that the " High Contracting Parties " (i.e., any of those Parties it might concern) shall assist in carrying out two courses of action which might return matters to normal, i.e. the return of internees to their last place of residence or their repatriation. However, these two courses, the only two mentioned, are far from being sufficient to meet all humanitarian requirements, especially if memory recalls the political, economic and social disturbances which, not long ago, shook the world [1].

ARTICLE 135. — COSTS

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or their return to their point of departure.

Where the Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expense of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.

[1] It should be recalled, in this connection, that after the Second World War, the International Committee of the Red Cross lent its assistance on many occasions in repatriating internees, particularly by arranging convoys and organizing food supplies and medical assistance. See, in this connection, the *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 629 ff.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

The Diplomatic Conference wished the measures recommended to the High Contracting Parties within the restricted limits established by the previous Article to be as effective as possible. For that purpose, it laid down detailed regulations concerning the apportionment of costs [1].

PARAGRAPH 1. — COSTS TO BE BORNE BY THE DETAINING POWER

Some of these costs will be borne in any case by the Detaining Power. The principle of the first paragraph, the Rapporteurs explained, is that the Detaining Power shall bear the costs involved in returning the internee to his domicile at time of internment, unless he was taken into custody on the high seas, in which case the Detaining Power shall pay the cost of completing his journey or of his return to his point of departure. Since internment was decided upon in the interest of the Detaining Power, it is only fair that that Power should bear the financial consequences of return or repatriation. Whether that is always in the best interests of the internee, in view of new conditions which may face him as a result of the events, is another question dealt with in the next paragraph.

PARAGRAPH 2. — EXEMPTION OF THE DETAINING POWER FROM LIABILITY FOR COSTS IN CASES OF VOLUNTARY REPATRIATION

As the Rapporteurs explain [2], the second paragraph establishes a distinction between repatriation carried out at the wish of the Detaining Power and voluntary repatriation at the wish of the internee or his Government. In the first case only are the expenses to be borne by the Detaining Power. In the second case, they are borne only in so far as they relate to the journey to the borders of the Detaining Power's territory ; the remainder will be paid by the person himself or by his Government, particularly if the order to return to the

[1] The details were not included in the Stockholm Draft but were embodied in the Convention by the Diplomatic Conference. See *Final Record*, Vol. II-A, p. 744.

[2] *Ibid.*, Vol. II-A, p. 844.

country of origin is given by that Government[1]. Finally, a person interned at his own request in accordance with Article 42 will be able to obtain from the Detaining Power only the payment of the cost of his return to his former residence, in accordance with paragraph 1 of this Article, which does not make any distinction between the various categories of internees. However, the Detaining Power, it appears, escapes responsibility for all the costs of possible repatriation and is not even bound to pay for the part of the journey made in its own territory.

It should be noted that this paragraph implicitly recognizes the internee's right to choose between return to his residence or repatriation. It also implies that the Detaining Power has the right to refuse the internee permission to reside in its territory. At that point, what will happen if the internee thus refused permission himself opposes his repatriation ? It would be contrary to the spirit of the Convention if he could be forcibly repatriated when he feared persecution in his country of origin for his political opinions or his religious beliefs. In such a case he would become a refugee, obliged to seek a new domicile in a country different from the one in which he is living. While awaiting the result of his efforts to find such a new domicile, the Detaining Power is bound by its humanitarian duty to tolerate his presence in the country on a temporary basis.

It is to be hoped that the right of a State to refuse a released internee permission to reside in its territory, even when the person concerned had his regular domicile there beforehand, will only be used for very serious reasons. Such a refusal, indeed, may have very wide repercussions on the family life and material interests of the individual, and his presence must seriously prejudice or have prejudiced the security of the State for it to be justified in taking such a serious decision. In particular, this clause cannot be taken as entitling a government to expel automatically at the end of hostilities all ex-enemy aliens whether they have been interned or not and to confiscate their property.

PARAGRAPH 3. — THE APPORTIONMENT OF COSTS IN CASES OF TRANSFER

The detailed provisions of Article 45 concerning the possible transfer of internees entail expenditure which it is logical to make the

[1] It should be noted, however, that the fact that the order is given does not mean that it must be obeyed. The person concerned, if he fears persecution in his country of origin for his political opinions or his religious beliefs, must remain free to disobey the order. In this connection, see what was said concerning voluntary repatriation in the commentary on Article 132.

Powers concerned bear in proportion to the advantages that each obtains from the arrangement. In view of the diversity of circumstances which may arise, it was not possible to provide any other solution than an agreement covering each particular case between the Powers concerned. Whatever happens, no part of the costs is to be borne by the internees themselves.

PARAGRAPH 4. — SPECIAL AGREEMENTS

This clause reserves the right of Parties to the conflict to make special agreements concerning the costs of the exchange and repatriation of their nationals in enemy hands. It is drafted in the same spirit as paragraph 2 of Article 132 in order to further to the utmost possible degree the conclusion of such agreements and to alleviate the sufferings of the internees.

These special agreements must not deal only with the methods of exchange or repatriation. It would be contrary to the spirit of the Convention to use Article 135 as a pretext for the conclusion of agreements for the forced repatriation of certain internees, for example. This provision like all those dealing with repatriation, must be interpreted with the humanitarian duty in mind which opposes the handing over by one State to another of individuals threatened with persecution in the territory of that other State for their political or religious opinions.

SECTION V

INFORMATION BUREAUX AND CENTRAL AGENCY

INTRODUCTION

The establishment of national Information Bureaux and the Central Agency is based on the conventions regarding prisoners of war. In its first drafts of a convention for civilians, the International Committee of the Red Cross had from the very beginning envisaged that these Bureaux and the Agency would also operate in behalf of civilian internees. When it proposed, in the 1934 Tokyo Draft and in the text submitted to the Conference of Government Experts in 1947, the adoption of a general clause providing for the application of the Prisoners of War Convention to civilian internees by analogy, the International Committee considered that it had automatically ensured this extension. However, the Conference of Government Experts considered that the position of civilian internees required a special statute and it was decided to incorporate in that statute articles which would adapt to civilians the provisions of the 1929 Prisoners of War Convention concerning national Bureaux and the Agency [1].

Later on, the International Committee pointed out that the transmission of information by this means should not be limited to civilian internees alone but that its advantages should be extended to all persons protected by the Convention. It took the Articles mentioned from the section concerning the status of internees and placed them in a special section, the last in Part III, devoted to the status and treatment of protected persons. This viewpoint was approved by the XVIIth International Red Cross Conference and finally by the Diplomatic Conference.

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[1] See *Report on the Work of the Conference of Government Experts*, pp. 295 and 328.

The six Articles of this section have been based on the corresponding provisions of the Third Convention (Articles 122 to 124) with such alterations are as necessary in view of the different position of civilians [1].

ARTICLE 136. — NATIONAL BUREAUX

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.

General Remarks

Inquiry offices for prisoners of war were instituted under Article 14 of the Hague Regulations of 1907, and the idea was developed further in 1929 when the matter was dealt with again in the Prisoners of War Convention. The task of these Information Bureaux, as they are now called, is to bring together all information on prisoners detained in the country and to reply to requests concerning them.

At the beginning of the Second World War, and after the International Committee of the Red Cross had persuaded the belligerents to apply to civilian internees the rules relative to prisoners of war, these Bureaux, or in some countries Bureaux established for the purpose, received in addition and transmitted to the Central Agency in Geneva information concerning civilians interned by the authorities in their country. This practice, which from the humanitarian point of view rendered services of incalculable value, is now given a written basis in the Convention.

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[1] A detailed account of the origin and the development of national Information Bureaux and the Agency and of their activities on behalf of prisoners of war will be given in the commentary on the Third Convention.

In the Third Convention all the provisions dealing with national Bureaux for prisoners of war are contained in a single Article, Article 122, which is very long, containing no fewer than nine paragraphs. Committee III of the Diplomatic Conference, in giving final shape to the provisions regarding civilians, chose a different method. Mainly for the sake of clarity it decided to divide the draft under discussion, which was similar to the text relating to prisoners of war, into four separate Articles, which have become Articles 136 to 139.

PARAGRAPH 1. — ESTABLISHMENT OF THE BUREAUX

This paragraph lays down a general rule. It does not state in detail the nature, composition and working methods of the Bureau, all these matters being left to the free decision of each Party, nor does it state what authority will be responsible for establishing and conducting the Bureau. In 1946, the National Red Cross Societies expressed the wish to have this duty assigned to them. The Conference preferred to leave matters indefinite and allow the Governments complete freedom in this respect. Moreover, there is nothing to prevent the Bureau being the same as that to be established for prisoners of war under the Third Convention, or being a department of it.

During the Second World War, the Bureaux which had the task of transmitting information concerning civilian internees to the Central Agency were varied in nature and origin. In some cases, they were the same as the Bureaux responsible for prisoners of war; in others, they were established by the National Red Cross Society; most often, however, they depended directly on government authorities, such as the Ministry of the Interior or the Ministry of Security. This last solution will probably be the one usually preferred, since, as a rule, it is these authorities which are responsible for not only civilian internees but all enemy aliens residing in the national territory.

The Article begins with the words " Upon the outbreak of a conflict and in all cases of occupation . . . ". These words must be interpreted strictly. The Parties to the conflict must not, for example, delay organizing the Bureau until requests for information reach them concerning enemy civilians who may be in their territory, just as they must not wait until prisoners of war are taken before establishing the Bureau concerned with them. They are bound to take action at the very beginning and of their own accord. It would even be desirable for them to go ahead in peacetime by laying down guiding rules for the establishment of these Bureaux and deciding on their methods of work so that they are ready for any eventuality.

If territory is occupied, whether in face of armed resistance or not, the establishment of an Information Bureau is immediate and to some extent automatic. In most instances it will doubtless be set up in occupied territory proper. If a Bureau were also opened in the national territory of the Occupying Power, the one in occupied territory could even be given a more or less wide autonomy, based on the geographical restrictions on its activities, on the special position of protected persons in occupied territory, which differs in many respects from the position of persons in national territory, and also on the fact that it would probably, at least in the first phase of the occupation, be subject to the military authorities.

Information may now be transmitted, therefore, not merely concerning civilian internees, as was the case during the Second World War, but also concerning all " protected persons ", as defined in Article 4 of the Convention. It should be emphasized at the very beginning that there is no question of information being given at random concerning any protected person. The sort of information to be communicated to and by the national Bureau and the protected persons to whom it will relate will be explained below.

It should also be noted in regard to this paragraph, that the corresponding provision in the Third Convention (Article 122, paragraph 1) contains three clauses which have not been repeated here. The first states that neutral or non-belligerent Powers shall institute an official Information Bureau if persons protected by that Convention have been received within their territory. The Conference of Government Experts had suggested the insertion of a similar clause in Article 136. The International Committee of the Red Cross considered, however, that in view of the special circumstances of their residence in neutral or non-belligerent countries and the objections they might perhaps raise to the communication of information concerning them to certain authorities, it was better to delete the clause from the Fourth Convention. In a large number of cases, those concerned would be able to use the postal services and would have every opportunity of writing themselves to organizations capable of putting them in touch, if they so desired, with their family. This point of view, supported by the XVIIth International Red Cross Conference, was shared by the Diplomatic Conference. It may be noted, furthermore, that the clause would have had no rational basis since the Fourth Convention does not impose obligations on neutral Powers.

The other two clauses are new to the Third Convention ; one states that the Power concerned shall ensure that the Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. This provision, while indicating the

importance to be attached to the Article, does not, however, seem indispensable, since the obligation laid on the Detaining Power to institute these Bureaux in itself obviously implies an obligation to ensure that they function normally. The other clause provides that the Detaining Power shall be at liberty to employ prisoners of war in its Bureau. The Powers may, indeed, have difficulty in recruiting qualified staff, particularly staff with a knowledge of languages, and a similar provision inviting them to draw on the talents of civilian internees, if needed, might have facilitated their task from the beginning. It was thought, however, that one of the principal reasons for the internment of civilians is precisely that they are mistrusted and that it was necessary to take that fact into account here. Nevertheless, there is nothing to prevent these Powers, on the basis of the provision in the Third Convention, from appealing to qualified and trustworthy civilians, while, of course, observing the provisions of the Fourth Convention concerning work and payment for work[1], and provided that the need for a certain degree of discretion does not militate against it.

PARAGRAPH 2. — CENTRALIZATION. — THE PURPOSE AND NATURE OF INFORMATION GIVEN

1. *Centralization*

If the Information Bureau is to be able to fulfil its task, all information throughout the territory of the Detaining Power must be centralized. While the Convention indicates the need for the Bureau to be given information within the shortest possible period, it leaves the Detaining Power free to choose the method by which the information will be transmitted by the services, administrative departments or other authorities responsible for the protected persons.

2. *Purpose of the information*

The first sentence defines the protected persons concerning whom information must be sent to the national Bureau. They are those who have been kept in custody for more than two weeks, who are subjected to assigned residence or who are interned.

From the beginning of its studies, the International Committee of the Red Cross had considered that the general regulations governing internment should also be applied to civilians arrested either for offences against the Occupying Power or for security reasons, and

[1] See Articles 95, 96 and 98.

that their names and the fact of their arrest should be communicated to the Power of origin. This point of view was shared by the conferences of experts which followed, and was endorsed by the Diplomatic Conference, which went still further. Noting that during the Second World War a large number of persons disappeared without trace, the Diplomatic Conference considered that the national Information Bureau, in order to keep constant track of each person, should record every sort of detention, whether for political reasons or for offences against ordinary law, and whatever the authority responsible. The keeping of such a record, however, would not be necessary if detention did not exceed two weeks[1].

The mention of persons subjected to assigned residence or interned confirms the more detailed provisions of Article 43, which stipulates that the Detaining Power shall, unless the protected persons concerned object, give the Protecting Power the names of such persons[2].

The list of protected persons concerning whom information must be transmitted ends there. It is conceivable, however, that, according to circumstances, notification will be sent to the Information Bureau, whether on their personal initiative or through the authorities concerning other categories of persons. This would apply, in particular, to persons who may have been transferred to another Detaining Power in conformity with Article 45[3], or who may have been evacuated as envisaged in Article 49, or who may have been obliged to move as a result of military events or some calamity and to leave their place of residence. The criterion for deciding in each case whether information concerning a protected person should be transmitted or not will always be a humanitarian one, based particularly on the need never to lose track of the person concerned, so that contact between him and his family can be maintained.

3. *Nature of the information*

The second sentence in the paragraph lists the various changes which may occur in the situation of a person kept in custody, interned or subjected to assigned residence and which must be communicated to the Information Bureau by the departments or organizations concerned. Unlike information concerning identity, which may only

[1] See *Report on the Work of the Conference of Government Experts*, pp. 294-295, and *Final Record*, Vol. II-A, p. 845.

[2] Articles 43, 136 and 137 are complementary concerning the type of information to be given and the method of transmission.

[3] See above p. 265. It should be noted that these persons belong to the category of those whose names must be communicated, since either they are already interned or subjected to assigned residence or the transfer itself constitutes subjection to assigned residence.

be given by the protected person himself and which is dealt with in Article 138, the information referred to here is all known to the Detaining Power, which can therefore plead no excuse if it fails in its obligation to transmit it.

The Detaining Power is also bound to inform its Bureau of any objections which a protected person may have to the communication of information concerning him to his country of origin.

Furthermore, the Detaining Power will see to it that information is communicated to its Bureau promptly and as soon as one of the events listed takes place. The Bureau must, indeed, be enabled to comply with the mandatory provisions of Article 137, which states that it shall immediately forward information by the most rapid means.

The list given here of the different events or situations concerning which information must be given calls for some comment. *Transfer* must be understood to mean a change in the place of residence or camp in which the protected person is living, since the list applies to persons kept in custody for more than two weeks, subjected to assigned residence or internment.

The mention of *admittances to hospital* should be taken together with paragraph 2 of Article 138, which calls for the regular and, if possible, weekly transmission of information regarding the state of health of internees who are seriously ill or seriously wounded. This provision also justifies the transmission of information concerning the state of health of mother and child in the case of *childbirth*.

The important question of *deaths* was considered above in connection with Articles 129 and 130. It should be recalled that not only the news of death, but *death certificates* must be communicated. Paragraph 3 of Article 129 stipulates that the Protecting Power and the Central Agency referred to in Article 140 must receive an official record of death duly registered and duly certified. The departments concerned must therefore send two duly certified copies of the death certificate to the national Bureau.

This list of information which must be given to the national Bureau is not exhaustive. The Convention mentions two other tasks of the Bureaux, which require the co-operation of special departments and which have been left out here :

(a) *Children.* — Paragraph 4 of Article 50 stipulates that a special section of the Bureau shall be set up which shall be responsible for taking all necessary steps to identify children whose identity is in doubt and to record particulars of their parents or other near relatives [1].

[1] See above, p. 289.

(b) *List of graves.* — Paragraph 3 of Article 130 stipulates that the Information Bureau shall forward, as soon as circumstances permit, and not later than the close of hostilities, lists of graves of deceased internees [1]. It will be for the camp administrative authorities or for special departments—which may be the Official Graves Registration Service established under Article 17 of the First Convention of 1949 [2] and Article 120 of the Third Convention—to supply to their Information Bureau the information which they are obliged to give under this Article.

ARTICLE 137. — TRANSMISSION OF INFORMATION

Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers of whom the aforesaid persons are nationals, or to Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.

Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.

All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

PARAGRAPH 1. — TRANSMISSION. — REPLY TO ENQUIRIES

This paragraph repeats, with some slight alterations, paragraphs 3 and 7 of Article 122 of the Third Convention concerning national Information Bureaux for prisoners of war.

1. *First sentence — Transmission of information*

Once the various items of information concerning protected persons have been gathered and transmitted by the departments

[1] See above, p. 506.

[2] See *Commentary* I, pp. 175-183.

concerned to the national Bureau, the Bureau—and this is the essential part of its task and the reason for its existence—will forward them to the Power concerned through the Protecting Power and the Central Agency. In this respect Bureaux for civilians do not differ in function from Bureaux for prisoners of war.

The only alteration made by the Diplomatic Conference in the corresponding provision of the Prisoners of War Convention of 1929 (Article 77) was to add the words " by the most rapid means ", which must be used for forwarding the information concerned to the country of origin. This addition was made to the Third as well as to the Fourth Convention. The national Bureaux, therefore, have not only the duty to forward information communicated to them by various departments and services immediately, but to use the most rapid means for doing so.

During the Second World War, information on prisoners of war and civilian internees was generally sent to the Central Agency by post, a procedure which sometimes entailed long delays. To remedy this, the Agency in certain cases established a system of telegraphic or radio transmission. It was with the idea that this system should be made general and improved that the Diplomatic Conference introduced the amendment mentioned. Every country must therefore try to use the most efficient methods made available by science (radio [1], microfilms, radiotelephotography, etc.). The use of these means could be made easier to a certain extent by granting Information Bureaux total or partial exemption from charges on their telegrams, in addition to the exemption from postal charges which they enjoy under Article 141. In practice, of course, these rapid methods should be used mainly for the transmission of information to the Agency. Information will generally be transmitted to the Protecting Power direct, through the diplomatic staff it maintains in the country concerned to carry out its mission. It will be for that staff to forward the information received rapidly to its own authorities.

The responsibility of the Bureaux, in fact, extends only to the forwarding of information to the Protecting Power and the Central Agency. To give full effect to this provision, the authorities of the Protecting Power and the Agency must in their turn, in reforwarding the information to the Power concerned, not only preserve the same sense of urgency, but also use " the most rapid means ".

The system of forwarding information to both the Protecting Power and the Central Agency originated in the 1929 Prisoners of War

[1] It should be emphasized that the information transmitted by radio must not only be sufficiently complete to enable certain identification but should later be confirmed in writing.

Convention. It reduces the risk of error or loss and above all enables all the information exchanged between the various sides to be brought together in a single place, thus giving the Agency a general view of the situation of protected persons in the hands of all the belligerents. This system gave every satisfaction during the Second World War and the provisions embodying it were repeated without change in the Third Convention of 1949. With one important reservation referred to in the second paragraph, the same was done in the Fourth Convention.

Whereas Article 122 of the Third Convention indicates that information concerning prisoners of war will be forwarded " to the Powers concerned ", the paragraph we are now discussing gives more exact details : information concerning protected persons will be transmitted to the Power " of whom the aforesaid persons are nationals " or " in whose territory they resided ". These additional details, suggested for humanitarian reasons by the International Committee of the Red Cross, are intended to cover cases where protected persons before the outbreak of hostilities resided in a foreign country without having its nationality, a country in which their family continued to reside. As it is above all for the information of families that the particulars are forwarded, this exception to the rule was necessary. In fact, it will be for the Protecting Power and the Agency to forward the information either to the country of origin or to the country of domicile or both according to circumstances.

The forwarding of information concerning protected persons in occupied territory will sometimes raise problems, particularly if the civilian administration of the territory is in the hands of the Occupying Power. Here also the Protecting Power and the Agency will have to take whatever measures circumstances make necessary, either restricting themselves to informing the family only or transmitting the information to a particular authority or charitable society, whether Red Cross or other.

2. *Second sentence — Reply to enquiries*

Independently of information concerning the identity, situation and health of the protected persons, which the national Bureau is obliged to collect under the terms of Articles 136 and 138, it must also reply to other enquiries addressed to it concerning protected persons.

This task is important since, however complete the information collected may be, it will often be necessary to make it more precise.

Thus the Bureau will very often have to make enquiries or to have enquiries made by the departments concerned or sometimes even by individuals, even though such enquiries are not expressly mentioned in the Convention [1].

The Diplomatic Conference did not give any details concerning enquirers. As a rule, enquiries reaching national Bureaux will be from either an official body, mainly the Central Agency, or an unofficial humanitarian or other body. The very lack of precision shows, however, a wish to leave ordinary individuals free to make enquiries from the national Bureaux for information concerning persons in whom they are interested, and this will conceivably apply as a rule to persons residing in occupied territory and making enquiries of the Bureaux set up in that territory.

The Bureaux are obliged to reply to all requests for enquiry. However, under the provisions of the following paragraph, they must not forward information concerning a protected person if its transmission might be detrimental to the person concerned or to his or her relatives. Only the Central Agency, warned of this reservation, can receive the information. Anything which cannot be officially communicated must not, for even stronger reasons, be communicated to individual enquirers. The Bureaux will therefore only transmit, on enquiry, information which the protected person authorizes them to communicate. Requests made by the Central Agency are not subject to this rule, the Agency being authorized to receive all information, even confidential, for its own files and subject to the same need for discretion with regard to the public.

PARAGRAPH 2. — NON-TRANSMISSION OF INFORMATION

This paragraph contains a provision not included in the Third Convention. It seeks to protect civilians in enemy hands and particularly their families in their country of origin, against the authorities of that country if they should have any reason for particular animosity towards them. This exceptional provision is based on the confused situations which occurred during the First World War. Civilians who have fled from persecution generally have an interest in remaining unknown to the authorities of their former country. They must therefore judge for themselves the expediency of notification to the authorities, even in the case of the forwarding of information to members of their family. Credit for this humanitarian solution must

[1] They are mentioned in the corresponding provisions of the Third Convention.

be given to the Diplomatic Conference [1], and mention should be made of the courage and objectivity of the government delegates who were the first to recognize the need to protect civilians against the arbitrary conduct of governments.

It is therefore for the protected persons themselves, either on their own initiative or in answer to enquiry, to state that they would consider it dangerous for themselves or their families to communicate to the adverse Party information concerning them. This desire must be strictly respected, otherwise these persons, made mistrustful, would keep silent or give false information. However, they must be warned that the information concerning them, although kept secret by the national Bureau, will nevertheless be communicated to the Central Information Agency, which will treat it in all due confidence.

Here it is worth emphasizing the fundamental difference which exists in this respect between the Protecting Powers and the Central Information Agency as it has operated so far in Geneva on behalf of prisoners and internees.

Protecting Powers, as governmental institutions, exercise their activities under a sort of contract between the States concerned. This contractual obligation provides in particular that they will undertake the forwarding of the most varied kinds of document from one State to another. They do not express an opinion in respect of these documents and do not consider whether it is expedient to forward them or not ; they simply forward them. The Central Agency, on the other hand, as a purely humanitarian body concerned exclusively with the fate of war victims, receives no document which it does not first study with a view to finding some new way of achieving its aims. Absolutely independent of States, it is free, if it considers it expedient, not to inform States of facts known to it, if such information might place in danger the very persons it has the duty of assisting. This policy was always strictly observed during recent wars and this has procured for the Agency the absolute confidence of war victims and of the governments themselves. This confidence is shown in this provision and particularly in paragraph 2 of Article 140, to which it expressly refers. All information concerning protected persons, even that which should remain confidential and which in any case must not come to the knowledge of third persons or outside authorities, will nevertheless be communicated to the Agency with an indication of its confidential nature. It should be noted, furthermore, that even when no such indication is given, the

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 845.

Agency may refrain from forwarding the information if it has special reasons for doing so or if it has received special information making such a course advisable.

While refraining in certain cases from forwarding to the authorities or to official departments the information it has received, the Agency will, on the other hand—and this is the reason why information must always be communicated to it—bring it in some way to the knowledge of the persons really concerned, i.e. families without news of protected persons, if it considers that it can so act without prejudice to anyone.

PARAGRAPH 3. — AUTHENTICATION

It is of the utmost importance that the information forwarded should not only be detailed and complete but that it should be above all of undoubted authenticity. Those concerned—families, the authorities and the Agency—must have full confidence in the authenticity of a message announcing death, illness or repatriation. Of course, errors will always be possible but an attempt has been made to reduce them, if possible, by making it obligatory for each national Bureau to authenticate, by means of a seal or the signature of the person responsible, all written communications issued by it. With regard to unwritten communications, it may be considered that the nature of the channels through which they are generally sent constitutes a sufficient guarantee of their authenticity. It would, however, always be possible, for radio or telephonic communications, to establish a code if exceptional circumstances justified such a measure.

ARTICLE 138. — PARTICULARS REQUIRED

The information received by the national Bureau and transmitted by it shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

This Article completes the list of particulars of protected persons which the national Bureaux are to receive and transmit. The first part of the list, dealing with changes which may occur in the situation of these persons, was given in the last paragraph of Article 136. Article 138 mentions the identity particulars of the protected persons, their place of residence, their relatives and their state of health.

Inspired, like the preceding Articles, directly by similar provisions in respect of prisoners of war, the stipulations of this Article correspond to paragraphs 4 and 6 of Article 122 of the Third Convention of 1949,

PARAGRAPH 1. — IDENTITY PARTICULARS

1. *First sentence — General definition*

The first sentence of the paragraph summarizes the purposes for which the national Bureaux are to be established and defines the information they will receive and transmit. The national Bureaux will receive and transmit information enabling the exact identification of the protected person and the rapid notification of his family. Although this information is communicated to the Power of which the protected person is a national or in whose territory he resided, those Powers are not the real addressees. They can, of course, make notes in passing for their own information but they must transmit these particulars to those for whom they were collected, — i.e., the family of the protected person.

The information transmitted must be of such a character as to make it possible " to identify the protected person exactly ". This detail is important. Indeed, during the recent conflicts too many families were upset by news not intended for them and which had been badly directed because of insufficient address, similarities of names, etc. The Convention therefore lists in detail and with exactitude the identity particulars which must be collected. This list is contained in the next sentence.

2. *Second sentence — List of particulars*

The list may be divided into two parts : on the one hand, it deals with information which can only be obtained by questioning the protected person held in custody, subjected to assigned residence or interned, and, on the other hand, with information which the departments concerned will possess as a matter of course.

The first part consists of identity particulars proper and particulars enabling the finding of the family which is to be informed. These particulars are : surname and first names, complete place and date

of birth, nationality, last residence, distinguishing characteristics, father's first name and the maiden name of the mother, and the name and address of the person to be informed.

" Last residence " refers to the last address known to the persons to be informed.

In some cases, there will be added to this list a mention of the interrogated person's objection to the transmission of information concerning him to the Power of origin or the Power in whose territory he resided.

Moreover, the questioning of protected persons in order to obtain the information requested should, of course, be done as early as possible. It must take place immediately a protected person is put into one or other of the three situations which make the communication of information to the Bureau obligatory : being held in custody for more than two weeks, or subjection to assigned residence or internment. In the case of interned persons, the interrogation will take place preferably at the time when the internment card mentioned in Article 106 is handed to him for completion. This card, a specimen of which is annexed to the Convention (Annex III)[1], quotes the identity particulars which should be found in it ; these are identical with those requested here except for " profession ", which does not form part of this list. The two operations, interrogation and issue of the card, can therefore be carried out in conjunction.

While the Detaining Power is under an obligation to try to obtain information by interrogating the protected person, that person is not bound to supply such information. Doubtless, if the person refuses, it will most often be out of fear of seeing his family subjected to some form of reprisals. It will then be enough to calm his fears if the protective measures provided for in the Convention are explained to him and he is assured of the absolute discretion of the national Bureau and the Central Agency. These fears, however, can be quite justified sometimes, particularly in the case of a person whose family resides in the territory of the Detaining Power or in territory occupied by that Power, although the Convention forbids any measures of reprisals against protected persons (members of families in this case being protected). The departments concerned will then have no other solution than to try to obtain the information from another source or to abandon the attempt.

The second part consists of information which can be obtained without interrogating the protected person : the date and nature of the measures taken against the person concerned, the place where

[1] See below p. 648.

they were taken and the address to which correspondence can be sent. This list confirms and completes the information given in the last paragraph of Article 136, which lists the details which the departments concerned must supply to the national Bureau concerning changes in the condition of protected persons.

PARAGRAPH 2. — INFORMATION REGARDING STATE OF HEALTH

The information listed in this paragraph will also automatically be known by the departments concerned without any need for the interrogation of the protected person in question. Like the other particulars asked for, they confirm and complete the indications given in the last paragraph of Article 136 dealing with changes in the situation of protected persons.

Paragraph 7 of Article 77 of the 1929 Convention relative to the Treatment of Prisoners of War provided that all additional particulars concerning prisoners of war should be transmitted to the interested Powers in weekly lists. This was not done, in general, during the last war and the Central Agency got into the habit of approaching the national Bureau itself for any information it needed, mainly when a prisoner or an internee was notified as being ill.

At the Conference of Government Experts, therefore, the importance of the regular transmission of information on the state of health of the sick or wounded was emphasized. The Diplomatic Conference embodied this idea in the Prisoners of War and Civilians Conventions.

Information on the state of health of internees "seriously ill" or "seriously wounded" will therefore be transmitted obligatorily. While it is not very easy to determine exactly what is meant by these two words, it will be admitted that they apply at least to all wounded and sick so long as their life is in danger.

In practice, information will be transmitted concerning each civilian internee as soon as he enters hospital. Indeed, any admittance to hospital of a protected person must be communicated, under the terms of the last paragraph of Article 136. It is inconceivable that only those persons whose state of health is serious should be mentioned in further communications and that the progress of those who, although in hospital, are not seriously wounded or sick shall be passed over in silence. If this happened, the families or, failing them, the Central Agency, would be quick to ask for news.

It should be noted, in a general way, that it would be useful if the civilian population were to receive instruction in the provisions of the Convention here discussed. In particular, civilians ought to know that the provisions dealing with the identification of persons

against whom special measures are taken by an enemy Power, are not intended to assist those measures, but simply to avoid persons disappearing without trace and all links between them and their families being cut. It is only in so far as these persons themselves collaborate spontaneously with the bodies established by the Convention—the national Bureaux and the Central Agency—that this purpose can be fully attained.

ARTICLE 139. — FORWARDING OF PERSONAL VALUABLES

Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died ; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

This Article, but for a few unimportant modifications, is a copy of paragraph 9 of Article 122 in the Third Convention. The Diplomatic Conference, on the advice of the International Committee of the Red Cross, considered that among the tasks assumed by national Bureaux on behalf of prisoners of war and whose extension to civilians seemed necessary, mention should be made of the forwarding of personal valuables, as was the case during the last world war.

1. *First sentence — Collection and forwarding*

A. *Collection*

The responsibility for collecting personal belongings devolves on the national Information Bureau. In fact, it will be the various bodies concerned : the administrative services of camps or other places of detention, municipal or village authorities in places of assigned residence, etc. who will have to look for, collect and forward these objects to the Bureau which, will, however, remain fully responsible.

B. *Personal valuables*

The term " personal valuables " should be understood to mean all the articles which belonged to the person who is no longer there—whether he has been repatriated or has died—which are of any commercial worth or sentimental value. It must always be remembered that an article of absolutely no intrinsic worth may often have very great sentimental value for the next of kin of the deceased person. In practice, therefore, almost all the articles found on the spot will be collected and forwarded.

The corresponding provision of the Third Convention (Article 122, paragraph 9) adds to the expression " personal valuables " the words " including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin ". This expression has not been retained in the Fourth Convention mainly because it was considered that the term " valuables " covered sums of money and that since the value of papers could be judged only by the next of kin, they should be forwarded to those persons, particularly if they seemed to be of a legal nature. It will be for the Detaining Power to decide what foreign currency may be sent if any.

Among the documents which should be carefully kept are wills, which are particularly important.

C. *Owners of the valuables*

Protected persons covered by this measure are those who have been repatriated or released or have escaped or have died when, in accordance with paragraph 9 of Article 136 to which reference is made, they had been put into custody, subjected to forced residence or interned. As far as the persons in custody are concerned, the minimum time limit of two weeks envisaged in that paragraph does not apply here. Obviously, property abandoned by persons who escaped or died during imprisonment of short duration must also be collected.

The list of occurrences which may lead to the collection and forwarding of the personal valuables of a protected person (repatriation, release, escape or death) is preceded by the words " in particular " which do not occur in paragraph 9 of Article 122 of the Third Convention. The list given here, then, is not restrictive. Though it is difficult to see, to begin with, what other events could occur in the lives of protected persons as defined in Article 136 which would justify similar measures, it may nevertheless be useful to make provision for special cases, which are left to the discretion of the national Bureaux.

D. *Forwarding*

Personal valuables will, as a rule, be forwarded direct to the persons concerned by the national Bureau. In many cases, however, it will not be possible for valuables to be forwarded in this way, either because the conflict is still in progress and postal relations have not been re-established, or because the address of the person concerned is unknown to the Bureau. The Central Agency will therefore arrange for forwarding. The reasons which led to the choosing of the Agency instead of the Protecting Power are that the Agency was more specifically designed for this sort of humanitarian task, which it carried out successfully during the Second World War, thus amassing, in this rather special sphere, a considerable amount of experience, since it had dealt with no less than 90,500 cases of the forwarding of property to members of the armed forces and civilians by the end of June 1947[1].

2. *Second and third sentences — The forwarding of articles and other effects*

A. *The forwarding of articles*

The second sentence reproduces without change the corresponding sentence in paragraph 9 of Article 122 of the Third Convention.

The provision in that Convention was a new one. It met a real need. Too often, during the last war, the Central Agency received personal effects in inadequate parcels, open, torn, and with no indication of the owner of the articles. The necessary detailed provisions have therefore been added not only to Article 122 of the Third Convention, but here also. Henceforth, therefore, parcels containing personal effects, apart from being well made up, will be sealed with the seal of the national Bureau and will contain an inventory of the contents and full identity particulars of the persons to whom the effects belonged.

Furthermore, Committee III of the Diplomatic Conference, anxious to ensure maximum safety for obviously very valuable parcels, added to Article 139 a third and last sentence which does not occur in paragraph 9 of Article 122 of the Third Convention, to the effect that detailed records must be maintained of the receipt and despatch of all valuables. This obligation is binding not only on the national Bureau itself, but also on the Central Agency in regard to those consignments which the Bureau sends through its intermediary.

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. II, pp. 76-81.

B. *Other effects*

It should be pointed out here that the corresponding provision of the Third Convention applies to a case not envisaged by the Article we are now discussing. Indeed, the last sentence of paragraph 9 of Article 122 says: " Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned ". This provision underlines the fact that the obligations of the Bureau relate essentially to articles and documents of small volume and which can therefore be sent in parcels benefiting from the exemption from postal charges granted to national Bureaux [1]. Other personal effects, such as clothes, books, musical instruments, works of art, etc., may in some cases involve quite high transport expenses. It was therefore provided that they would be sent " under arrangements agreed upon between the Parties to the conflict concerned ", arrangements which will lay down methods of transport and responsibility for payment of costs.

This provision of the Third Convention shows the path which must be followed by the Powers concerned if similar problems should arise with regard to personal effects belonging to civilians.

ARTICLE 140. — CENTRAL AGENCY

A Central Information Agency for protected persons, in particular for internees, 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, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

[1] See below, Article 141.

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 and of the relief Societies described in Article 142.

General Remarks and historical Survey

It is impossible in this study to examine in detail the nature and mode of operation of the Central Information Agency : the subject is too vast[1]. The Agency dates back to 1870. During the Franco-German war, the International Committee of the Red Cross first took the initiative of opening in Basle an official Agency concerned with wounded and sick soldiers and soon after added an office for collecting and forwarding all possible information concerning prisoners of war. The same thing was done in 1877 at Trieste and in 1912 at Belgrade. It was in 1914, however, that the establishment of an international Prisoners of War Agency faced the International Committee with all the complexities of the vast problem of collecting and forwarding information concerning wounded, sick or deceased prisoners and civilians. A year after its establishment, the Agency was already employing 1200 persons and through its unexpectedly rapid growth had taken on considerable importance. The experience thus gained enabled the International Committee to suggest to the Diplomatic Conference of 1929 that it should give legal sanction to the existence and operation of the Agency in the Convention relative to the Treatment of Prisoners of War. Article 79 of that Convention provided the legal basis which in 1939 enabled the International Committee to open in Geneva the Central Prisoners of War Agency, the immense scale of whose activities is still universally remembered ; a few figures will illustrate its work : in premises with a total working area of 11,000 m² worked 2585 people, of whom 1676 gave their services free ; whereas at the end of the First World War the card-indexes of the International Agency contained 7 million cards, those of the Central Agency contained 36 million at the end of June 1947, between 6 and 7 million of them concerning civilians.

The 1949 Diplomatic Conference was therefore careful not to interfere with the structure and legal basis of the Agency, which it

[1] For further information, see *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. II : The Central Agency for Prisoners of War, Geneva, 1948.

confirmed in the Third Convention and, in identical terms, in the Fourth, merely adding in both cases a request to the High Contracting Parties to give the Central Agency any financial aid it might require.

PARAGRAPH 1. — ESTABLISHMENT. ORGANIZATION

Some delegates to the 1949 Diplomatic Conference, emphasizing that the establishment of the Agency was imperative under the terms of several Articles in the Third and Fourth Conventions, wondered whether the 1929 text should not be amended in order to make it obligatory, if not automatic, for the International Committee of the Red Cross to organize the Agency. They were, however, the first to recognize the correctness of the International Committee's viewpoint, when it pointed out that the 1929 wording was much to be preferred and ought to be left unchanged. Its very flexibility, indeed, made it possible for the International Committee to meet any sort of situation, by not setting up an Agency, for instance, when the brief duration of a conflict did not justify it, or transferring the Agency or some of its departments to a country more easily accessible to the belligerents, as it did during the Balkans war in 1912[1].

Furthermore, provision must be made for cases when the International Committee might not wish to establish the Agency itself, for example when it considered that other bodies or a national Red Cross Society would be better fitted in the circumstances to carry out the task. It may, furthermore, be forced by events to cease activities ; it is then important that the possibility should remain of others taking over all or part of those activities, and especially the establishment of the Agency.

The International Committee is not, therefore, obliged itself to organize the Central Agency. It is merely to " propose " the establishment of the Agency to the Powers concerned " if it deems necessary ". Do these words, which date from the 1929 Convention relative to the Treatment of Prisoners of War, mean that the Powers could reject the suggestion ? They do, but the Powers would then have to agree to the establishment somehow of a Central Information Agency in a neutral country, for its establishment is obligatory.

Another point is also left to the discretion of the International Committee of the Red Cross : whether to separate the Agency concerned with civilians from that to be set up under Article 123 of the

[1] The XVIIth International Red Cross Conference adopted a Resolution (No. XVII) inviting the Governments to grant the International Committee of the Red Cross every facility in cases where transfers of this kind were necessary.

Third Convention for the benefit of the wounded and sick and prisoners of war. The circumstances ruling at the time may indeed lead it to prefer two separate Agencies, in different countries for example. Such circumstances will, of course, be exceptional, since the advantages of combining the two Agencies into a single body are numerous and obvious : they would use the same working methods, the same type of skilled staff, the same machines, etc.

Only one obligation arises under this paragraph, i.e. that the Central Information Agency shall be created in a neutral country. The Agency, indeed, must be neutral if it is to work. As an intermediary between two or more belligerents, it cannot accomplish its humanitarian task, which requires absolute confidence on their part, except by observing complete impartiality in its methods of work and in the attitude of its staff. Furthermore, the Agency must be in almost continuous contact with the belligerent Parties and such contact can only be maintained if it has its headquarters in a neutral country.

A conflict might conceivably break out, however, in which there were no more neutral countries or at least which left neutral only countries unfitted for or opposed to the establishment of the Agency on their territory. It would then be for the belligerents themselves to come to a direct agreement to entrust the establishment of an Agency to an institution of their own choice, such as a Red Cross Society in one of the belligerent countries, or to agree on a certain amount of postal traffic for the exchange, which is obligatory, of information concerning their nationals.

PARAGRAPH 2. — TASKS OF THE AGENCY

1. *Collection and nature of information*

The first task of the Agency is to collect all possible information concerning the protected persons. It will obtain that information first of all from the national Information Bureaux as envisaged in Article 137 ; this represents the " official channels ". It may, however, resort to other methods of collection, i.e. " private channels ". Indeed, nothing must prevent the Agency from trying to obtain the greatest possible amount of information concerning persons sought by their family and from approaching all those who might be of assistance, whether public authorities, institutions, or private persons.

This concentration of information, and the fact that the Agency brings together items of information from all the belligerent countries, gives its work considerable value, particularly when war-torn countries

are disorganized and their archives scattered. It is also of tremendous importance when protected persons are of uncertain nationality or when particulars concerning them must be communicated to a large number of countries.

As a rule, this information will deal with the various steps taken with regard to protected persons kept in custody for more than two weeks, subjected to assigned residence or interned, all these being measures which national Bureaux are obliged to communicate to the Agency by virtue of Article 136. This information, however, may not be sufficient or the Agency may wish for information concerning other categories of protected persons. It will seek such information by whatever methods it considers best, if the national Bureau cannot supply it.

Another task of no less importance consists in transmitting to the various national Bureaux, safe-keeping and filing information, documents and articles which the Powers themselves are obliged to send to the Agency under various Articles of the Convention. Those Articles are as follows:

Article 24, paragraph 2, which provides that the Central Agency shall assist in the exchange of family correspondence if correspondence by ordinary post becomes difficult or impossible;

Article 91, paragraph 4, which provides that duplicates of medical certificates issued at their request to civilian internees shall be forwarded to the Central Agency;

Article 113, which provides for the transmission through the Protecting Power or the Central Agency, of wills, powers of attorney, letters of authority or any other documents intended for internees or despatched by them;

Article 129, which provides that duly certified copies of official records of death shall be transmitted to the Central Agency;

Article 139, which provides for the collection and forwarding of personal valuables belonging to protected persons who have been repatriated or have died.

One activity of the Agency, now dealt with also in Article 106 of the Convention, is concerned with the receipt and filing of internment cards and the transmission of the information contained in them. This task can become a very extensive one. It will be similar to that undertaken by the Agency with regard to the prisoner-of-war capture cards mentioned in Article 70 of the Third Convention of 1949.

The very title " Central Information Agency " indicates the size of the task of replying to enquiries sent from all sides in times of conflict and the investigations made necessary by these enquiries. In that respect, it should be noted that its work would be greatly

eased if all information and requests for enquiry or search were sent to it on cards of a uniform type and of the same dimensions as the internment cards (10 × 15 cm.)[1], which the national Red Cross Societies, for example, could draw up and make available to enquirers.

Apart from its tasks under the Convention, the Central Agency can take over a number of other activities in accordance with circumstances and requirements. Noteworthy examples of these are taken from the numerous activities of the Agency during the Second World War :

The Agency received and forwarded a large number of photographs of civilians, whether interned or not, and of funerals and graves. Encouraged by the wide interest aroused by these photographs and their sentimental value, it did everything possible to increase their number. It set up a special department dealing particularly with civilians not protected by Conventions at that time : the stateless, refugees, deported persons and those subjected to persecution. The Agency undertook special enquiries and in some cases achieved encouraging success. It dealt actively with the emigration of refugees or stateless persons to various countries of asylum. It established a department whose task it was to find the various members of a family separated by the events of war and to reunite them, etc.[2]

2. *Transmission of information*

Items of information concerning civilians will, as a rule, be treated by the Agency in the same way as those dealing with prisoners of war. They will be transmitted to the " country of origin " of the civilians. When, however, the civilians and their families do not reside any longer in that country, the information will then be transmitted to the " country of residence ".

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[1] It should be noted, in this connection, that the prisoner-of-war capture card as suggested in the specimen annexed to the Third Convention (Annex IV) measures 10.5 × 15 cm. This slight difference in width is doubtless the result of a mistake, for there is no reason to make these two cards of different sizes, far from it. It would therefore be advisable for the Powers, when drawing up capture and internment cards, to keep to one of these two sizes for both sorts of cards. A width of 10 cm. would seem to be preferable ; on the other hand, it is important that they should not be more than 15 cm. long, otherwise they would not fit in the present card-indexes of the Agency. It should further be noted that if these sizes should appear inadequate, it would be always possible to draw up a folding card of double size (20 × 15 cm.) also accepted by postal authorities.

[2] See, for more details, the *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. II : The Central Agency for Prisoners of War, Geneva, 1948.

The draft Article submitted to the Diplomatic Conference spoke of the country " of domicile ". The Conference preferred the word " residence " as being more general and less likely to raise legal difficulties, since the word " domicile " has a precise meaning in law which varies from country to country.

The authorities or bodies in those countries which are to receive the information are deliberately not named. Every State is therefore free to designate as it wishes the recipient of information communicated by the Agency. Sometimes, the recipient will be the national Information Bureau, which is the natural correspondent for the Agency. However, the Agency is not even obliged to communicate its information to an official body only ; if it considers it expedient, it may also transmit information direct to the persons concerned. It may even transmit it only to those persons or may refrain from forwarding it at all if it appears dangerous. Indeed, paragraph 2 of Article 137 stipulates that if the transmission of information might be detrimental to the person concerned or to his or her relatives, the national Bureau shall be obliged to warn the Agency, which will take the " necessary precautions ". These precautions are indicated here : the Agency will not transmit information to the country of origin or residence " in cases where such transmissions might be detrimental to the persons whom the said information concerns or to their relatives ". What it will do with the information in such cases will depend on circumstances ; as a rule it will get in touch with the person concerned and discuss the best way to act.

3. *Facilities for transmission*

One of the essential factors determining the effectiveness of the Central Agency is the rapidity with which it can transmit information, particularly to the national Information Bureaux. In this respect, the paragraph is explicit : the Agency must transmit " as rapidly as possible " to the Powers concerned the information it receives.

The slowness of postal communications or the great distances involved have often obliged the Agency to use the telegraph, but this was financially very burdensome and the expenditure which the Agency had to claim from the States concerned was often only reimbursed with great reluctance. Henceforth, the use of telegrams will be made easier by Article 141, which provides that the Agency must, so far as possible, be given the benefit of partial or total exemption from telegraphic charges.

However, the clause which seems likely to have the greatest importance for the Central Agency is the final provision of this para-

graph : " It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions ".

Since exemptions from charges and financial help for the Agency are expressly provided for in Article 141, it may be deduced that the facilities mentioned here are more material than financial. The statement implies that the Central Agency will be able to request a certain priority for its communications, both in postal and telegraphic traffic, a priority which will, of course, have to make due allowance for the requirements of the war effort. The Convention mentions only the Parties to the conflict, but the non-belligerents, who are not subject to these requirements, should also be obliged to an even greater extent to grant priorities of this kind.

This stipulation is of still greater value in respect of a means of communication which the Agency was led to develop at the end of the war for the most varied purposes, i.e. broadcasting. This method is likely to play a useful part in the reception and transmission of information, in so far as it takes into account on the one hand the need not to distort the names of the persons concerned and, on the other hand, the legitimate desire of the belligerents that the information given may not be exploited for military or propaganda purposes.

Therefore, at the request of the International Committee of the Red Cross, supported by the national Red Cross Societies, the International High Frequency Broadcasting Conference held in Mexico in 1947, decided to allocate to the International Committee through the Swiss Confederation, a certain number of broadcasting times and frequencies which might, in case of need, be allocated wholly or in part to the Agency. This is a first application of the provision examined above.

The provision goes further : it implies an obligation on the States parties to the Convention to respect the broadcasts of the Central Agency for humanitarian purposes—i.e., not only to refrain from jamming them, but to put their broadcasting services at the disposal of representatives or departments of the Agency abroad, in order to enable them to establish rapid contact with Geneva or any other place where the Agency might be situated.

Another " facility " which might be granted to facilitate the work of the Agency arises from Article 111 of the Convention, which deals with the means of transport which might be provided by the Protecting Powers, the International Committee of the Red Cross or any other authorized body, in order to ensure the forwarding of the consignments mentioned in Articles 106, 107, 108 and 113, if the Powers concerned were prevented from doing so. These means of transport could, in case of need, also be used by the Central Agency for forward-

ing the correspondence, lists and reports which it exchanges with the national Bureaux.

One comment is necessary with regard to the last sentence of the paragraph. The corresponding provision of the Third Convention (last sentence, paragraph 2, Article 123), is identical except for the word " reasonable " ; " facilities " is used without the adjective which was introduced by Committee III of the Diplomatic Conference for the sake of accuracy. It must be admitted that it does not add very much to the sense, and may even appear to restrict the scope of the provision to some extent. The facilities which the Parties to the conflict will be able to grant to the Agency will certainly always be " possible " and in no case " unreasonable ".

PARAGRAPH 3. — FINANCIAL SUPPORT

During the preparatory work for the revision of the Convention, the attention of Governments was drawn to the question of the expenditure incurred in the operation of the Central Agency, a question which the 1929 Convention did not regulate.

The International Committee of the Red Cross, when called upon to organize the Agency, has always drawn on the funds at its disposal for the means necessary for the Agency to operate. It may happen, however, and did during the last world war, that the Agency's activities suddenly expand to an unexpected extent, so that the funds which the Committee has available, which are always restricted and are needed for many other tasks, may prove inadequate. Now the Agency must be able to operate uninterruptedly. It was therefore natural that the Powers concerned should seek to ensure that it receives the necessary funds.

For that purpose, the XVIIth International Red Cross Conference made provision in the Third Convention for an apportionment of expenses among the belligerents *pro rata* to the services the Agency rendered to their nationals. However, the insistence on proportional payment, apart from the difficulties of accountancy which it might entail, failed to take into account two facts : on the one hand any step taken by the Agency in behalf of a prisoner or an internee is not only to the advantage of the State of which he is a national, but also indirectly, and to a certain degree, to the advantage of the Detaining Power ; on the other hand, prisoners of war or civilian internees may no longer have a Government to meet these expenses, and yet they need the services of the Agency at least as much as if not more than the others.

It was with these facts in mind that the Diplomatic Conference finally abandoned the principle of proportionality and adopted without change paragraph 3 of Article 123 of the Third Convention. The wording of this paragraph, despite the fact that it is less imperative than that of the Stockholm Draft, was considered suitable for emphasizing the fact that the operation of the Agency, in view of its importance, must in no case be hindered by lack of financial means and for calling the attention not only of the belligerent Powers, but of all States parties to the Convention to this matter, since they all implicitly recognize the usefulness and universality of the Central Information Agency.

PARAGRAPH 4. — OTHER HUMANITARIAN ACTIVITIES

In the 1929 Convention relative to the Treatment of Prisoners of War, the organization of the Central Agency was the only specific activity of the International Committee of the Red Cross to receive express mention (except the right to carry out its humanitarian work, mentioned in general terms in Article 88). It was necessary, therefore, to state clearly, as was done in the last paragraph of the Article on the Agency, that the mention of these activities was not intended to exclude action being taken by the International Committee in behalf of prisoners in other domains.

The 1949 Conventions provide expressly for the other specific activities of the International Committee, apart from those falling within the competence of the Agency (relief, camp visits, etc.). However, the last paragraph of the 1929 text was repeated and for this there can be no explanation unless an entirely general sense is henceforth given to the clause. It is, it seems, in the nature of a reservation which might be added to any of the clauses of the Conventions which entrust a task to the Committee and which means that none of them must restrict the manifold activities which the Committee may be led to undertake, partly with the assistance of the national Red Cross Societies, to meet the requirements of persons protected by the 1949 Conventions.

Paragraph 3 of the 1929 Article is reproduced, however, with a small addition—i.e. " and of the relief Societies described in Article 125 " (Third Convention) or " . . . in Article 142 " (Fourth Convention).

At first sight, the connection between these phrases and what goes before is not very clear. In fact, the situation which they are intended to cover is very different from that envisaged at the beginning of the paragraph and there would have been some advantage in

embodying the provision, more explicitly, in another Article, for example the one relating to relief societies. Perhaps, however, the addition is to be explained simply by a wish not to attach too much importance to what is merely a contingency.

It might happen, indeed, and has done in the past, that an organization for assistance to prisoners of war and civilian internees approved by the Powers concerned, may successfully develop activities connected with the transmission and collection of information concerning prisoners and internees, although such activities are not explicitly mentioned among the tasks listed in the Article on relief societies as being among their functions. In such a case, it would be regrettable if activities of that kind, which might be useful to a great number of war victims, were to be rejected by a belligerent on the pretext that the Central Agency has a monopoly in the matter. In humanitarian activities, such a pretext is inadmissible and the addition to the paragraph is intended to make that point clear.

It should be noted, however, that if a belligerent Power approved the activities of a relief society in this sphere and agreed to supply it with information concerning the protected persons, whether members of the armed forces or civilians, held in detention, it would nevertheless still be obliged to communicate periodically to the Central Agency, in accordance with the provisions of the Conventions, information concerning those persons. A sharp distinction must be drawn between the basic, universal and obligatory character of the Agency's activities and the probably more restricted and optional character of activities which might be developed by a relief society for the same purposes. Nothing must be done to whittle down the requirements of the Conventions : centralization in a single department, neutral from every point of view, of all information concerning protected persons, whether members of the armed forces or civilians, as the only method of enabling the greatest advantage to be drawn from such information for the persons themselves, a fact proved by the experience of two world wars and well understood by the Diplomatic Conferences of 1929 and 1949.

ARTICLE 141. — EXEMPTION FROM CHARGES

The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges, or, at least, greatly reduced rates.

As early as 1899, the need was recognized to grant prisoners of war and national Information Bureaux free postage for incoming and outgoing correspondence. Article 16 of the Hague Regulations of 1899 and 1907 embodied that principle, which was stated again in Article 80 of the 1929 Convention relative to the Treatment of Prisoners of War. The postal Conventions concluded later, particularly that of 1906, confirmed the principle and made it fully effective.

At the beginning of the Second World War, the International Committee of the Red Cross asked the belligerents to extend exemption from postal charges to the Central Prisoners of War Agency in Geneva, and the request was granted without difficulty. Treatment of the Agency in the same way as a national Information Bureau in regard to postal charges, was considered most appropriate by all the conferences of experts held to discuss the revision of the Conventions, and the Diplomatic Conference of 1949 accepted it without hesitation, and all the more willingly in that it had recognized in the preceding Article (Article 140, paragraphs 2 and 3) that the Agency should receive from the Parties to the conflict all reasonable facilities with regard to the transmission of information and, if possible, some financial aid. Now the exemption from postal and other charges granted to the Agency and the Bureaux does more than merely emphasize the strictly humanitarian character of their activities; it reduces their expenses to a very considerable extent, a particularly important factor for the Agency, since its financing depends mainly on the goodwill of the Parties to the conflict.

The exemptions granted are of three kinds : exemption from postal charges, exemption from transport charges and customs dues and exemption from telegraphic charges.

1. *Exemption from postal charges*

In granting free postage for " all mail ", the provision merely lays down a principle ; it is for the States to take steps through their post office authorities to confirm that principle and embody it in law by means of the Conventions which the post offices conclude among themselves under the ægis of the Universal Postal Union. Indeed, for the post offices, exemption arises not from the Geneva Conventions, but from the postal Conventions. It is in those Conventions, therefore, that the nature and scope of the exemption granted to Information Bureaux and the Central Agency must be sought.

It was in Brussels in 1952 that the new Universal Postal Convention was drawn up, which gave effect to the provisions of the

1949 Geneva Conventions. Bearing the date July 11, 1952, it entered into force on July 1, 1953. Article 37 deals with the matters under discussion here ; the following is the text :

Universal Postal Convention

ARTICLE 37

Free Postage for Items relating to Prisoners of War and Civilian Internees

1. Correspondence, insured letters and boxes, postal parcels and postal money orders addressed to or sent by prisoners of war, either directly or through the Information Bureaux and the Central Prisoner of War Information Agency prescribed in Articles 122 and 123 respectively of the Geneva Convention of 12th August, 1949, relative to the treatment of prisoners of war, are exempted from all postal charges. Belligerents apprehended and interned in a neutral country are classed as prisoners of war properly so called so far as the application of the foregoing provisions is concerned.
2. The provisions of § 1 apply also to items of correspondence, insured letters and boxes, postal parcels and postal money orders originating in other countries and addressed to or sent by civilian internees as defined by the Geneva Convention of the 12th of August, 1949, relative to the protection of civilian persons in time of war, either directly or through the Information Bureaux and the Central Information Agency prescribed in Articles 136 and 140 respectively of that Convention.
3. The National Information Bureaux and the Central Information Agencies mentioned above also enjoy exemption from postage in respect of correspondence, insured letters and boxes, postal parcels and postal money orders concerning the persons referred to in §§ 1 to 2, which they send or receive, either directly or as intermediaries, under the conditions laid down in those paragraphs.
4. Items benefiting by the freedom from postal charges provided under §§ 1 to 3 and the forms relating to them shall bear the indication " Service des prisonniers de guerre " (Prisoners of War Service) or " Service des internés " (Civilian Internees Service). These indications may be followed by a translation in another language.
5. Parcels are admitted free of postage up to a weight of 5 kgs. The weight limit is increased to 10 kgs. in the case of parcels whose contents cannot be split up and of parcels addressed to a camp or the prisoners' representatives there (" homme de confiance ") for distribution to the prisoners.

This Article calls for some comments.

If paragraph 3 is taken literally, only items of correspondence concerning interned civilians [1] (as well as prisoners of war) which the Bureaux or the Agency despatch or receive, will have the advantage of exemption from postage. In principle, therefore, correspondence concerning other protected persons, particularly those subjected to assigned residence, has no right to this exemption.

However, it seems that this provision, which considerably restricts the general scope of Article 141 of the Fourth Convention, may nevertheless be interpreted in a more liberal sense. Indeed, Article 37 of the Postal Convention, in paragraphs 1 and 2, concentrates on the exemption which should be given to the persons protected by the Conventions.

Now, under Article 110 of the Fourth Convention, it is only interned civilians who, subject to certain reservations [2], have the right to free postage and not the other categories of protected persons. When dealing in paragraph 3 with the exemption granted to the national Bureaux and the Agency, those who drafted the Postal Convention, doubtless anxious to be brief, merely referred to the preceding paragraphs to indicate in respect of what persons the correspondence of the Bureaux and the Agency could benefit from exemption from postal charges, and perhaps they did not notice that in so doing they restricted the correspondence covered to that of interned civilians alone, mentioned in paragraph 2, whereas the Bureaux and the Agency should, under the Geneva Conventions, enjoy such exemption for all mail. It seems a justified inference that the restriction thus made by the authors of the Brussels Convention was not intentional. The preparatory documents and the numerous contacts which they made beforehand with the various parties concerned show without any doubt that their main anxiety in this matter was to give the fullest possible effect to the provisions of the Geneva Conventions and that they in no way intended—and in any case were not competent—to restrict the scope of a general principle approved by the Diplomatic Conference of 1949. The national Information Bureaux will, however, be well advised, on their establishment, to have this interpretation of the Universal Postal Convention confirmed by the postal authorities concerned. For its part, the International Committee of the Red Cross will do its best to have the principle confirmed and to try to ensure that

[1] Information given to the International Committee of the Red Cross shows that the words " interned civilians " should be understood, in the Universal Postal Convention, as including both internees proper and persons arrested and placed in civilian camps or prisons.

[2] See the commentary on Article 110.

the next revision of the Postal Convention abolishes this anomaly and thus brings Article 37 into harmony with the humanitarian law of the Conventions.

In connection with this Article, it must be stated also that the list given in paragraph 3 of cases where free postage is granted is exhaustive. Free postage applies only to items of correspondence, i.e. cards, letters or similar objects, letters and boxes with a declared value, postal parcels of 5 kgs.—10 kgs. if the contents are indivisible—and postal orders sent to or despatched by national Bureaux or the Agency.

2. *Exemption from transport and customs charges*

In order not to make the Article unnecessarily long, the Diplomatic Conference, having laid down the principle of free postage, merely referred to Article 110, which gives details of all the other exemptions which will be granted to civilian internees for the correspondence and packages sent by or to them and of which the national Bureaux and the Agency are also to have the benefit.

Article 110, in the commentary on which all the details will be found, provides in addition to exemption from postal dues, to a certain extent, and exemption from telegraphic charges, which will be dealt with below:

(a) exemption from import, customs and other dues (first paragraph)
(b) exemption from transport costs (paragraphs 3 and 4).

This latter exemption refers to the cost of transporting consignments which by reason of their weight or any other cause cannot be sent by post. These charges are to be borne by the Detaining Power in all the territories under its control and by other Powers parties to the Convention in their respective territories. Costs connected with transport not covered by these paragraphs will be charged to the senders.

3. *Exemption from telegraphic charges*

All the provisions concerning national Bureaux and the Agency insist, as we have seen, on the speed with which information must be collected and transmitted. Thus the use of telegrams, exceptional during the First World War, was common practice during the Second. By June 30, 1947, the Central Prisoners of War Agency had received 347,982 telegrams and had despatched 219,169, some of them containing several thousand words.

However, while the sending of telegrams scarcely raises any financial problems for the national Bureaux, which generally depend directly on the State, they are very expensive for the Central Agency, which has not been able to use this form of communication until assured of reimbursement by the State concerned. Therefore, all the Conferences held in preparation for the revision of the Conventions expressed the wish that both the national Bureaux and the Agency should have the benefit of free telegraphic services in both directions.

The Diplomatic Conference complied with the request but could not make the provision obligatory, since there are many countries in which the organization and operation of the telegraphic system are in the hands of private companies. It did, however, make an urgent recommendation : so far as possible, exemption from telegraphic charges or at least considerable reductions in those charges should be granted.

It should be recalled, in this connection—and this was explained in greater detail in connection with paragraph 5 of Article 110—that the International Telecommunication Conference (Buenos Aires 1952) adopted a resolution (No. 3) which recommended to the next Telegraph and Telephone Conference which will probably be held in 1957 or 1958 :

(1) to consider sympathetically whether, and to what extent the telegraph franking privileges and the reductions in telegraph charges envisaged in the Geneva Conventions mentioned above could be accorded ;

(2) to make any necessary modifications to the International Telegraph Regulations.

It will be seen that the recommendation does not reject the idea of complete exemption. It can only be hoped that it is acted upon.

PART IV

EXECUTION OF THE CONVENTION

SECTION I

GENERAL PROVISIONS

ARTICLE 142. — RELIEF SOCIETIES AND OTHER ORGANIZATIONS

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

General Remarks and Historical Survey

When the Franco-German war of 1870 involved the internment in Germany of a large number of French prisoners, committees were founded, including one at Basle and one in Brussels, to bring relief to them. Anxious to provide a basis in international law for the activities of such committees, certain liberal-minded persons tried to have a clause concerning them inserted in the Brussels Declaration of 1874. The proposal was rejected. However, it was repeated in identical terms, and this time with success, at the Hague Conferences of 1899 and 1907. As Article 15 of the Hague Regulations, and Article 79 of the 1929 Convention relative to the Treatment of Prisoners of War, it served during the two world wars as a legal basis for the relief activities of charitable societies, particularly national Red Cross Societies and the International Committee of the Red Cross.

During the preparations for revising the Conventions, the societies covered by the provision expressed the wish that its wording should be brought up to date without altering its spirit, i.e. that basic principle which today, as in the past, retains all its value and is one of the great achievements of humanitarian law : direct voluntary assistance given by individuals to the victims of conflicts. Of course, this assistance has had to take organized shape and be subjected to certain conditions before embodiment in the Conventions. Nevertheless, it has remained intact in the 1949 Conventions and it is that which makes this Article so valuable for relief societies and particularly for the whole of the Red Cross movement.

This Article 142 repeats almost word for word the corresponding Article 125 of the Convention relative to the Treatment of Prisoners of War except for its last paragraph, for reasons which will be discussed later. Furthermore, it occupies a different place in the general arrangements of the Convention.

Whereas in the Third Convention the part devoted to General Provisions immediately follows Article 125 (which is therefore the concluding Article of the chapter relating to Information Bureaux), the corresponding part in the Fourth Convention begins with Article 142. The reason which moved the Diplomatic Conference to alter, in this Convention, not the place occupied by this provision in relation to other Articles, which has not changed since the Hague Regulations, but the heading under which it is included, is not very clear. No doubt it was thought that Section V, which deals with Information Bureaux and is for that reason restricted in application to certain categories of protected persons only, should not contain a provision conferring a benefit on all protected persons. On the other hand, moving the

provision and introducing it, for example, into Section I of Part III, which would have been its natural place, would have upset the traditional arrangement of the Articles. Whatever the reason, by merely making Part IV start one Article earlier, that Article was included in the General Provisions, thus achieving the aim sought and keeping the former order of the Articles. While this has the advantage of preventing any restriction on the categories of persons assisted by relief societies, it must be admitted that it does not seem fully satisfactory, and a criticism may be made of the fact that Article 142 appears under the heading " Execution of the Convention " and yet contains no executory clause properly speaking.

It should be noted, in this connection, that Article 142 was not included in the draft Convention submitted to the Diplomatic Conference. Indeed, it was thought at first that there was no reason to repeat in the Fourth Convention the provisions relative to relief societies which form Article 125 of the Third, since almost identical clauses had already been inserted in the " Provisions common to the territories of the Parties to the conflict and to occupied territories " under Article 30. It was at the express request of the delegation of the Holy See that the Diplomatic Conference nevertheless decided to repeat in the Civilians Convention, without change, Article 125 of the Third Convention [1].

There is some reason for the addition. While Article 142 and Article 30 in some respects duplicate and repeat each other, they are complementary in that Article 142 defines relief societies and describes their activities, which is not done in Article 30. However, the two Articles should be read together and, as was said with regard to Article 30, " the commentary on one forms part of the commentary on the other ".

PARAGRAPH 1. — DESCRIPTION AND TASKS OF RELIEF SOCIETIES

1. *Description of relief societies*

Article 78 of the 1929 Convention did not make clear to what societies it was to apply. It might have seemed difficult to apply it to international relief organizations, since it had first been inspired by the activities of purely national relief committees and committees set up on neutral territory.

How could the activities of various relief societies, and particularly of the Red Cross, in behalf of war victims be covered ? The 1912 Inter-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 689-690.

national Red Cross Conference had proposed one solution : the activity of a national Society in behalf of prisoners would consist in collecting relief and forwarding it to the International Committee of the Red Cross for distribution to prisoners belonging to the same country as the society. According to that idea, it is primarily to the International Committee that the Article concerning relief societies should apply ; although that interpretation was never disputed, it was stated on several occasions that the clause should be made more precise when the Conventions were revised.

In 1912, the possibility had also been discussed, still in connection with the Article concerning relief societies, of a national Society acting in behalf of enemy aliens in its country's territory. That idea, which the experience of the two world wars has not generally supported, was taken up again in a Resolution of the International Red Cross Conference in 1948[1]. It was necessary, therefore, to make provision for it when revising the Conventions.

The new Article 142 is in keeping with these different requirements, particularly by virtue of the last sentence of the first paragraph : relief societies may be constituted either " in the territory of the Detaining Power, or in any other country, or they may have an international character ".

The expression " in any other country " also covers relief societies in occupied countries—an important point. Such societies, whose general activities must be enabled to continue under Article 63, are therefore authorized henceforth to bring relief to protected persons, and particularly to detained or interned civilians, who are nationals of those countries. Their duly accredited delegates will thus be able, subject to the reservations in the following paragraph, to visit their compatriots in occupied territory itself and in the national territory of the Occupying Power.

The societies of " an international character " will be essentially international federations made up of several national societies pursuing the same aims. During the Second World War, there were many instances of relief societies of various kinds combining their efforts in a search for greater efficiency and establishing international organizations to co-ordinate their activities and to collect and forward their consignments. It is such federations as well as essentially international societies which are referred to here.

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[1] The Resolution reads : " The XVIIth International Red Cross Conference recommends that national Societies contribute to the relief of enemy prisoners of war and civilian internees which should be afforded on the basis of the most complete impartiality."

The increasingly important part played by public institutions in the national life involved the appearance, during the last world war, of institutions for relief to war victims of a public or semi-public character, but which could in no way be called relief societies.

It was therefore necessary to extend the scope of the expression but not to abandon it, because of the weight of tradition behind it. For that reason, the phrase " or any other organizations assisting the protected persons " was added to the first sentence of the paragraph. The wording was designed to be applicable to bodies whose principal and long-term purpose was not assistance to civilians but which during a conflict might include such assistance among their tasks : the humanitarian nature of the body may therefore be temporary. On the other hand, mere sporadic activities on the part of an organization could not be considered as conferring on it the standing and privileges of a relief society.

The national Red Cross Societies at one time wondered whether they would not be justified in claiming special mention among the relief societies listed in the Third and Fourth Conventions. However, realizing that other institutions had also made what was often a very considerable contribution to relief for the victims of conflicts, and anxious to avoid any competition in the listing and naming of societies, the Red Cross itself gave up the idea of being thus mentioned in the 1949 Conventions.

The expression " relief " includes spiritual assistance. During the Second World War, religious bodies were able to carry on activities in behalf of war victims on the basis of the Article relative to relief societies. They wished, however, this point to be mentioned expressly in the new Conventions and the Diplomatic Conference complied by referring to them explicitly in the first sentence of paragraph 1.

Although the mention of religious bodies precedes that of " relief societies or any other organizations ", that does not mean that the facilities envisaged must necessarily and always be granted primarily to religious organizations. The order in the list is solely one of convenience and at the same time due to the idea that spiritual matters should always have precedence.

2. *Tasks of the relief societies*

The 1929 Convention relative to the Treatment of Prisoners of War used the general expression " their humane task ". It did state, however, that representatives of the societies should " be permitted to distribute relief ". Experience showed that this wording was inadequate and the first sentence of paragraph 1 of the new Article

gives more details; those details, however, need not be taken as setting limits to the activities of relief societies.

In particular, the new Convention lays down three main tasks of the societies allowed to operate in the territory of the Detaining Power or in territory occupied by that Power:

A. *Distribution of relief.* — This phrase should be understood in a wide sense. In general, distribution will consist in apportioning relief supplies between the various places of internment rather than between individuals, although individual distribution might occur in certain circumstances. The phrase does not imply that distribution must perforce be carried out by the delegates of the relief societies in person. On the other hand, their rôle must not always be restricted to the mere sending of relief; the spirit of the whole Article implies their personal participation in the charitable work with which they are dealing, a participation which may consist, for example, in finding out requirements, being present when relief is distributed in a camp, checking on such distributions afterwards, by getting in touch with the camp leader or responsible representative, and ensuring the transport of relief by making the necessary arrangements with the authorities concerned.

The paragraph also states the nature of the relief which may be distributed to protected persons. It is the same as that mentioned in Article 108. The wording of Article 142 in this connection corresponds in the main to that of Article 108, which has already been discussed. One extra detail occurring in Article 142 may be mentioned, however: relief may come from any source, so that the Detaining Power would not be justified in refusing it on the grounds of its origin. That is an embodiment of the principle of the Red Cross movement, that assistance to victims should not only be given without distinction, but should also be accepted whatever its source, provided that it is disinterested.

B. *Religious activities.* — In the Draft Convention the relief activities of religious bodies were covered rather by the extensive provisions dealing with the religion of the civilian internees; there was provision, in particular, for visits to the internees by the representatives of such bodies, visits which are all the more justified when their purpose is to bring spiritual comfort, for which direct, personal contact is necessary.

The system adopted by the Diplomatic Conference deals with the activities of these organizations in a single Article, which repeats their right to visit protected persons, a right of which all bodies

fulfilling the necessary conditions will now have the advantage, i.e. in particular religious organizations and national Red Cross Societies in the country of a Detaining Power or in occupied countries.

Visits by representatives of relief societies to protected persons form, of course, an essential part of their charitable activities, and will aim at providing the material or spiritual aid required by those persons and assisting them in organizing their leisure, a point dealt with later. If, however unwittingly, those visits were to touch on other aspects of the life of protected persons, they would become to a certain extent a check on the application of the Convention. Now that is a task which was deliberately entrusted by the Diplomatic Conference to the representatives of the Protecting Power or its substitutes. The Conference deliberately deleted the mention of relief societies which, in the draft of the Third Convention, also figured in the Article on supervision[1]. Would the belligerents still tolerate such activities on the part of relief societies and would they not, therefore, out of mistrust, hinder them in their other tasks, which are much more essential? It therefore seems expedient that relief societies, if they wish their right to visit protected persons to remain worthwhile and effective, should use it with the greatest circumspection and prudence.

C. *Assistance to protected persons in organizing their leisure.* — This assistance can be given particularly through the despatch and distribution of books, musical instruments and all articles used for recreational, educational or artistic purposes.

The wording of Article 142 shows that the representatives of relief societies are called upon to take a still more direct part in this matter and to assist the protected persons to organize even their recreational activities. In this respect, the present Article may be compared with Article 94, which obliges the Detaining Power to encourage activities of this kind, while respecting the individual freedom of every civilian internee to participate or not[2]. The reservation was intended to prevent a Detaining Power making propaganda among the internees for recreational activities; the permission, henceforth, given to relief societies themselves to inaugurate or organize these activities will only reinforce, in the eyes of the civilians concerned, the guarantees of impartiality which they represent.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 322-323.

[2] See above p. 409.

3. *Attitude and obligations of the Detaining Powers*

The paragraph begins with a reservation of the rights of the Detaining Powers. A similar reservation is already included in Article 30, which says that the facilities to be given to relief societies shall be given " within the bounds set by military or security considerations ".

While the Convention obliges the Detaining Power to treat the relief societies correctly and while it thus gives the most important humanitarian right to private societies, even foreign societies, to enter its territory—i.e. the territory of a belligerent—it would not be reasonable to expect this to be done unless solid guarantees were given to the Powers concerned. Even the old Article on relief societies placed certain limits on their activities: overriding military necessity, the need for their delegates to obtain a permit from the military authorities and to observe the routine and police regulations prescribed.

The new Convention formulates all these restrictions in a more general form and one more suited to modern requirements, in the opening sentence of paragraph 1 : " Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need ".

On the other hand, Article 142 omits the condition imposed on relief societies by the former Article of being properly established according to the law of their country. This condition, quite apart from the fact that international organizations sometimes find it difficult to fulfil, is, when all is said and done, of no interest to the Detaining Power and cannot be allowed to serve as a pretext for a refusal.

The Detaining Power, therefore, can only base opposition to the activities of a relief society on the reservation mentioned above and on condition that the reservation is invoked in good faith. In this respect, it is probable, in modern conditions, that a belligerent detaining protected persons will only grant the right to carry out charitable work on their behalf in its territory to organizations whose traditions, constitution and quality of work inspire a maximum of confidence, above all in the case of societies in other countries, or particularly non-allied countries.

Finally, in addition to the permission granted to the societies themselves, the Convention provides, as did the 1929 Convention, that delegates may carry out their functions in the territory of the Detaining Power or in a country it has occupied only if they have been duly accredited to that Power. This means that permission must be granted twice, once for the relief society and the second time for its delegates.

Once approval has been given, the Detaining Power must grant relief societies and their delegates every facility for carrying out their mission.

Although it is impossible to state in advance what these facilities will be, two could be mentioned here : the issue of " laissez-passer " and facilities for forwarding to their destination relief supplies for distribution to those in need. These supplies, of course, must be transported free by the Detaining Power under Article 110 ; there is nothing to prevent that Power, however, also making available to the delegates of relief societies, means of transport to enable them to carry out their distribution schemes in the best possible conditions.

These facilities will, of course, be granted subject to the reservation listed at the beginning of paragraph 1. Although in this respect the relationship between the two sentences is not very clearly stated, it does, however, follow from the general spirit of the provision.

PARAGRAPH 2. — LIMITATION OF THE NUMBER OF DELEGATES

In the course of the very first attempts to draft the clauses which were to become the Article now under discussion, it was perceived that the Powers could not be obliged to accept the idea that any organizations which wished to come to the assistance of war victims had a legal right, under the Convention, to move about freely in their territory. Thus, at the very beginning, provision was made for the Powers to be authorized to restrict the number of societies whose delegates would be admitted. A Government may, indeed, feel that it cannot repose any trust in a particular national or foreign society or in several such societies, or that it would prefer to refuse the offers of some of them, either because the offers received are too numerous or because it wishes to give a single society the task of collecting at a central point and distributing the consignments destined for people in its hands.

However, this possibility is immediately modified by a formal condition : " on condition that such limitation shall not hinder the supply of effective and adequate relief to all protected persons ". The notion of " effective and adequate relief " may, of course, be interpreted in various ways. For that reason, a decision that a restriction on the number of relief societies would have undesirable repercussions on the effectiveness of the assistance needed by those concerned should not be left to the Detaining Power. It seems, at first glance, that it comes within the competence of the Protecting Powers, whose task it is to supervise the application of the Convention,

and of the institution which has always worked to meet the needs of war victims : the International Committee of the Red Cross.

It would often be advisable, of course, for the societies concerned to co-ordinate their relief activities and to entrust the practical work on the spot to one of their number or to a body specially set up. Experience has shown that such a concentration of efforts always leads to better co-ordination and greater effectiveness in relief actions.

[1]PARAGRAPH 3. — SPECIAL POSITION OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The Convention mentions explicitly the various specific tasks of the International Committee of the Red Cross, particularly the establishment of the Agency (Article 140) and the visiting of protected persons wherever they are (Article 143). It was therefore natural, in the Article on relief societies, to make special mention of the International Committee, since its activities in this sphere during the Second World War, still more than in the First, assumed enormous proportions, as the report describing them will show[1].

Such was certainly the idea of the delegation which, in proposing to the Conference of Government Experts in 1947, for the text on relief societies, the wording now embodied in this Article, suggested that in paragraph 3 the special position of the International Committee of the Red Cross in this sphere must be recognized and respected at all times. During the Diplomatic Conference, two delegations wondered whether the provision was necessary. However, to have deleted it while explicitly mentioning the other activities of the International Committee could possibly have been interpreted as meaning that its relief activities were considered of lesser importance.

That was not the intention of the delegations which expressed the doubt ; the majority of the others wished, on the contrary, to underline by this paragraph their belief that restrictions on the activities of relief societies could not, in principle, be applied to the International Committee of the Red Cross or at least that the Committee was the last body to which they should be applied. It was therefore finally decided unanimously to retain this paragraph[2].

The special position of the International Committee, which is at one and the same time a relief society and an information agency, is also confirmed by paragraph 3 of Article 30. It arises not only from

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 300-302, 341-342.

its neutrality and traditional impartiality, which are the basis for its unique position as neutral intermediary for all categories of protected persons, but also from the relief activities in behalf of protected persons which it has carried out over a very long period.

It should be pointed out, finally, that the corresponding Article 125 in the Third Convention contains still another paragraph, which has not been repeated here, stipulating that receipts for each consignment of relief shall be forwarded to the relief society or organization making the shipment.

While the omission of this paragraph in Article 142 may, in one sense, appear regrettable, it must not in any case justify a refusal to draw up or to have drawn up for the donors receipts for the consignments addressed to protected persons. The giving of receipts is, after all, merely a practical detail connected with relief activities ; not only are those activities permitted but detailed provision is made for them, especially in regard to civilian internees. Reference may be made, in this connection, to the Draft Regulations concerning Collective Relief for Civilian Internees[1], Article 5 of which authorizes internees' committees to complete forms or questionnaires intended for the donors and relating to collective relief supplies. Now Article 104 of the Convention provides explicitly that the Internee Committees shall receive all material facilities for the accomplishment of their duties, particularly in regard to the receipt of supplies. It seems clear, therefore, that no difficulty must be put in the way of receipts being made out and sent to the donor societies. Generally speaking, the right of scrutiny given to the bodies entrusted with the task of supervising the application of the Convention will be adequate assurance to the donors of the safe delivery of their consignments and even that assurance will be unnecessary if the relief is distributed with the participation of delegates of the donor societies.

ARTICLE 143. — SUPERVISION

Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

[1] See below, p. 642.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

General Comments and Historical Survey

The Diplomatic Conference of 1929 was the first to recognize that the co-operation of the Protecting Powers helped to guarantee the application of the provisions of the Conventions. Article 26 of the 1929 Convention relative to the Treatment of Prisoners of War embodies this principle, together with clauses to ensure its practical application : collaboration between the Protecting Powers was to be ensured through their representatives and recognized delegates, who were to have access to all premises occupied by prisoners and might hold conversation with them without witnesses.

These provisions proved so useful during the Second World War and fulfilled so obvious a need that they were accepted without discussion of substance by the Diplomatic Conference of 1949, which strengthened and extended them. Their incorporation in the four Conventions, accepted unanimously by the Conference, made it necessary, however, to modify their form. The statement of the principle itself (" The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers ") was placed among the provisions common to all four Conventions because of its altogether general character. It is contained in Article 8/8/8/9[1]. On the other hand, the clauses of application—i.e. the statement of the best methods of carrying out supervision—could not be common to the four Conventions. Since these methods consist mainly of visits to prisoners of war and protected persons and the inspection of their places of detention and internment, they could only be included in the Conventions which govern the conditions of detention and internment, i.e. the Third and Fourth Conventions.

[1] See the commentary on Article 9.

They were quite naturally placed, therefore, in the chapters concerning execution of the Conventions and are the subject of Article 143 of the Fourth Convention and Article 126 of the Third.

Their separation from the statement of principle is, however, purely formal and the causal links between them remain. Article 143 therefore should be read in conjunction with Article 9, of which it is the logical extension.

It should, however, be emphasized here that visits to protected persons are not the only method of supervising in practice the application of the principle mentioned in Article 9. Of course, the inspection of places of detention and internment and interviews with protected persons are the best means available to the Protecting Powers for really effective supervision, but it would be illogical to restrict to those activities alone the obligation laid on those Powers to assist in the application of the Convention and subject it to scrutiny, as must be done everywhere where it is applicable. Thus, the Protecting Power in carrying out each of its tasks under the Convention will, in so far as it is itself a party to the Convention, be under the additional obligation of exercising a degree of supervision based not on the mandate it has received from the Power of origin, but on a higher mandate given to Protecting Powers in general by the whole of the States party to the Convention. Furthermore, a number of provisions in the Convention provide explicitly for supervision by the Protecting Power, and the reader is referred to the commentary on those provisions[1].

Nevertheless, in the case of civilian internees and detainees, the Convention will find application mainly in places of internment and detention. It is therefore essentially by visits to those places that the Protecting Power will be able to fulfil its general task most effectively. It is for that reason that Article 143 has received the title " Supervision ", although, it should be emphasized, the actual principle of supervision by the Protecting Power of the application of the Convention must be sought in Article 9[2].

Article 143 also contains a new feature, important for giving effect to that principle, which it extends and strengthens. The International Committee of the Red Cross will now take part in the

[1] Particularly Article 23 (supervision of medical supplies, food and clothing for the civilian population), Article 55 (supervision of food and medical supplies for the population in occupied countries), Articles 61 and 109 (supervision of the distribution of relief consignments in occupied countries and to civilian internees), and Article 71 (penal procedure).

[2] It should be recalled that the titles in the margin, used in this commentary as titles for the Articles, have no legal force. They were not adopted by the Conference but drafted afterwards by the secretariat.

system of supervision and the presence and activities of its delegates side by side with those of the Protecting Power is hereby sanctioned.

It should be emphasized here that the International Committee of the Red Cross does not, in fact, exercise and has never exercised real supervision in the legal sense of the term. The humanitarian purposes for which it exists have led it to make every effort to ensure that the victims of war are treated humanely and without unnecessary harshness. Acting in the first place on a purely empirical basis, it later successfully urged the drafting of legal rules binding on States in this matter. These rules, contained in the Geneva Conventions, represent general standards of humane conduct. However, the way in which individuals are in fact treated is of even greater interest to the Committee than the strict application of rules of law. For that reason its activities in behalf of the victims of war go in some ways far beyond the actual supervision of the application of the Conventions which apply to them. Those activities, which can be termed " factual supervision ", are carried out on the Committee's own initiative and in the name of the inalienable rights of the human individual.

The 1929 Convention relative to the Treatment of Prisoners of War, in assigning duties to the Protecting Powers, also sanctioned the by then traditional right of the International Committee to take the initiative. This enabled the Committee from 1939 onwards to renew and extend the factual supervision it had carried out so successfully during the First World War. It did not take the place of supervision by the Protecting Powers but merely supplemented it, and it led to numerous improvements being made in the conditions of prisoners of war and civilian internees during the Second World War. It is almost beyond doubt that the 1929 Convention would not have been applied as it was and that many infringements of it would have occurred if the Protecting Powers had not conscientiously visited the camps from the very beginning and if the International Committee had not once more sent delegates to almost all the belligerents.

This factual supervision was not given full legal sanction by the Diplomatic Conference and no request had been made for such sanction. The International Committee, a private body with strictly humanitarian ends, will doubtless not always be suitable or even equipped for exercising in every case complete supervision of the application of the Conventions. Such supervision would go beyond its competence and the tasks assigned to it by the Conventions themselves. The Committee might jeopardize its reputation for independence and neutrality by carrying out tasks which are in fact of a some-

what political nature and thus fall within the purview of the Protecting Power. On the other hand, factual supervision is implied in Article 9/9/9/10 common to the four Conventions, concerning the International Committee's right of initiative, an Article which reproduces Article 88 of the 1929 Prisoners of War Convention. Finally, it is almost explicitly recognized in the last paragraph of Article 143 : " The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives ". Stated in this form, at once more flexible and less official, supervision is left to the Committee's initiative and may be carried out freely according to circumstances and the conditions ruling at the time.

As has been said, Article 143 lays down the principal method of exercising the supervision mentioned in Article 9 : visits to camps and all places where protected persons are held. These visits call for a few general comments.

The inspection of places where prisoners of war are detained, at the same time as the distribution of relief, is one of the activities which the International Committee of the Red Cross has undertaken from the very beginning of its existence. It was as long ago as 1864, during the Prusso-Danish war, that the first delegates of the Committee made their first visits to camps. Subsequently, such visits became one of the essential tasks that the Committee carried out during each conflict and which, until the First World War, it was often alone in performing. These activities were given legal sanction in the Hague Regulations of 1899 which authorize relief societies to visit the places of internment of prisoners. It was during the First World War that the representatives of the Protecting Powers, given a mandate to that effect by the Powers of origin of the prisoners, were also authorized to inspect camps and that authorization was confirmed by Article 86 of the 1929 Convention. Article 88 of the same Convention confirmed the right of the International Committee to continue without hindrance the humanitarian work it might perform for the protection of prisoners of war. The camps of civilian internees [1], who were given the benefit by analogy of the Convention relative to the Treatment of Prisoners of War, were also visited in most cases, both by the Protecting Powers and by the International Committee.

Carried out in parallel and often by very similar methods, these visits, far from duplicating each other, were complementary. In the use made of the findings, however, appreciable differences very

[1] I.e., persons who happened to be on enemy territory when hostilities broke out and who were interned because of their nationality alone.

often appeared. The Protecting Powers acted under a mandate given by the Powers of origin and the reports which their delegates drew up after their visits to a camp were communicated only to those Powers. It was for the Powers of origin, on reading the reports, to ask the Protecting Power to request the enemy to cease any malpractice which had been discovered. Supervision by the Protecting Powers was exercised only on behalf of the Powers which had appointed them its agents. The position of the International Committee was different. Its camp visits applied to all the occupants without regard to nationality, solely on the basis of the fact that they were prisoners or internees. The Committee carried out these inspections, not on behalf of a particular Power, but in the name of humanity and with a view to putting a stop, as far as possible, to any abuses reported by its delegates. Thus the reports made by the delegates after each of their visits were immediately transmitted to the Power responsible for the place of detention visited, with comments drawing attention to shortcomings noted and urging remedial action. Moreover, the International Committee was the only institution able to visit in the same way and at the same time prisoner-of-war and internee camps in almost all the belligerent countries[1], while often a Protecting Power visited the prisoners and internees of only one nationality and in one country. The Committee thus obtained very complete and precise information which enabled it to compare the situation of those detained in the various camps and to bring forward supporting evidence in favour of claims for reciprocal treatment.

Under Articles 9 and 143 of the Fourth Convention, the special position of the International Committee will be shared henceforth, in part, by the Protecting Powers, since in future they will carry out supervision not only on behalf of the country for which they are acting, but on behalf of all the States parties to the Convention. They will therefore be able henceforth to make direct to the Detaining Powers any criticism they consider called for; they will intervene on their own initiative, thus assuming an active instead of a passive rôle.

The part played by the International Committee remains unchanged and is merely confirmed by these provisions. The Committee, however, will retain the advantage over the Protecting Powers of being able to go to some degree automatically into all camps and places of detention, whatever the nationality of the

[1] During the Second World War, the delegates of the International Committee paid more than 11,000 visits to prisoner-of-war and civilian internee camps.

inmates and in the national or occupied territories of all the belligerents.

To close this study, it should be said that Article 143 is one of the series of provisions in the Convention—and one of the most important—whose application in occupied territory is linked to the duration of occupation as provided for in paragraph 3 of Article 6. In general, and in accordance with paragraph 4 of Article 6, Article 143 will remain in force after the end of a conflict, so long as there remain protected persons who have not been released or repatriated. The Protecting Powers and the International Committee of the Red Cross will therefore continue to visit them and to supervise the application of those provisions of the Conventions which concern them. Thus their activities and their responsibilities may continue in certain circumstances long after the end of a conflict.

PARAGRAPH 1. — VISITS

The Article begins with a general rule : all places without exception where protected persons are shall be open to inspection.

The rule repeats exactly the opening paragraph of the corresponding Article 126 of the Third Convention. Both Articles are based on the second paragraph of Article 86 of the 1929 Convention relative to the Treatment of Prisoners of War, from which they differ in only one particular, the fact that some examples are given of the places to be inspected.

The inspectors will be representatives or delegates of the Protecting Powers and also, under the terms of the last paragraph, of the International Committee of the Red Cross. The fact that the whole Article speaks of Protecting Powers and only at the end mentions that the International Committee's delegates will enjoy the same prerogatives does not give the representatives of the Protecting Power any priority. All are placed on the same footing.

The distinction made here between representatives and delegates of the Protecting Powers is explained in Article 9. The representatives will be members of the diplomatic or consular staff of those Powers serving in the country at the commencement of hostilities or sent there later. They will need, in order to carry out the tasks entrusted to them by their Government in fulfilment of its protective mission, no approval other than that given to them when they enter upon their diplomatic or consular duties in the country. The delegates will be persons recruited by the Protecting Power sometimes in the country itself, outside the diplomatic corps and among its own nationals or even nationals of another neutral country. Those

delegates, as stated in Article 9, will be subject to the approval of the Power with which they are to carry out their duties, as will the delegates of the International Committee of the Red Cross.

The persons who are to inspect places of internment and other places must be carefully selected. The task is not easy ; it requires wide general knowledge, experience, tact and a great deal of discretion. Among the essential items of knowledge, naturally, will be a knowledge of the Convention whose application is to be supervised and of the laws, decrees, etc., issued by the Detaining Power and applicable to the protected persons. Generally speaking, the choice will readily fall on a doctor, because of his special knowledge and since a doctor alone, in very many cases, is capable of discerning deficiencies not obvious to the layman. At the very least, a doctor will be attached to a delegation, if it consists of several inspectors, or will make his visits of inspection alternately with another representative. Furthermore, these inspectors will need to have a good knowledge of the language of the detaining country, and above all the language of the protected persons they will visit. Of course, the next paragraph allows for recourse to an interpreter ; but this is a step which should only be taken in exceptional cases, since it is only by expressing direct in their own language and without witnesses what they wish to say that protected persons will be able to make their needs known clearly and freely.

It is not to be expected that camp inspectors should have constantly in their minds a complete list of the many obligations laid on the Detaining Power with regard to protected persons. A method is therefore recommended to which several Protecting Powers and the International Committee of the Red Cross resorted during the Second World War, i.e. the drafting of a handbook for their delegates. This document listed the various tasks of a delegate, informed him of his rights and duties and, in a chapter devoted to camp visits, gave a complete list in a rational order of the various items which must be looked into and the questions to which a reply must be given[1]. A specimen report on a camp visit was attached. These handbooks were of great service and enabled delegates to make thorough and complete inspections in the shortest possible time.

The words " shall have permission " indicate that the inspectors must request permission to visit the place of detention or internment they have chosen, and that their request must be granted. Only imperative military necessity would allow of such permission being

[1] A list of this description is to be found in the *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 233-238.

postponed (but never refused) as will be seen in connection with paragraph 3.

The Detaining Powers are therefore obliged to grant permission. They are also obliged to facilitate to the greatest possible extent the inspection of places of internment or detention under the terms of paragraph 2 of Article 9. If need be, they will arrange for the transport of delegates, give them the necessary visas and passes, furnish guides, an escort, interpreters, etc.

No restriction is imposed in regard to places open to inspection. The agents of the Protecting Powers and of the International Committee must be able to reach all protected persons, whether in groups or as isolated individuals, in the territory of the Detaining Power or in occupied territory.

As has been said, this provision differs from the 1929 text in that it mentions three types of place open to inspection : places of internment, detention and work. This list, of course, does not add anything new to the rule formulated at the beginning of the paragraph and its presence here is not essential. It is, however, useful since it mentions expressly the three types of place in which the Convention will find its widest application, and where, as a result, wider supervision must be exercised. Furthermore, it is intended to prevent the Detaining Power restricting visits to the main camps only. In this respect, the places of internment—i.e. in fact the civilian internee camps, which are the subject of 63 Articles of Section IV of Part III—are of particular importance.

Places of detention will include places where civilian internees are undergoing punishment and places where protected persons are detained who have not been interned. For this category the Articles whose application must be supervised will be mainly Article 37, in the case of aliens in the territory of a Party to the conflict, and Articles 64 to 77 in the case of protected persons in occupied territory.

Places of work will mean in most cases labour detachments from civilian internee camps, the operation and inspection of which are dealt with in Article 96. They may, however, also be the places of work of persons who are not interned, regulated by Article 40, in the case of aliens in a territory of a Party to the conflict and Articles 51 and 52 in the case of persons in occupied territory, whose application will have to be supervised.

Of course, the three types of place mentioned are only examples given because of their importance for the supervision of the application of the Convention; that is confirmed by the word " particularly " which precedes them. They do not constitute a restrictive list. Incidentally, Article 126, the corresponding provision of the Third Convention,

quotes a fourth example of places particularly subject to supervision : the places of departure, passage and arrival of prisoners who are being transferred. The clause was introduced into the Third Convention at the request of the International Committee of the Red Cross, which had noted how often transfers of prisoners were carried out in unsatisfactory conditions ; but it was not considered necessary to repeat it here in respect of the transfer of civilian internees, doubtless for reasons of simplification. Of course, this omission does not mean that there should be no supervision of transfers of internees or that it should be any less strict.

PARAGRAPH 2. — ACCESS TO PREMISES. INTERVIEWS WITHOUT WITNESSES

Like the previous paragraph, this one has its origin in Article 86 of the 1929 Convention relative to the Treatment of Prisoners of War, reproduced in the Third Convention of 1949. It contains no changes.

In all places where there are protected persons, all the premises which they use either permanently or temporarily will be visited : dormitories, canteens, sanitary installations, infirmaries, etc. The same will apply to premises not used directly by the protected persons but devoted to their needs, such as warehouses and other storage places. Indeed, the delegates have the right to check on the food supply of interned and detained civilians and particularly the distribution of relief sent to them under the authority of paragraph 3 of Article 109.

In the case of occupied countries this authorization is of a very general character and supervision will extend to the supply of foodstuffs and clothing for the whole population of such countries, by virtue of the last paragraph of Article 55. The commentary on that Article emphasized the importance of such supervision and the wide proportions it may assume. Ther ise no need to repeat the comments here.

Interviews without witnesses with prisoners of war were authorized for the first time by the 1929 Convention (Article 86) but in the form of a recommendation and " as a general rule " only. The restriction was abolished in 1949. The importance of such interviews for obtaining a knowledge of actual conditions needs no emphasis. It is a striking fact that during the First World War it was in the very countries where the application of the Convention left most to be desired that most obstacles were put in the way of interviews without witnesses with prisoners of war and civilian internees. In the very first revised drafts this provision was therefore given the character of an absolute

right conferred on the agents of the Protecting Powers and the International Committee, and the Diplomatic Conference accepted it in its new form without any discussion in the case of both the Third and the Fourth Conventions. Henceforth, therefore, the authorities responsible for protected persons are obliged to allow inspecting delegates or representatives to interview any internee or detained person without witnesses and for the necessary length of time. The provision is addressed particularly to camp commandants, prison governors and certain military authorities in occupied countries who, in the past and often on their own initiative, have shown the greatest opposition to such interviews.

It has already been stated how desirable it is that delegates should know the language of the protected persons they are visiting ; recourse to interpreters, although authorized here, must therefore be avoided as much as possible. If it cannot be avoided, the Detaining Power must, on request, supply the delegates with the necessary interpreters. This service is, indeed, one of the facilities the Detaining Power is bound to give to delegates under paragraph 2 of Article 9. It would be preferable, however, for the interpreters themselves to form part of the staff of the Protecting Power or of the International Committee of the Red Cross in order to avoid any suspicion of tendentious interpreting. It will also be possible to choose them from among the protected persons themselves.

PARAGRAPH 3

First sentence. — Reasons of military necessity

This reservation, which did not form part of the corresponding text of 1929, was introduced in the drafts of the Third and Fourth Conventions by the International Committee of the Red Cross itself. The Committee considered, indeed, that it was impossible to increase the number and activities of the delegates of the Protecting Powers and the International Committee and to extend the scope of their work and their powers without giving the Detaining Powers the countervailing permission to restrict such activities temporarily if military necessity demanded it. Otherwise, those Powers would have been put in a position where, compelled as they sometimes would be to forbid or postpone such camp visits mainly in the areas near to the fighting lines and in occupied territories, they were faced with the alternative of violating the Conventions or harming their own interests. Here as elsewhere, if they are to be applicable, humanitarian principles must take into account actual facts. This clause was accepted without discussion by the 1949 Diplomatic Conference. It

even strengthened it—but only after long controversy—by adding to the rule which states the general principle of supervision in the four Conventions (Article 8/8/8/9) a provision forbidding the delegates of Protecting Powers to exceed their terms of reference and instructing them to take into account the imperative security needs of the Detaining Power [1]. Furthermore, it included in those Articles, in the First and Second Conventions (which do not provide for camp visits), a clause identical with the one under discussion.

If they are to justify the prohibition of visits, military necessities must be imperative. Whether they are or not is a matter for the Detaining Power alone to decide and the right of supervision of the Protecting Powers is restricted by this exercise of sovereignty. However, such a decision must not be lightly taken, since the provision insists that the necessity must be obviously imperative, because the prohibition of visits based on it must be an exceptional measure.

Furthermore, the prohibition will be temporary. The Protecting Powers and the International Committee will have the right to bring the temporary nature of the prohibition to the notice of the Detaining Power and, after a certain length of time, to request it to raise all restrictions. Moreover, the Protecting Power will be able to carry out supervision " a posteriori ", by checking afterwards whether the prohibition of visits has been used by the Detaining Power to violate the Convention or if, on the contrary, the temporary prohibition has not been prejudicial to the protected persons. In any case, it is not in the interests of the Detaining Power to misuse this reservation, because it would very soon be suspected of deliberately wishing to violate the Convention by taking advantage of the absence of qualified witnesses.

Second sentence. — No restriction on visits

Once authorized in principle, visits to places where protected persons are must not be subjected to any hindrance. The frequency of visits, it is worth noting, is left to the discretion of the visitors. In general, experience shows that in regard to internment camps, two or three visits per year are a minimum ; they must be more frequent if conditions have not been satisfactory, so that a closer check is needed. The same will apply to the duration of the visits which will depend on the circumstances ruling at the time.

The corresponding provision of 1929 and the first revised drafts stipulated in addition that the civilian or military authorities of the places of internment must be informed of visits. The International

[1] See commentary on Article 9.

Committee of the Red Cross and with it the Diplomatic Conference did not accept this clause. The Committee had noted that conditions in camps were sometimes changed when visits were announced.

PARAGRAPH 4

First sentence. — Selection of places to be visited

This sentence is directly connected with the last sentence of the previous paragraph and like it emphasizes the discretion left to inspecting representatives and delegates in the arrangement and carrying out of their visits. The choice of places to be visited is left entirely to the judgment of the Protecting Powers and the International Committee of the Red Cross. It will depend on many circumstances : assessment of the conditions prevailing in the places concerned, complaints received concerning them, special requests from the country of origin, the date of the previous inspection, geographical conditions, etc. Visits may also take place at the request of one or more protected persons.

Second sentence. — Visits by compatriots

Article 86 of the 1929 Convention already provided that persons of the same nationality as the prisoners of war might be allowed to take part in visits to the camps. During the Second World War, this possibility was rarely utilized, mainly for security reasons. In view of its obvious humanitarian character, however, the provision was nevertheless repeated in the Third Convention of 1949 (Article 126), and repeated here.

Article 116 authorizes civilian internees to receive visitors, especially near relatives. This will apply mainly to members of the internee's family who resided with him in the country where he is detained or in occupied countries. Article 142 also authorizes representatives of religious organizations and relief societies to visit protected persons.

If, therefore, Article 143 were to be taken as applying only to the relatives of civilian internees and the representatives of relief societies, it would admittedly duplicate the two Articles mentioned above. In fact, while some duplication does occur, the provision nevertheless covers a wider field. The term " compatriot " used here includes both relatives and delegates of the national relief societies ; it applies to everybody of the nationality of the internee with a particular interest, recognized by the Powers concerned, in visiting him or whom he himself might have a particular interest in meeting. Furthermore, the Protecting Powers themselves or the International Committee

of the Red Cross may consider it expedient to have their delegates accompanied by a compatriot of the persons visited, either for humanitarian motives, to bring a " breath of home " to the detained, or to allay certain fears or to carry out some supervision.

Moreover, the provision enables the Detaining Powers, which might hesitate to agree to certain relatives or the delegates of certain societies being allowed to go freely and alone into the camp, under Articles 116 and 142, to meet their obligations under the Convention nevertheless by asking that the visits should be made as part of the inspections by the Protecting Powers or the International Committee ; this would give the necessary safeguards.

The visits provided for here must be the subject of a preliminary agreement between those concerned, i.e. the Protecting Powers or the International Committee of the Red Cross on the one hand, and the Detaining or Occupying Power on the other. Furthermore, the agreement of the country of origin of the internees, a country of which the visitors will be nationals, must often be requested. That Power, indeed, may legitimately wish its citizens not to go into enemy territory without its authorization.

Paragraph 5. — Activities of the delegates of the International Committee of the Red Cross

Mention was made in the General Comments[1] of the scope and importance of this provision which is also contained in the Third Convention and which gives express sanction for one of the main traditional activities of the International Committee of the Red Cross, i.e. visits to camps of prisoners of war and civilian internees. The International Committee's delegates had not been able to carry out those activities before except under special agreements concluded in advance with each of the Powers concerned. Now, however, they become to some degree automatic and cannot any longer be considered as being merely one of the " services " which the International Committee offered the Parties in conflict—which it may continue to offer under Article 3—and which they were entirely free to reject.

The representatives and delegates of the Protecting Powers and those of the International Committee are henceforth placed on a completely equal footing. Their rights and their duties are the same if allowance is made for their different spheres of action. This applies not only to camp visits proper but to visits to all places of every kind where protected persons may be found, and to interviews held with them without witnesses.

[1] See above p. 567.

This task, entrusted to the Committee under the Convention, must not, of course, be taken to justify any restriction on the other activities it intends to develop on behalf of protected persons. Article 10 is definite on this matter. The Committee remains free to take any humanitarian initiative it may consider necessary in regard to camp visits or outside camps, whereas the Protecting Powers, even while supervising the application of the Convention, will always be restricted by the provisions of the Convention themselves and, in a general way, by the contract they will have concluded with the mandator Power.

The approval which must be given for the appointment of delegates of the International Committee, and which the Committee has in any case always asked for, places them in the same position as the delegates of the Protecting Powers. It is normal that the Party to the conflict which is going to welcome them in its own territory or in territory occupied by it, should receive certain guarantees in this connection, guarantees which it also requests from the delegates of relief societies authorized by Article 142 to enter its territory.

This approval will be asked for once only for every delegate. It will not therefore have to be obtained anew for every single journey.

ARTICLE 144. — 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.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

In signing the first Article of the Convention, the Powers undertook to respect and ensure respect for it in all circumstances. Now if legal provisions are to be properly applied a thorough knowledge of them is necessary. It was important, therefore, that the Contracting Parties should undertake to disseminate the text of the Convention as widely as possible in their respective countries. That is the aim

[1] Article common to the four Conventions. See First Convention, Article 47 ; Second Convention, Article 48 ; Third Convention, Article 127.

of this Article, which is worded in almost identical terms in all four Conventions.

The duty incumbent upon States by virtue of Article 144 is general and absolute in character. It must be carried out in peacetime and wartime alike. It is made clear by the mention of measures on which the Convention puts particular emphasis: military and civil instruction.

In the first place, the Convention must be known by those who will have to apply it, who may have to render an account of their shortcomings before the courts and who, in some cases, are likely to become beneficiaries. The study of the Conventions must therefore be included in the syllabuses of military instruction, the teaching being adapted to the rank of those addressed. Article 144 mentions explicitly categories of persons for whom it is particularly necessary to receive instruction: any civilian, military, police or other authorities who in time of war assume responsibilities in respect of protected persons, must have a thorough knowledge of the Conventions.

In case of mobilization, the essential points must be gone through again so that they are fresh in the minds of those concerned [1].

The Convention must also be widely disseminated among the population so that its principles are known to all those who may benefit from it. It is possible to go even further and to say that men must be trained from childhood in the great principles of humanity and civilization, so that those principles take deep root in their conscience.

Provision has therefore been made for the inclusion of the study of the Convention in syllabuses of civil instruction.

This requirement is preceded, however, by the words " if possible ". It is not that the 1949 Diplomatic Conference thought it any the less imperative to instruct civilians than to teach the military. The only reason for the addition is that in certain countries with a federal structure public education is the responsibility of the provinces and not the central authorities. Some delegations, therefore, having a scrupulous regard for constitutional niceties which may be thought unfounded, considered that they must deal tenderly with provincial liberties [2].

Finally, the whole population should have a real knowledge of the Convention and themselves be inspired with the sentiments which

[1] In 1951, the International Committee of the Red Cross issued for the use of military personnel and the public a summary of the Conventions of Geneva of 1949, in the shape of a booklet in French, English and Spanish.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 70 and 112.

inspire it. No effort should be neglected to achieve this supremely important aim. The governments, which can easily make the practical efforts required will be anxious, no doubt, to fulfil this duty.

A wide dissemination of the Geneva Conventions means not only that it would be easier to apply them in wartime but also that the principles of humanity will be disseminated and thus contribute towards the development of a pacific spirit among the peoples.

It is here that the Red Cross as a whole and each of its national and international components have an important part to play in helping the public authorities to ensure ever wider dissemination among the peoples of the principles it has championed since 1863 and whose sacred character it has persuaded the governments of the whole world to recognize. The Red Cross has a tremendous rôle to play in this dissemination.

The provisions of the second paragraph echo Article 99 among others, which states that the officer in charge of a place of internment must have in his possession a copy of the Convention and that the text of the Convention must be posted inside the place of internment. Every place of any size should be given a text of the Convention, which may be of great importance if the territory is occupied.

ARTICLE 145. — TRANSLATIONS: RULES OF 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.

The " official translations " of the Convention are those drawn up by the executive authorities in a country under the terms of their own law. Countries with more than one national language may, therefore, communicate several translations. The versions in French, English, Spanish and Russian should be excluded, however, since the two first are the authentic texts of the Convention, while the last two have been officially made by the Swiss Federal Council under the terms of Article 150. At the moment this commentary was published, translations made by governments have added to these four texts official versions in Arabic, Czech, Danish, Dutch, Finnish, German,

[1] Article common to the four Conventions. See First Convention, Article 48 ; Second Convention, Article 49 ; Third Convention, Article 128.

Hebrew, Hungarian, Indonesian, Italian, Japanese, Norwegian, Persian, Polish, Serbo-Croat, Swedish and Thai.

The widest possible interpretation should be given to the expression " laws and regulations " which are also to be communicated. This means all legal documents issued by the executive and the legislative authorities connected in any way with the application of the Convention. Thus, States will have to communicate to one another laws passed in application of Articles of the Convention ; they will also be obliged, however, to communicate laws and regulations they may adopt which are not obligatory under the Convention. Several provisions in the Convention call in various cases for adaptations or additions to national laws. Penal sanctions, regulations for internment, the establishment of safety zones, the protection of civilian hospitals, the use of the red cross emblem and the identification of young children, all call for legislative action on which the application of the Convention can be based. It is important that the parties to the Convention should be informed of them and the most expeditious procedure for this purpose is to use as intermediary the Swiss Federal Council, which is the depositary of the Geneva Conventions.

PENAL SANCTIONS

(ARTICLES 146 TO 148)

1. *Historical survey*

The Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called " war crimes ".

The punishment of infringements of the laws and customs of war is not completely new. During the XVIIIth and XIXth centuries some examples can be found of sentences punishing such infringements, but they were rare and did not form a body of precedent. The codification of the laws of war, which began in Geneva in 1864 and was continued in The Hague in 1899 and 1907, did not lead to the drawing up of international regulations on the punishment of war crimes.

Of course, the Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land stipulated, in Article 3, that a belligerent Party which violated the provisions of the Regulations annexed to that Convention would, if the case demanded, be liable to pay compensation and would be responsible for all acts committed by persons forming part of its armed forces. The liability of the

belligerent State was, however, purely pecuniary. The various States were left entirely free to punish or not acts committed by their own troops against the enemy or by enemy troops in violation of the laws and customs of war. In other words, punishment depended solely on the existence or absence of national legislation for the punishment of the acts committed.

At the end of the First World War, however, the system hardly seemed satisfactory and the Versailles Treaty embodied provisions for the punishment of nationals of the vanquished countries who had committed against the Allied troops acts contrary to the laws and customs of war. The result of this provision in the Versailles Treaty and the Leipzig judgments arising from it are well known.

It was mainly during the Second World War and the years which followed it that the problem of punishing war criminals arose. The very numerous violations of the laws of war committed during the war had made the question an urgent one, which engaged the attention of public opinion and the authorities in the various countries.

The absence of any international regulation of this matter and the small number of national laws concerned with it led most States to pass special legislation to punish the war crimes committed by the enemy against their people and troops. Although in most cases public opinion considered it normal and fair to punish those who were condemned on the basis of these laws, there remained a certain feeling of uncertainty as to whether the verdicts given were lawful or not. Furthermore, the various penal systems are not based on the same principles. In the Anglo-Saxon countries in general, it seems that the existence of a rule of international law, whether in writing or merely customary, even if it does not include mention of penalties, enables the courts of the country to condemn those who have violated that rule, whereas in other countries, particularly on the Continent, penal law, if it is to be applicable, must include not only formal regulations but also provisions determining the nature and seriousness of the punishment. In these countries, the saying *nulla poena sine lege* remains fully valid.

Whatever the opinion held on the punishments inflicted after the Second World War, it would have been more satisfactory to be able to rely on already existing rules without having been obliged to have recourse to special measures.

2. *The 1949 Convention and the preparatory work*

The events of the Second World War led the International Committee of the Red Cross to the conclusion that any international

convention dealing with laws and customs of war must necessarily include a chapter concerned with the punishment of violations of the Convention. Its opinion on that point was confirmed by the numerous requests for intervention it received on behalf of prisoners accused of war crimes who, as stated above, were tried under special legislation, since no laws for the punishment of war crimes had been drawn up in the ordinary way before the opening of hostilities. Moreover, the International Committee could not remain deaf to the arguments of those who claimed that complete and faithful application of the Conventions could only be founded on the infliction of effective punishment on those violating them.

The International Committee therefore, although it naturally had a dislike of suggesting measures of punishment, drew the attention of the conferences of experts held in Geneva in 1946 and 1947 to this important problem. The conferences recommended that the Committee should pursue its studies even more thoroughly.

In 1948, the International Committee presented to the XVIIth International Red Cross Conference the following draft Article (Article 40 of the First Convention) :

> 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.

That Article, therefore, provided that certain violations of the Convention would be considered as war crimes and defined the manner in which the guilty would be punished. The formula adopted was based on the principle *aut dedere aut punire*, often used as the basis of extradition. When presenting this text to the Conference, the International Committee emphasized that its studies of the problem of punishment were still incomplete ; it intended to pursue them particularly because of the development of punishment for war crimes by a considerable number of countries and the United Nations themselves.

The XVIIth Conference invited the International Committee to pursue its work in this sphere and to submit the results to a later Conference.

As a result of this invitation, the International Committee of the Red Cross, in December 1948, called to Geneva four international experts with whom the question was thoroughly examined. There resulted a draft of four new Articles to be incorporated in each of the

four Geneva Conventions, concerning the punishments to be inflicted on persons who had committed breaches of those Conventions [1].

On pages 18 to 23 of the Remarks and Proposals submitted by the International Committee of the Red Cross, for consideration by the Diplomatic Conference, will be found a short statement of the reasons which led the Committee to put forward this draft. The

[1] The following is the text of the Articles concerned :

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.

II. *Grave violations.*

Without prejudice to the provisions of the foregoing Article, grave breaches of 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 orders.*

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.

experts consulted proclaimed the need to punish infractions of the Geneva Conventions. It is for that reason that each Contracting Party must promulgate the necessary legislation within two years; the carrying out of this obligation is verified automatically by the communication of the measures taken to the depositary State.

The universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment. Furthermore, the influence of an order by a superior or of an official instruction on the responsibility of the author of the act committed is expressly provided for and stated. Finally, the experts agreed that persons accused must, despite the reprobation felt for such acts, have the full benefit of jurisdictional and procedural guarantees. The International Committee had had the opportunity of explaining to them its experiences in this domain.

At the 1949 Diplomatic Conference, the problem of the penalties to be prescribed for violation of the Conventions was entrusted for study to the Joint Committee which had the task of considering all the provisions common to the four Conventions. The draft texts of the International Committee of the Red Cross were only delivered to Governments a very short time before the opening of the Conference, so that several delegations opposed their being taken as a basis of discussion. However, the Netherlands delegation adopted the proposals and placed them officially before the Conference. Consideration of them was adjourned for some weeks.

In the commentary on each of the new Articles, there will be occasion to refer to the discussions which led to their adoption. Worth special mention here is the great amount of preparatory work done outside the Conference and we wish to pay tribute to Mr. M. W. Mouton, a member of the Netherlands delegation, who was their main artisan. Finally, ten delegations put forward a joint text which, apart from a few drafting changes, was adopted by the Conference [1].

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[1] The following is the text of this amendment in the *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 42:

Article A. — " The High Contracting Parties, in so far 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

3. *Outlook for the future*

The Brussels Conference for the Unification of Penal Law held in 1947 discussed the problem of the punishment of war crimes.

The General Assembly of the United Nations requested the International Law Commission to prepare a draft code of offences against the peace and security of mankind. This Code, the drafting of which was completed by the International Law Commission at its 1951 session, provides for the punishment of a number of offences among which (Article 2, II) are violations of the laws or customs of war.

It is significant that the International Law Commission based its work on the idea that such offences cause a certain difficulty in the relationships between peoples and may aggravate still further the dissensions which led to the state of war, thus making the re-establishment of peace more difficult.

The Commission, however, did not draw up a list of those violations of the laws and customs of war to be considered as war crimes. It considered, indeed, that the laws and customs of war were not precise enough to enable such a list to be made and preferred a general formula which could be adapted to developments in international law.

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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."

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.

Maritime 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.

Prisoners of War Convention. The wilful killing, torture or maltreatment, including biological experiments, the wilful causing of great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or wilfully depriving the prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Civilians Convention. The wilful killing, torture or maltreatment, including biological experiments, the wilful causing of great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in this Convention, the taking of hostages and the extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly."

The result of the International Law Commission's work is that therefore penal regulations, quite apart from those contained in the Geneva Conventions, may be put into force internationally for the punishment of breaches of those Conventions; enforcement will, therefore be ensured in two ways.

At its 1950 session the General Assembly of the United Nations had also set up an Ad hoc Committee to work out a draft scheme for international penal jurisdiction. That Committee, which met in the summer of 1951, in the course of drawing up the draft statute for an international criminal court, discussed the type of offence which would fall within the competence of such a court. The wording adopted was very general but it was considered that among the offences within the court's competence breaches of the laws and customs of war should have their place.

This draft was again submitted to the General Assembly in 1952, which decided to set up yet another committee to examine the question again and to revise the draft. The committee met in 1953 and submitted the results of its labours to the 1954 Assembly, which adjourned consideration of the question until the session following that at which it will have examined the report of the new Ad hoc Committee working to define aggression.

There seems to be very little chance, because of the widespread opposition encountered, of the United Nations setting up an international criminal court in the near future.

ARTICLE 146. — PENAL SANCTIONS : GENERAL OBSERVATIONS [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.*

[1] Article common to the four Geneva Conventions. See First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129.

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.

This Article is the cornerstone of the system used for the repression of breaches of the Convention. That system is based on three essential obligations laid upon each Contracting Party : to enact special legislation ; to search for persons alleged to have committed breaches of the Convention ; to bring such persons before its own courts or, if it prefers, to hand them over for trial to another High Contracting Party concerned.

The provision also refers to the list of grave breaches given in Article 147 and ends with the statement of the safeguards of proper trial and defence by which accused persons shall benefit.

PARAGRAPH 1. — SPECIAL LEGISLATION

It is desirable that States which have ratified the Convention or acceded to it should take without delay the necessary steps to fulfil their obligations under Article 146 [1]. This task of adapting penal law for the punishment of breaches of the Convention is certainly a complex one and will often require long and thorough study.

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[1] A number of States which have ratified this Convention have already fulfilled this obligation. Switzerland is an example where the Military Penal Code has been partially revised by the addition of a new general provision (Article 109), under which an offender against the provisions of the international Conventions relative to the waging of war or the protection of war victims, will be punished for breach of his military duties, unless more severe provisions of the Military Penal Code are applicable. Similarly, Yugoslavia has modified its Penal Code and adapted it to the new Geneva Conventions. A penal law dated February 27, 1951 introduces into the new Penal Code all the grave breaches defined in the Geneva Conventions. Article 125 covers war crimes committed against the civilian population ; indeed the list of punishable offences is considerably larger than that in Article 147 of the Fourth Convention. The Netherlands issued a series of laws on May 19, 1954 which embody in domestic criminal law the provisions of the four Geneva Conventions for the repression of breaches of the Conventions. Article 8 of the law punishes with imprisonment up to 10 years those who are guilty of violations of the laws and customs of war ; if there are aggravating circumstances a sentence of as much as 15 years imprisonment may be imposed or even, in certain cases, the death penalty or life imprisonment or imprisonment of 20 years.

The majority of the other countries which have ratified the Geneva Conventions should also adapt their penal legislation, since it will be impossible in most cases to make do with the legislation already existing.

For that reason, the International Committee, when the four Geneva Conventions of 1949 were adopted, expressed the wish to draw up a model law, on which the national legislation in various countries could be based and which would also have the advantage of creating a certain uniformity of legislation [1].

Generally speaking, the Geneva Conventions become applicable when one of the situations listed in Articles 2 and 3 occurs—i.e. in case of war, occupation or civil war. However, Article 146 is one of those which must be put into effect in peace-time in anticipation of those situations. The laws to be enacted on the basis of this paragraph should, in our opinion, fix the nature and length of the punishment for each offence, on the principle of making the punishment fit the crime. It should not be left to the discretion of the judge [2].

Paragraph 1 refers to Article 147, which lists the breaches considered as grave. The list will be discussed in the commentary on Article 147.

According to Article 146, the penal sanctions to be provided will be applicable to persons who have committed or ordered to be committed a grave breach of the Convention, thus establishing the joint responsibility of the author of an act and the man who orders it to be done. It will be possible to prosecute them both as accomplices. There is no mention, however, of the responsibility which might be incurred by persons who do not intervene to prevent or to put an end to a breach of the Conventions. In several cases of this type the Allied courts brought in a verdict of guilty. In view of the Convention's silence on this point, it will have to be determined under municipal law either by the enactment of special provisions or by the

[1] The Sixth International Congress of Penal Law, held in Rome in autumn 1953, had on its agenda the repression through penal law of breaches of the international humanitarian Conventions. Reports were submitted to the Congress from various countries and a general report was presented by Mr. Claude Pilloud, Assistant Director and Head of the Legal Department of the International Committee. The Congress laid the basis for what might become a model law for the repression of breaches of the Geneva Conventions (see *Revue internationale de Droit pénal*, 1953, Nos. 1, 2 et 3).

Since then, work on drawing up a model law has been continued by the International Committee of the Red Cross and other bodies. As the discussions at the Sixth International Congress of Penal Law showed, it is above all in the definition of breaches that uniformity must be sought ; the fixing of the sentence and the procedure to be followed are thought to be matters for municipal law in each country.

[2] The Anglo-Saxon system, which was followed by the International Tribunal at Nuremberg and which formed the basis for several national legislations after the end of the Second World War, seems to be rather unsatisfactory. The system is illustrated by a statement in the " Manuel Oppenheim-Lauterpacht " according to which war crimes, whatever their seriousness, can be punished by the death penalty (6th edition, Volume II, page 456).

application of the general clauses which may occur in the penal codes.

In the proposals it submitted to the Diplomatic Conference on the basis of the advice of the experts it had consulted, the International Committee of the Red Cross had put forward a special Article dealing with the effect of having acted under superior orders on the guilt of a person who has committed a criminal offence. The Diplomatic Conference did not approve the Article and it was left to national legislation to deal with the matter. Many military penal codes contain clauses on the subject but there are some which do not. In any case, it is to be hoped that a person committing an offence under orders or in application of general instructions will be treated in the same manner, whether he is an enemy alien or a national of the country concerned. The International Law Commission of the United Nations, which considered the problem when it was drawing up its draft Code of Offences against the Peace and Security of Mankind, after long discussion first evolved the following principle: "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 under international law, provided a moral choice was in fact possible to him". (Report of the International Law Commission covering its Third Session.) Later, on the basis of comments by governments, the Commission changed this wording to provide that the accused would be responsible under international law only if, in the circumstances, it was possible for him to act contrary to superior orders.

The conclusions of the International Law Commission are very close to the proposals of the International Committee of the Red Cross, which had recommended that in assessing responsibility, it should be enquired whether the accused person could or not have reasonably been aware that he was taking part in a violation of the Convention. The International Law Commission preferred the concept of possible choice, which is much wider since it covers not only the cases where the accused has committed an offence but also those in which he acted under moral or physical coercion.

Paragraph 2. — Search for and prosecution of persons who have committed grave breaches

The obligation on each State to enact the legislation necessary implies that such legislation should extend to any person who has committed a grave breach, whether a national of that State or an enemy. The laws in a number of countries which already provide for

punishment of any breaches of the Geneva Conventions committed by their own nationals should be amended to cover this point.

The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.

Extradition is restricted by the municipal law of the country which detains the accused person. Indeed, a rider is deliberately added : " in accordance with the provisions of its own legislation ". Moreover, a special condition is attached to extradition. The Contracting Party which requests the handing over of an accused person must make out a *prima facie* case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. The exact interpretation of " *prima facie* case " will in general depend on national law, but it may be stated as a general principle that it implies a case which, in the country requested to extradite, would involve prosecution before the courts.

Most national laws and international treaties on the subject refuse the extradition of accused who are nationals of the State detaining them. In such cases Article 146 quite clearly implies that the State detaining the accused person must bring him before its own courts.

Furthermore, this paragraph does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the Diplomatic Conference specially wished to reserve the future position and not to raise obstacles to the progress of international law [1].

Paragraph 3. — Suppression of other breaches

Article 147 defines the grave breaches of this Convention. However, under the terms of this paragraph, the Contracting Parties must

[1] See *Final Record*, Vol. II-B, pp. 114-115. The Netherlands considered it necessary to enact a special law on extradition for war crimes (Law No. 215 of 19 May 1954), explicitly defining the conditions under which extradition may be requested and granted.

also suppress all other acts contrary to the provisions of this Convention. The wording is not very precise. The expression " faire cesser " used in the French text may be interpreted in different ways. In the opinion of the International Committee, it covers everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated. The Special Committee of the Joint Committee had first of all proposed the wording " prendre les mesures nécessaires pour la suppression de ". During the discussions in the Joint Committee, the word " suppression " was kept in the English text, whereas in the French text the word " redressement " was used. Finally, the Diplomatic Conference in plenary session adopted the wording " faire cesser " but kept the word " suppression " in the English text [1]. However, there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention.

Other grave breaches of the same character as those listed in Article 147 can easily be imagined. This was well understood when the Yugoslav Penal Code (Article 125) was adopted, since the following crimes were added to the list : forced change of nationality, forced conversion to another religion, forced prostitution, the use of intimidation and terrorization, collective punishments, illegal detention in a concentration camp, forced recruitment to the intelligence or administrative services of the Occupying Power, the starving of the population, the levying of illegal or excessive taxes or requisitions, the devaluation of the currency or the illegal issue of currency.

This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.

[1] This word corresponds approximately to the French word " répression " (but not to the French " suppression "). Thus the English and French texts are not in entire agreement.

PARAGRAPH 4. — PROCEDURAL GUARANTEES

The procedural guarantees listed in the Convention reproduce and develop those contained in the 1929 Prisoners of War Convention (Articles 60-67).

The intervention of the Protecting Power and its right to be present at the hearings and to ensure that the accused persons are properly defended were mentioned in that Convention. It is by virtue of those provisions that in the post-war years the International Committee of the Red Cross has been able, in the absence of Protecting Powers, to intervene in cases of numerous prisoners accused of war crimes. It has even been called upon sometimes to assist them in legal proceedings. Some countries, such as France, have given the Committee certain facilities for carrying out such activities. The experience gained has shown the need for persons accused of war crimes to have the benefit in every case of certain procedural guarantees and the right of free defence. These guarantees are needed in particular when the accused person is tried by an enemy court. For that reason, in the draft it had submitted to the Diplomatic Conference, the International Committee had suggested a special Article to deal with the matter. At first the proposal met with some objections ; many of the delegates thought that it should be left to the national legislation of each country to settle the point. It was pointed out, furthermore, that most of the accused tried by the enemy are prisoners of war and that Article 85 of the Third Geneva Convention would automatically, therefore, give them the benefit of adequate guarantees in view of their prisoner-of-war status. The French delegation, however, realizing the importance of applying the same system to all accused whatever their personal status, proposed during the discussions held in the Joint Committee that the present paragraph should be adopted. The Joint Committee's approval was endorsed by the Conference.

A full analysis here of the procedural guarantees offered by the Third Geneva Convention would be out of place [1], but under it prisoners of war undergoing trial possess the following main rights : Article 87 says 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 Detaining Power who have committed the same acts. According to Article 99, the accused shall have the opportunity to present their defence and the assistance of a qualified advocate or

[1] The International Committee of the Red Cross intends to publish a commentary on this Convention also.

counsel. Under Article 101, if the death penalty is pronounced on a prisoner of war, the sentence must not be executed before the expiration of a period of at least six months. The time spent in custody awaiting trial is dealt with in Article 103. Article 105 details the rights of the defence, and Article 106 states that the accused shall have the same right of appeal or petition as those open to members of the armed forces of the Detaining Power. Finally, and this is particularly important, accused persons in the hands of the enemy must be allowed the benefit of assistance from the Protecting Power.

In referring to the rules drawn up for prisoners of war, the Diplomatic Conference took a wise decision. Rather than establish a new law it preferred to refer back to an existing law, already tried and tested, which constitutes a real safeguard for the accused.

In connection with this paragraph, it may still be wondered whether the person accused of war crimes can and should be tried during hostilities. The International Committee of the Red Cross has pointed out on several occasions, notably before the meeting of Government Experts in Geneva in 1947, how difficult it is for an accused person who is to be tried by a military tribunal to prepare his defence during hostilities. How, indeed, could he bring proof which might lessen or even disprove his responsibility ? Cases clear enough for a verdict to be passed before the end of hostilities will doubtless remain an exception.

It seems to be a good rule, therefore, that the trial of a person accused of war crimes should not take place at a time when it is impossible for him to adduce proofs which could lessen his responsibility or disprove it.

ARTICLE 147. — GRAVE BREACHES [1]

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 present Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed

[1] Article common to the four Conventions. See First Convention, Article 50 ; Second Convention, Article 51 ; Third Convention, Article 130.

in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The idea of defining grave breaches in the Convention itself must be laid to the credit of the experts convened in 1948 by the International Committee of the Red Cross. If repression of grave breaches was to be universal, it was necessary to determine what constituted them. However, there are violations of certain detailed provisions of the Geneva Convention which would constitute minor offences or mere disciplinary faults which as such could not be punished to the same degree.

It was also thought advisable to draw up as a warning to possible offenders a clear list of crimes whose authors would be sought for in all countries. The idea had been stated in the draft of Article 40, which defined in a rather general way what was meant by grave breaches. A joint amendment submitted to the Diplomatic Conference by a number of delegations led to the inclusion in each Convention of a list of offences defined more exactly. It was that text which was finally adopted by the Conference with slight alterations[1].

Protected persons are defined by Article 4 and *protected property* by various provisions of the Convention, including Articles 18, 21, 22, 33, 53, 57, etc.

Wilful killing. — " Wilful killing " would appear to cover cases where death occurs through a fault of omission. Of course, the omission must have been wilful and there must have been an intention to cause death by it. It seems, therefore, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees would be held responsible. In the same way, any putting to death as a reprisal would certainly come within the definition of wilful killing, since the Convention forbids reprisals against protected persons. The same applies to the execution of hostages.

On the other hand, cases in which protected persons are killed as a result of acts of war — for example, the bombardment of a civilian hospital — are more difficult to class as wilful killing : the question is left open.

[1] The very term " grave breaches " gave rise to rather lengthy discussion. The delegate of the USSR would have preferred the use of the word " serious crimes " or " war crimes ". Finally, the Conference showed its preference for the expression " grave breaches " although such breaches are called " crimes " in the penal legislation of almost all countries ; the choice of the words is justified by the fact that " crime " has a different meaning in different legislations.

Torture.—The word torture has different acceptations. It is used sometimes even in the sense of purely moral suffering, but in view of the other expressions which follow (i.e. inhuman treatment including biological experiments and suffering, etc.) it seems that it must be given here its, so to speak, legal meaning—i.e., the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. Looked at from this angle, torture is a concept which in general is not dealt with as such by national penal codes. It is more than a mere assault on the physical or moral integrity of a person. What is important is not so much the pain itself as the purpose behind its infliction. This, therefore, is a point which will require additional clauses in most national legislations; fortunately, judicial torture has disappeared from all civilized penal systems.

Inhuman treatment.—This idea is rather difficult to define. In general, the Convention provides, in Article 27, that protected persons must always be treated with humanity. The sort of treatment covered by this Article, therefore, would be one which ceased to be humane. It could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them being brought down to the level of animals. That leads to the conclusion that by "inhuman treatment" the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.

Biological experiments.—Biological experiments are certainly injuries to body or health and as such will be dealt with in most penal codes. It was the memory of the criminal practices of which certain prisoners were victim that led to these acts being included in the list of grave breaches. Only biological experiments are forbidden and the prohibition does not deny a doctor the possibility of using new methods of treatment justified by medical reasons and based only on concern to improve the state of health of the patient. It must be possible to use new medicaments offered by science, provided that they are administered only for therapeutic purposes.

That interpretation is fully in agreement with the corresponding provisions of the other three Geneva Conventions, particularly the Third Convention (Article 13), which is the most explicit and which states that no prisoner of war may be subjected to medical or scientific

experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Wilfully causing great suffering.—This refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. In view of the fact that suffering in this case does not seem, to judge by the phrase which follows, to imply injury to body or health, it may be wondered if this is not a special offence not dealt with by national legislation. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.

Serious injury to body or health.—This is a concept quite normally encountered in penal codes, which usually use as a criterion of seriousness the length of time the victim is incapacitated for work.

Unlawful deportation or transfer.—This refers to breaches of the provisions of Articles 45 and 49. The unhappy experiences of the Second World War have made it necessary to prohibit deportation completely in this Convention. In the same way, transfers are forbidden except in cases where the safety of the protected persons may make them absolutely necessary. Provisions doubtless do exist in the national penal codes which would enable these breaches to be punished by analogy : coercion or deprivation of personal liberty are quite common examples, but in this particular case the coercion is exercised by the authorities and it is not, therefore, easy to deal with it by analogy with offences against ordinary law. These breaches should therefore be the subject of special provisions.

Unlawful confinement.—Most national legal systems punish unlawful deprivation of liberty and this breach could therefore be dealt with as an offence against ordinary law. The offence, however, would probably be very difficult to prove. Indeed, the belligerent Powers can intern any enemy citizens or aliens on their territory if they consider it absolutely necessary for their security. In the same way, Occupying Powers can intern some of the inhabitants of the occupied territories. The illegal nature of confinement would therefore be very difficult to prove in view of the extended powers granted in this matter to States. Obviously, however, internment for no particular reason, especially in occupied territory, could come within the definition of this breach.

Compelling a protected person to serve in the forces of a hostile Power. —This is an offence *sui generis*. A French decree of August 8, 1944 treats this offence in the same way as illegal recruitment into the armed forces, which is covered by Article 92 of the French Penal Code. That procedure, however, scarcely seems satisfactory. Provisions of the penal codes punishing coercion could also be invoked, it would seem ; but again the fact that the coercion is exercised by the authorities puts rather a different complexion on the case.

It should be recalled that the Fourth Hague Convention of 1907, in Article 23, forbids a belligerent to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention.—National legislations contain hardly any provisions on this subject, although they do imply, of course, that a person must be tried according to the existing rules. At the most the penal codes provide for the punishment of magistrates who allow themselves to be turned aside from their duty for a monetary consideration or other form of bribery. The supervision exercised over the administration of justice in all countries makes it difficult, however, to conceive of a protected person being deprived of the right of fair and regular trial.

Working by analogy with municipal law is therefore scarcely possible, since it is the Convention itself in many Articles which specifies the conditions under which protected persons may be tried before the courts. In other words, the breach mentioned here can be split into a number of different offences, for example : making a protected person appear before an exceptional court, without notifying the Protecting Power, without defending counsel, etc. If such a breach has not been specially mentioned, it could be punished on the basis of a general clause covering all breaches of the Convention not listed by name.

The taking of hostages.—Hostages might be considered as persons illegally deprived of their liberty, a crime which most penal codes take cognizance of and punish. However, there is an additional feature, i.e. the threat either to prolong the hostage's detention or to put him to death. The taking of hostages should therefore be treated as a special offence. Certainly, the most serious crime would be to execute hostages which, as we have seen, constitutes wilful killing. However, the fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself

a very serious crime ; it causes in the hostage and among his family a mortal anguish which nothing can justify.

The extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.—These two phrases cover a number of very different offences :

(a) *Destruction.*—The Fourth Convention forbids the destruction of civilian hospitals and their property or damage to ambulances or medical aircraft. Furthermore, the Occupying Power may not destroy in occupied territory (Article 53) real or personal property except where such destruction is rendered absolutely necessary by military operations. On the other hand, the destruction of property on enemy territory is not covered by the provision. In other words, if an air force bombs factories in an enemy country, such destruction is not covered either by Article 53 or by Article 147. On the other hand, if the enemy Power occupies the territory where the factories are situated, it may not destroy them unless military operations make it absolutely necessary.

(b) *Appropriation.*—To appropriate property, the enemy country must have it in its power by being in occupation of the territory where it is situated. It will be recalled, in this connection, that the requisitioning of civilian hospitals and their material and the requisitioning of foodstuffs is subject in occupied territory to a series of restrictive conditions.

To constitute a grave breach, such destruction and appropriation must be extensive : an isolated incident would not be enough [1].

Most national penal codes punish the unlawful destruction and appropriation of property. In the same way, most military penal codes punish pillage. However, it will be noted that the destruction and appropriation mentioned here are dependent on the necessities of war. Therefore, even if in the national codes there are definitions of what constitutes such necessities, it seems difficult to apply this idea without adaptation to an army or even to a State. It seems, therefore, that the appropriation and destruction mentioned in this Convention must be treated as a special offence.

CONCLUSIONS

1. The ratification of the Fourth Geneva Convention of 1949 will necessitate in a great majority of States the enactment of additional

[1] It might be concluded from a strict interpretation of this provision that the bombing of a single civilian hospital would not constitute a grave breach, but this would be an inadmissible inference to draw if the act were intentional.

penal laws applicable to all offenders, whatever their nationality and whatever the place where the offence has been committed.

2. It is desirable that this legislation should be in the form of a special law, defining the breaches and providing an adequate penalty for each.

3. If it is impossible to enact such special legislation, it will be necessary to resort to a simpler system which would include as a minimum :

(a) special clauses classing as offences with a definite penalty attached to each : torture ; inhuman treatment ; causing great suffering ; destruction and appropriation of property not justified by military necessity ; compelling a protected person to serve in the forces of a hostile Power ; wilfully depriving a protected person of the rights of fair and regular trial ; unlawful deportation or transfer.

(b) a general clause providing that other breaches of the Convention will be punished by an average sentence, for example imprisonment from five to ten years, in so far as they do not constitute offences or crimes to which more severe penalties are attached in the ordinary or military penal codes. This general clause should also provide that minor offences can be dealt with through disciplinary measures.

ARTICLE 148. — RESPONSIBILITIES OF THE CONTRACTING PARTIES [1]

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.

This provision naturally does not relate to the obligation to prosecute and punish those committing breaches of the Convention which Article 146 makes absolute. If, however, any doubt existed on that point, this Article would clear it up entirely.

Article 148 is completely new. According to the comments on it made by the Italian delegation, which put it forward, this amendment is a logical consequence of the preceding Article. The State remains responsible for breaches of the Convention and will not be allowed to absolve itself from responsibility on the grounds that those who

[1] Article common to the four Conventions. See First Convention, Article 51 ; Second Convention, Article 52 ; Third Convention, Article 131.

committed the breach have been punished. For example, it remains liable to pay compensation.

For a better understanding of the sense of this provision, it should be compared with Article 3 of the Fourth Hague Convention of 1907, which reads :

> 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 committed by persons forming part of its armed forces.

In our opinion, Article 148 is intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor. As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called " war reparations ". It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability.

ARTICLE 149. — 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.

General Observations and Historical Survey

There was a provision of the same kind in the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Article 30). The enquiry procedure

[1] Article common to the four Conventions. See First Convention, Article 52 ; Second Convention, Article 53 ; Third Convention, Article 132.

envisaged left many loopholes and, in 1937, the International Committee had convened a Commission of Experts to revise and develop the text. On the basis of its consultations, the International Committee put before the XVIIth International Red Cross Conference the following text for the First Convention :

ARTICLE 41. — PROCEDURE OF ENQUIRY

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.

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 Diplomatic Conference entrusted consideration of this Article to the Joint Committee which adopted the 1929 text with some modifications and decided to introduce it into all four Conventions. The changes proposed by the experts at their conference in 1937 were scarcely taken into account by the Diplomatic Conference.

It should be noted that this Article deals only with violations of a certain degree of seriousness which cause disagreement between the Parties. Indeed, for all other violations the Protecting Power is certainly empowered to make enquiries and transmit the result of those enquiries to the country of origin of the protected persons. In the same way, if internees are wounded or killed by a sentry, by another internee or by any other person, an official enquiry under the terms of Article 131 must be held by the Detaining Power itself. Its results are communicated to the Protecting Power. The field of application of Article 149 is quite restricted, therefore, since by reason

of the system of supervision laid down in Articles 9, 11 and 143, most of the cases of alleged violations will be dealt with by the supervisory bodies provided for in the Convention itself.

PARAGRAPH 1. — OPENING OF THE ENQUIRY

An enquiry is obligatory when a Party to the conflict requests it. The Parties concerned, however, must decide on the procedure to be followed in the enquiry. It is therefore probable that when asking for the opening of an enquiry, the Party to the conflict concerned will also propose the methods by which it should be conducted.

On several occasions in this commentary emphasis has been laid on the difficulty in time of war of reaching agreement between belligerent States. The difficulty will be all the greater if the point a issue is a violation alleged to have been committed by one of the belligerents and the opening of an enquiry on its territory. Moreover, it should be pointed out that this Article, which dates back as far as the First 1929 Convention, has never been applied, to the best of the International Committee's knowledge[1].

PARAGRAPH 2. — ENQUIRY PROCEDURE

This applies to cases where the Parties concerned are unable to agree on the procedure to be followed. They must then agree on the choice of an umpire who will decide on a procedure. Again, agreement between the Parties becomes necessary. If such an agreement proves impossible, the Convention contains no obligatory provision. The most that could be done would be to invoke Resolution No. 1 of the Diplomatic Conference, which recommends that, in the case of a dispute relating to the interpretation or application of the 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.

In practice, the body which seems the best qualified to carry out the enquiry would quite naturally be the Protecting Power. If necessary, the diplomatic representatives of other neutral States already on the spot and able to act rapidly could also carry out an enquiry.

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[1] An attempt to apply Article 30 of the 1929 Convention was made during the Italo-Abyssinian conflict (1935-1936).

PARAGRAPH 3. — ACTION TO BE TAKEN ON THE FACTS DISCOVERED

As already stated, this can apply only to grave breaches, raising important problems, which it has not been possible to settle in the normal way through the Protecting Power or through the official enquiry carried out by the Detaining Power itself under Article 131.

Under the terms of this paragraph, the body carrying out the enquiry must be enabled to discover the facts and therefore, in principle, to travel to the spot and check the facts reported. The Parties to the conflict undertake in this paragraph to put an end to the violation in the case of a permanent or continuous violation of the Convention and to punish those responsible. It should be noted, in this connection, that the obligation is already contained in Articles 146 and 147.

It would be possible also to set up two separate bodies, one to decide on questions of fact and the other to determine whether or not there has been a breach of the Convention on the basis of those facts. It should be noted, in this connection, that it may in certain circumstances prove extremely difficult to arrive at the facts, since if this enquiry procedure is followed, it means *a priori* that the Parties disagree on whether a breach has been committed or not.

SECTION II

FINAL PROVISIONS

The formal or diplomatic provisions which it is customary to place at the end of an 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.

ARTICLE 150. — 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

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 working languages. The 1929 Conventions, on the other hand, had been drawn up in French only, as French was still the leading diplomatic language at that time.

Paragraph 1 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

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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 works quoted in that Article. See also *Handbook of Final Clauses*, United Nations Secretariat, 1951.

[2] Article common to all four Conventions. Cf. First Convention, Article 55 ; Second Convention, Article 54 ; Third Convention, Article 133.

French that the Plenipotentiaries appended their signatures in 1949. 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. A consequence will be that the interpretation of the Convention will be made easier, as the two texts can be compared and one will throw light on the other, but that there will be an awkward problem to solve when the two texts differ.

It is generally difficult 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 suggested, in its draft proposals, that where there was doubt as to the interpretation of a provision, the French version should be taken as the correct one. The suggestion was not adopted, however, 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, it 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 Conventions are concerned, and has the particular advantage of avoiding the production of a variety of different versions in the numerous Spanish-speaking countries.

The Russian and Spanish versions are official in that the body which prepared them was specified in the Convention itself, but, unlike the French and English, they are not authentic, and the French and English versions would be regarded as correct in the event of any divergencies.

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[1] This procedure is generally followed in countries which, like Switzerland, promulgate their national laws in several languages, each version being equally authentic.

[2] There are also translations into German and Italian made by the Swiss Federal Council, not at the request of the Diplomatic Conference, but under an obligation of Swiss law.

ARTICLE 151. — 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.

The procedure resorted to in order to make the Geneva Conventions a part of positive international law is the one normally adopted and is in two 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 that text has been signed [4] in the name of at least two States. It is the act of signature which is the subject of Article 151. The procedure for bringing the Convention into force is dealt with in the subsequent Articles.

Article 151 begins by laying down that the Convention is to bear the date of the day of signature, viz. August 12, 1949. It should be noted that the other three Geneva Conventions drawn up by the Diplomatic Conference of 1949 bear the same date.

The Article then gives States an opportunity of having the Convention signed in their name up to February 12, 1950, i.e. within a period of six months [5]. 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 [6]. The few States which are not covered by this provision may become parties to the Convention by acceding to it.

As will be seen in the discussion on 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 the act cannot therefore be disregarded. Moreover, the Swiss Federal Council

[1] Article common to all four Conventions. Cf. First Convention, Article 56 ; Second Convention, Article 55 ; Third Convention, Article 136.

[2] Certain writers consider, however, that a treaty is not actually " concluded " until it enters unto force.

[3] Attention should be drawn here to the words introducing the Convention : " The undersigned . . . have agreed as follows ". See above, p. 11.

[4] When signatures are given *ad referendum*, they are subject to confirmation.

[5] Eighteen States signed the Convention on August 12, 1949. Twenty-seven did so on December 8 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.

[6] Five States availed themselves of this opportunity, two of them having been represented at the Conference by observers.

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[1]. Such reservations will not remain in force, however, unless they are confirmed when the instrument of ratification is deposited.

ARTICLE 152. — RATIFICATION [2]

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.

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, carried out by the body competent under the municipal law of each country, can alone give the Convention obligatory force and make it binding on the State concerned.

Ratification is made effective by the deposit with the Swiss Federal Council of a communication called the instrument of ratification, which is an expression of the will of the State concerned towards the other States[3].

The statement that the Convention " shall be ratified as soon as possible " is a pressing recommendation to each country to hasten the 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 receipt. This task has been

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[1] For the text of those reservations, see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, pp. 342-357.

[2] Article common to all four Conventions. Cf. First Convention, Article 57 ; Second Convention, Article 56 ; Third Convention, Article 137.

[3] It is only the deposit of the ratification which is valid 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.

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 that record to signatory and acceding Powers.

Both the record and the copies will mention any reservation which may accompany the ratification, for the information of the other States.

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.

The effect of an objection by a State party or signatory to the Convention to a reservation made by another party 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 system in force in Pan-American affairs claim that the objection only prevents the Convention from entering into force as between the party making the reservation and the State objecting to that reservation. The International Court of Justice, in an opinion given in connection with the Genocide Convention, recommended a compromise solution, in which the criterion adopted would be the compatability or incompatibility of the reservation with the object of the Convention.

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 153. — ENTRY INTO FORCE [1]

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.

[1] Article common to all four Conventions. Cf. First Convention, Article 58 ; Second Convention, Article 57 ; Third Convention, Article 138.

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[1].

The Convention will, of course, enter into force at that juncture only 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.

That date marks an event of some importance, however ; it is the date on which the Convention becomes an integral part of international law. From that day onwards the Convention will exist as such, whereas without the two ratifications, it would never be more than an historical document. Then only will it become possible for a non-signatory State to become party to the Convention by acceding to it[2].

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 cases of armed conflict. Certain Articles nevertheless become applicable immediately, in peacetime : Articles 53 and 54, for example, 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, to make it possible for accessions to this universal humanitarian Convention to take place as soon as possible.

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 steps, particularly legislative and administrative measures, as are necessary in view of the new obligations it has assumed.

The Fourth Convention actually entered into force on October 21, 1950, Switzerland having ratified it on March 31, 1950, and Yugoslavia on April 21 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

[1] The text says " *not less than* two instruments of ratification " to meet the improbable case of several States having ratified on the same day.

[2] See commentary on Article 155, p. 621.

[3] In practice, the waiting period will be longer in the single case of the first State to ratify the Convention, since it will be determined by the date of the second ratification.

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.

ARTICLE 154. — RELATION WITH THE HAGUE CONVENTIONS

In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

1. *General Observations and Historical Survey*

When the Geneva Diplomatic Conference of 1929 expressed a wish for an improvement in the protection of civilians under international law, it might have been thought that such protection could be ensured by a development of the Fourth Hague Convention of 1907.

However, the tragic events of which so many civilians were victim during the Second World War showed that such a vital problem could only be solved by means of special regulations, and it was recognized that a completely new and separate diplomatic instrument would have to be drawn up. Those who took part in the preparatory work had such an instrument in mind.

Once the text was drawn up, it was necessary to specify the relationship between the new Convention and the Hague Regulations, which contain general provisions forming the basis for the protection of civilians in time of war, particularly in occupied territory. Article 154 is therefore based on the need to specify the relationship of the Convention with the Hague Regulations. Various drafts were put forward. Some had thought that the new Convention could be said to " replace " the 1907 Hague Regulations in respect of subjects dealt with in the Convention. Finally, the 1949 Diplomatic Conference decided in favour of a proposal made by the International Committee of the Red Cross at the Conference of Government Experts in 1947.

The wording adopted by the Diplomatic Conference is similar to that which specifies the relationship between the Third Geneva Con-

vention relative to the Treatment of Prisoners of War and the 1907 Hague Regulations. The Third Geneva Convention, however, repeats everything in the Hague Regulations which concerns prisoners of war, whereas in the Fourth Convention some of the provisions of those Regulations which deal with civilians have been omitted or amended. The explanation is simple : the Hague Regulations codify the laws and customs of war and are intended above all to serve as a guide to the armed forces, whereas the Fourth Convention aims principally at the protection of civilians.

Generally speaking, however, it may rightly be claimed that the Convention as a whole determines the treatment of civilians in time of war so that in that connection, with the few exceptions discussed later, the new provisions have entirely replaced the 1907 Regulations. For that reason, when a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to enquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899. Furthermore, the Hague Regulations are considered to have given written expression to international custom and no State would be justified today in claiming that the Regulations are not binding on it because it is not party to them. The International Military Tribunal sitting at Nuremberg stated as much when it said that in 1939 the Regulations annexed to the Convention (the Fourth Hague Convention of 1907) were accepted by all civilized States and regarded by them as the codified expression of the laws and customs of war to which Article 6(b) of its Charter referred.

There is no need, therefore, in particular cases, to wonder whether the Hague Regulations and the Fourth Geneva Convention are both applicable. If the Geneva Convention is applicable, the Hague Regulations are also applicable *a fortiori* in respect of all matters concerning civilian persons in time of war not contained in the 1949 Convention.

A detailed examination of those provisions of the Hague Regulations (sections II and III) which affect the situation of civilian persons is necessary to determine what points have been omitted in the Fourth Convention.

2. *Examination of the provisions of the Hague Regulations*

Article 23. — In addition to the prohibitions provided by special Conventions, it is especially forbidden :

. . . . . .

(*g*) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Without expressing an opinion on the subject, it may perhaps be permissible to refer to the inordinately wide use which has been made of the pretext of " the necessities of war " to justify destruction and seizure.

The Fourth Convention has repeated this prohibition in Article 53 in respect of destruction in occupied territory only. Furthermore, the prohibition relates only to destruction carried out by the Occupying Power. Destruction caused by other belligerents, particularly by bombing, is not mentioned.

The provision of the Hague Regulations, in so far as it is considered still applicable, therefore remains valid for all seizures of enemy property and for destruction not carried out by the Occupying Power in occupied territory.

Article 23. — . . . it is especially forbidden . . .

(h) to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile Party.

The Geneva Convention contains no explicit provision of this type, since as a general rule it does not deal with the protection of property. It therefore remains completely valid, although, in truth, it has not always been observed by belligerents.

Article 23, paragraph 2. — A belligerent is likewise forbidden to compel the nationals of the hostile Party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

This prohibition is general in scope and applies both to the inhabitants of occupied territory and to enemy nationals in the territory of the State concerned.

The Fourth Convention, in paragraph 1 of Article 51, confirms this prohibition in respect of occupied territory, extends it and makes it more precise. It prohibits not only compulsion, but also forbids any pressure or propaganda which aims at securing voluntary enlistment. It is not restricted to warlike operations against the country of the protected persons, but prohibits all military service.

The situation of enemy aliens in the territory of a belligerent is governed by paragraph 2 of Article 40, which contains the same prohibition as the Hague Regulations.

Article 27. — In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the same time for military purposes.

It is the duty of the besieged to indicate the place of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

The protection of civilian hospitals is henceforth ensured by Articles 18 and 20 of the Convention ; subject to certain conditions, they may be marked by means of the red cross emblem.

As regards all other buildings and establishments, however, the provision in the Hague Regulations remains valid.

Article 28. — The pillage of a town or place, even when taken by assault, is prohibited.

Article 33 of the Fourth Geneva Convention of 1949 repeats this prohibition in absolutely general terms.

Article 29. — A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies : soldiers and civilians carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

The definition of a spy given in this Article remains completely valid since the Geneva Convention contains no similar provision. However, a spy is also a protected person in so far as he conforms to the definition given in Article 4 of the Fourth Convention. Under Article 5 of the Convention, the spy may nevertheless be deprived temporarily of certain rights, particularly the right of communication.

Article 30. — A spy taken in the act shall not be punished without previous trial.

The Convention contains several provisions in this respect which extend the principle and make it precise. Thus Article 3 prohibits " the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples ".

Article 3, although it applies only to armed conflicts not of an international character, contains rules of absolutely general application. The prohibition mentioned is, moreover, confirmed by Article 5 and Articles 64-76.

It should also be noted that paragraph 2 of Article 68 authorizes the Occupying Power under certain conditions to inflict the death penalty on protected persons found guilty of espionage.

Article 31. — A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

This rule remains valid.

Article 42. — Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only the territories where such authority has been established and can be exercised.

As stated above, the Geneva Convention is a complete document containing its own rules of application. Those rules are based above all on the individual. Once the individual is in the power of the enemy he becomes by that very fact a protected person in the sense of Article 4. Article 42 of the Hague Regulations, therefore, has no direct influence on the application of the Fourth Convention to civilian persons protected by its terms.

Article 43. — The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This Article imposes obligations of a general nature on the Occupying Power, intended to protect not only the inhabitants of the occupied territory, but also, for example, the State, political institutions, etc.

The Geneva Convention does not deal with the observance of the laws in force except in so far as they are directly connected with civilian persons. For that reason, it contains specific provisions concerning penal legislation (Article 64 et sqq.) and labour legislation (Article 51).

With regard to the maintenance of public order and safety, the Fourth Convention only deals with such aspects as are directly connected with the protection of civilian persons, particularly ensuring food and medical supplies for the population (Article 55), preserving hygiene and public health (Article 56) and giving spiritual assistance (Article 58).

It may therefore be concluded that the Convention has taken from this provision of the Hague Regulations those parts essential for the protection of civilian persons. In all other respects, Article 43 of the Regulations remains valid.

Article 44. — A belligerent is forbidden to force inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence.

Article 31 of the Geneva Convention contains a general prohibition on the exercise of physical or moral coercion, in particular to obtain information from protected persons or from third parties. Article 44 of the Regulations therefore no longer has any point.

Article 45. — It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

There is no exactly similar provision in the Fourth Convention, but its substance is certainly contained in Article 27, which provides that protected persons are entitled to respect for their persons and honour. Furthermore, Article 68 emphasizes that protected persons who are not nationals of the Occupying Power are not bound to it by any duty of allegiance.

It may therefore be considered that, while the Convention does deal with this point in general terms, the specific prohibition contained in the Hague Regulations remains valid.

Article 46. — Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Everything in this Article which concerns the protection of the individual has been repeated, developed and made more precise in the Convention, especially in Article 27.

On the other hand, respect for private property is not covered by the Geneva Convention.

Article 47. — Pillage is formally forbidden.

As stated with regard to Article 28 of the Regulations, Article 33 of the Convention contains a general prohibition of pillage. Article 47 of the Regulations therefore loses all point as regards civilian persons.

Article 48. — If, in the territory occupied, the occupant collects the taxes, dues and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Article 49. — If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

These Articles are not directly connected with the protection of the civilian persons. They are therefore not to be found in the Convention and remain valid.

Article 50. — No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

This provision has given rise to various interpretations. Thus many authors have claimed that it does not prohibit the execution of hostages.

The Convention defined and extended the prohibition on collective punishment in Article 33. Article 34 forbids the taking of hostages.

Article 50 of the Regulations has thus become very much out-of-date.

Article 51. — No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-Chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributories.

The reader is referred to the comments on Articles 48 and 49.

Article 52. — Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall, as far as possible, be paid for in cash ; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Here, a distinction must be drawn between requisitions of services and requisitions in kind :

(a) Requisitions of services :

Article 51 of the Convention develops and makes more precise the Article in the Hague Regulations. It constitutes, in fact, a new set of very detailed regulations. On two points, however, the Hague Regulations remain valid : the requisition of services shall be in proportion to the resources of the country and shall only be demanded on the authority of the commander in the locality occupied. The Convention does not mention these two points.

It should also be noted that under Article 54, judges and public officials benefit from special provisions.

(b) Requisitions in kind :

In this sphere the Hague Regulations remain completely valid. The Convention mentions only some special cases for which special rules are laid down. These include food and medical supplies (Article 55) and civilian hospitals and their material and stores (Article 57). These requisitions remain subject, as provided in the Hague Regulations, to the authority of the commander in the locality occupied.

Articles 53 to 55.

These Articles, which do not deal directly with the protection of civilian persons, have no equivalent in the Convention and therefore remain completely valid.

Article 56. — The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of arts and science, is forbidden and should be made the subject of legal proceedings.

This Article remains valid. It may be noted that Article 63 of the Convention gives relief societies wider guarantees. Furthermore, the protection of hospitals is dealt with at length in Articles 18, 19, 20, 56 and 57 of the Convention. On this particular point, the Geneva Convention has established a completely new system.

3. *Conclusions*

An examination of those provisions of the Hague Regulations which relate to the protection of civilian persons shows that the Fourth Convention repeats most of them. Nevertheless, the Hague Regulations remain applicable.

In giving instructions to their armed forces or administrative services with regard to the treatment of civilian persons, especially in occupied territory, States will therefore have to take this situation into account. They could take as a basis for such instructions the Fourth Convention, with the addition of those points on which the Hague Regulations remain valid and must be observed.

In order to facilitate the drawing up of such instructions, the points concerned are summarized as follows :

In respect of all the belligerent countries :

(1) Prohibition of the seizure of enemy property and the destruction of enemy property other than that carried out by the Occupying Power in occupied territory (Article 23 (g)) ;

(2) Prohibition on declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party (Article 23 (h)) ;
(3) Definition of a spy (Articles 29 and 31) ;

Occupied territories :

(4) The general maintenance of public order and safety and respect for the laws in force (Article 43) ;
(5) Prohibition on coercion of the population to swear allegiance (Article 45) ;
(6) Respect for private property (Article 46) ;
(7) Taxes and contributions (Articles 48, 49 and 51) ;
(8) Requisitions of services : they must be proportional to the resources of the country and only carried out on the authority of the commander in the locality occupied (Article 52) ;
(9) The requisition of foodstuffs and medical material and stores shall only be demanded on the authority of the commander in the locality occupied (Article 52).

Naturally only those questions which directly concern civilian persons have been mentioned. Of course, provisions of another character, such as Articles 22, 23 (in part), 24 to 27, 32 to 34, 36 to 41, 42 and 53 to 56 of the Hague Regulations which deal with very different subjects, remain completely valid.

ARTICLE 155. — ACCESSION[1]

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.

Accession is the method by which any Power which has not signed the Convention may become party 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 or not they are parties to one of the earlier Conventions. The Geneva Conventions, which draw their strength from their universality, are treaties open to all[2].

[1] Article common to all four Conventions. Cf. First Convention, Article 60 ; Second Convention, Article 59 ; Third Convention, Article 139.

[2] The Geneva Convention of 1906 did not yet possess this characteristic in the same degree. (See Article 32 of that Convention.)

Accession is exactly the same in its effects as ratification, to which it is equivalent in all respects.

An accession can, however, place take only 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 October 21, 1950.

ARTICLE 156. — 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.

Contrary to former practice, accession today works on the same principles as ratification. Thus accessions to the Fourth Convention will take effect six months after the date on which they are received by the Swiss Federal Council which, in this case also, is named as depositary and has the task of communicating accessions to the other Powers.

Article 156 does not state, as Article 152 did for ratifications, that the Federal Council must draw up a record of the deposit of each accession, nor that it must transmit a copy of that record to the other Powers. In practice, however, there is no reason why the formalities should not be the same for accessions as for ratifications.

If reservations are made on accession, they will be treated in the same way as reservations on ratification [2].

ARTICLE 157. — 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.

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[1] Article common to all four Conventions. Cf. First Convention, Article 61 ; Second Convention, Article 60 ; Third Convention, Article 140.

[2] See commentary on Article 152.

[3] Article common to all four Conventions. Cf. First Convention, Article 62 ; Second Convention, Article 61 ; Third Convention, Article 141.

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, the entry into force of the Convention obviously cannot be subject to the six months waiting period which follows ratification or accession under normal peacetime conditions.

Ratification or 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 Conventions 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 situation 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).

Article 157 also mentions that the Federal Council is to communicate ratifications or accessions to signatory States " by the quickest method ". Grave events demand urgent measures. The customary procedure, as laid down in Article 152, paragraph 2, is in that case no longer required. Suitable means such as a telegram will be used.

ARTICLE 158. — DENUNCIATION [2]

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

[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 provisions of the Convention. The third paragraph of Article 2, which raises the principle of reciprocity affects only 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.

[2] Article common to all four Conventions. Cf. First Convention, Article 63 ; Second Convention, Article 62 ; Third Convention, Article 142.

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, repatriation and re-establishment 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. If there were no such provision, 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 since the first came into existence no State has ever denounced a Geneva Convention. Surely it is inconceivable that any Power would wish to repudiate such elementary rules of humanity and civilization.

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 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 High Contracting Parties.

PARAGRAPH 3. — NOTICE

A denunciation will not take effect immediately ; under normal peacetime conditions, it will take effect only after one year has elapsed.

[1] See the commentary on Article 154.

If the denouncing Power is involved in a conflict [1] the waiting period will be prolonged and the denunciation will not take effect until peace has been concluded [2], or even, where the case arises, until the release and repatriation of protected persons are completed [3]. 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 begins, which are subject to a waiting period of one year. The spirit of the Article, however, 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.

Paragraph 4. — Effect of denunciation

The paragraph begins by stating 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 obviously deliberately so, as it is, such a clause is nevertheless useful, as it reaffirms the value and permanence of the lofty principles underlying the Convention. Those principles exist independently of the Convention and are not limited to it. The clause shows clearly that a Power which denounced the Convention would nevertheless remain bound by the principles contained in it in so far as they are the expression of the imprescriptible and universal rules of customary international law.

The provision takes its whole significance from the fact that the Convention contains no Preamble [4].

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[1] The word " conflict " must obviously be understood in its broadest sense ; it covers the various situations described in Articles 2 and 3.

[2] 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 conflicts not of an international character, it will mean the effective re-establishment of a state of peace.

[3] This provision may be compared with Article 6.

[4] See above, p. 14.

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 159. — REGISTRATION WITH THE UNITED NATIONS

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.

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, indeed, 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 [2], 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 [3]. 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 152 to 156.

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 Secretariat of any ratifications, accessions and denunciations which it receives.

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[1] Article common to all four Conventions. See First Convention, Article 64; Second Convention, Article 63; Third Convention, Article 143.

[2] See Article 18 of the Covenant of the League of Nations and Article 102 of the United Nations Charter.

[3] See Resolution 1 below.

ANNEX I

DRAFT AGREEMENT RELATING TO HOSPITAL AND SAFETY ZONES AND LOCALITIES

In the commentary on Article 14 of the Convention, which invites Powers to establish hospital and safety zones and localities, several references were made to the Draft Agreement which the Diplomatic Conference of 1949 decided to annex to the text of the Convention.

As stated, the Draft Agreement has only been put forward to States as a model, but the fact that it was carefully drafted at the Diplomatic Conference, which finally adopted it, gives it a very real value. It could usefully be taken as a working basis, therefore, 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 and safety 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 in Article 14 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War 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.

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 14 of the Convention, to which it refers. Reference should therefore be made to the commentary on that Article, for the categories of persons covered.

The wording of the Convention does not define certain categories of persons very clearly, particularly the aged. Should the term " aged persons " be taken to mean those over 60, as the Conference of Experts of 1947 proposed ? It is a moot point, but the age suggested may serve as a useful working basis.

What proportion of the total population would be entitled to take shelter in a hospital and safety zone ? As the question has not been studied systematically, some figures taken from the Swiss " Annuaire statistique " may be useful : according to the Annuaire the different categories of persons referred to in Article 14 of the Fourth Convention would represent the following percentages as far as Switzerland is concerned :

	%
Children under 15 years of age	20.7
Mothers of children under 7 years of age approximately	6
Expectant mothers	0.3
Old people (over 65 years of age)	10
	37

If the infirm, the wounded and the sick are added to the total, the proportion will certainly exceed 40 % of the whole population. There can be no question of providing shelter in a zone only representing a small portion of the territory for such a large proportion of the population. There is no cause for undue concern, however. People living in country districts far away from the probable zone of military operations will hardly think of leaving their homes. It is nevertheless well to bear the figures in mind, in case it should, for instance, be proposed to arrange for the evacuation of a town and for the feeding of the evacuees and the necessary administrative staff.

It should perhaps be added, that in the Committee's opinion, the expression " personnel entrusted with the organization and administration of these zones " must be taken in a fairly broad sense, to include, for example, the police, the department responsible for preventing illegal entry into the zone, and the fire and civil defence services, as

[1] Under Article 13 of the Draft Agreement, it 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 ".

well as members of the Special Commissions 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 size. Residents in the zone have certain obligations which will be discussed in connection with the following Article.

The Monaco Draft [1] 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 on holiday from war factories.

ARTICLE 2. — PROHIBITED WORK

No persons residing, in whatever capacity, in a hospital and safety zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

The meaning of " work directly connected with military operations " is defined in Articles 40 and 51 of the Convention. Reference may also be made to Article 50 of the Third Convention of 1949, which authorizes the employment of prisoners of war on the following classes of work :

(a) agriculture ;
(b) industries connected with the production of 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 little ambiguity 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 solely for use by the armed forces. There are, however, a number of doubtful cases—the manufacture of lorries, for example,

[1] See Commentary on the First Geneva Convention, p. 208.

since such vehicles may be used for purely 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.

Nevertheless, in view of the difficulty of the problem, it would be advisable to make every effort to ensure that the local population in a hospital and safety zone is always as small as possible. Article 4 *(b)* of this Draft Agreement emphasizes that particular point.

ARTICLE 3. — PROHIBITED ACCESS

The Power establishing a hospital and safety 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 there is a risk that, under certain circumstances, unauthorized persons might try to enter the zones in considerable numbers.

ARTICLE 4. — CONDITIONS

Hospital and safety 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 lays down the following four conditions which hospital zones must fulfil :

(a) *Size.*—Hospital zones must occupy only 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 conditions set here. Watering places or spas with numerous hotels and clinics would no doubt be suitable.

If there were a sudden influx of persons to be protected, account should be taken of the opportunities offered by Article 15 of the Fourth Geneva Convention of 1949, which permits the establishment of " neutralized zones " where wounded and sick combatants or non-combatants and able-bodied civilians could alike be given shelter.

As 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.

The term " military objective " is found also in paragraph 5 of Article 18 of the Convention, which recommends that hospitals be situated as far as possible from such objectives. Reference may be made to the Commentary on Article 18 for a discussion of 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 that reason that the text also excludes " large industrial and administrative establishments ", although that in no way implies that they are to be regarded as being military objectives. Lines of communication serving the zone, which will not, under the Agreement, be utilized for military purposes, must also not 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. 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. That condition sets States a particularly difficult problem. As a general rule, they do not know the strategic 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 position of the zones will know for certain will be the plans for 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.

In any case, the authors of the provision were wise enough to insert the words " according to every probability ".

If a zone, contrary to the expectations 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 and safety 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 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 abuses and 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 put forward objections 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 zone may possess an aerodrome, provided it only serves zonal needs.

The obligation laid down in this Article 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 the zones must be respected and protected by the Parties to the conflict 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 guns may not be sited in the zone.

On the other hand, the use of the term " 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 civil 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 in the Convention, of the flight of aircraft over 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 and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.

Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground.

They may be similarly marked at night by means of appropriate illumination.

In the documents it prepared for the Conference of Government Experts in 1947, the International Committee of the Red Cross requested the marking of safety zones and localities with an emblem to be decided upon. In the Draft Agreement it submitted to the XVIIth Conference of the Red Cross in 1948, the Committee abandoned the idea of using the red cross emblem but suggested new markings : oblique red bands on a white ground. It was provided, however, that the zones set aside for the wounded and sick could make use of the red cross emblem. The Diplomatic Conference endorsed the suggestion, although one delegation pointed out the disadvantages of creating a new sign.

In reality, the red bands on a white ground apply to safety zones ; no new emblem has been created for hospital zones, which shelter only the wounded and sick. As has been seen, all the parts making up a hospital zone are entitled to use the sign laid down in the Convention, provided that the Government gives permission ; the use of the sign is therefore regulated by the Convention and can only be modified by special agreement. The existence of a resident population makes necessary formal agreement between the Parties concerned.

Safety zones and localities, on the other hand, have markings of their own : oblique red bands on a white ground. The number of bands is not stated. In practice it would be advisable to lay down details of the design and regulate its use, although safety zones also are protected by notification as well as by their special markings[1].

The first paragraph makes the marking of zones and localities compulsory, but illumination at night is left optional. The absence or inadequacy of distinctive markings by night would undoubtedly expose the zone or locality to risks ; on the other hand, the illumination of certain parts of a territory may, as is well known, 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 and safety zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

[1] The sign of two oblique red bands on a white ground is used as an emblem by the Association internationale des Lieux de Genève.

As soon as the adverse Party has received the above-mentioned notification, the zone shall be regularly established.

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.

This provision is out of its logical place in the Draft Agreement, since its first paragraph relates to a situation which exists before the conclusion of the Agreement [1]. A provision of this nature should have been inserted in the Convention itself.

However, it offers States a most valuable basis for action. 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 and safety 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, 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 enemy should be able to demand the setting up of a supervisory body to ascertain, for example, if the obligations arising from Articles 4 and 5 of the Agreement are duly fulfilled.

The drafts submitted to the Diplomatic Conference stipulated that this function should be entrusted to the Protecting Power acting for the State which had recognized the zone. It would have been possible in that way to make use of an organization ready to carry out the work on the spot. The Conference was nevertheless unwilling to agree to this solution, as it considered that the Protecting Powers were already overburdened with tasks of all kinds.

The Draft Agreement accordingly entrusts supervision to Special Commissions. There is no indication, however, of their composition

[1] Article 14, paragraph 2, of the Convention reads : " Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements... ".

or of who will appoint their members. These points will have to be settled at the time the Agreement is concluded. The members of the Commission 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 and 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. It would also be desirable for doctors to take part.

ARTICLE 9. — SANCTIONS

Should the Special Commission 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 was seen in the commentary on 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 rôle 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 expanded in this respect; it might, for example, contain a reference to Article 149 of the Convention, which fixes the procedure for enquiries into cases of alleged violations.

The non-utilization of a zone for the purpose stipulated in the Agreement would no doubt in itself justify intervention by the Commission.

PARAGRAPH 2. — WITHDRAWAL OF RECOGNITION

The text adopted by the Diplomatic Conference is very nearly identical with that submitted to the XVIIth International Red Cross Conference.

The wording of paragraph 2 implies that when the five days time limit has expired, the Commission is immediately to approach the adverse Party, which only then may declare that it is no longer bound by the Agreement in respect of the zone in dispute.

The consequence of such a declaration would be to put an end to the privileged position of the zone, but it would not deprive the persons and property there of protection, since they would still be protected by the Geneva Convention. The local population would continue to benefit by the general immunity which international law assures them, and by the provisions of the Fourth Geneva 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 to 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 19 of the Convention.

ARTICLE 10. — NOMINATION OF MEMBERS OF THE COMMISSIONS

Any Power setting up one or more hospital and safety zones, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by the Protecting Powers or by other neutral Powers, persons eligible to be members of the Special Commissions mentioned in Articles 8 and 9 [1].

As 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

[1] The wording here differs from that used in the Agreement annexed to the First Geneva Convention, which uses the words " or have nominated by neutral Powers ", in place of the words " or have nominated by the Protecting Powers or by other neutral Powers ". The latter wording is to be preferred.

belligerents as they stand. The Agreements concluded should therefore lay down the exact procedure in regard to these two matters[1].

ARTICLE 11. — RESPECT FOR THE ZONES

In no circumstances may hospital and safety 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.

This traditional wording creates positive obligations of wider implication than a mere prohibition of attack. 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 responsible for the welfare of persons residing in the zone. This responsibility also falls on the Power establishing the zone[2].

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[1] 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.:

(a) a Commission composed of nationals of neutral countries nominated by the Protecting Powers and agreed to by the Powers concerned, which was to carry out its duties from the time the 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 a 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; inspection was to be carried out on receipt of a request from the adverse Party.

[2] Article 11 of the draft submitted to the XVIIth International Red Cross Conference included a second paragraph, according to which enemy forces which reached a zone could cross it without halting in it. The paragraph has now been dropped.

ARTICLE 12. — OCCUPATION

In the case of occupation of a territory, the hospital and safety 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 first mention of an obligation was in the proposals submitted by the International Committee of the Red Cross to the Conference of Experts in 1947 : the idea was maintained in the various drafts, and in the final text of 1949.

Under the terms of this Article, however, the Occupying Power may 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 or other persons in a safety zone, provided they belong to the requisite categories. It must first, however, make suitable arrangements for those who were there at the time of occupation. Moreover, 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 the obligations laid upon the establishing State are at the same time safeguards for the enemy, it would be advisable for the Agreement to fix the conditions governing the winding up of these zones, or, at least, for the utilization of the zone to be limited to a fixed 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 purpose as hospital and safety zones.

It has already been 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 [2]. The above remarks therefore apply to both.

[1] See René CLEMENS : *Le Projet de Monaco*, p. 222.

[2] For a definition of the two terms, see *Commentary I*, p. 206.

ANNEX II

DRAFT REGULATIONS CONCERNING COLLECTIVE RELIEF FOR CIVILIAN INTERNEES

This draft which, according to Article 109 (paragraph 1) of the Convention, will be applied in the absence of special agreements between the Parties, deals with the conditions for the receipt and distribution of collective relief shipments.

It is based on the traditions of the International Committee of the Red Cross which submitted it, and on the experience the Committee gained during the Second World War.

During the 1914-1918 war, the International Agency set up by the International Committee had distributed some relief to prisoners of war [1] and its relief activities were recommenced and considerably expanded during the Second World War.

The development of total war had indeed made essential this type of action by an impartial humanitarian body. Between 1939 and 1947, the International Committee of the Red Cross carried out extensive activities on behalf of an unprecedented number of prisoners of war and internees of all categories, and the civilian populations of many countries. These activities reached their peak in 1943-1944 with 2,000 wagons received and dispatched per month ; the International Committee had become the greatest relief distribution centre on the continent of Europe.

Below are the eight Articles of the Draft Regulations with a brief commentary.

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[1] As had the Basle Agency, a forerunner of the Central Prisoners of War Agency, as early as 1870. See above, p. 541.

ARTICLE 1. — THE ROLE OF THE INTERNEE COMMITTEES

The Internee Committees shall be allowed to distribute collective relief shipments for which they are responsible, to all internees who are dependent for administration on the said Committee's place of internment, including those internees who are in hospitals, or in prisons or other penitentiary establishments.

Since the Internee Committees have the general task of furthering the physical, spiritual and intellectual well-being of the internees (Article 103, paragraph 1), it was logical to recognize their right to distribute relief, a right which is furthermore implicit in Article 104 relative to the privileges of the Internee Committees, the second paragraph of which expressly mentions the " receipt of supplies ". The rights thus conferred on Internee Committees, however, must not be allowed to run counter to the interests of internees who might be forgotten through temporary absence from the main place of internment. It is for that reason that the Article makes explicit reference to those who might be in hospital or in a detached working party.

ARTICLE 2. — A SPECIAL CASE : MEDICAL STORES

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the Internee Committees. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

The principle governing the distribution of collective relief respects both the intentions of the donors and the plans drawn up by Internee Committees. A reservation is made here in respect of the distribution of medical stores, with a strong emphasis on preference for distribution in agreement with responsible medical men. The donors may, indeed, be mistaken with regard to the value of certain medicaments and the organization set up by the Internee Committees has everything to gain by scrupulous respect for medical advice. The doctors must therefore be allowed to allocate the medicaments to the best possible effect, i.e. to use them for those really in need. They must not, how-

ever, continually favour certain patients and that is why mention is made of the need for the distribution to be carried out equitably.

ARTICLE 3. — RECEIPT OF SUPPLIES

Members of Internee Committees shall be allowed to go to the railway stations or other points of arrival of relief supplies near their places of internment so as to enable them to verify the quantity as well as the quality of the goods received and to make out detailed reports thereon for the donors.

This Article relates to Article 104 of the Convention, which provides that the Internee Committees may receive goods sent and stipulates that " all material facilities " shall be granted them. At the station, when the relief arrives, the delegate of the Internee Committee will be able to check the quantity and quality of the goods ; he will transmit his report to the donors. In case of loss or deterioration, the donors must, indeed, be able to claim the necessary compensation under their insurance contracts.

ARTICLE 4. — SUPERVISION OF DISTRIBUTION IN "ANNEXES" OF PLACES OF INTERNMENT

Internee Committees shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their places of internment has been carried out in accordance with their instructions.

The travel facilities given to members of the Internee Committees must enable them to reach working parties detached from the main place of internment and, where necessary, hospitals, in order to comply with the recommendations of Article 1 of these Regulations, concerning the allocation of relief to internees temporarily separated from the internment centre. These facilities are in accordance with Article 104 (paragraph 2) of the Convention.

ARTICLE 5. — FORMS OR QUESTIONNAIRES CONCERNING RELIEF SUPPLIES

Internee Committees shall be allowed to complete, and to cause to be completed by members of the Internee Committees in labour detachments

or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

If they are to be forwarded without delay—i.e., without being censored—, the forms or questionnaires for donors must deal strictly with collective relief only. It will be for the Internee Committee to draw up, in agreement with the commandant of the place of internment, specimen forms which, on the commandant's responsibility, may be considered as fulfilling the provisions of these regulations and, as such, not subject to delay.

ARTICLE 6. — WAREHOUSES

In order to secure the regular distribution of collective relief supplies to the internees in their place of internment, and to meet any needs that may arise through the arrival of fresh parties of internees, the Internee Committees shall be allowed to create and maintain sufficient reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal : each warehouse shall be provided with two locks, the Internee Committee holding the keys of one lock and the commandant of the place of internment the keys of the other.

This Article is designed to make easier the carrying out of the distribution plans drawn up by the Internee Committees and mentioned in Article 2. Since the supply of the place of internment with food is normally arranged by the Detaining Power, it is reasonable that when large consignments of relief arrive the Internee Committee should lay down stocks against a future shortage. The warehouses, however, should not contain anything other than goods received as collective relief and every guarantee must be given to the Detaining Power that these premises shall not be used for illegal purposes, such as the storage of arms or escape equipment. It is important also that the goods placed in warehouses should not be misappropriated and the Detaining Power must not be itself allowed to use them for its own needs. It is for that reason that the double-lock system was conceived. Thus the warehouse may only be opened when a representative of the Detaining Power and a representative of the Internee Committee are both present. Each of these delegates will be able, therefore, to check on the state of the provisions from the point of view which concerns him.

ARTICLE 7. — PURCHASES IN THE COUNTRY OF INTERNMENT

The High Contracting Parties, and the Detaining Powers in particular, shall, so far as is in any way possible and subject to the regulations governing the food supply of the population, authorize purchases of goods to be made in their territories for the distribution of collective relief to the internees. They shall likewise facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

If the supplies of the country of internment are sufficient for the population and if wartime regulations do not paralyse private trade, it may certainly be of advantage in many cases, if only to save transport costs, for the donors to make their purchases of relief supplies on the spot. Before that could be done, however, many financial, technical or administrative difficulties would have to be overcome. Exchange regulations in particular would probably make it necessary to obtain certain exemptions from the Power of which the donors are nationals and from the Detaining Power, but these ought to be granted in view of the humanitarian purpose for which they are sought.

ARTICLE 8. — OTHER METHODS OF ALLOCATING COLLECTIVE RELIEF

The foregoing provisions shall not constitute an obstacle to the right of internees to receive collective relief before their arrival in a place of internment or in the course of their transfer, nor to the possibility of representatives of the Protecting Power, or of the International Committee of the Red Cross or any other humanitarian organization giving assistance to internees and responsible for forwarding such supplies, ensuring the distribution thereof to the recipients by any other means they may deem suitable.

The draft regulations are intended to make the method of allocating relief as efficient and fair as possible. However, a traditional feature of relief actions is that they must not be hindered except by insurmountable obstacles due to the circumstances of the moment and then only for so long as those circumstances subsist. It would not be right for regulations of any kind to introduce extra difficulties and

to hinder the application of the right to relief given in Article 108 of the Convention. It is for that reason that the Article reserves the right to distribute relief outside the framework provided by these regulations. In particular, the Internee Committees, which normally carry out this work, cannot do so when internees are in course of transfer or before they are installed in a properly administered place of internment. The Protecting Power, the International Committee of the Red Cross and any other humanitarian body coming to the assistance of internees therefore remain entitled in special cases to decide whether and how relief should be distributed.

ANNEX III

MODEL INTERNMENT CARDS, LETTERS AND CORRESPONDENCE CARDS

I. *Internment Card*

The model internment card is provided under the terms of Article 106 of the Convention, and corresponds to the capture cards of prisoners of war.

It must therefore be forwarded without delay, since its primary purpose is to inform his family of the address and state of health of the internee. The test of Article 106 shows clearly that the model internment card is given only by way of a suggestion ; it is based on the experience of the International Committee of the Red Cross and of the use of prisoner-of-war capture cards.

On the model internment card will be found notes stating

(1) that this card is not the same as the special card which each internee is allowed to send to his relatives,

(2) that the card is to be used to notify any change of address of the internee.

It is these points which make it necessary to forward the document without delay.

II. *Model Letter*

III. *Model Correspondence Card*

The model letter and correspondence card are also based on the experience of the International Committee of the Red Cross.

They are called for by Article 107, according to which they must be forwarded " with reasonable despatch ". They differ, therefore, from internment cards and their transmission may be less rapid, particularly to enable them to be censored ; delays in transmission must not, however, be unreasonable.

The model letter and correspondence card do not call for any comment other than that their dimensions were chosen as corresponding to the normal format for letters and postcards. The letter is intended to be folded in two, the internees writing their message on the back and filling in the answers to the printed questions on the front.

I. INTERNMENT CARD

ANNEX III

1. Front

CIVILIAN INTERNEE MAIL

Postage free

POST CARD

IMPORTANT

This card must be completed by each internee immediately on being interned and each time his address is altered by reason of transfer to another place of internment or to a hospital.

This card is not the same as the special card which each internee is allowed to send to his relatives.

CENTRAL INFORMATION AGENCY
FOR PROTECTED PERSONS

INTERNATIONAL COMMITTEE
OF THE RED CROSS

2. Reverse side

Write legibly and in block letters—1. Nationality

2. Surname 3. First names *(in full)* 4. First name of father

.....

5. Date of birth 6. Place of birth

7. Occupation

8. Address before detention

9. Address of next of kin

.....

*10. Interned on :
(or)
Coming from (hospital, etc.) on :

*11. State of health

12. Present address

13. Date 14. Signature

* Strike out what is not applicable—Do not add any remarks—See explanations on other side of card

(Size of internment card—10 × 15 cm.)

ANNEX III *(continued)*

II. LETTER

CIVILIAN INTERNEE SERVICE

Postage free

To

Street and number

Place of destination *(in block capitals)*

Province or Department

Country *(in block capitals)*

Sender :

Surname and first names

Date and place of birth

Internment address

(Size of letter—29 × 15 cm.)

III. CORRESPONDENCE CARD

ANNEX III *(continued)*

1. Front

CIVILIAN INTERNEE MAIL

Postage free

POST CARD

To

Street and number

Place of destination *(in block capitals)*

Province or Department

Country *(in block capitals)*

Sender :

Surname and first names

Place and date of birth

Internment address

2. Reverse side

Date :

.....

.....

.....

.....

.....

.....

Write on the dotted lines only and as legibly as possible.

(Size of correspondence card—10 × 15 cm.)

RESOLUTIONS OF THE DIPLOMATIC CONFERENCE OF GENEVA, 1949

In addition to drawing up the four Geneva Conventions, the Diplomatic Conference of 1949 adopted eleven resolutions. They are given below, with references where necessary to the relevant passages in 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 co-operation 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 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,

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[1] See commentary on Articles 12 and 149.

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.

Resolution 4. — Whereas Article 33 of the Geneva Convention of July 27, 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 personnel duly provided with the badges and identity cards prescribed in Article 40 of the new Convention.

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.

[1] See commentary on Article 11.

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.

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 the Armed Forces at Sea of August 12, 1949, will arrange that, whenever conveniently practicable, 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 co-operation 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 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[1].

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[2].

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 commentary on Article 107.

[2] See commentary on Article 3.

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