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

II

GENEVA CONVENTION

FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA

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GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
1960

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

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GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
1960

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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 almost all have ratified them. Thus the 1949 Conventions, a decisive step in the work of protecting war victims, are now attaining 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 ; it was followed in 1956 by a second volume, concerning the Fourth Convention, and in 1958 by a third, on the Third Convention [1]. *The volume on the Second Convention is now being published, and with it the International Committee completes this undertaking.*

Although published by the International Committee of the Red Cross, 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.

This Commentary has been written mainly by Mr. Jean S. Pictet, who received constant and valuable assistance from Rear-Admiral

[1] Dates of the original (French) edition. The English version of the Commentary on the Fourth Convention appeared in 1958, and that on the Third Convention in 1960.

Martinus Willem Mouton, Doctor of Laws, Delegate of the Netherlands to the 1949 Diplomatic Conference and to the preparatory meetings ; the International Committee sought his advice as a naval expert and a specialist in international law, and would like here to pay a tribute to his great ability. Contributions to this work have also been made by the following : Mr. Frédéric Siordet, for Articles 1 to 3 and 8 to 10, Mr. Claude Pilloud, for Articles 11 and 50 to 53, Mr. Jean-Pierre Schoenholzer, for Articles 12, 13 and 18 to 20, Mr. René-Jean Wilhelm, for Articles 6, 7 and 47, and Mr. Oscar M. Uhler, for Articles 46, 48, 49 and 54 to 63. The translation into English has been prepared by Mrs. A. P. de Heney.

Although each of the Geneva Conventions constitutes a separate, independent instrument, the Second undoubtedly stems from the First. From the outset, what is today the Second Convention of 1949 was conceived as an adaptation to maritime warfare of the humanitarian principles already formulated in reference to war on land [1]. *The validity of these principles is absolute, and the reason for drawing up two separate instruments was to take account of the conditions peculiar to the two forms of war. The " Land Convention ", which is older and more detailed than the " Maritime Convention ", remains the principal source. For more detailed information on general matters, the reader should therefore refer to Volume I of the Commentary* [2].

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.

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[1] Although this expression is no longer included in the title of the Convention, where it appeared up to 1907, the adaptation still remains a fact.

[2] The comments in the present volume on the common provisions (Chapters I and VIII) are briefer than in the volume on the First Convention.

INTRODUCTION

1. *The " Maritime Convention " : its origin and progressive development*

The practice of respecting and tending the wounded and prisoners in war-time began to gain ground during the XVIth century. Many of the cartels and capitulation agreements concluded since then between military commanders have contained provisions of a humanitarian nature which have rightly been considered as forerunners of the Geneva Conventions.

Progress was particularly slow in the case of maritime warfare, but at the end of the XVIIIth century some cartels included provisions relating to it [1]. Perhaps the most instructive is the treaty for the exchange of all prisoners taken at sea, concluded between France and England on March 12, 1780, which showed the desire to alleviate the hardships of conflicts. It set forth the principle of repatriation for the shipwrecked, instituted the " truce flag ", ensuring the inviolability of vessels carrying exchanged prisoners, and included a clause providing that all " surgeons and surgeons' assistants of the king's ships ", and even those of " merchant ships, privateers and other vessels " were to be released without being regarded as prisoners ; the same privilege was extended to doctors attending naval personnel of either Party, and to chaplains and ministers of religion captured at sea aboard any vessel.

The Committee which founded the Red Cross—the future International Committee—realized the desirability of extending the principles of the Geneva Convention to naval operations, and the draft submitted by it to the 1864 Diplomatic Conference, which drew up the first Geneva Convention, contained a final Article

[1] See Georges CAUWÈS : *L'extension des principes de la Convention de Genève aux guerres maritimes*, Paris 1899, p. 16, and GURLT : *Zur Geschichte der internationalen und freiwilligen Krankenpflege*, 1873, pp. 29 and 31.

reading as follows : " Similar provisions relative to war at sea may be embodied in a later Convention concluded between the Powers concerned." But this Article—modest though it was—was rejected, either because it was considered as being outside the terms of reference of the Conference, or because the delegates had not received instructions on the matter from their Governments [1].

One should not be unduly surprised at the setback. In those days, adequate information was lacking as to what naval warfare would be in the future. The navy had just undergone what was probably the greatest transformations in its history, having been equipped successively with steam, the propeller and armour-plating. New and hitherto unknown methods therefore had to be evolved.

Two years after its conclusion, the 1864 Geneva Convention received its baptism of fire during the Austro-Prussian war of 1866 and proved its worth brilliantly, particularly at Sadowa which was as murderous a battle as Solferino and, like it, left 40,000 killed and wounded in its wake. The situation in the Prussian camp, where the Convention was applied, was in great contrast to the way in which the wounded were abandoned where it was not applied. It nevertheless became clear that certain terms in the Geneva Convention were too vague and required clarification.

At the naval battle of Lissa, however, the absence of any clauses applicable to naval warfare similar to those of the Geneva Convention became tragically apparent. On July 20, 1866, after a terrible engagement lasting for four hours off the Dalmatian coast, near the island of Lissa, the twenty-seven Austrian ships commanded by Admiral Tegethoff defeated the Italian fleet of thirty-four vessels. The *Re d'Italia* sank after being rammed, and hundreds of sailors were drowned without any ship being able to rescue them. Another naval combat with disastrous consequences took place during the War of Secession, when men from the cruiser *Alabama* perished for want of adequate rescue methods.

As on land before 1864, the lack of organized medical aid or standards of protection had caused the needless death of many combatants.

[1] See C. LUEDER : *La Convention de Genève*, 1876.

The first attempt to formulate such standards was made in 1867 by the International Conference of the Red Cross. A preparatory meeting had adopted a preliminary draft of amendments to the 1864 Geneva Convention, containing provisions applicable to the wounded in armed forces on land and at sea. A special committee was established by the Conference to study the preliminary draft ; it prepared a fresh text which, without completely revising the 1864 text, extended its essential provisions to the navy. Thus it declared that medical personnel at sea should have neutral status, and that vessels responsible for picking up the wounded and shipwrecked should be protected and marked with the emblem. The Conference adopted the text in the form of a recommendation.

This document was no doubt inadequate and would not have enabled the desired purpose to be achieved completely, but at least it suggested an approach to the problem. As one author has written, " the 1867 assembly, while maintaining a prudent reserve, nevertheless made a useful contribution by proclaiming principles whose achievement and final codification were being advocated by all the relief societies " [1].

Shortly thereafter, on the initiative of the Italian Government and the Geneva Committee—the future International Committee of the Red Cross—which was acting under a tacit mandate from the 1867 Conference, the Swiss Federal Council convened an " International Conference " in Geneva to supplement some of the provisions in the 1864 Convention and adapt it to maritime warfare. With General Dufour (one of the founders of the Red Cross) as chairman, the Conference met from October 5-20, 1868, and fourteen States were represented. It adopted the " Draft additional Articles to the Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field "[2].

Of the fifteen Articles in the 1868 Draft, only five relate to war on land and they merely supplement the 1864 Convention. The text refers mainly to hostilities at sea.

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[1] See CAUWÈS : *op. cit.*, p. 35.

[2] A good report on the work of the 1868 Conference is given by Cauwès and also by Lueder, *op. cit.*, who also describe the subsequent vicissitudes of the additional Articles.

To adopt the Articles relating to war on land would actually, however, have been tantamount to amending the 1864 Convention, and would have required the agreement of all the States party to that instrument; it was therefore decided that the Conference should draw up merely a draft rather than a diplomatic instrument laying obligations on the Powers.

A committee of naval experts was appointed to draft the "Articles concerning the Navy" ; it was composed of Vice-Admiral van Karnebeek (Netherlands) as Chairman, Rear-Admiral Coupvent des Bois (France) as Rapporteur, Captain Köhler (North Germany), Rear-Admiral Yelverton (Great Britain) and Commander Cottrau (Italy).

A report on the 1868 Conference was printed but was somewhat inexplicit, and a search in the archives of the International Committee of the Red Cross has yielded the manuscript record of the discussions of the " Special Committee for the Navy " of which commentators had hitherto been unaware ; it is still more summary, however.

This record of the Special Committee at least serves to clarify some historical points. It reveals that Vice-Admiral van Karnebeek, of the Netherlands Royal Navy, was the principal and virtually the real author of the draft Articles for the Navy, which were to form the basis for the future " Maritime Convention " of Geneva and The Hague [1]. In fact, the 1868 Draft already contained the essential elements of what became the medical statutes for armed forces at sea : protection of the wounded, sick and shipwrecked, neutral status of medical personnel, protection of hospital ships, respect of the red cross emblem. It therefore seems appropriate to examine it in some detail.

On October 13, the Special Committee presented its draft Articles to the Conference. Following an immediate request by the French Government, however, their adoption was postponed. On October 19, they came again before a plenary meeting, but with an important amendment. Whereas the first version made military hospital ships immune from capture [2], the second permitted the

[1] He also seems to have played a decisive part in the preparation of the draft drawn up in 1867 by the International Committee of the Red Cross.

[2] Article 6 of the first draft opened with the following paragraph (which was later replaced by the new Article 9) : " Military hospital ships having on board wounded or sick of the naval force which they accompany shall be protected by neutrality ".

opposing Party to seize them. And although Admiral Coupvent seems to have convinced his audience at the time when he stated that " nothing has been changed in the humanitarian part of the Convention ", looking back one is rather persuaded of the contrary. In order to satisfy a military requirement which was not properly understood, the draft was, so to speak, deprived of its backbone. It was then approved without discussion.

The 1868 Articles have never become widely known ; they read as follows :

Articles concerning the Navy

Article 6. — The boats which, at their own risk and peril, during and after an engagement pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, so far as the circumstances of the engagement and the position of the ships engaged will permit.

The appreciation of these circumstances is entrusted to the humanity of all the combatants.

The wrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

Article 7. — The religious, medical, and hospital staff of any captured vessel are declared neutral, and, on leaving the ship, may remove the articles and surgical instruments which are their private property.

Article 8. — The staff designated in the preceding Article must continue to fulfil their functions in the captured ship, assisting in the removal of the wounded made by the victorious Party ; they will then be at liberty to return to their country, in conformity with the second paragraph of the first additional Article.

The stipulations of the second additional Article are applicable to the pay and allowances of the staff.

Article 9. — The military hospital ships remain under martial law in all that concerns their stores ; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

Article 10. — Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality, but the mere fact, noted in the ship's books, of the vessel having been visited by an enemy's cruiser, renders the sick and wounded incapable of serving during the continuance of the war. The

cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

If the merchant-ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerents.

The belligerents retain the right to interdict neutralized vessels from all communication, and from any course which they may deem prejudicial to the secrecy of their operations.

In urgent cases special conventions may be entered into between the commanders-in-chief, in order to neutralize temporarily and in a special manner the vessels intended for the removal of the sick and wounded.

Article 11. — Wounded or sick sailors or soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

Their return to their own country is subject to the provisions of Article 6 of the Convention, and the additional Article 5.

Article 12. — The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefits of neutrality, in virtue of the principles of this Convention, is a white flag with a red cross.

The belligerents may exercise in this respect any mode of verification which they may deem necessary.

Military hospital ships shall be distinguished by being painted white outside, with green strake.

Article 13. — The hospital ships which are equipped at the expense of the aid societies, recognized by the governments signing this Convention, and which are furnished with a commission emanating from the Sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral as well as the whole of their staff.

They shall be recognized and protected by the belligerents.

They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their staff, while performing their duties, shall be an armlet of the same colours. The outer painting of these hospital ships shall be white, with red strake.

These ships shall bear aid and assistance to the wounded and wrecked belligerents, without distinction of nationality.

They must take care not to interfere in any way with the movements of the combatants.

During and after the battle they must do their duty at their own risk and peril.

The belligerents shall have the right of controlling and visiting them ; they will be at liberty to refuse their assistance, to order them to depart, and to detain them if the exigencies of the case require such a step.

The wounded and wrecked picked up by these ships cannot be reclaimed by either of the combatants, and they will be required not to serve during the continuance of the war.

Article 14. — In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality, with any other view than the interest of the sick and wounded, gives to the other belligerent, until proof to the contrary, the right of suspending the Convention as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the Convention is suspended with regard to him during the whole continuance of the war.

Article 15. — The present Act shall be drawn up in a single original copy, which shall be deposited in the archives of the Swiss Confederation.

An authentic copy of this Act shall be delivered, with an invitation to adhere to it, to each of the signatory Powers of the Convention of the 22nd of August, 1864, as well as to those that have successively acceded to it.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at Geneva, the twentieth day of the month of October, of the year one thousand eight hundred and sixty-eight.

After the 1868 Conference, the Swiss Federal Council forthwith sent a circular to the States party to the 1864 Convention, informing them of the Draft of additional Articles and inviting them to " accede " thereto. The International Committee of the Red Cross also made representations to the Red Cross Societies. A number of Governments, however, asked for explanations or modifications regarding certain Articles. Questions were also raised as to the method and validity of accession. It may be noted that France requested the reinstatement of the provision affording immunity from capture to hospital ships, with as much insistence as when it had asked for its deletion at the end of the 1868 Conference.

All this led to an exchange of notes, and fresh proposals were made to the Powers by the Swiss Federal Council. Although the majority of States responded favourably, these various procedures took some time, so that the outbreak of the Franco-Prussian War

in 1870 put an end to the Federal Council's efforts to gain official acceptance for the Draft at an early date. It succeeded nevertheless in getting the belligerents to accept the Draft as a *modus vivendi* during the conflict [1]. France and Prussia gave instructions in that sense to their armed forces on land and at sea. The additional Articles were never actually applied, however, at least as far as the navy was concerned, for there were no naval engagements.

Once the war was over, it did not seem opportune to resume negotiations. Nevertheless, during the ensuing years a number of States notified Berne of their " accession " in a number of ways, and some of them took the opportunity of notifying the commissioning of hospital ships. Opinion was divided among the various countries, however, as to the validity of the accessions notified. The Federal Council itself never considered the Draft of additional Articles as a treaty [2]. And the 1868 text was gradually forgotten.

At the International Conferences of the Red Cross in 1884, 1892 and 1897, reference was again made to the need to extend the principles of the Geneva Convention to maritime warfare, and the matter was finally placed on the agenda of the First International Peace Conference convened at The Hague on the initiative of the Czar. The 1868 Draft was taken as a basis for study, and in fact its entire substance was retained when, in this vast codification of the laws of war, maritime affairs were at last given their rightful place in international law.

The Conventions of The Hague of 1899 and 1907 are well known and the relevant records — though never very explicit in regard to maritime matters — are to be found in most law libraries. We shall therefore refer to them only briefly.

The " Third Convention of The Hague of 1899, for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva

[1] The 1868 Draft was also accepted as a *modus vivendi* during the Spanish-American War of 1898.

[2] As already stated above, it was necessary that all the States party to the 1864 Convention adopt Articles which, at least in the case of those relating to land warfare, constituted amendments to that Convention. The Federal Council, like the Geneva Committee, moreover, was apprehensive of any changes in the 1864 instrument. Had the Articles concerning the navy, which were otherwise more important, been dissociated from the other provisions, they might perhaps have been made effective at that time. See G. MOYNIER : *Etude sur la Convention de Genève*, pp. 76, 82 and 249.

Convention " was fortunately accepted by the States. It comprised fourteen Articles, and was a marked improvement over the additional Articles of 1868. All hospital ships thus became exempt from capture. It may be noted here that although the Peace Conferences in the Netherlands afforded the opportunity for concluding and subsequently revising the Maritime Convention, the latter has never ceased to be part of the Geneva juridical system, which is composed of provisions protecting the victims of war and all those who, because of their natural weakness, need special care and attention.

The Third Convention of 1899 was revised at the Second Peace Conference and thus became the Tenth Convention of The Hague of 1907, " for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention ", comprising twenty-eight Articles and containing many improvements, mainly due to the fact that it was no longer modelled on the 1864 Geneva Convention, but on that of 1906, which was much more highly developed. The Tenth Hague Convention of 1907 was in force for the two world wars. During the 1914-1918 conflict, however, its application was unfortunately impaired by grave disputes between the Parties and by bloody incidents. One of the belligerents attacked and sank hospital ships, alleging that they were being used to transport troops and munitions and that it was unable to avail itself of the right to inspect them, since it was mainly using submarines. The adverse Powers then provided their hospital ships with military escort, thus renouncing the protection of the Convention in this respect. Neutral commissioners were placed on board hospital ships in the Mediterranean, but this does not seem to have restored matters completely [1].

A number of hospital ships were also attacked and, in some cases, sunk during the 1939-1945 war. Most of these attacks seem to have been due to the lack of up-to-date marking methods, visible at a great distance [2].

With the evolution of methods of war, and more especially the fact that the Geneva Convention had been revised in 1929, it became

[1] See J. GALLOY : *L'inviolabilité des navires-hôpitaux*, Paris 1931, and *Bulletin international des Sociétés de la Croix-Rouge*, 1917, pp. 186, 316, 385 ; 1918, pp. 202, 281.

[2] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 214-215.

necessary to review and amend the Maritime Convention. After preliminary studies, and with the assistance of naval experts delegated by the Governments and the National Red Cross Societies, the International Committee of the Red Cross drew up a draft revised Convention in 1937, which was approved by the XVIth International Conference of the Red Cross and placed on the agenda of the Diplomatic Conference which the Swiss Federal Council had convened for 1940 but which was prevented from taking place by the outbreak of war.

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 International Committee of the Red Cross followed its usual methods. The available literature was gathered together and the points on 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 of experts 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. The International Committee then drew up complete drafts, 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 revision of the First Geneva Convention, and the Second, which adapts it to maritime warfare, (*b*) the revision of 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 First Committee was presided over by Sir Dhiren Mitra (India) and Mr. Ali Rana Tarhan, President of the Turkish Red Crescent. It was fortunate in having the assistance of General René Lefebvre (Belgium) as Rapporteur and Chairman of its Drafting Committee. He was responsible for the Committee's Report to the Plenary Assembly, which gives a valuable indication of the grounds for decisions. We shall have occasion to refer to it often in this Commentary. The Committee had the assistance of an expert from the International Committee of the Red Cross, Mr. Jean S. Pictet, Director for General Affairs, while Mr. Alfred Rappard of the Federal Political Department acted as its Secretary. The membership of the Committee also included numerous naval experts.

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 provide 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 Diplomatic Conference, but a 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 by the first two States—Switzerland and Yugoslavia—the Convention 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. By the middle of 1959, the date on which the present volume appears [1], the following seventy-seven Powers had

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

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, Mexico, Egypt, Japan, El 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 Federal Republic of Germany, Poland, Thailand, Finland, the United States of America, Panama, Venezuela, Iraq, Peru, Libya, Greece, Morocco, Argentina, Afghanistan, Laos, the German Democratic Republic, the People's Republic of China, Iran, Haiti, Tunisia, Albania, the Democratic Republic of Viet-Nam, Brazil, the Democratic People's Republic of Korea, the United Kingdom of Great Britain and Northern Ireland, Sudan, the Dominican Republic, Ghana, Indonesia, Australia, Cambodia, the Mongolian People's Republic, Ceylon, and New Zealand.

* * *

In becoming the Second Geneva Convention of 1949, the Maritime Convention has developed considerably and comprises no less than sixty-three Articles—only one less than the First Convention, which is the traditional " Geneva Convention ". For the first time nearly all the provisions of the Convention relating to war on land have their counterpart in the Maritime Convention, and the order is exactly the same.

This new diplomatic instrument is worthy of its predecessors. Though it may still contain some gaps and imperfections, on the other hand a number of points have been successfully developed or clarified. Some people may consider that the Maritime Convention has remained more " humanitarian " than the First, since the principle that medical personnel are exempt from capture has been retained to a greater extent, in view of the special conditions prevailing at sea. In the unfortunate event of any new conflict, this Convention too would serve to protect numerous victims and would be one of the last refuges of civilization and humanity.

TITLE OF THE CONVENTION

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF AUGUST 12, 1949

The title is not an integral part of the Convention. It comes before the introductory sentence (" *The undersigned . . . have agreed as follows* : ") and does not appear again after it. As however, it was expressly submitted to the Conference, it is official, and calls for brief comment.

It will be noted that the title is quite new. For the first time, the Convention which protects the victims of naval warfare has received its own appropriate name. Until now, it was simply presented as an extension, or an annex, of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. It first appeared in the Draft of additional Articles of 1868 under the heading " Articles concerning the Navy " ; as already noted in the Introduction to this Commentary, that Draft was intended to clarify certain stipulations of the 1864 Geneva Convention and to extend its benefits to armed forces at sea [1].

When the rules relating to naval warfare finally became part of positive law at The Hague, in 1899, they were still not given a title of their own, indicating their purpose. Although they constituted a completely independent *ad hoc* instrument, they were entitled " Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864 ", and thus remained bound up with the Geneva law. In 1907, when the Second Conference of The Hague revised the 1899 text to adapt it to the new (1906) version of the Geneva Convention, the revised text was given a similar title : " Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention ". It will be

[1] See above, p. 5.

noted, however, that the date of the latter (1906) is not indicated, whereas it was in the 1899 Convention (1864) [1].

This reference to the Geneva law, both in 1899 and in 1907, shows that the legislators at The Hague considered the Convention which they were framing as being bound up with the juridical movement which had begun at Geneva ; and when the 1949 version embodied the name of that city in its title, it was merely resuming its natural place.

The International Committee of the Red Cross proposed the present title for the Convention in the draft texts which it submitted to the XVIIth International Conference of the Red Cross. There were no objections to the proposal. Indeed, since it had been acknowledged that the various categories of war victims should be protected by separate legal instruments [2] it became obvious that each of the latter should be given a title defining it clearly and completely.

The Diplomatic Conference also adopted this title, without further discussion, but inserted the name *Geneva* as in the case of the other three Conventions which it had revised or drawn up [3], considering that " from a practical point of view, it would be preferable, particularly as the literature already generally refers to the Geneva Conventions, to give the official title of ' Geneva Conventions ' to all these documents, as a tribute to the city of Geneva,

[1] The simple reference to " the Geneva Convention " shows that even at that time there was no possible question as to its nature and object, which required no further clarification.

[2] In earlier drafts, it had been thought that all the provisions relating to maritime warfare might be embodied in the " Wounded and Sick " Convention.

[3] For brevity the second of the four Geneva Conventions, which is the subject of the present Commentary, will be called " the Convention " or " the Second 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 " ;

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

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

Similarly, references may be made to " the 1899 Convention " or " the 1907 Convention " to designate the Conventions of The Hague for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (Convention No. III of 1899, and Convention No. X of 1907).

the headquarters of the International Committee of the Red Cross, and also to Switzerland as a whole " [1].

The title of the Second Convention is modelled on that of the First, but with two modifications: the shipwrecked have been added to the wounded and sick; and whereas the title of the First refers to " wounded and sick *in* armed forces in the field ", that of the Second reads: " wounded, sick and shipwrecked *members of* armed forces at sea ". This slight change, which is purely stylistic, is intended only to define more clearly the fact of belonging to the armed forces. No corresponding alteration was made in the First Convention, in order not to make any unnecessary change in a long-established title which was universally recognized.

In conclusion, it should be emphasized that the term " armed forces at sea " does not merely indicate the navy as such, as will be seen later in connection with Article 13 [2], but also any armed unit of any branch of the services on board ship.

PREAMBLE

The undersigned, Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Tenth Hague Convention of October 18, 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, have agreed as follows :

The extreme brevity of the Preamble will be noted. Contrary to custom, it contains no list of the Sovereigns or Heads of States of the signatory Powers or of the names of their plenipotentiaries and makes no mention of the presentation or verification of the latters' credentials; nor does it include the usual statement of the motives which led the Powers to conclude the Convention. All this is replaced by a summary indication of the purpose of the meeting of the Diplomatic Conference, which was *inter alia* to revise the Tenth Hague Convention of 1907.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Berne, 1950-51, four volumes, Vol. I, II-A, II-B, III; Vol. II-B, p. 457.

[2] See below, p. 94 ff.

The rest of this Commentary, as it proceeds Article by Article, will make it clear that the work of the Diplomatic Conference of Geneva was much more than mere revision. The Conference not only strengthened the protection accorded to wounded, sick or shipwrecked military personnel ; it also extended that protection to categories of persons who had previously been without it, or had been liable to have their claim to it contested by over-literal interpretation of the earlier texts.

In order to arrive at the precise purposes of the present Convention, one must go back to the source — that is to say to the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864. The plenipotentiaries of 1864 stated that they were " animated no less by the desire to mitigate, so far as with them lay, the evils inseparable from war, to put an end to unnecessary hardships, and to ameliorate the lot of wounded combatants on the battle-field . . . ". That wording covered everything. The opening phrases were again used by the plenipotentiaries in 1899 and 1907 in the Preamble to the two Hague Conventions : " animated no less by the desire to mitigate, so far as with them lay, the evils inseparable from war . . . ". The idea of suppressing unnecessary hardships and of respecting human personality, which even war can no longer ignore, represented a tremendous victory for humanity. It is therefore a matter for regret that the plenipotentiaries in 1949 — who, like their predecessors, were desirous only of mitigating the evils of war—were not able, for reasons which we shall see later, to proclaim those principles once more in a Preamble.

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 that kind.

In the drafts submitted by it to the XVIIth International Red Cross Conference in 1948, the International Committee of the Red Cross had not made any suggestions with regard to a Preamble, preferring to leave the coming Diplomatic Conference to draw up

such Preamble as it thought fit. But the XVIIth International Conference introduced a Preamble into the draft Convention for the Protection of Civilian Persons in Time of War. 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 reposed 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, anyone may be faced with a situation in which they have 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 of Geneva) of disseminating knowledge of the new Conventions widely and in peace-time, 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.

For however carefully the texts had been drawn up, however clearly they had been worded, it would have been too much to expect every soldier and every civilian to know the details of all the Articles—over four hundred—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 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 proposal met with approval and the First Committee of the Diplomatic Conference, which was the body instructed to draw up the two first Conventions, appointed a sub-committee to submit a text.

The draft quoted above gave rise to no fundamental objections ; and the second paragraph, which contained the essential points, formed the basis of the various amendments moved. The resulting discussions were indeed very arduous ; but they turned not on anything in the wording of the draft, but on the additions which it was proposed to make to it. Certain delegations urged that the principle of respect for the human being should be justified by an affirmation of the divine origin of man. Other delegations were equally insistent that the Preamble should include provisions relating to the punishment of persons violating the Conventions. The majority took the view that a Preamble should confine itself to the enunciation of a clear statement of principle and that it should contain neither rules of application or sanctions, nor religious considerations representing the convictions of a proportion only of the signatory States. In the end, the Committee adopted by a majority a Preamble which reproduced the essentials of the above draft.

In the meanwhile the same points came up for discussion in the two other Committees, responsible for drawing up the Third and Fourth Conventions. After lengthy debate both these Committees, faced with the uncompromising attitude of the advocates of the proposed additions, abandoned the idea of a Preamble altogether, preferring to do without it rather than insert in it provisions on which unanimity could not be reached. Learning of that decision, the First Committee decided to reverse its previous vote and to leave the First and Second Conventions also without a Preamble [2].

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[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 at Geneva (April 21, 1949), Geneva, February 1949, p. 8.

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

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

In spite of its not having been proclaimed at the head of the Conventions, the expression of the guiding principle underlying them was not altogether discarded. The possible application of the present Convention to conflicts other than international wars was considered by the Conference in connection with what ultimately became Articles 2 and 3. The drafts submitted to the Conference provided for full application of the Conventions even in cases of civil war, colonial conflicts or wars of religion, which was admittedly going very far. The States, as it proved, were not prepared to bind themselves in advance by all the provisions of the Conventions in the case of their own nationals; but they were nevertheless at one in recognizing the " indivisibility " of the principle underlying the Conventions. They agreed that in the event of non-international conflicts such as civil wars, a minimum of humanitarian provisions should be respected; and in defining that minimum they very naturally reverted to the essential elements of the draft Preambles, which had been so fully discussed and so strangely rejected [1].

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

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[1] See the commentary on Article 3, pp. 32-39 below.

CHAPTER I

GENERAL PROVISIONS

Like all treaties, the Geneva Conventions contain clauses of a general nature and implementing provisions which are more limited in scope.

In the 1929 Convention, as in the earlier Conventions, the two types of provision were intermingled ; that was also the case in the Hague Conventions relative to maritime warfare, where the general provisions were few in number. In the Tenth Hague Convention of 1907, for instance, they were contained in Articles 18 and 22.

When it was proposed to revise the earlier Conventions and draw up a new one, it was decided to arrange the provisions methodically. Each of the four draft texts prepared by the International Committee of the Red Cross began with the principal provisions of a general character, in particular those which enunciated fundamental principles and so should, by rights, be repeated in the various Conventions. This more logical arrangement had the additional advantage of preparing the way for a combination of the four Conventions in a single instrument, if such a step was contemplated. The suggested arrangement was adopted by the XVIIth International Red Cross Conference, and later by the Diplomatic Conference.

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

ARTICLE 1. — RESPECT FOR THE CONVENTION [1]

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

[1] Article common to all four Conventions. See First, Third and Fourth Conventions, Article 1.

Article 19 of the Tenth Hague Convention of 1907 specified that " The commanders-in-chief of the belligerent fleets must see that the above Articles are properly carried out ; they will also have to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention " [1].

That provision did not mean that the entire responsibility for execution of the Conventions was left to the commanders-in-chief. The ratification of a treaty by two States in itself constitutes an obligation to respect its terms. Yet in 1929 the need for making the provision more explicit was felt. Article 25 of the 1929 Convention stated that " The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances " [2].

The Contracting Parties undertake not 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. It would not, for example, be enough for a State to give orders or directives to the military authorities, leaving it to them to arrange as they pleased for their detailed execution. The State must supervise their execution. 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 peace-time, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises. Thus, 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

[1] See the commentary on Article 46, p. 251 below.

[2] A similar provision was included in Article 82, paragraph 1, of the 1929 Convention relative to the Treatment of Prisoners of War.

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 " mean that as soon as one of the conditions of application for which Article 2 provides is present, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in its entirety and in regard to all whom it protects.

The words in question also mean that the application of the Convention does not depend on the character of the conflict. Whether the war is " just " or " unjust ", whether it is a war of aggression or of resistance to aggression, in no way affects the treatment which the wounded, sick and shipwrecked 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

[1] The Contracting Parties are no longer merely required to take or propose to Parliament the necessary legislative action to repress violations. They are also under an obligation to fix penal sanctions for grave breaches and to seek out and prosecute the guilty parties, and cannot evade their responsibility.

[2] Article common to all four Conventions. See First, Third, and Fourth Conventions, Article 2.

bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Neither the Tenth Hague Convention of 1907 nor the Geneva Conventions of 1929 defined the conditions for their application. Their very titles and purpose made it clear that they were intended for use in war-time and that notion 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 either of a declaration of war giving the reasons on which it is based or of an ultimatum with conditional declaration of war " [1]. Since 1907, Parties to a conflict have in many instances contested the legitimacy of the Government of the adverse Party on various pretexts, or have refused to recognize the existence of a state of war. Now, the Geneva Conventions are not so much contracts concluded on a basis of reciprocity in the interest of the parties as a solemn affirmation of principles respected for their own sake, a series of unconditional commitments on the part of each of the Contracting Parties *vis-à-vis* the others.

Furthermore, as we shall see later, the application of the Hague Conventions was still subject to the *clausula si omnes*. If one of the belligerents was not a Contracting Party, the other belligerents were relieved from all their obligations.

Lastly, the Geneva Conventions have today achieved a much greater degree of universality than the 1907 Conventions.

For all these reasons, since the provisions applicable to maritime warfare have been embodied in the " Geneva law ", their application is now more extensive [2].

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

[1] Third Convention of The Hague of 1907, Article 1. On the other hand, the Third Hague Convention of 1899 contained the following provision in Article 11, paragraph 1 : " The rules contained in the above Articles are binding only on the Contracting Powers, in case of war between two or more of them ".

[2] The Commentary on the First Convention contains a study on the history of this Article and its preparation at the Diplomatic Conference. See *Commentary I*, p. 28 ff.

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 respect due to the human person as such is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only a single shipwrecked person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which he depends. All that can be done by anyone ; it is merely a case of taking the trouble to save a human life.

PARAGRAPH 2. — OCCUPIED TERRITORIES

This paragraph, which is new, is more aptly placed in the Fourth (Civilians) Convention, and may at first sight seem superfluous here, for if there is no military resistance, what victims will there be ? The provision is not without value, however. To provide for the protection and care of wounded, sick and shipwrecked members of the armed forces the Convention also protects a whole series of persons, establishments and property ; and without this paragraph it would be possible for an Occupying Power to refuse

to care for the sick military personnel of the occupied Power. It might requisition or sequestrate for its own purposes hospital ships which happened to be in port or in territorial waters. It might also take into its service the military personnel of the occupied Power, including the doctors and other members of the naval medical service. Thanks to the present paragraph the establishments and property covered by the Convention will always be available for their charitable purpose.

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

1. *Relations between belligerents party to the Convention*

This provision, which is taken from Article 25, paragraph 2, of the 1929 Convention, is sufficiently explicit to require no comment. It is consistent with the practice followed in two world wars. The Tenth Convention of The Hague still contained the dangerous *clausula si omnes* [1]. It is to the credit of the belligerent Powers in 1914-1918 and, as regards war at sea, 1939-1945, that they did not avail themselves of it.

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

The second sentence, added by the Diplomatic Conference of 1949, is less explicit. It is actually a compromise, which does not indicate clearly whether application by the Contracting Party is subject to the suspensive or the resolutive condition. In other words, is the Contracting Party absolved from applying the Convention so long as the non-Contracting Party does not accept or apply its provisions, or, on the contrary, must it honour its signature from the outset, with the possibility of being released from its obligations later if the adverse Party does not accept them and carry them out ?

An answer to this question may be found in the first report by the Special Committee to the Joint Committee of the Diplomatic

[1] See above, p. 27.

Conference, which states: " 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 " [1].

The spirit and character of the Conventions lead perforce to the conclusion that the Contracting Party must apply their provisions from the moment hostilities break out, and at least until the adverse Party has had the time and an opportunity to state any contrary intentions. That may not be a strictly legal interpretation, but it seems the only reasonable solution. It follows from the spirit of the Conventions and is in accordance with their character. It is also in accordance with the understandable moral interest of the Contracting Party, since it invites the latter to honour a signature given before the world. Lastly, it is in accordance with the practical interest of the Contracting Party 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 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. Does this mean that a formal and explicit declaration by the non-Contracting State is indispensable, and that if the second condition—*de facto* application—is alone fulfilled, the Contracting Party is released from its obligations ?

Contrary to the opinion of the Rapporteur of the Special Committee [2], it does not appear possible to maintain such an interpretation. It would bring about a paradoxical—not to say, monstrous—situation. It would entitle a Power to disregard rules solemnly proclaimed by itself, while its adversary, though not legally bound to 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.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 108.

[2] *Ibid.*, p. 109.

Summum jus, summa injuria. The saying should never be true of 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 abandon, ill-treat or put to death wounded, sick or shipwrecked persons before one's adversary had done so, merely because it was inferred from his silence that he was intending to do so ?

In the absence of any express stipulations in the present paragraph, it must therefore be assumed that acceptance may be tacit. It may even 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 always make such a declaration, and with the least possible delay. The International Committee of the Red Cross for its part, when offering 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 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] Article common to all four Conventions. See First, Third and Fourth Conventions, Article 3.

(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, sick and shipwrecked 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.

This Article, which is common to all four Geneva Conventions [1], marks a new step forward in the unceasing development of the idea on which the Red Cross is based and of the humanitarian law resulting from it. It constitutes an extension of Article 2 and embodies all the rules applicable to conflicts not of an international character. The Second Convention adapts the principles of the

[1] With the exception of the words " and shipwrecked " which are included only in the present Convention.

First Convention to maritime warfare ; for a study of the origin of this Article and its elaboration during the twenty-five meetings devoted to it at the 1949 Diplomatic Conference, the reader should therefore refer to the Commentary on the First Convention [1].

Article 3, which has been called a " Convention in miniature " within the Geneva Conventions, applies to non-international conflicts only, and will be the sole Article applicable to them until such time as the Parties have agreed to bring into force between them all or part of the other provisions of the Convention.

It is applicable automatically without requiring a prior determination as to the nature of the conflict, and without any condition in regard to reciprocity. It is true that it provides for the application merely of the principles of the Conventions and not of specific provisions, but it defines those principles and in addition lays down certain brief and imperative rules.

Finally, Article 3 has the advantage of expressing briefly, in each of the four Conventions, the common principle which governs them.

PARAGRAPH 1. — APPLICABLE PROVISIONS

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

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

The expression is so general, so vague that one might have feared that it might cover any act committed by force of arms— any form of anarchy, rebellion, or even plain banditry.

Such was not the authors' intention, however ; they did not consider the term " armed conflict " as applying to any and every isolated event involving the use of force and obliging the officers of the peace to have resort to their weapons.

In general, Article 2 should be recognized as applying to armed conflicts consisting of *hostilities* in which *armed forces* on either side are engaged — in other words, conflicts which are in many respects similar to an international war, but take place within the confines of a single country.

[1] See *Commentary I*, pp. 38-48.

B. *Obligations of the Parties.*—The obligation is absolute for each of the Parties, with no reciprocity clause. This is offset, it is true, by the fact that it is no longer the Convention as a whole which will be applicable, but only the provisions of Article 3 itself.

The obligation resting on the Party to the conflict which represents established authority is not open to question. On the other hand, what justification is there for the obligation on the adverse Party in revolt against the established authority ? Some doubt has been expressed as to whether insurgents can be legally bound by a Convention which they have not themselves signed. The answer is provided in most national legislations ; by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country. But this system is not universal. However that may be and without embarking on a discussion of international law which cannot be settled in the same way everywhere, one may state this : if the responsible authority at the head of the insurgents exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.

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, it cannot 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 a Preamble or prefatory Article which would have referred to it.

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.

It is not necessary for an armed force as a whole to have laid down its arms for its members to be entitled to protection under the Article. The Convention, it should be recalled, refers to individuals and not to units of troops, and a man who has surrendered individually is entitled to the same humane treatment that he would receive if the whole army to which he belongs had capitulated [1].

We shall endeavour to explain later, when discussing Article 12, the sense in which " humane treatment " should be understood [2]. The definition is not an easy one ; 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 extenuating circumstances.

Items (*a*) and (*c*) concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War. The wording adopted is flexible—for here there is always the risk of being unable to catch up with the imagination of future torturers—and, at the same time, precise.

Items (*b*) (taking of hostages) and (*d*) (sentences and executions without a proper trial) prohibit practices which have in the past been fairly general in war-time. But although they were common practice, they are nevertheless shocking to the civilized mind.

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[1] The English text leaves no room for doubt in this regard : " including members of the armed forces *who* have laid down their arms ". The Conference deliberately adopted the word " who ", which obviously relates to " members ", rather than " which " which would have referred to " armed forces ". See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B on Article 2, paragraph 4, p. 100.

[2] See below, pp. 90-91.

Sentences and executions without previous trial are too open to error. " Summary justice " may be effective on account of the fear it arouses, but it adds too many 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 civil war or international war. We must be very clear about one point : it is only " summary " justice which is prohibited. The State retains its full right to prosecute, sentence and punish according to the law.

Reprisals do not appear here in the list of prohibited acts, but any reprisal entailing one or other of the acts referred to under items (*a*) to (*d*) is prohibited and so, speaking generally, is any measure incompatible with the " humane treatment " demanded unconditionally in the first clause of sub-paragraph (1).

As already noted, the field of application of Article 3 is very wide, embracing persons who do not take part in the hostilities as well as combatants who have laid down their arms or been placed *hors de combat.*

B. *Sub-paragraph (2) : — Care of the wounded, sick and shipwrecked.* — Here the Article reaffirms, in generalized form, and extends to the shipwrecked for this Convention, the fundamental principle underlying the original Geneva Convention of 1864. The clause, which is numbered separately, completes the preceding provision ; it is concise and particularly forceful. It expresses a categorical obligation which cannot be restricted and needs no explanation.

Paragraph 2. — Right of humanitarian initiative

This paragraph is not merely decorative ; it is of great moral and practical value. It is the adaptation of Article 9 of the Convention to the " Convention in miniature " represented by Article 3.

Although the International Committee of the Red Cross has been able to do a considerable amount of humanitarian work in certain internal conflicts, in others the doors have been closed against it, the mere offer of its services being regarded as an attempt

to interfere in the internal affairs of the State. Article 3 no longer permits any such inference. An impartial humanitarian organization is now legally entitled to offer its services. The Parties to the conflict may, of course, decline the offer if they consider they can do without it. But they can no longer look upon it as an unfriendly act or resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict with complete impartiality.

It is obvious that outside help can only, and should only, be supplementary. It is for the Parties to the conflict to conform to Article 3 and apply its provisions.

For offers of services 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 [1].

Paragraph 3. — Special agreements

In the case of armed conflict not of an international character, the Parties are legally only bound to observe Article 3 and may ignore all the other Articles. Each one of them, however, is completely free—and should be encouraged—to apply all or part of the remaining provisions of the Convention. 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. Surely the most practical step is not to negotiate special agreements, but simply to refer to the Convention as it stands, or at all events to certain of its provisions.

[1] In this connection, see the commentary on Article 9 below, p. 64. Since 1949, the International Committee of the Red Cross has had occasion to invoke Article 3 and offer its services to the Parties in conflict several times during various internal conflicts. This offer has frequently been accepted.

The provision does not merely offer a convenient possibility, but makes an urgent request, points out a moral duty: " The Parties to the conflict should further endeavour . . . "

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 often expressed during the discussions ? It should be remembered that although the Government must endeavour to conclude such agreements, it is not expressly required to do so. It is also free to stipulate that adherence to such an agreement in no way confers the status of a belligerent on 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 to the conflict can deny.

Lastly, it must not be forgotten that this provision, like those which precede it, is governed by the last clause of paragraph 4 below.

Paragraph 4. — Lack of effect on the legal status of the Parties to the conflict

This clause is essential. Without it Article 3 would probably never 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 might interfere with the *de jure* Government's suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse Party. The provision was first suggested at the Conference of Government Experts [1], and makes clear the purely humanitarian object of the Convention, which is in no way concerned with the internal affairs of States.

Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has any authority or any particular status. It does

[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.

not limit in any way the right to suppress a rebellion by all the means—including arms—provided by law ; nor does it in any way affect the Government's right to prosecute, try and sentence the rebels, according to its own laws.

In the same way, the fact of the adverse Party applying this Article does not give it any special immunity—still less any international status—whichever it may be and whatever title it may give itself or claim.

Article 3, like the rest of the Convention, is concerned only with individuals and the physical and moral treatment to which they are entitled as human beings. It does not affect the legal or political treatment which they may deserve as a result of their behaviour.

ARTICLE 4. — FIELD OF APPLICATION

In case of hostilities between land and naval forces of Parties to the conflict, the provisions of the present Convention shall apply only to forces on board ship.

We shall consider the two paragraphs of this Article together, since they form a whole. The first paragraph reproduces Article 22 of the 1907 Convention [1]. The second, which is new, merely serves to make the first more explicit.

As already noted, the First and Second Geneva Conventions of 1949 are in parallel ; the latter is merely a faithful adaptation of the former to maritime warfare. Their titles give an adequate definition of their respective scope. The first applies to " the

[1] Although the following text, written by the Rapporteur, Louis RENAULT, appears in the records of the 1899 Conference (*Actes*, pp. 28 and 37) : " In the provisions which the Committee submits to the Conference, mention is made of the wounded, sick and shipwrecked, but not of the victims of maritime warfare. The latter expression, which would be correct in most cases, is not always so, and must therefore be avoided. The relevant rules become applicable from the moment when there are wounded or sick persons on board a sea-going vessel, regardless whether they were wounded or fell ill at sea or on land. If a ship is detailed to transport by sea wounded or sick members of the land forces, the provisions of our draft text will therefore apply to that vessel and to the wounded and sick on board. Conversely, it is self-evident that if wounded or sick sailors are put ashore and placed in an ambulance or a hospital, the Geneva Convention will be fully applicable to them. This comment seems to us to answer the remarks made in the Sub-Committee, and we consider that there is no need to include a special provision on this subject ".

wounded and sick in armed forces *in the field* ", while the second relates to " wounded, sick and shipwrecked members of armed forces *at sea* ".

Does it follow that the present Article is completely superfluous ? No, for although the First Convention obviously applies to armed forces fighting on land, and the Second to engagements at sea, some doubt might have arisen in regard to amphibious operations. The present Article supplies the answer : both Conventions are applicable —the First to combatants who are actually on land, and the Second to those who, at that same moment, are at sea. This division is logical and, in the absence of a specific provision to that effect, the same conclusion could no doubt have been reached. What would have made interpretation more difficult, however, is the fact that according to the text, the Maritime Convention will apply even to land forces who may be temporarily at sea, while the First Convention will be applicable to members of the naval forces who happen to be on land [1].

The expression " hostilities between land and naval forces " must not be interpreted too literally or in too restrictive a manner. The rule of division, as stated in the present Article, is in general valid, but there is one exception to it : Article 36 stipulates that members of the medical personnel and crews of hospital ships may not be captured while they are " in the service " of such ships. The Convention therefore remains applicable to them even if they have had to go ashore, and in no case may they be retained [2].

At the 1949 Diplomatic Conference, some delegates were in doubt as to whether or not the words " forces on board ship " actually covered all the persons protected by the Convention [3], and the Rapporteur emphasized that the expression must be taken in the broadest possible sense [4]. Of that there is no doubt. The present Article is not actually intended to define the categories of

[1] Similarly, the air forces must apply, and will be covered by, the First Convention while they are on land or over land, and the Second while they are on or over the sea.

[2] Generally speaking, when a ship is in port and members of its crew are ashore on duty or even on shore leave, they have the same legal status as if they were on board ship.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 138.

[4] *Ibid.*, p. 200.

persons protected ; other Articles are provided for that purpose [1]. Its object is merely to indicate to both branches of the armed forces —on land and at sea—which Convention applies to them and which one they must observe. The provisions of the two instruments are actually very similar, if not identical, but it is nevertheless important to know which of them one is to apply.

There is yet another Article in the present Convention—Article 23—which helps to clarify the relationship between the two Conventions, and the reader may refer to the commentary on it [2]. Lastly, it should be noted that Article 27 affords protection to fixed coastal installations used by rescue craft, even though they are on land.

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Why is there no equivalent here of Article 5 of the First Geneva Convention of 1949, which extends the duration of application of the Convention until the final repatriation of " protected persons " ? The answer is that protected persons who are held by the Parties to the conflict for any considerable period will be on land, and the First, Third or Fourth Convention will therefore be applicable to them.

ARTICLE 5. — APPLICATION BY NEUTRAL POWERS

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

This Article, which is new, corresponds to Article 4 of the First Geneva Convention of 1949.

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[1] The expression " forces on board ship " (meaning military personnel on board ship) would obviously be quite inadequate to designate protected persons. The latter include not only wounded, sick and shipwrecked members of the armed forces and persons with similar status (including members of the merchant marine, although they are not part of the armed forces), in accordance with Article 13, but also members of the medical personnel (Articles 36 and 37) and even the dead (Articles 18, 19 and 20). As for the shipwrecked, they are, unfortunately, not always " on board ship ".

[2] See below, p. 161.

The present Convention contains a number of provisions addressed to neutral countries. For example, it determines the position of wounded persons who are taken on board a neutral warship (Article 15) ; wounded persons landed in a neutral country by a ship (Article 17) or aircraft (Article 40) ; and hospital ships while in a neutral port (Article 32).

The purpose of the present provision is to provide, by a general extension, for all cases not expressly referred to. In fact, the remark at the end of the commentary on the preceding Article is also valid here to some extent. Although a provision of this kind was essential in the First (Article 4) and Third (Article 4 B. (2)) Conventions, it may seem less necessary in the Maritime Convention; persons " received or interned " in the territory of the Parties to the conflict will eventually find themselves on land, so that strictly speaking the First and Third Conventions would provide an answer to any questions which might arise regarding nationals of belligerent countries who are in neutral territory.

The Second Convention may, however, be applied to some extent to neutral countries with access to the sea, particularly during the initial phase when nationals of a belligerent country who are war victims may be considered as shipwrecked. Subsequently, the neutral authorities will have recourse to it when determining the fate of hospital ships and their personnel and crews, for the Maritime Convention contains particularly liberal provisions in regard to them.

Lastly, since the Fourth Geneva Convention of 1949 does not contain any clause similar to the present Article—for civilians are normally accorded the most favourable status in a neutral country—and that Convention, in Article 4, actually excludes from its scope persons protected by the Second Convention [1], the present Article

[1] There should be no misunderstanding as to the character of this exclusion. It refers to the persons whom the Second Convention is principally designed to protect, that is to say military personnel, because they are also covered by the Third Convention if they fall into the hands of the adverse Party. Members of the merchant marine are mentioned in the Second Convention in connection with the initial phase of operations, during which they may be wounded or shipwrecked. Once on dry land, they may be considered by the adverse Party as military personnel or as civilians and are then protected respectively by the Third and Fourth Conventions. The system set up by the four Geneva Conventions, taken as a whole,

may be invoked for the benefit of shipwrecked members of the merchant marine, to whom the Maritime Convention affords protection (Article 13 (5)) [1].

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

In preparing the recent revision of the Geneva Conventions, the International Committee of the Red Cross thought well to introduce the text which has become Article 4 of the First Convention of 1949 and Article 5 of the present Convention. The Committee had several reasons for doing so.

Firstly, it seemed logical to insert into the Geneva Conventions themselves a provision concerning their application. Moreover, the Hague text merely referred back to the 1906 Geneva Convention. As the latter has been revised and added to on two occasions—in 1929 and 1949—the reference should obviously be to the most recent version. A general reference valid for the whole Convention eliminated the need for special references in certain Articles. Lastly, if there was a need to confirm a humane principle already recognized in international law and respected by neutral Powers during two world wars, it was no less necessary to supplement it. There was an obvious gap in Article 14 of the First Hague Convention : it mentioned only the wounded and sick and made no reference to medical and religious personnel, the shipwrecked and the dead. Even though it may be admitted that by implication

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is complete and no one is left outside its rules. Any individual in the hands of the adverse Party has a definite status in international law : he is either a member of the armed forces, and as such protected by the Third Convention, or a civilian, protected by the Fourth. There is no intermediary status unless the status of retained medical personnel is so considered, in which case it is determined by the First and Third Conventions.

Until such time as they recover or are rescued, the wounded, sick and shipwrecked in the hands of the enemy are entitled to special treatment, pursuant to the First and Second Conventions, in addition to the treatment to which they may be entitled as prisoners of war under the Third Convention.

[1] As regards the application of the Second Convention to the merchant marine and to civil aviation, reference should be made to the commentary on Article 13 (5). Neutral Powers may not consider members of the merchant marine whom they pick up as military personnel.

the 1907 Convention covered them all, it was preferable to say so clearly.

Let us now look closely at the contents of the present Article.

The wounded, sick and shipwrecked referred to are those mentioned in Article 13 : they must belong to the armed forces of a belligerent or to categories of persons considered as being on the same footing as members of such armed forces. The medical and religious personnel referred to are those to whom Articles 36 and 37 refer : they comprise not only the medical and religious personnel proper, but also the administrative personnel of medical units and the entire crew of hospital ships.

The phrase " received or interned " in the territory of neutrals was deliberately selected in order to cover all cases which might arise through the application of the present Convention (Articles 15, 17 and 40), the Eleventh (Articles 5 to 7) and the Thirteenth Conventions of the Hague of 1907 (Articles 3 and 21 to 24). As those provisions are not very detailed and are contained in a number of instruments, they must be supplemented by customary law.

It follows from the application by analogy of the Second Geneva Convention by neutral Powers that medical personnel will not necessarily be interned. According to the spirit of the Geneva Conventions, they may be called upon for medical duty and must be allowed more or less complete freedom to enable them to perform it. If their presence is not or is no longer necessary to the wounded, they will be returned to the belligerent on which they depend. Hospital ships, together with their personnel and crew, must always be returned immediately.

The present Article introduces the principle of the application " by analogy " of the Second Geneva Convention, which, having been drawn up with a view to determining the treatment of enemies, contains a number of provisions applicable only to belligerents— as, for example, Article 16 (capture), Article 38 (seizure) and Article 8 (appointment of a Protecting Power) [1]. Furthermore, neutral States will, generally speaking, only be able to apply

[1] Nevertheless if diplomatic relations have been broken off between the State of origin of rescued persons and the neutral State which receives or interns them, a third Power may act in a capacity similar to that of a Protecting Power.

mutatis mutandis to persons whom they have interned on their territory, or who are even their guests, provisions which, in the text of the Convention, refer to adversaries.

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

The arrangement adopted has much in common with that which prevailed during the Second World War in regard to civilians of enemy nationality who were in belligerent territory at the outbreak of hostilities. On the proposal of the International Committee of the Red Cross, such persons were in most countries given the benefit of the 1929 Prisoners of War Convention, applied " by analogy ".

Article 4 of the Third Geneva Convention leaves the door open for " any more favourable treatment which these Powers (neutrals) may choose to give " to internees. This reservation is so obvious that it may be considered as being implicit in Article 5 of the Second Convention, now under consideration. In general, the Geneva Conventions represent minimum safeguards to be accorded to war victims, and the Powers are invited to act more generously.

ARTICLE 6. — SPECIAL AGREEMENTS [1]

In addition to the agreements expressly provided for in Articles 10, 18, 31, 38, 39, 40, 43 and 53, the High Contracting Parties may

[1] Article common to all four Conventions. See First and Third Conventions, Article 6 ; Fourth Convention, Article 7.

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 wounded, sick and shipwrecked persons, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

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

General Remarks and Historical Background

Although war breaks off diplomatic relations between the belligerents, 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 in the course of a war [1], relating in particular to the treatment which the nationals of each of the Parties are to receive when in enemy hands. Agreements of this nature were concluded between the belligerents during the 1914-1918 war, when it became apparent that the Hague Conventions were inadequate. The provisions of the 1929 Prisoners of War Convention were very largely based on those agreements.

In regard to maritime warfare, one particular document is worthy of note—the 1780 treaty between France and England for the exchange of all prisoners taken at sea, already referred to in the Introduction to the present volume. In particular, it explicitly

[1] See on the subject R. Monaco : *Les Conventions entre belligérants.* Recueil des Cours de l'Académie de droit international de La Haye, 1949, II, T. 75, pp. 277-362.

mentioned the principle of repatriating the shipwrecked, the institution of the " truce flag " intended to ensure immunity for ships carrying prisoners, and stated that " surgeons and surgeons' apprentices " as well as chaplains and ministers of religion taken at sea were not to be held prisoner [1].

In the 1929 Convention (Article 83, paragraphs 1 and 2) the High Contracting Parties therefore reserved the right to conclude special conventions " on all questions relating to prisoners of war concerning which they may consider it desirable to make special provision ".

Unfortunately, during the Second World War the interpretation which the belligerent States gave to these provisions was not always satisfactory and at the Conference of Government Experts the International Committee of the Red Cross therefore proposed that the Convention should expressly state that special agreements between belligerents should in no circumstances worsen the situation of protected persons. Although there were some reservations, the Commission supported that view and it was approved by the Diplomatic Conference [2].

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 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 10, paragraph 2) ;

(*b*) evacuation of the wounded and sick from a besieged or encircled area and passage of medical personnel and equipment on their way to that area (Article 18, paragraph 2) ;

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[1] See CAUWÈS : *op. cit.*, pp. 16-18.

[2] See *Report on the Work of the Conference of Government Experts*, p. 259 ; see also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 109.

(*c*) installation of neutral observers on board hospital ships to verify strict observation of the provisions of the Convention (Article 31, paragraph 4) ;

(*d*) travel conditions for ships chartered to transport medical equipment and supplies (Article 38, paragraph 1) ;

(*e*) installation of neutral observers on board ships chartered to transport medical equipment and supplies in order to verify such equipment and supplies (Article 38, paragraph 2) ;

(*f*) times and routes for flights by medical aircraft (Article 39, paragraph 1) ;

(*g*) marking of medical aircraft or other means of identification (Article 39, paragraph 2) ;

(*h*) flights of medical aircraft over enemy or enemy-occupied territory (Article 39, paragraph 3) ;

(*i*) use of the most modern methods available to facilitate identification of hospital ships and rescue craft (Article 43, paragraph 8) ;

(*j*) enquiry procedure concerning any alleged violation of the Convention (Article 53, paragraph 2).

The above list, which appears in the Convention, is merely by way of indication, for there are other Articles in the Convention which refer to agreements between the belligerents, either to encourage such agreements or on the contrary to prohibit them :

(*a*) prohibition of any derogation from the provisions relating to substitutes for Protecting Powers if one of the Parties is restricted in its freedom to negotiate (Article 10, paragraph 5) ;

(*b*) establishment of conciliation procedure for the application or interpretation of the Convention (Article 11, paragraph 2) ;

(*c*) limitation on the use of markings (Article 44) ;

(*d*) situation of wounded, sick or shipwrecked persons who are landed in a neutral port, agreement between the Parties to the conflict and the neutral Power concerned (Article 17, paragraph 1).

Lastly, there are other cases in which, although the Convention does not include any express provision, agreements between the belligerents might be necessary :

(*a*) search for the victims immediately after each engagement (Article 18, paragraph 1) ;

(*b*) burial at sea (Article 20, paragraph 1) ; we have in mind the possible handing over of bodies to the adverse Party ;

(*c*) possible release of wounded, sick or shipwrecked who have fallen into enemy hands (Article 16).

This list shows that the term " special agreements " is used to denote a wide variety of arrangements. Sometimes it is a matter of arrangements for individual cases (evacuation of the wounded), sometimes of actual regulations (medical aircraft), sometimes of a quasi-political agreement (substitute for the Protecting Power).

Apart from the above list the term " special agreements " should therefore be understood in a very broad sense. One must not forget that the Hague Convention and the Geneva Conventions grew up from agreements of this kind. The belligerents must remain absolutely free to develop and steadily improve the status of 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 6, there is no need for it to deal exclusively with matters covered by the Second Convention. Such matters may form part of an agreement of much wider scope between the Parties. An armistice agreement, for example, may contain not only clauses relating to the armed forces on land, but also one or more provisions concerning the naval forces.

Special agreements are generally not 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, their special features being that, in the first place, the Head of State does not formally intervene and secondly, they may take several forms : sometimes they are concluded by an exchange of notes or letters, or they may even be

oral agreements. In war-time, it is sometimes necessary to take immediate steps to implement agreements in circumstances which make it impossible to observe the formalities required at other times; such agreements are 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 protection of the wounded and shipwrecked.

Even when there is no urgency, the absence of formalities is justified by the fact that special agreements can usually be considered as measures taken in application of the Convention. The latter binds the States concerned and it is only natural that its application should be within the competence of executive bodies. This absence of formalities means that agreements may even be made orally; reciprocal declarations of intention will often be exchanged through a third party [1]. Apart from those concluded on the actual battle-front 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.

B. *Time of conclusion.* — Certain special agreements are meaningless unless 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 [2]. Furthermore, as already noted, it is conceivable that certain agreements could be concluded by one or more belligerent Powers with neutral States which are also party to the Conventions, with a view to arranging, for example, for the wounded to be accommodated in hospitals or even interned in a neutral country. Lastly, certain agreements can obviously be concluded after the close of hostilities.

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[1] The special agreements concluded between Italy and the United Kingdom provide a good example of this form of agreement. They appeared in Italy under the title: *Testo delle Note Verbali che integrano e modificano la Convenzione di Ginevra de 1929 . . .*, Rome, 1941 and 1942.

[2] This applies particularly to those mentioned in Article 10, paragraph 1; Article 11, paragraph 2; Article 39, paragraph 2; Article 53, paragraph 2. This possibility is expressly referred to in Article 10, which uses the wording " The High Contracting Parties " and not " the Parties to the conflict " as in most other provisions.

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 some of their rights under the Convention, and in particular in regard to supervision by the Protecting Power, work connected with military operations, and penal or disciplinary sanctions. Such measures were represented to those concerned as an advantage, but in the majority of cases they ultimately involved drawbacks which were sometimes very serious.

Although less explicit than the present paragraph, it would seem that Article 83 of the 1929 Convention should have prevented agreements of this kind. Be that as it may, in order to prevent any ambiguity in the future the International Committee of the Red Cross recommended, when the preliminary work began, that the provision relating to special agreements should be clarified as follows:

> Such agreements shall in no case adversely affect the situation of protected persons, as defined in the present Convention, nor restrict the rights which it confers upon them.

This proposal was approved by a large majority at the 1949 Diplomatic Conference [1], which thus declared itself, despite the objections raised, in favour of maintaining the " safeguard clause " proposed by the International Committee of the Red Cross.

B. *Scope of the safeguard clause.* — Special agreements may neither " adversely affect the situation of wounded, sick and shipwrecked persons, of members of the medical personnel or of chaplains " nor " restrict the rights which it (the Convention) confers upon them ".

It will not always be possible to determine at once whether or not a special agreement " adversely affects the situation of wounded,

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

sick and shipwrecked persons..." [1]. What is the position, for instance, if their situation is improved in certain respects 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 became apparent only later and as a result of circumstances. The criterion, " adversely affects the situation ", is not, therefore, in itself clear, and that is why the second condition is of value.

In what sense should the word " rights " conferred by the Convention be understood ? The question is examined here only in relation to special agreements between the belligerents. 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 [2]. The reference is therefore to the whole body of safeguards which the Convention affords to protected persons.

The States may not by special agreement restrict, i.e. derogate from, their obligations under the Convention to the disadvantage of protected persons ; on the other hand, nothing prevents them from undertaking further and wider obligations.

C. *Special problems.* — (*a*) If, as a result of a change in circumstances, the application of a provision of the Convention entailed serious disadvantages for protected persons, 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 cannot settle of their own accord. If such a situation were to arise, 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

[1] See R.-J. WILHELM : *Le caractère des droits accordés à l'individu dans les Conventions de Genève.* Geneva, 1950, p. 13 ff.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol. II-B, p. 74.

concerned might take, either separately or by mutual agreement, with a view to remedying the situation.

(*b*) If two belligerents were to agree to subject their nationals to treatment contrary to the Convention, it would be difficult for the protected persons concerned—no matter how great their interest in defending their " rights " (and this point will be considered under Article 7)—to oppose the conclusion and consequences of such an agreement. But it would then be the duty of the organizations responsible for supervising the proper application of the Convention 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 members 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. The Geneva law goes farther than a simple treaty providing for reciprocal concessions. It protects the humanitarian heritage which is not, and must not be allowed to be, at the mercy of temporal political interests. The individual is considered in his own right. The State is not the only subject of law, and this step forward by the Geneva Conventions constitutes an important advance in present-day international law.

PARAGRAPH 2. — DURATION OF SPECIAL AGREEMENTS

This provision did not really seem essential [1].

The present Convention makes express provision concerning its duration in Article 5 and the belligerents may not waive its application even in an instrument of capitulation.

[1] It had been introduced in the 1929 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. In accordance with Article 83, paragraph 2, of the 1929 Convention, subject to any more favourable measures contained in an armistice agreement the agreements concluded between belligerents must continue to be applicable (see *Actes de la Conférence de 1929*, p. 511).

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, or so long as no other agreement has been concluded which would accord them more favourable treatment. But this benefit may be withdrawn from protected persons only if the relevant provisions are expressly abrogated in a later agreement. If an agreement concluded for a specific period expires without being replaced by a new agreement, the conventional text will automatically be applicable once more.

It should also be noted that the contents (not the text) of any special agreement concluded pursuant to the present Article must be posted in every prisoner-of-war camp (Article 41, paragraph 1, of the Third Convention) [1].

ARTICLE 7. — NON-RENUNCIATION OF RIGHTS [2]

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

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 5 on the duration of application, and Article 6 prohibiting agreements in derogation of the Convention. This Article will be applied mainly in connection with the Third Convention, that is to say during the period of internment proper. It is hardly conceivable that a shipwrecked or wounded person could renounce the assistance and care which the present Convention assures unless his mental

[1] See *Commentary III*, p. 243.

[2] Article common to all four Conventions. See First and Third Conventions, Article 7 ; Fourth Convention, Article 8.

faculties were partially impaired or unless he were subject to constraint.

1. *Renunciation of protection under the Convention*

The Conferences which prepared the revision of the 1929 Convention considered the implications for the individual of changes which, as a result of war, sometimes affect the legal or political structure of States (such as occupation, *debellatio*, change of Government, or civil war) [1]. We have already quoted the example of an occupied country concluding an agreement with the occupying Power, the terms of which may adversely affect its nationals in enemy hands. Article 7 should now obviate that danger.

As experience showed during the Second World War, however, agreements of derogation may in certain cases appear to be licit. If, for instance, they take the form of an authorization by the national Government permitting prisoners of war to opt freely for a status other than that laid down by the Convention, they appear to transfer to the prisoners themselves the responsibility for deciding their status.

In this connection, one may also consider the situation of nationals of a State which, as a result of war, ceases to exist legally, whether for the time being or definitively. In such a case the Detaining Power might be even more strongly tempted to modify the status of prisoners under the Convention on the basis of the wishes of the persons concerned, having no partner with whom such modifications might be discussed.

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 those concerned may be subjected to pressure in order to influence their choice ; the pressure may vary in intensity and be more or less overt, but it nevertheless constitutes a violation of their moral and sometimes even physical integrity. In any case, change of nationality deprives the person concerned of the pro-

[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.

tection accorded under the Convention. To obviate that danger and to meet a general desire, the International Committee of the Red Cross included the present provision in the drafts. In its proposal, however, the prohibition applied to the use of coercion to influence the will of the individual. That might have been interpreted as implying that protected persons could renounce the benefits of the Convention, provided their choice was made completely freely and without pressure. The Diplomatic Conference, like the XVIIth International Red Cross Conference, preferred to avoid that interpretation and accordingly adopted a more categorical wording which no longer refers to constraint, thus intimating to the States party to the Conventions that they could not be released from their obligations towards protected persons even if the latter of their own free will expressed a desire to that effect.

Such an absolute rule was not agreed to without opposition. Reference was made to the case of combatants who had been forced to enlist and who, after being taken prisoner, went over to the other side in order to participate in the " liberation " of the country which, in their hearts, they had never ceased to consider as their native land. Other delegations wondered whether Conventions designed to protect the individual should be carried to the point where in a sense they denied him the essential attribute of the individual, namely liberty.

In the end, however, the Diplomatic Conference voted unanimously in favour of absolute prohibition, mainly because it is difficult, if not impossible, to prove the existence of duress or pressure [1].

Two further points call for notice :

[1] The Norwegian representative, who stated these motives the most forcibly, said amongst 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 obtained by duress was not sufficient in his view; everyone knew that it was extremely difficult to produce proof of there having been duress or pressure. Generally, the Power 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 that 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 should be deemed completely devoid of validity. (See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 17-18.)

In the first place, the Conference did not overlook the fact that the rules as drafted might entail " harsh " consequences for some persons. 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 dangerous breach in the structure of the Convention ?

The Conference also accepted the view that in war-time protected persons in the hand 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 [1].

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

A. *The basic concept.* — In the commentary on Article 6 the meaning to be attached to the expression " rights which the Convention confers 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 same expression recurs in Article 7 [2].

The initiators of the Geneva Conventions wished to safeguard the dignity of the human person, in the profound conviction that

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[1] The Conventions nevertheless take into account the wishes of protected persons in certain cases : for instance in the Third Convention, the provisions relating to release on parole (Article 21, paragraph 2), the assembling of prisoners in camps (Article 22), recreation (Article 38), dangerous labour (Article 52), religious duties and attendance at services of their faith (Article 34), and the repatriation of wounded or sick prisoners of war (Article 109, paragraph 3). In all these cases, the wishes expressed by protected persons would merely lead to more flexible application of the Convention and not to the partial or total absence of certain rights. In this connection, the example was quoted of certain social laws which apply to the persons concerned independently of their will. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 18. Reference might also be made in municipal law to the rules for the protection of the individual, some of which, considered as being in the common interest, can in no case be waived by those concerned. Thus Article 27 of the Swiss Civil Code lays down that " No one may renounce, even in part, the exercise or enjoyment of his rights ".

[2] Here the phrase " rights which it confers " used in Article 6 has been replaced by " rights secured " which is much stronger ; similarly, in the French text, " *accorde* " has been replaced by " *assure* ".

imprescriptible and inviolable rights are attached to it, even when hostilities are at their height [1].

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 1949 Conventions (in particular in Articles 6 and 7) that the existence of " rights " conferred on protected persons was affirmed. In this connection, one should recall the unanimous recommendation of the Red Cross Societies, meeting in conference at Geneva in 1946, to confer upon the rights recognized by the Convention " a personal and intangible character " allowing the beneficiaries " to claim them irrespective of the attitude adopted by their home country " [2].

B. *Practical aspect of the rights.* — One might fear that there is a risk that the rights which are thus " secured " to protected persons might remain merely theoretical unless any violation thereof entails a penalty.

In that respect there has been a very clear evolution. Let us take the case of penalties. The Tenth Convention of The Hague of 1907 (Article 21) provided for legislative measures to be taken, should the penal laws prove inadequate. But the 1949 Geneva Conventions lay down with the requisite precision (in Articles 50, 51 and 52, common to all four Conventions) the obligation incumbent on all States party to the Conventions, whether belligerent or neutral, to promulgate penal measures, seek out those who are guilty, and punish breaches of the Conventions. The Conventions also define the rôle of the Protecting Power (Article 8) and of the International Committee of the Red Cross (Articles 9 and 10),

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[1] See Max HUBER : *The Red Cross, Principles and Problems*, Lausanne, 1941, pp. 11-12, and Jean S. PICTET : *La Croix-Rouge et les Conventions de Genève*, lecture delivered before the Academy of International Law at The Hague, 1950, p. 30.

[2] See *Report on the Work of the Preliminary Conference of National Red Cross Societies*, p. 71.

which are authorized to defend the interests of protected persons [1].

So far this commentary has dealt only with the relationship between protected persons and the belligerent in whose hands they are. What, then, is the position when the violations are the consequence of an agreement signed by the State of origin of the protected persons ? Would it not be possible for the State of origin to be prosecuted by the persons affected, 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 as those of national legislation. Article 7 nevertheless emphasizes that as a corollary to the individual character of the rights secured to them by the Convention, protected 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 the slightest derogation from that status.

C. *Obligation on the persons protected.* — Rights entail obligations. It is obvious that the respect due to the wounded and sick must also be afforded by persons who can claim protection under the Convention. For example, a member of the medical personnel who took advantage of his duties to rob the wounded or dead would be liable to the punishment prescribed for such offences. Although the present Article is addressed primarily to the Contracting States, it may be interpreted as implying an indication and even a warning to the wounded and sick and to medical personnel, for the latter must contribute to the maintenance and reinforcement of the inalienable character of their rights, even if they lose by so doing.

Thus, Article 48 relating to the dissemination of the Conventions is of particular importance in connection with Article 7.

[1] Mention may also be made of Article 78 of the Third Convention, which gives prisoners of war the " unrestricted right " to apply to the representatives of the Protecting Powers. Prisoners of war therefore have not only rights but also the means of availing themselves of them.

ARTICLE 8. — PROTECTING POWERS [1]

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. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

This provision, taken from Article 86 of the 1929 Convention relative to the Treatment of Prisoners of War, was introduced into all four Conventions of 1949. It makes compulsory scrutiny which was only optional under the 1929 Convention.

The Protecting Power is, of course, a neutral State instructed by another State to safeguard its interests and those of its nationals in relation to its adversaries [2].

PARAGRAPH 1. — GENERAL ROLE OF THE PROTECTING POWERS

1. *First sentence. — " The present Convention shall be applied with the co-operation . . . "*

This is a command. The English text, which is authentic equally with the French, makes it absolutely clear [3].

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[1] Article common to all four Conventions, with the exception of the last sentence which is not included in the Third and Fourth Conventions. See First and Third Conventions, Article 8 ; Fourth Convention, Article 9.

[2] For an account of the historical background of this Article, see *Commentary I*, pp. 86-95.

[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.

The command is addressed in the first instance to the Parties to the conflict, who are bound to accept the co-operation of the Protecting Power ; if necessary they must demand it. This is fully established by the clear intention, constantly manifested at the Diplomatic Conference, of establishing stricter control and making it obligatory.

The command is also addressed to the Protecting Power, however, if the latter is a party to the Convention. By the very fact of agreeing to act as Protecting Power on behalf of one of the Parties, it takes on a higher mandate which is conferred upon it by all the States party to the Convention [1]. It is obliged to participate, so far as it is concerned, in the application of the Convention.

What does the rôle of the Protecting Power involve, and what should be understood by " co-operation " and " scrutiny " ?

Articles 8 and 10 are not the only provisions which mention the intervention of the Protecting Power or its substitute. Express reference is made to it in three other provisions : Article 11 (conciliation procedure) and Article 49 (translations), which are common to all four Conventions, as well as Article 19, paragraph 2 (forwarding of information regarding wounded, sick and shipwrecked persons).

The present Convention refers less frequently than the others to action by the Protecting Power in specific instances. The First Convention contains three provisions of its own in which the Protecting Power is mentioned, whereas the Third and Fourth Conventions contain respectively twenty-seven and thirty-three such provisions.

The following question therefore arises: do the co-operation and the scrutiny laid down in principle in Article 8 consist solely of the activities referred to in the Articles listed above, or is the Protecting Power assigned a general mission in Article 8 giving it the right—and the duty—to intervene in cases other than those particular ones ?

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[1] If the Protecting Power were not a party to the Convention, the latter mandate would be binding on it only to the extent that it expressly accepted it.

The reply to this question emerges clearly enough from the general desire, expressed during the discussions at the Diplomatic Conference, to establish a genuine supervisory organization with wide powers [1]. The answer emerges also from the text of paragraph 3. Here the Conference deliberately replaced the original wording (" their mission *as defined* in the present Convention") by the words " their mission *under* the present Convention ", thus emphasizing that there has been no attempt at giving an exhaustive " definition " of the duties of the Protecting Power.

The first sentence of Article 8 thus entitles a Protecting Power to undertake any intervention or initiative which may enable it to verify the application of any provision of the Convention or help to improve its application. All the occasions upon which a Protecting Power would have to intervene cannot be envisaged here nor can the conditions under which such interventions take place. They will be determined by the circumstances of the conflict and the means at the disposal of the Protecting Power.

As has already been pointed out, the Protecting Power's duties under the Second Convention will be much less onerous than under the Third and Fourth Conventions ; but there are some Articles which, although they do not mention the Protecting Power by name, are particularly liable to lead to intervention by the latter.

They are the following :

Articles 12 and 13 :	Supervision of the treatment given to the wounded, sick and shipwrecked.
Article 20 :	Supervision of the rules regarding burial at sea.
Article 31, par. 4 :	Control and search of hospital ships.
Article 37 :	Supervision of the condition and treatment of religious, medical and hospital personnel in enemy hands. Supervision of the landing of such personnel.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, on Article 6/7/7/7, pp. 58-59, 74.

Article 38 : Supervision of ships chartered for the conveyance of medical equipment.

Article 50 : Co-operation in the institution of enquiries concerning alleged violations of the Convention.

2. *Second and third sentences. — Executive agents*

All members of the diplomatic and consular staff of the Protecting Power are *ipso facto* entitled, in their capacity as official representatives of their Government, to engage in the activities arising out of the Convention. This rule therefore covers not only members of the staff who were occupying their posts when hostilities broke out, but also those appointed later. 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 required only for auxiliary delegates specially appointed by the Protecting Power, who do not have diplomatic or consular status. This would apply in particular to persons recruited by the Protecting Power in the country in which it was to act.

PARAGRAPH 2. — FACILITIES

This provision was also taken from Article 86 of the 1929 Prisoners of War Convention and calls for little comment. In Article 86, it concerned only camp visits. Here it is placed among the general Articles and applies to *all* the activities of the Protecting Power.

PARAGRAPH 3. — LIMITS

This paragraph is the result of a compromise, adopted to give partial satisfaction to the supporters of an amendment which, in

the opinion of the majority, was too restrictive and might virtually paralyse any activity on the part of the Protecting Power. While trying to give the fullest possible scope to the needs of humanity, the delegates at the Conference could not ignore the requirements of national security [1].

Although it permits no sanctions other than the withdrawal of *exequatur* or *agrément* from the official at fault, this clause none the less serves as a solemn reminder to the Protecting Power of the nature of its mission, which is to co-operate with the belligerent Power as the party primarily responsible for the application of the Convention. The Protecting Power is not merely entrusted with the duty of exercising the right of scrutiny as the authorized agent of one of the Parties to the conflict. It must also *co-operate* in applying the Convention in order to ensure that the wounded, sick and shipwrecked are accorded the humane treatment specified therein. Thus, when instructing its agents, the Protecting Power should not forget to remind them that all their efforts should be directed towards the strict application of the Convention, without the slightest irregularity which, by throwing suspicion on them and perhaps on their colleagues and Government, might restrict or even compromise the effectiveness of their work ; for that would increase the suffering caused by the war.

The last sentence, which gave rise to keen opposition, was omitted from the Third and Fourth Conventions. It was retained in the First and Second Conventions because they apply mainly on the battlefield or in its immediate vicinity, and a representative of the Protecting Power might, in all innocence and ignorance, overhear and circulate some military secret. But the belligerent Powers must never curb the activities of the Protecting Power by invoking " imperative necessities " without due consideration or merely for the sake of convenience. Those activities may only be restricted as an exceptional, temporary and partial measure. The restrictions must only apply to those of the Protecting Power's activities which come up against the military necessities in question. Only *imperative* necessities can justify an exception to the rule,

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, on Article 6/7/7/7, pp. 58-59, 74.

and it is therefore inconceivable that it could result in the suspension of the whole of the Protecting Power's activities under the Convention.

Lastly, it should be noted that once it has been appointed and in the absence of any agreement to the contrary, the Protecting Power will exercise its activities in all the territories controlled by the belligerent to which it is accredited, and for so long as there are persons and property protected by the Convention.

CONCLUSIONS

At it stands, Article 8 is not perfect. But if one thinks of the tremendous advance which it represents in humanitarian law, it can be considered satisfactory.

This Article presupposes the existence of a Protecting Power appointed by the Power of origin. It does not, however, make the appointment obligatory. As will be seen later, Article 10 permits the High Contracting Parties to agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Power.

By making supervision compulsory and calling in a third Power, a neutral Power and as such immune from the passions of war, to co-operate in ensuring respect for fundamental principles, Article 8 reinforces the Convention's effectiveness.

Article 1 reads as follows: " The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances ". This undertaking applies just as much to a Protecting Power which is a party to the Convention as it does to the belligerent Powers. 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 the evils of war by signing the Geneva Conventions.

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

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

Historical Background

This provision reproduces Article 88 of the 1929 Convention relative to the Treatment of Prisoners of War in a more general form applicable to all four 1949 Conventions [2].

On the basis of that provision the International Committee of the Red Cross undertook and successfully carried out a considerable amount of work during the Second World War. There is no need to describe that work here, even briefly [3].

It should be noted that that work, with all it entailed in the way of initiative, negotiations and effort (even including the formation of a fleet to carry relief supplies) was only possible, with very few exceptions, where the 1929 Prisoners of War Convention was in force [4].

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[1] Article common to all four Conventions. See First and Third Conventions, Article 9 ; Fourth Convention, Article 10.

[2] See *Commentary I*, pp. 103-107.

[3] Central Prisoners of War Agency : approximately 40,000,000 index-cards ; number of visits to prisoner-of-war camps : 11,000 ; relief transported and distributed in prisoner-of-war camps : 450,000 tons. See on this subject *Report of the International Committee of the Red Cross on its activities during the Second World War*, 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, 359 pages.

[4] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, Part III, Chapters XI and XII.

Thus, at a time when certain prisoner-of-war camps were being visited daily by its delegates and received whole trainloads of relief supplies, access to other camps or sections of camps was barred to the International Committee of the Red Cross, and it could not secure the entry into them of a single gramme of food, owing to the fact that they contained prisoners of war whose countries of origin were not bound by the Convention in their relations with the Detaining Power.

See also *Inter Arma Caritas* : The Work of the International Committee of the Red Cross during the Second World War, Geneva, 1947.

At the Diplomatic Conference the discussion on this provision was very short. No one contested the principle involved. On the contrary, the draft was expanded to include a reference to " any other impartial humanitarian organization " after the words " the International Committee of the Red Cross ". This addition was justified, and the Article thus amended was accordingly adopted in plenary assembly without discussion or opposition.

COMMENTS ON THE ARTICLE

The reference in Article 9 of the new Conventions, among the general Articles, to the right of humanitarian initiative gives it wide scope. It means that *none* of the provisions of the Convention excludes humanitarian activities on the part of the International Committee of the Red Cross [1].

In theory, therefore, all humanitarian activities are covered. They are, however, covered subject to certain conditions relating to the character of the organization undertaking them, the nature and object of the activities concerned and, lastly, the consent of the Parties to the conflict.

1. *Approved organizations*

If they are to be authorized, the humanitarian activities must be undertaken by the International Committee of the Red Cross or by any other *impartial humanitarian* organization. The International Committee is mentioned in two capacities—firstly on its own account, 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 ". Being the founder body of the Red Cross and the promoter of the Geneva Conventions, it is by tradition and organization better qualified than any other body to help effectively in safeguarding the principles expressed in the Conventions.

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

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 9 does not require it to be international. The International Committee of the Red Cross itself is international only so far as its activities are concerned; its membership is not international, for it is composed solely of Swiss citizens. Furthermore, the Convention does not require the organization in question to be neutral, but it is obvious that impartiality benefits greatly from neutrality.

2. *Activities authorized*

In order to be authorized, the organization's activities 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 considerations. The whole Convention is designed with a view to the application of the principle contained in Article 12. Within those limits, any subsidiary activity which helps to implement the principles of the Convention is not only authorized but desirable under Article 9. Such activities may take the form of:

1. Representations, interventions, suggestions and practical measures affecting the *protection* accorded under the Convention;
2. The sending of medical and other personnel and equipment;
3. The sending and distribution of relief (foodstuffs, clothing and medicaments)—in short, anything which can contribute to the humane treatment of those to whom the Convention is applicable.

These activities must be impartial, but it should be emphasized that impartiality does not necessarily mean mathematical equality. If a rescuer has only ten life-belts to distribute among a hundred shipwrecked persons, the condition of impartiality does not in any way require him to divide them into one hundred unusable pieces, still less to refrain from distributing them for fear of being unfair. It means that he must not allow his choice to be governed by prejudice or by considerations regarding the person of

those to whom he gives or refuses assistance. The condition of impartiality is fulfilled if he gives the life-belts to the ten persons within his reach who seem in greatest danger, making no distinction between friends, allies or enemies.

All these humanitarian activities are subject to one final condition—the consent of the Parties to the conflict. This condition is harsh but inevitable. The belligerent Powers do not have to give a reason for their refusal ; but being bound to apply the Convention they alone must bear the responsibility if they refuse help in carrying out their commitments.

The " Parties concerned " must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when relief consignments 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 that blockade.

3. *Scope of the Article*

The scope of Article 9 of the present Convention is obviously less than that of the corresponding Article in the Third and Fourth Conventions. Nevertheless, the provision has its own value. No one can foretell what a future war will consist of, under what conditions it will be waged and to what needs it will give rise. It is therefore right that a door should be left open for any initiative or action, however unforeseeable today, which may be of real assistance in protecting, caring for and aiding the wounded, sick and shipwrecked [1].

Lastly, Article 9 is of value from the point of view of principle, since it provides a corner for something which no legal text can

[1] The importance of this Article is illustrated by Article 125, paragraph 3, of the Third Convention and Article 142, paragraph 3, of the Fourth Convention, which state : " The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times ". On the basis of those Articles in particular, the Swiss Federal Council has declared, for its part, that it recognizes the international rôle of the International Committee of the Red Cross and has requested the Swiss authorities to assist it in carrying out its duties in all circumstances.

prescribe, but which is still one of the most effective means of combating war—namely charity, or in other words the spirit of peace. And through this Article which is common to all of them, the four Geneva Conventions of 1949 perpetuate Henry Dunant's gesture on the field of battle. Article 9 is more than a tribute paid to Henry Dunant ; it is an invitation to all men of goodwill to renew his gesture.

ARTICLE 10. — SUBSTITUTES FOR PROTECTING POWERS [1]

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

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

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

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its

[1] Article common to all four Conventions. See First and Third Conventions, Article 10 ; Fourth Convention, Article 11.

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.

Scrutiny having been made compulsory, it was necessary to ensure that it could take place in all circumstances. The purpose of the present Article is therefore to provide for either the substitution for the Protecting Power of an organization chosen by the two Parties, or its replacement if, for any reason, the said Protecting Power can no longer continue its activities [1].

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 8 and the activities arising thereunder.

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

The provision relates only to the duties envisaged by the Convention. It does not in any way affect the right of the Power of origin to appoint a Protecting Power in the normal way, 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 afforded 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 the Protecting Power, other than those duties for which the Convention provides ;

[1] See *Commentary I*, pp. 113-117.

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

The organization must be approved by both Parties and must offer guarantee of *impartiality* and *efficacy*.

What is meant by " impartiality " has already been 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 enjoys in the 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 be appointed only by agreement ; failing such agreement, the duties for which the Convention provides fall automatically to the Protecting Powers.

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

(*a*) In peace-time the High Contracting Parties may conclude an *ad hoc* agreement by which the rôle assigned by the Convention to the Protecting Powers is to be entrusted, in the event of armed conflict, to a special organization designated by name. As soon as a conflict breaks out between two or more of the High Contracting Parties, the organization in question will be invested with the functions arising out of Article 8. The Protecting Powers appointed by the Parties to the conflict will 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 necessarily concluded between *all* the Powers party to the Convention. It may be the act of some of them only, in which case the special organization will

[1] See above, p. 68.

not be invested with the functions arising out of Article 8 except in regard to relations between adversaries which are parties to the agreement. In all other cases the Protecting Powers will continue to be responsible for these 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 8, *eo ipso* dispenses the Protecting Powers from the exercise of those functions, and limits them to the discharge of the other duties which international usage makes theirs.

(*c*) In the course of the conflict the opposing Parties may agree —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.

The Diplomatic Conference refrained from giving a more precise indication, even by analogy, of the organization to which the paragraph relates. It may be one specially created for the sole purposes of Article 10, or may be already in existence. In the latter case, it may be specialized or general, official or private, international or national. The essential point is that it should be impartial and effective.

Paragraph 2. — Absence of Protecting Power

We now come to the actual appointment of a substitute for the Protecting Power.

This paragraph does not become applicable automatically if the Protecting Power first chosen ceases to exist or gives up that office.

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, each being on precisely the same footing as the first Protecting Power. The same thing is true in the event of the disappearance of a special organization appointed pursuant to paragraph 1 and each Party to the conflict remains entitled to appoint a Protecting Power in the normal way, automatically responsible under Article 8 for the duties provided for in the Conventions. The present Article refers to the duties not of *the* Protecting Power appointed, but of *any* Protecting Power. It is clear from the foregoing that paragraph 2 cannot, and must not, be applied before all other possibilities have been exhausted for ensuring scrutiny by means of either a Protecting Power or a special organization.

In practice, this contingency is hardly likely to arise unless the Power of origin persistently failed or refused to appoint a Protecting Power, or ceased to exist.

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 must be *neutral.* It was hardly possible for 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 : it can be only the organization mentioned in the previous line as being " provided for in the first paragraph above ", that is to say an organization appointed by prior 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 entitled to perform all the duties devolving upon a Protecting Power under the Convention, but no others [1].

[1] In the Korean war (1950-1953), the Parties to the conflict, although not bound by the Geneva Conventions of 1949, made known their intention of applying the principles thereof. No Protecting Power or substitute was appointed, however. The system of supervision established in 1949 was not tried out, therefore, during that conflict.

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 resort, 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. 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 is to undertake at least those activities which bring directly and immediately to the persons protected by the Convention the care which their condition demands. Thus, the humanitarian organization referred to in paragraph 3 does not act, as it were, as an agent, 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 ; and that is an essential condition for its humanitarian work.

The Detaining Power *must* request the intervention of a humanitarian organization ; and should such an organization anticipate it by spontaneously offering its services, the Detaining Power *must* accept them.

The obligation is unconditional. Consequently, a Detaining Power which was justified in declining the offer of services of a humanitarian organization that failed to furnish sufficient assurances 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 paragraphs 3 and 4. The Detaining Power cannot therefore decline such 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.

PARAGRAPH 4. — REQUISITE QUALIFICATIONS

The Protecting Power is primarily the agent of the Power of origin, but the Convention imposes on it humanitarian duties which it must perform as impartially as possible. In the absence of a Protecting Power, the substitute which takes its place is appointed by the enemy of the Power of origin, and it might therefore be feared that the Detaining Power might appoint a neutral State or an organization devoted to its own cause. Hence the desire to bring home to the substitute that it has been chosen as an exceptional measure and for want of a better alternative, that it does not thereby become the agent of the Detaining Power, but that it is charged by all the Contracting Parties with loyal co-operation in the application of the Convention in relation to the adversaries of that Power. The reminder should be viewed primarily as a weapon to enable the substitute 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.

Furthermore, 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 we have seen above [1], that in general cases a substitute will be appointed only when the Power of origin is not, or is no longer, in a position to express any opinion or to appoint a Protecting Power. If, however, the Detaining Power did not recognize the Government of the Power of origin, the neutral Powers or organizations invited should consult that Government, even if their consultations were only unofficial.

[1] See above, p. 74.

As for the " sufficient assurances " stipulated, reference should be made to what has been said above concerning paragraph 1 [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 the substitute which it has called upon or accepted.

PARAGRAPH 5. — PROHIBITION OF DEROGATIONS

This paragraph, which was originally intended for the Third Convention only, was inserted into all four Conventions by the Diplomatic Conference. Its purpose is to ensure neutral scrutiny in all circumstances, including cases where one Party to the conflict has become subject to the domination of the other. An Occupying Power, temporarily or finally victorious, will not in future be able to evade the provisions of Article 10 by reaching an agreement with a Government of the enemy State which has fallen under its influence, or has actually been set up by it, to establish a system in which a special substitute, at its beck and call, would in fact place the protected persons at its mercy, thus rendering any sort of supervision illusory. No plea by a Detaining Power 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.

Paragraph 6 calls for no comment.

CONCLUSIONS

It would be idle to deny it, Article 10 is not all it might be. Despite 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. The text may, perhaps, admit of different interpretations, but rather than go

[1] See above, p. 71.

into them here, it would be preferable to consider the positive side of the Article.

Like the two Articles which precede it, Article 10 supplements and reinforces Article 1. The Convention is to be respected *in all circumstances*. That requirement is so 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 principles set forth in Article 12 on which all the other provisions of the Convention depend. Such is their significance that even war, which is the *raison d'être* of the Convention, cannot prevail against them. There may be many interpretations of Article 10, but only one true one—namely, the one which is best fitted to give practical effect to the provisions of Article 12.

ARTICLE 11. — CONCILIATION PROCEDURE [1]

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

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

[1] Article common to all four Conventions. See First and Third Conventions, Article 11 ; Fourth Convention, Article 12.

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.

Such alterations as were made in 1949 were in general intended to facilitate the activities of the Protecting Powers and extend their competence in the field of disputes which might arise from the application of the Conventions.

PARAGRAPH 1. — GOOD OFFICES OF THE PROTECTING POWERS

The Protecting Powers are to lend their good offices in cases of disagreement with regard to the application and interpretation of the Convention, as well as in all cases where they deem it advisable in the interest of protected persons.

The only indication which the Convention contains of the form such good offices will take is the provision 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 in order to try to achieve a fair compromise.

It may happen that one and the same State is responsible for safeguarding the interests of two belligerents *vis-à-vis* one another. If that is not the case, the Protecting Powers concerned can take action either severally or jointly, although it seems 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 present provision 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 as their own consciences dictate [1].

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

The 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 that the particularly bitter nature of the struggle made the holding of such meetings very difficult, if not impossible.

The Parties to the conflict are bound to give effect to the proposals for a meeting made to them by the Protecting Powers. It should be noted that these proposals may be made spontaneously by the Protecting Powers, which may also suggest that a neutral person, possibly one appointed by the International Committee of the Red Cross, should be present at the meeting.

During the Diplomatic Conference one delegation was against any reference in the Article to disagreements concerning the interpretation of the Convention, on the grounds 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.

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[1] This extension of their powers is a logical consequence of the general mission entrusted to them under Article 8 : " The present Convention shall be applied with the 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 1914-1919*, Payot, Paris 1929, p. 100 ff.

Legal settlement of disputes. — A word should be said here concerning a proposal relating to the legal settlement of problems which might arise from the application or interpretation of the Convention. The point was studied by a working party of the Joint Committee's Special Committee at the 1949 Diplomatic Conference. The Special Committee adopted the text of an Article to be inserted immediately after that relating to enquiry procedure (Article 53 in the present Convention). The new Article read as follows :

> The States, parties to the present Convention, who have not recognized as compulsory *ipso facto* and without special agreement, in relation to any other 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 of the International Court, which made the United Nations Security Council responsible for laying down the conditions in which the Court was 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 competency of one of its bodies. After a lengthy discussion, the Conference decided to change the proposed Article into a Resolution (Resolution No. 1) which was adopted without opposition. It reads as follows :

> The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Convention 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.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 103 and 132.

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 or 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.

CHAPTER II

WOUNDED, SICK AND SHIPWRECKED

Chapter I is composed of provisions of a general nature which are common to all four Conventions of 1949. Chapter II embarks on the main subject-matter of the Second Convention, and may therefore be considered in practice as the beginning of it. Indeed, it is the most important Chapter, for it embodies the essential idea which was championed by the founders of the Red Cross and, since 1864, has been the focal point of the Geneva law—namely, that the person of a combatant who has been placed *hors de combat* by wounds, sickness or any other cause, such as shipwreck, is from that moment sacred and inviolable. He must be tended with the same care whether he be friend or foe.

In addition to this great principle of immunity, which is the keystone of the Convention and with which the Chapter opens (Article 12), there are a number of other rules here, perhaps not always in very logical order, stating the conduct to be observed in regard to the wounded, sick and shipwrecked [1]: a definition of the persons protected (Article 13), of their status (Article 16), the obligation to search for, evacuate and register them, whether alive or dead (Articles 18 to 20), together with the provisions relating to their handing over to a belligerent (Article 14), to the treatment to be given them if they are picked up by a neutral warship (Article 15) or disembarked in a neutral port (Article 17), and lastly to possible appeals to the charity of neutral vessels (Article 21).

This Chapter contains numerous additions to the corresponding provisions in the Tenth Hague Convention of 1907 [2]; certain

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[1] For brevity and to avoid repeating the phrase " wounded, sick or shipwrecked " the word " wounded " or " shipwrecked " will sometimes be used alone, it being understood that the three categories are always covered.

[2] i.e. Articles 11 to 17 and Article 9. Those provisions were reproduced, without substantial amendment, in Articles 81 to 87 of the 1913 Oxford Manual of the Institute of International Law.

details have been clarified and on some points rather important changes have been made. The purpose of all these modifications is to afford increased protection to the victims of conflicts, similar to that provided by the First Convention in the case of war on land, and also so far as possible to define the status of protected persons in all circumstances.

In the first draft revision of the 1907 Convention (prepared in 1937), the present Chapter was entitled " Wounded and sick " — exactly as in the First Convention. The International Committee of the Red Cross subsequently proposed the addition of the word " shipwrecked ", pointing out that in the Second Convention the fate of the shipwrecked is closely linked to that of the wounded and sick, since the same provisions are applicable to all three categories. With this amendment, the title gives a more accurate indication of the contents of the Chapter.

ARTICLE 12. — PROTECTION AND CARE

Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term " shipwreck " means shipwreck from any cause and includes forced landings at sea by or from aircraft.

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

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

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

The requirement embodied in this Article is one of the most elementary humanitarian principles. Yet, in the case of maritime

warfare, the public conscience awoke to it somewhat tardily, and the sea was too often and for too long the scene of merciless and cruel deeds. Even in literary works it has been alleged that the history of the French, Netherlands, British and Spanish navies contained no instances of the charitable rescue of shipwrecked crews [1]. That opinion seems somewhat exaggerated, however, and it is only just to point out that as long ago as the XVIIth century, noble and generous gestures were made in behalf of the wounded and shipwrecked [2]. It was not until the beginning of the XIXth century [3], however, when Nelson ordered that as a general rule the crews of enemy ships set on fire were to be rescued, that there was a definite alleviation of the sometimes implacable nature of war at sea.

When in 1864 the Powers jointly proclaimed the principle of respect for the wounded soldier on the battlefield, the time also seemed ripe for fairly ready acceptance that that principle should be extended to war at sea.

The naval battle of Lissa, in 1866, when public opinion was shocked by the heavy losses, made it obvious that if the principle had already been thus extended, many sailors could have been saved. In the following year, at the first International Conference of the Red Cross (held at Paris in 1867), there was no opposition to the establishment, in the form of a recommendation, of a first draft extending the principle of 1864 to war at sea ; that draft constituted " the first embryo of written law in behalf of the victims of maritime warfare " [4]. As already mentioned in the Introduction, the 1868 Diplomatic Conference embodied the principle in the " Articles concerning the Navy " of the " Additional Convention of October 20, 1868 " [5].

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[1] See CAUWÈS : *op. cit.*, p. 6.

[2] See C. R. BOXER : *The Journal of Maarten Harpertszoon Tromp, Anno 1639*, Cambridge University Press, 1930, pp. 39, 63, 165-6, 168. See also J. C. M. WARNSINCK : *Admiraal de Ruyter, De Zeeslag op Schooneveld, Juni 1673*, The Hague 1930, passim.

[3] Mention should, however, be made of the cartel of March 12, 1780, already referred to in the Introduction to the present Commentary.

[4] CAUWÈS : *op. cit.*, p. 33.

[5] See above, p. 5 ff.

That Convention was never ratified, however, and it was not until 1899, when the Third Hague Convention was concluded, that the principle of rescuing the shipwrecked, wounded and sick at sea was finally embodied in positive law : hospital ships " shall afford relief and assistance to the wounded, sick and shipwrecked of the belligerents independently of their nationality " (Article 4) ; the wounded or sick " shall be protected and looked after " (Article 8).

As has already been seen, this principle dominates the whole Convention. The 1949 Diplomatic Conference, acting in this respect more logically than the Hague Conferences of 1899 and 1907, therefore placed it at the beginning of the Convention, immediately following the eleven general Articles common to all four Conventions [1]. From this principle flow all the other obligations laid on the Parties to a conflict, to which the succeeding Chapters refer.

Paragraph 1. — Respect and protection

The paragraph opens with a definition of the persons who must be respected and protected when wounded, sick or shipwrecked, namely " members of the armed forces and other persons mentioned in the following Article ".

The Hague Convention of 1899 mentioned only " sailors and soldiers who are taken on board ". The 1907 Convention added to this definition " other persons officially attached to fleets or armies ". In 1959 it was nevertheless considered necessary to specify who those " other persons " were, and the Diplomatic Conference listed them in Article 13, for reasons which will be given later [2]. The present paragraph refers to that list.

The term " armed forces " naturally includes land, naval and air forces.

Does this mean that only wounded, sick and shipwrecked belonging to those categories must be respected and protected, and not civilians, for instance ? Certainly not. In the first place,

[1] It is to be found dominating the First Convention in Article 12, the Third Convention in Article 13, and the Fourth Convention in Article 27.

[2] See below, p. 94 ff.

it must be pointed out that the purpose of this provision, and indeed of the whole Convention, is to protect wounded, sick and shipwrecked persons who, if they were not in this helpless state, could rightfully be attacked. As its title indicates, the Convention relates to " members of armed forces at sea ". Article 12 affords to combatants in special circumstances the general protection which the law of nations normally offers to every human being. The fact that those entitled to that special protection are mentioned here in no way detracts from the normal rights of all other persons. Apart from the respect and care due to every wounded or sick person, which today is accepted as a matter of course, it has become an undisputed moral obligation that the shipwrecked must be rescued in all circumstances. This principle was moreover recognized by the Brussels Conventions of 1910 [1], which, *inter alia*, require the captain of any vessel to assist any shipwrecked person, even an enemy.

The various meetings of experts which took place before the 1949 Diplomatic Conference were all in agreement that it might be useful to make express reference to this general obligation in the Convention. A second paragraph was therefore inserted in the draft text, extending the benefit of the provisions of paragraph 1 to wounded, sick and shipwrecked " of all vessels which are victims of hazards of war ". In the draft submitted to the Diplomatic Conference, however, the International Committee of the Red Cross considered it preferable to omit that provision from the Second Convention, with a view to its inclusion in the new Convention for the protection of civilians; that seemed a more logical place for it, and it could be put in a more general form which would not limit the notion of shipwreck solely to the consequences of the hazards of war. After considerable discussion, the Conference finally agreed with that view [2]. For reasons which were not explained, however, the Conference did not act on the request by the representative of the International Committee of the Red Cross

[1] Article 11 of the Convention for the unification of certain rules respecting assistance and salvage at sea, Brussels, September 23, 1910, and Article 8 of the Convention for the unification of certain rules with respect to collisions, Brussels, September 23, 1910.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 52-54.

that the corresponding provision in the Fourth Convention should therefore be expanded, and Article 16, paragraph 2, of that Convention as finally adopted is exactly the same as the draft originally submitted [1].

Another reason for the absence in the present provision of any express reference to civilians is the fact that the persons listed here, and they alone, will have prisoner-of-war status as soon as they are in the hands of the enemy.

On the other hand, the Second Convention rightly provides, in Article 35 below, that the fact that hospital ships are carrying wounded, sick or shipwrecked civilians must not be considered as depriving them of protection. Some authors have considered that this provision, coupled with the absence of any reference to civilians in the present Article, was a potential source of confusion, if not contradiction, in the Convention [2]. We do not agree. The experience of the Second World War has shown that the civilians carried on board hospital ships are not always victims of maritime warfare, but may merely be wounded or sick persons who have to be evacuated. It was therefore essential to mention them in Article 35 since they are not " protected persons " in the sense of the Second Convention and their presence on board hospital ships might seem illegal. It was not necessary to refer to them in Article 12, since in any case civilians must be respected and protected, in virtue of the general principles of humanitarian treatment.

The words " who are at sea " were inserted in 1949 at the suggestion of the International Committee of the Red Cross with a view to defining the scope of the Second Convention, since wounded, sick or shipwrecked persons on land are protected by the corresponding provisions in the First Convention. The words should be taken in a broad sense as covering persons who, being in peril at sea, therefore have need of special assistance. The term " at sea " is of very general significance here; it comprises the high seas as

[1] The paragraph reads as follows : " 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 ".

[2] See TUCKER : *The Law of War and Neutrality at Sea*, Washington, 1957, p. 120, note 76.

well as the territorial sea, and even, in certain cases, internal waters.

None of the Geneva Conventions defines what is meant by " wounded " and " sick ". Any definition would necessarily be restrictive in character and would open the door to every kind of misinterpretation and abuse. The meaning of the words is a matter of common sense and good faith. They cover combatants who have fallen or have ceased to fight by reason of a wound or sickness. It is the fact of being wounded, of falling or laying down arms which constitutes the claim to protection.

On the other hand, the word " shipwrecked " calls for some explanation. Dictionaries are in agreement in defining a shipwrecked person as someone who is in peril as a result of the destruction or loss at sea of the vessel in which he was travelling. This definition nevertheless seems too restrictive. The occupants of a small craft which is carried out to sea by currents and can no longer return to the coast become shipwrecked, as do the passengers in a disabled ship, the survivors from an aircraft which has come down in the sea, etc. A person cast away on the coast or an island following an accident at sea would also be considered as shipwrecked. In all instances such as these, the Convention wishes the persons concerned to be rescued and protected; the provision emphasizes that the term " shipwreck " must be taken in its broadest sense and gives two examples, namely, forced landings at sea by or from aircraft. Another factor is involved here: the shipwrecked persons must be in need of assistance and care, and they must naturally refrain from any hostile act.

Article 11 of the Brussels Convention of 1910 defines a shipwrecked person as being a person found at sea in danger of perishing. That definition, however, does not introduce the concept of need, and does not cover a shipwrecked person who manages to reach the coast or an island, or one who is not really in danger of losing his life. For our part, we prefer the following definition: " a person in distress at sea or stranded on the coast ".

The terms " respected " and " protected " are taken from the 1906 and 1929 Geneva Conventions respectively. The word " respect " *(respecter)* means, according to the Dictionary of the French Academy, " to spare, not to attack " *(épargner, ne point attaquer)* ;

in a more positive sense, it comprises even such action as is necessary to ensure respect. " Protect " *(protéger)* means " to come to someone's defence, to lend help and support " *(prendre la défense de quelqu'un, prêter secours et appui)*. In the case of the shipwrecked, it means that they must be rescued—there is an implicit obligation to collect them [1]. The First Geneva Convention has added two further duties to these rules: that of giving humane treatment and care. These duties are specified in paragraph 2 of the present Article.

The obligation set forth in paragraph 1 is a general one: it is valid " in all circumstances ", and is addressed to all—captains and crews of military or civilian vessels, the authorities on land, the civilian population, etc. The principle of the inviolability of a person placed *hors de combat* is universal, and it is the duty of everyone to know it and act in accordance with it.

Obviously, however, extreme cases may sometimes arise where the obligation cannot be respected in full. Thus, during a landing by armed forces, it will not always be possible while the attack is in progress to distinguish between an attacker trying to reach land and a soldier in danger of drowning. Similarly, in the case of persons specialized in under-water attacks, it may not always be evident when they are in peril and need assistance as shipwrecked. In such instances, persons in distress who renounce active combat can only expect the adversary to respect and rescue them if they make their situation clear, and of course provided the adversary sees their signals.

Paragraph 2. — Treatment and care

This paragraph reproduces the text of Article 12, paragraph 2, of the First Convention. It adds a positive obligation to the negative one contained in paragraph 1 : the wounded, sick and shipwrecked must be given such medical care as their condition requires.

This fundamental principle has remained unchanged since 1864. The 1929 Diplomatic Conference added a rule which had

[1] This obligation is explicit in Article 18 ; see below, pp. 130-131.

until then been implicit, namely that humane care and treatment must be given. The 1949 Diplomatic Conference made a point of developing and defining those two ideas. That is the purpose of the present paragraph and the two following ones.

Paragraph 2 begins by laying down that *adverse* distinctions are prohibited. By this novel provision the Conference very rightly sought to make clear that it did not intend to exclude distinctions made *to the advantage* of enemy wounded, sick or shipwrecked and in order to take account of their physical constitution or sex, the climate of their country of origin, etc.

The paragraph goes on to enumerate the adverse distinctions which are, in particular, forbidden—such as those founded on sex, race, nationality, religion, political opinions or other similar criteria. Accordingly, there is nothing now which can justify a belligerent in making any adverse distinction between wounded, sick or shipwrecked who require attention, whether they be friend or foe. They are on a footing of complete equality in the matter of their claims to protection, respect and care.

Next comes a list of the breaches considered as being the gravest a belligerent can commit in regard to the wounded, sick or shipwrecked in his power [1].

It should be noted here that it was intended, by prohibiting the subjection of the wounded, sick or shipwrecked to biological experiments, to put an end to criminal practices and to prevent wounded in captivity from being used as " guinea-pigs " for medical experiments. But the provision refers only to " biological experiments ". It does not prevent the doctors in charge from trying new therapeutic methods which are justified on medical grounds [2].

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[1] Such acts are considered as " grave breaches " in the sense of Articles 50 and 51.

[2] The corresponding provision of the Third Convention (Article 13) is more explicit and lays down specifically that " no prisoner of war may be subjected to . . . medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest."

PARAGRAPH 3. — ORDER OF TREATMENT

The prime purpose of Article 12, paragraph 3, of the First Convention is to strengthen the principle of the equality of treatment of the wounded, sick or shipwrecked, which was embodied in the preceding paragraph. It indicates the only reasons which can justify priority in the order of treatment—namely, reasons of medical urgency. It also indicates an exception to the above principle, but an exception which is perfectly justified. In a hospital ship, for instance, which is crowded by an influx of wounded, both friends and enemies, the doctors will attend first to those patients for whom delay might be fatal or at any rate prejudicial, proceeding afterwards to those whose condition is not such as to necessitate immediate attention.

PARAGRAPH 4. — TREATMENT OF WOMEN

This provision, which is identical to Article 12, paragraph 4, of the First Convention, is an example of a favourable distinction made compulsory. Its introduction by the Diplomatic Conference merely made good an existing omission. In 1929, it was already recognized that women taking part officially in military operations must be treated with the special consideration due to their sex ; and a clause to that effect was introduced in the Convention relative to the Treatment of Prisoners of War, but not in the Geneva Convention properly so called. It was no doubt felt that this special consideration for wounded or sick women combatants was implicit. But in view of the continually increasing participation of women in military operations, and in view also of painful experiences during the Second World War, it seemed necessary to include a special injunction on the point.

The special consideration with which women must be treated is of course in addition to the safeguards embodied in the preceding paragraphs, to the benefits of which women are entitled equally with men. What special consideration ? No doubt that accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect. Apart from this, the principle of equality of treatment as between enemies and nationals is involved.

ARTICLE 13. — PROTECTED PERSONS

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories :

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

(2) *Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :*

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

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

(c) *that of carrying arms openly ;*

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

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

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

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

(6) *Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading*

forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The main purpose of this Article is to specify to what persons, on their falling sick or being wounded or shipwrecked at sea, the Convention applies, it being understood that the term " at sea ", which has the same meaning here as in Article 12 [1], covers persons picked up at sea as well as those carried on board a hospital ship or other vessel. The Article also makes it possible to define the various categories of medical and religious personnel entitled to protection under the Second Convention, pursuant to Article 37. We shall examine below the value and scope of these two functions.

1. *Search for a definition.* — From the first, the Geneva Convention has always accorded its protection to wounded and sick members of the armed forces. But whereas in 1864 the only mention was of " combatants " (in French, " *militaires* "), in 1906 the wording adopted was " military combatants, and other persons officially attached to the armed forces ". In adapting the Convention to maritime warfare, the phrase " sailors and soldiers " was used in both the Hague Convention of 1899 and that of 1907.

At the time, those terms may well have appeared clear and adequate. Whereas it was felt necessary to protect combatants who were placed *hors de combat,* civilians were regarded as being outside the struggle and enjoying general immunity.

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

That was one of the chief problems with which the experts and the International Committee of the Red Cross were concerned in

[1] See above, p. 88 - 89.

dealing with the revision of the Geneva Conventions. It further engaged the full attention of the 1949 Diplomatic Conference.

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

When the Diplomatic Conference set out to define the categories of persons to whom, on their falling sick or being wounded or shipwrecked, the First and Second Geneva Conventions were to apply, it noted that the categories in question were precisely those which were entitled, on falling into the enemy's hands, to be treated as prisoners of war. The Conference was thus logically led to refer to the contents of Article 4 of the Third Convention. It could do so either by merely referring to the Article in question, or by repeating its substance in the First and Second Conventions. The latter solution was adopted, in accordance with the general principle, to which the Conference adhered wherever possible, of endeavouring to make each of the four Geneva Conventions an independent diplomatic instrument. The course thus taken also covered the possible case of a Power being party to the present Convention without having ratified the Third.

2. *Value of the definition*

A. *With regard to the wounded, sick and shipwrecked*

In the Convention now under consideration, the enumeration of the persons belonging to the armed forces is not of the same importance as in the Third Convention but is of purely theoretical value.

Article 4 of the Third Convention is constitutive in character, and the enumeration which it gives is comprehensive. If an individual not belonging to one of the categories specified is captured

after committing hostile acts, he may find himself denied the right to be treated as a prisoner of war, not to mention the punishments which may be inflicted on him.

On the other hand, this enumeration has by no means the same significance in the First and Second Conventions. In virtue of a humanitarian principle universally recognized in international law, of which the Geneva Conventions are merely the practical expression, any wounded, sick or shipwrecked person whatever—even a *franc-tireur* or a criminal—is entitled to respect and humane treatment and the care which his condition requires [1]. Even civilians, when they are wounded, sick or shipwrecked, have the benefit of humanitarian safeguards (as embodied in Part II of the Fourth Geneva Convention of 1949) very similar to those which the First and Second Conventions prescribe in the case of members of the armed forces ; and the applicability of those safeguards is quite general. In this respect the three Conventions are entirely complementary, and cover the whole field of human suffering.

Article 13 cannot therefore in any way entitle a belligerent to refrain from respecting a wounded or shipwrecked person, or to deny him the requisite treatment, even where he does not belong to any of the categories specified in the Article. Any wounded person, whoever he may be, must be treated by the enemy in accordance with Article 12 of the present Convention. When a wounded person falls into the enemy's hands, the latter will have ample time to consider, at the proper time and place, what his status is, and whether or not he is a prisoner of war.

At most, Article 13 will serve to determine under which Convention the shipwrecked or wounded person is to be rescued, respected, protected and cared for. Moreover, since Article 16 of the Convention stipulates that wounded, sick and shipwrecked who fall into enemy hands are to be prisoners of war, it was desirable that the Second and Third Conventions should be in exact accordance on the point. That does not, however, in any way, alter the fact that as regards the definition of these persons, Article 13 tends to meet a desire for precision rather than a vital need.

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[1] Subject, of course, to any judicial proceedings to which he may be liable.

B. *With regard to medical personnel*

Pursuant to Articles 24 and 25 of the First Geneva Convention, the protection afforded to the medical personnel of the armed forces on land is bound up with their duties, which are listed. A different system was adopted for the Second Convention. Mainly for reasons of clarity [1], in Article 37 the Diplomatic Conference embodied a definition of the medical and religious personnel who, if they fall into the hands of the enemy, are to be protected by the Second Convention, namely, those " assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 " [2].

This somewhat indirect use of Article 13 makes its significance far greater than its original purpose would warrant. Here, the enumeration is a constitutive element for the protection of medical personnel, and it is comprehensive.

3. *Different categories*

As Article 13 has its origin, and finds its real significance, in the Convention relative to the Treatment of Prisoners of War, the different categories which it specifies cannot usefully be considered except in connection with the Third Convention, and the reader should therefore refer to the Commentary on that instrument [3]. We shall, however, consider here the categories listed under paragraph (5), which refers particularly to the merchant marine. It should be noted that the present Article in its recapitulation of the categories specified in Article 4 of the Third Convention has not included those referred to in that Article under Part B, which relates to persons already in enemy hands or coming under the control of a neutral Power.

With regard to paragraph (1), it should be noted that apart from the regular forces there are no longer volunteer units in the navy. During the Second World War, nationals of an occupied

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 129.

[2] In addition, of course, to the personnel and crew of hospital ships, who are afforded protection pursuant to Article 36.

[3] See *Commentary III*, p. 44 ff.

country allied to one of the belligerents who continued the fight at sea were under military command, as were their ships. Moreover, privateering was abolished by the Paris Declaration of 1856 and if it were ever to be resumed in any form the crews would be protected only if they met the conditions set forth in paragraph (2). As regards paragraph (4), it would seem that nowadays in wartime there are no longer any civilians on board warships who meet the definition given. Lastly, as regards paragraph (6)—relating to mass levy—it may be noted that in the " Law of Naval War " drawn up at Oxford in 1913, the Institute of International Law gave the following definition of this notion as applied to war at sea, in Article 13 : " The inhabitants of a territory which has not been occupied, who, upon the approach of the enemy, spontaneously arm vessels to fight him, without having had time to convert them into warships . . . shall be considered as belligerents . . . if they respect the laws and usages of war " [1]. It seems unlikely, however, that such a situation could arise in modern warfare.

The merchant marine. — Until the latter part of the XIXth century, it was the usual practice for the crews and officers of captured enemy merchant vessels, who were themselves of enemy nationality, to be taken prisoner. This practice was confirmed by the prize rules of many States, as well as by doctrine [2].

After 1870, however, a contrary trend became apparent : in its conflict with France, Germany took the stand that such personnel should not be taken prisoner, although Napoleon I seems to have been the first to declare this principle. The trend towards more liberal laws was followed first in doctrine [3], then in practice. Enemy crews were usually set free by the Americans during the Spanish-American war of 1898, and by the Japanese during their conflict with Russia in 1904-1905.

At the Second Hague Conference of 1907, this more liberal tendency culminated in the adoption of the Eleventh Convention

[1] See R. GENÊT : *La Revision de la X^e Convention de La Haye*, Paris, 1951-53, pp. 55-56.

[2] See FAUCHILLE : *Traité de droit international public*, Vol. II, par. 1395 — 48 to 51.

[3] *Ibid.*, par. 1395 — 51.

"relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval Warfare ". Article 6 of that Convention specifies that " the captain, officers and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war " [1].

In fact, as can be seen, the 1907 Conference made no change in the principle regarding the capture of enemy merchant crews, for it may be deduced, *a contrario*, from Article 6 that such crews are to be made prisoners of war if they do not comply with the requisite condition. The Conference merely wished to make the principle less strict, so as to take account of the evolution which was taking shape. The British delegate to the Conference made a point of emphasizing that the aim of the proposal was precisely to mitigate the conditions applicable to a certain category of persons who, under current international law, were liable to be made prisoners of war. The chairman of the committee and the rapporteur to the Conference spoke in like terms [2]. The rule is therefore still that enemy crews are liable to capture, but a loop-hole is provided. The rule applies *a fortiori* where a merchant ship is attacked and defends itself ; under Article 8 of the 1907 Hague Convention, the crew are then considered as combatants, and as such are liable to capture [3]. The Hague provisions were reproduced in most of the prize rules and instructions drawn up by the maritime States in ensuing years [4].

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[1] Article 5 contains a similar rule, applicable to the captain and officers when nationals of a neutral State serving on an enemy ship, whereas neutral members of the crew are released completely.

[2] See *Actes* of the 1907 Hague Conference, Vol. III, pp. 959, 962, 1027, and Vol. I, p. 267. FAUCHILLE (*op. cit.*, par. 1395 — 52) has also noted that the principles adopted by the 1907 Peace Conference undoubtedly represented a relaxation of the practices followed until then. Some authors have, however, taken Article 6 as meaning that the principle accepted in 1907 was that thenceforth enemy merchant seamen were not to be made prisoners of war. It must be acknowledged, however, that the Article sets forth the exception, not the rule. The intention of the drafters of the Article in so doing was no doubt to emphasize that they wanted the rule to be less strict.

[3] See OPPENHEIM-LAUTERPACHT : *International Law*, Vol. II, 1952, p. 266 (§ 85) and MOUTON : *Nederlands Juristenblad*, February 1950, pp. 135-136.

[4] See FAUCHILLE : *op. cit.*, par. 1395 — 54.

The experience of two world wars showed, however, that the flexibility introduced in 1907 was not accepted in practice. Between 1914 and 1918, all the belligerents interned crews of captured enemy merchant vessels, in application of the rule that any enemy civilian of military age could be prevented from returning home, and could be interned [1].

When the 1929 Diplomatic Conference drew up the Prisoners of War Convention, it considered whether or not the crews of merchant vessels should be expressly included in the list of persons who might be accorded prisoner-of-war status. It found, however, that such an extension would involve an amendment to the Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907, and the Diplomatic Conference was not qualified to make such an amendment. It therefore declared itself incompetent in the matter. The rapporteur of the Conference's Second Committee made a point of stating that the Convention which was to be adopted was not applicable to the crews of merchant vessels [2].

In theory, therefore, the 1907 rules alone were valid during the Second World War, but the flexibility which they afforded was not put into practice any more than during the First World War. This was not only for the same reason, but also because in many States the merchant navy, normally in private hands, was taken over by the Government authorities, and even the crews were frequently made part of the armed forces. Last and most important, almost all the merchant ships of the belligerents were armed for defensive purposes [3]. Crews of prizes and survivors of naval operations were always taken prisoner, but there was no uniformity of treatment. Germany, Italy, the United States, Brazil and the Union of South Africa placed them on the same footing as civilian internees, whereas Great Britain, Canada, Australia and New

[1] See OPPENHEIM-LAUTERPACHT, *op. cit.*, p. 267 (§ 85).

[2] See *Actes de la Conférence diplomatique de 1929*, p. 633.

[3] This sometimes led them to attack first. TUCKER notes that " during World War II, armed merchant vessels were instructed to use their armament upon sighting an enemy submarine : the assumption being that unlawful attack by the submarine would—in any event—be forthcoming ". (*Op. cit.*, p. 58, note 30.)

Zealand considered them as prisoners of war but did not apply the provisions of the 1929 Convention relative to pay and employment, so that they were treated in virtually the same way as civilian internees [1].

Many difficulties arose from this vague situation. As soon as work was begun on the revision of the Geneva Conventions, the experts therefore recommended unanimously that prisoner-of-war status should be expressly granted to members of the enemy merchant marine. The 1949 Diplomatic Conference adopted that proposal [2]; it considered, like the experts, that prisoner-of-war status was in that instance preferable to that of a civilian internee in every respect and in fact corresponded to the nature of the duties of belligerent merchant crews, which were comparable in importance with those of members of the armed forces.

The provision adopted thus represents a positive and categorical codification not only of current practice, but also of doctrine. It does not in any way alter the 1907 principle and even retains the escape clause provided at The Hague, for the phrase " who do not benefit by more favourable treatment under any other provisions of international law " is simply a reference back to Articles 5 to 8 of the Eleventh Convention of 1907. Under the new rules, masters and officers of neutral nationality and masters, officers and crews of enemy nationality can therefore escape capture by offering or agreeing to make a promise in writing not to serve any more [3].

The nationality of crew members is no longer determining as regards their status. That fact does not, however, modify the usual rule and practice according to which neutral persons serving on board enemy merchant ships are not prisoners of war if neither the crew nor the ship have committed any hostile act before capture or resisted capture. On the other hand, the provision requires prisoner-of-war status to be applied to them if they are

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 552-554.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 238-239 and 418-419.

[3] The Powers which resort to these provisions must therefore duly apply Article 7 of the Eleventh Convention of 1907 which requires the captor to notify the names of such persons to the Power of origin, and enjoins the latter to see that the written promise given by its nationals is kept.

detained. Crews of neutral vessels in the service of a belligerent will also be prisoners of war, since they will have acquired an enemy character.

In the same way, the status of the crew is no longer determined by the question of armament of a merchant vessel. Regardless whether or not the ship is equipped with weapons for its own defence, as was customary for many States in past centuries and still more so in the Second World War, the crew will be taken prisoner.

One point has been clarified: the word " crews " includes " masters, pilots and apprentices ". In some countries, and in particular in Great Britain, masters, pilots and apprentices are not members of the crew and it was therefore necessary to make express provision for them [1]. The term " master " must not be taken here as a rank but as denoting the person in command of the ship.

The phrase " members of crews " covers only members of the merchant marine who have mustered on a ship but not those who, after completing their term of service, are on board ship as passengers and still less those who are on shore leave [2].

The place where a captured vessel is does not in any way affect the status of the crew. The Diplomatic Conference agreed with the proposal by the XVIIth International Conference of the Red Cross that the words " captured at sea " should be deleted from the draft text. The provision therefore applies to the crews of ships captured, for instance, in an enemy or occupied port.

The main purpose of the foregoing considerations is to help to determine the status of members of the merchant marine who fall into enemy hands. They should therefore be read in the original context of the provision (Article 4 of the Third Convention). Here, the provision means simply that the wounded, sick and shipwrecked as well as medical personnel of the merchant marine will be entitled, in the same way as members of the regular navy, to protection under the Second Convention. As regards the wounded,

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[1] The French text here uses the term " *commandants* " for the English word " masters ". The translation is unsatisfactory and " *patrons* " or " *capitaines* " would probably have been more suitable.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 418-419.

sick and shipwrecked not in the categories listed in Article 13, we must emphasize once more that they remain protected, not only in virtue of general humanitarian principles, but also under the Brussels Conventions of 1910 [1], in which these principles were set forth. Consequently, any victim, whoever he may be, must be treated properly. In the present Convention and from the humanitarian point of view, the enumeration given in Article 13 is thus of purely theoretical value.

The reservation regarding more favourable treatment under any other provisions of international law, which attains its full importance in the Third Convention, is also theoretical here. For at the present stage of international law, there is no provision for treatment more favourable than that provided under the Second Convention for the wounded, sick and shipwrecked. Of course, if one considers that the purpose of the present Article is to define which wounded, sick and shipwrecked persons are entitled to prisoner-of-war status, then one can understand that there is some point in specifying here that, in certain circumstances, members of the merchant marine would not be granted that status. That would only occur at a later stage, however, after the persons concerned have come within the scope of the Third Convention.

The Conference of Government Experts proposed that, by analogy, the " civilian members of air crews attached to the armed forces " should be accorded the same treatment as members of the merchant marine [2]. That proposal was dropped during later discussions, and was taken up again by the 1949 Diplomatic Conference which extended its scope and made it applicable to the crews of all *civil aircraft.* That was logical, since, like military aircraft, enemy civil aircraft are liable to capture in the same way as enemy ships. The rules governing the status and treatment of members of the enemy merchant marine therefore apply *mutatis mutandis* to the crews of enemy civil aircraft [3], it being understood that the term " civil aircraft " covers any type of aircraft. The Diplomatic Conference emphasized the point by specifying, in Article 12, that the term " shipwreck " includes forced landings at sea by or from

[1] See above, p. 87.

[2] See *Report on the Work of the Conference of Government Experts*, p. 104.

[3] See TUCKER, *op. cit.*, p. 113, note 59.

aircraft. The reservation regarding " more favourable treatment under any other provisions of international law " is for the time being of no significance here, since no such provisions at present exist. As regards the status of medical personnel of civil aircraft, reference should be made to the commentary on Article 37 [1].

ARTICLE 14. — HANDING OVER TO A BELLIGERENT

All warships of a belligerent Party shall have the right to demand that the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered, whatever their nationality, provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

The 1868 draft provided that belligerent ships could not require the handing over of wounded persons on board hospital ships of relief societies, but that they could take over those on board military hospital ships, since such vessels were liable to capture. The 1899 Convention made no reference to the matter, but it is clear from the records of that Conference that the plenipotentiaries present considered it legal for a belligerent to take over the wounded on board a hospital ship which it had boarded [2]. In 1907 an express stipulation was laid down (Article 12), identical to the present Article except for the new " humanitarian reservation " included at the end of the latter.

The wording calls for a few comments. First of all, it was not for any particular reason that the term " belligerent Party " was not replaced by " Party to the conflict " as was done throughout the rest of the Convention ; the drafters simply copied the 1907 text. A reference to the shipwrecked was deliberately omitted from the " humanitarian reservation ", which does not apply to able-bodied persons. If shipwrecked persons are in good health,

[1] See below, pp. 208-209.

[2] See *Actes* of the 1899 Conference, pp. 37-38. See also *Actes* of the 1907 Conference, Vol. III, p. 310.

the reservation is not applicable to them. If their health is affected, they will be considered as wounded or sick.

We come now to the commentary on the Article [1].

A. *The right of surrender.*—If a warship meets a hospital ship or a merchant vessel, it is entitled to search it, under Article 31 and the present Article of the Second Convention. It may require the handing over of any wounded, sick or shipwrecked found on board. If the men are of its own nationality, it can thus release them from war captivity. If they are of enemy nationality, it takes them prisoner, in accordance with the general principle set forth in particular in Article 16 that combatants, even though wounded, who fall into enemy hands become prisoners of war.

The belligerents' right of surrender can apply to hospital ships of all categories (Articles 22, 24 and 25) as well as to rescue craft and merchant or other vessels, also without distinction as to nationality [2].

If an enemy warship finds on board a hospital ship or other vessel any wounded, sick or shipwrecked members of the merchant marine who have given a written undertaking, in accordance with Article 6 of the Eleventh Convention of The Hague of 1907, not to resume any service connected with military operations, then that warship cannot take them on board, for they are already free men.

Obviously, however, the belligerents are in no way obliged to exercise their right of surrender. And in fact they will usually refrain from doing so, since it is to their advantage to leave the wounded and sick where they are rather than incur the considerable hindrance of taking them on board. Space is limited on a warship and useless passengers are not welcome, particularly during the early part of a voyage. By stopping or slowing down, warships also run greater risk of air or submarine attacks. There are, however, known cases where the right of surrender has been exercised [3].

[1] The reader should refer to the corresponding passage in the report by Louis RENAULT, on which this portion of the commentary is largely based (*Actes* of the 1907 Conference, Vol. III, p. 310).

[2] As regards neutral persons landed in a neutral country by a merchant vessel over which the belligerents have not exercised their right of surrender, see below, p. 109.

[3] See J. C. MOSSOP: "Hospital Ships in the Second World War", *British Yearbook of International Law*, 1947, p. 405.

Can a hospital ship take prisoner wounded persons on board another hospital ship or a merchant vessel ? Certainly not for a hospital ship is not a warship. It must therefore refrain from any act of force—or else lose its protection, pursuant to Article 34—and may not stop and examine another ship [1]. On the other hand, a transfer of that kind could be carried out with the intervention of a warship, the latter effecting the boarding operation, and ordering the transfer of the wounded to a hospital ship of its own nationality.

B. *Limitation of the right of surrender.* — There has always been some concern over the right of surrender, and proposals have been made for its limitation on humanitarian grounds [2]. In 1937, experts pointed out the risks involved for the wounded if small warships, despite their inadequate equipment and facilities, were to remove patients from hospital ships and take on board men whose health was seriously impaired. Later, at the 1949 Diplomatic Conference, the Italian Delegation proposed that belligerents should be authorized to retake wounded of their own or an allied nationality, but not to capture enemy wounded. It was pointed out that capture was an act of war, and should therefore not occur on board a charitable ship [3].

The right of surrender was nevertheless retained. In 1907 Renault wrote as follows to justify it : " In a given case, it may be essential not to let pass wounded or sick persons who could still render great services to their country. This is still more understandable in regard to able-bodied shipwrecked persons. It has been said that it would be inhuman to force a neutral vessel to hand over the wounded whom it had collected charitably. In order to overcome that objection, one need merely think of the situation

[1] Similarly, it may not capture military personnel. See the commentary on Article 16, p. 113 below.

[2] In signing the Tenth Hague Convention of 1907, Great Britain entered a reservation to the relevant Article, stating that it would be applied only to combatants collected before and after a naval engagement in which British forces had taken part. During the Second World War, however, Great Britain applied the Article in full to its adversaries. See Mossop, *op. cit.*, p. 405.

[3] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 55.

which would prevail in the absence of any Convention. Under positive international law, it would be permissible not only to take prisoner any enemy combatant found on board a neutral vessel, but also to seize and confiscate that vessel for having acted in an 'un-neutral' manner. Moreover if, for instance, shipwrecked persons could escape captivity merely by seeking asylum on board a neutral vessel, then the belligerents would try to prevent charitable action by neutrals wherever such action might cause irreparable damage to the belligerents. Humanity would not gain thereby."

In our view, the right of surrender is generally consistent with the Convention, for the humanitarian system which the latter establishes does not impede the rights of the belligerents, and it is on that account that the Convention is respected. As has already been stated, the right of surrender will be exercised only rarely because of the burden which it imposes on vessels of war.

The 1949 Conference nevertheless inserted what we have referred to as a humanitarian reservation, which is of a dual nature. The right of surrender is subject to the condition " that the wounded and sick are in a fit state to be moved " (proposed by the International Committee of the Red Cross) and " that the warship can provide adequate facilities for necessary medical treatment " (proposed by Italy and Canada).

This clause should allay the fears of those who felt that excessive suffering might be involved. Even without, it, however, the belligerents would have had to take account of those considerations in accordance with the general principles of the Convention, for Article 12 stipulates that the wounded, sick and shipwrecked must be treated humanely in all circumstances.

ARTICLE 15. — WOUNDED TAKEN ON BOARD A NEUTRAL WARSHIP

If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

This provision corresponds to Article 13 of the 1907 text. Only three amendments were made in 1949 : (1) the inclusion of a re-

ference to military aircraft ; (2) the insertion of the phrase " where so required by international law ", to which we shall revert ; (3) the suppression of the word " possible ", which is always unfortunate in a Convention.

The purpose of the Article is to make provision for wounded, sick or shipwrecked nationals of the Parties to the conflict when taken on board a neutral warship or neutral military aircraft [1]. Here there can be no question of boarding by the belligerents nor of the right of surrender. In customary law, warships are considered as being part of the territory to which they belong [2]. Such wounded persons will be taken to the neutral country concerned, where the authorities must intern them so as to ensure that they can take no further part in war operations.

In 1907, Louis Renault wrote as follows with regard to this provision (then Article 13 of the Tenth Hague Convention) : " It fills a gap in the 1899 Convention and cannot give rise to any difficulty. A case of this kind occurred during the last war and was settled, after some hesitation, in the way provided in the Draft. Wounded, sick or shipwrecked persons who are picked up by a neutral warship are in exactly the same situation as combatants who take refuge in neutral territory. They are not handed over to the adversary but must be guarded " [3].

In 1948, experts proposed that the present Article should be specified as being applicable only to wounded, sick or shipwrecked persons picked up on the high seas. The proposal was not adopted in 1949, because it was bound up with the notion of " the territorial sea " which had given rise to various disputes between States [4].

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[1] In the present Convention, Articles 15, 17 and 40 relate to the situation of wounded, sick or shipwrecked nationals of the belligerents when in neutral territory or on board a neutral vessel. Article 15 should logically be followed by Article 17, both being preceded by Article 16.

[2] The present Article will be extended by analogy to other neutral public vessels employed solely on government service for non-commercial purposes. See OPPENHEIM-LAUTERPACHT, *op. cit.*, par. 348, note 2.

[3] *Actes* of the 1907 Conference, Vol. III, p. 310. For instances of application of this provision, see FAUCHILLE, *op. cit.* (1395 — 35 and 36). See also FRANÇOIS : *Handboek van het Volkenrecht*, 1950, Vol. II, p. 677.

[4] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 61. See also BRIGGS : *The Law of Nations*, 1938, pp. 194-197.

This in no way modifies the customary law in force, however [1]. The present Article in general applies only on the high seas. Three possible cases might arise. The first instance is that of shipwrecked persons picked up by a neutral warship (or military aircraft) in a neutral territorial sea. They are considered in the same way as those who have reached the coast of neutral territory by their own means, and are free [2]. The second case is that of shipwrecked persons picked up in the territorial sea of their own country. There is therefore all the more reason why they must remain free ; they have escaped the adversary's control [3]. On the other hand—and this is the third possible case—shipwrecked military personnel picked up in the territorial sea of the enemy country would be liable to internment, for they would not have escaped capture.

On a proposal of the British Delegation, the 1949 Conference inserted the words " where so required by international law " here and in all the Articles providing that belligerent personnel must be interned in a neutral country. That was no doubt a wise move. The plenipotentiaries at the Geneva Conference were authorized to lay down provisions of international law regarding war victims, but they had no authority to revise the Conventions dealing with the rights and duties of neutrals. They expressly stated that they did not consider themselves competent " to interpret international law concerning survivors who had been landed " in a neutral country, it being understood that " each contracting State would have complete liberty of interpretation " [4].

Internment in a neutral country forms a system on its own which also involves customary rules. In the absence of any specialists appointed for the purpose, something might have been overlooked. Moreover, those rules may evolve.

The fact that the plenipotentiaries were reluctant to commit themselves in this regard may also reflect an underlying desire to avoid clarifying rules which are sometimes confused and open to

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 105. See also the Italian Law of 1938 on neutrality (Art. 27).

[2] See OPPENHEIM-LAUTERPACHT, *op. cit.*, Vol. II, par. 348 a).

[3] See R. GENET, *op. cit.*, p. 59.

[4] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 104, 105 and 201. See also the commentary on Article 17, p. 116 ff. below.

varying interpretations, so as to make it possible in future as in the past to settle specific cases according to current circumstances.

There is also a definite reason for this addition to the Article. The delegation which proposed it gave the following justification : " It is not international law at present that a neutral Power should be bound to detain merchant seamen or civilian aircrews landing in their territory, even though they belong to a belligerent " [1]. Article 13 states that the Convention is applicable to merchant seamen who do not benefit by more favourable treatment [2]. Although during the Second World War the belligerents generally interned merchant seamen or took them prisoner [3], positive law (Eleventh Hague Convention of 1907, Articles 5 and 6) does not require them always to do so, and nothing obliges a neutral Power to intern them.

The present Article requires the neutral Power to " ensure " that belligerent nationals taken on board " can take no further part in operations of war ". Under Article 17, they must be " so guarded by the neutral Power ... that ... etc." The two expressions are equivalent, and mean that in practice belligerent nationals will be interned. Since, however, the neutral States are responsible for preventing such persons from leaving their territory, they must also take all necessary measures for guarding and supervising them so as to ensure that this requirement is met ; they will decide whether the internment regulations can be relaxed in any way [4].

What treatment should be afforded in a neutral country to military personnel who have been picked up and interned pursuant to the present Article ? A definition may be found in Chapter II of the Fifth Convention of 1907 of The Hague, which, although in principle applicable only to war on land, is the sole instrument that refers to the treatment to be given by a neutral State to internees. It may therefore be taken as a guide for internment in

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 220.

[2] As regards this reservation, see the commentary on Article 13 (5), p. 98 ff. above.

[3] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 552 ff.

[4] Article 24, paragraph 4, of the Thirteenth Convention of The Hague provides that interned ships' officers may be released on parole.

maritime warfare. Reference may also be made, by analogy, to the 1949 Geneva Conventions (Second Convention, Article 5 ; Third Convention, Article 4.B (2)).

The costs of internment will be borne by the State on which the persons concerned depend, in accordance with the principles of international law (Article 12 of the Fifth Hague Convention of 1907) and as indicated in Article 17, paragraph 2, of the present Convention ; indeed, the latter provision might well have been included here also.

* * *

The Article commented on above lays down the rules applicable to wounded, sick and shipwrecked persons taken on board a warship. What happens if they are taken on board a neutral merchant vessel ? In the absence of any formal text, one must be guided by custom and doctrine, which generally concur that such persons will be free if the neutral merchant vessel has not encountered a warship of the adverse Party or has not made any promise to the contrary to that Party [1]. The present solution differs in that a belligerent is entitled to board and search a merchant vessel and demand the handing over of any wounded or sick who may be in it, but he may not do so in the case of a neutral warship. After the search, the belligerent may also leave the wounded on board the merchant vessel in exchange for a promise that they will be interned on arrival in the neutral country. Otherwise, as we have already said, the wounded, sick or shipwrecked will be free ; they must not be interned, but must be allowed to return to their country of origin and resume active service. In that event, landing in a neutral port is merely the end of the rescue and has nothing in common with the military operation in which they were engaged before being shipwrecked, as the neutral merchant vessel would merely have been following its normal course and returning to its home country.

[1] This conclusion is drawn from Louis RENAULT (*Actes* of the 1907 Conference, Vol. I, p. 76, and Vol. III, p. 311). See also the *Oranjeboek* of the Netherlands Government (July 1914-October 1915, p. 34 ; October 1915-July 1916, pp. 27 and 32) ; FAUCHILLE, *op. cit.*, par. 1395 — 36 and par. 1463 — 28 ; OPPENHEIM-LAUTERPACHT, *op. cit.*, Vol. II, p. 734 (§ 348a, note 2) ; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 107 and 201 ; Netherlands proclamation of neutrality, 1939, Article 5.

It should be noted again, however, that the 1949 Diplomatic Conference deliberately refrained from laying down rules governing this and several other questions relating to the internment of war victims in neutral countries; we shall revert to this matter in commenting on Article 17.

If, as is to be hoped, a general study is one day made of these questions, the situation of shipwrecked persons who are taken on board a neutral merchant vessel will obviously have to be reviewed in the light of the general solution then adopted.

ARTICLE 16. — WOUNDED FALLING INTO ENEMY HANDS

Subject to the provisions of Article 12, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor's own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

Except for two modifications of form, this provision is modelled on Article 14 of the 1907 Convention, which in turn corresponded to Article 9 of the 1899 Convention.

The two modifications of form were made in order to ensure consistency between the Maritime Convention and that applicable to armed forces on land. The words " Subject to the provisions of Article 12 " and " and the provisions of international law concerning prisoners of war shall apply to them " were added. The provision corresponds to Article 14 of the First Geneva Convention of 1949.

The present Article defines the status of the victim—that is to say, the sick, wounded or shipwrecked person—who has fallen into the hands of the adverse Party. He is at one and the same time a wounded, sick or shipwrecked person who must be respected, protected and cared for just as if he were not an enemy, and a combatant who is made a prisoner of war. A wound, an illness or the distress caused by shipwreck entitle the victim to the necessary care and treatment, but one cannot conceive of their changing the

status of a member of the armed forces who is captured. That is a long-standing principle admitted in international law and which was more or less explicit in the various Conventions on the subject. The framers of the 1899 and 1907 Conventions were guided by that principle [1]. It makes no difference how a wounded or shipwrecked person falls into the hands of the opposing Party—whether he was captured after an engagement, or was taken off a hospital ship or neutral merchant vessel (Article 14), or reached the coast of the enemy country by his own means ; all that does not affect the status of persons who fall into the hands of the opposing Party.

A hospital ship cannot take prisoner wounded or shipwrecked members of the enemy forces. If it rescues them at sea or receives them from a ship of their own nationality, they must not be considered as being prisoners of war. The fact of being landed in an enemy country or taken over by the enemy military authorities constitutes capture. A hospital ship may belong to the naval forces, but it is not a warship in the proper sense of the term ; it does not have the characteristics of a warship ; it is a charitable vessel, placed outside the fighting, and just as it may not offer any resistance to the belligerents, so it may not commit any act of war, for otherwise it would lose its protection, pursuant to Article 34. It is an act of war to capture military personnel or hold them prisoner by force [2]. Similarly, a wounded man cannot be captured by a doctor on the battlefield, but he will become a prisoner of war on arrival in enemy territory.

The sea is a vast " no man's land ", and if a warship transfers wounded or shipwrecked prisoners whom it has captured to a hospital ship of its own nationality, their prisoner-of-war status will be suspended temporarily ; their final fate will be determined by the country in which they are landed or by the nationality of any warship which takes them aboard. In the meantime, if the fancy takes them to leave the hospital ship (for instance during a

[1] See *Actes* of the 1899 Conference, pp. 37-38, and of the 1907 Conference, Vol. III, p. 565.

[2] This in no way precludes special security measures on board hospital ships *vis-à-vis* wounded or shipwrecked members of the enemy forces, for instance locking them up. It is perfectly legitimate to protect the personnel and crew against any groups which might cause disturbances or even try to take over the ship.

call at a neutral port), and supposing their health so permits, there seems to be nothing to prevent them from doing so. If they are transferred to a hospital ship of their own nationality, they may no longer be considered as prisoners of war.

In the same way, merchant vessels cannot take prisoner shipwrecked persons of the opposing nationality, for they are not warships even though they may be armed for purposes of self-defence.

A. *Law applicable.* — Article 16 states that " the provisions of international law "—that is to say, customary law as well as the principles of the Conventions relating to prisoners of war—are to be applicable *ipso facto* to the wounded, sick and shipwrecked who fall into enemy hands. Those rules may vary, and have in fact already been developed to a considerable extent. They were laid down in the first place in the Regulations on the Laws and Customs of War annexed to the Hague Conventions of 1899 and 1907, but were amplified and rendered more explicit in the 1929 Convention relative to the Treatment of Prisoners of War, and improved still further in the Third Geneva Convention of 1949. The latter Convention is now almost universal, and in practice it is the provisions of that instrument which will be applicable. It is true, of course, that no express reference to that Convention occurs in the Article. But that is in order to make the provision more adaptable where States are not parties to the Third Convention, and also in the case of the latter Convention alone being revised or supplemented.

It follows from the above considerations that a wounded, sick or shipwrecked member of the armed forces who falls into the hands of an enemy party to the Second and Third Geneva Conventions will enjoy protection under both Conventions until his recovery, the Second Convention taking precedence over the Third where the two overlap. After recovery, his situation will be governed solely by the Third Convention, even in the event of his again being wounded or falling sick. The point is one of academic rather than practical interest, since the safeguards which the Third Convention accords to prisoners of war are equivalent to those accorded by the Second Convention, particularly in the matter of medical treatment.

It is clear, however, that as long as the victims are on board ship, the rules governing the treatment of prisoners of war can be

applied to them only by analogy and to the extent permitted by the installations and equipment of the ship. Many of those provisions are incompatible with living conditions at sea. They will apply fully after landing. Lastly, the Second Convention relates primarily to wounded, sick and shipwrecked members of the armed forces *at sea,* in a temporary situation where the principal concern is to rescue and tend the victims. The Third Convention applies fully in the following stage, that of captivity on land, when the detaining State must make all necessary arrangements for prolonged detention. But the fact remains that the two stages overlap to a certain extent.

B. *Reservation in regard to Article 12.* — The provision begins with the words : " Subject to the provisions of Article 12 ", which constitute a reservation not only with regard to the medical treatment to be provided prior to any other measure consequent upon the capture of the victim, but also with regard to the special protection to which all physically injured persons are entitled under Article 12 as a whole. The provision ensures that the Second Convention shall take priority over the Third. The latter is to be applicable to the wounded, sick and shipwrecked who are prisoners only when all relevant obligations under the Second Convention have been fulfilled. The reservation may thus be taken to refer not only to Article 12, but also to the first paragraph of Article 18, which provides that after each engagement the shipwrecked, wounded and sick must be searched for and collected, protected against pillage and ill-treatment and given the requisite initial treatment. All those obligations must obviously be fulfilled before the provisions of the Third Convention become operative.

C. *Decisions to be taken by the captor.* — Several alternative solutions are open to a belligerent holding on board one of its ships wounded, sick or shipwrecked personnel of the opposing Party, that is to say, men whom it holds as prisoners of war.

1. The most usual case is that they will be transferred to the territory of the detaining State and interned in a prisoner-of-war camp. If it " holds " them, to use the wording of the Convention,

that is to say if it keeps them on board a warship, this may be only as a temporary measure pending transfer on land.

2. In the second possible case the belligerent will land them in neutral territory. This may occur when warships are far from their own country or when they are carrying an excessive number of wounded on board, and in particular when they do not have the necessary equipment on board for giving all appropriate treatment to seriously wounded or seriously sick persons. The ship may even land only some of the victims on board.

The conditions for landing and the status of those concerned are laid down by the next Article and the reader should refer to the commentary on that provision.

3. Lastly, the Convention provides that the wounded may be returned to their home country, although we do not know of any instances of such action [1]. In that event, since the belligerent has acted charitably in the interest of the victims, the latter must not serve again during the hostilities, which means that they must not resume " active military service " in the sense of Article 117 of the Third Convention [2].

ARTICLE 17. — WOUNDED LANDED IN A NEUTRAL PORT

Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war.

The costs of hospital accommodation and internment shall be borne by the Power on whom the wounded, sick or shipwrecked persons depend.

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[1] This refers here to immediate return, the decision being taken by the commanding officer of the ship. On the other hand, seriously wounded and seriously sick prisoners of war may be repatriated under the Third Convention, and such repatriations took place during the First and Second World Wars.

[2] That Article reads as follows : " No repatriated person may be employed on active military service ".

1. — *General remarks and historical background*

This is probably the Article which, of all those contained in the Convention, has caused and still causes the most difficult problems of interpretation, not because of its contents but because of the gaps in it.

It is truly surprising that the authors of the 1899 and 1907 Conventions concerning the victims of war at sea did not seek to solve certain important problems which are at the very heart of the matter, such as for instance the situation of wounded or shipwrecked persons who are landed by a hospital ship or merchant vessel in a neutral port, although there is no reference to such a case in any other Convention.

But it is even more surprising that in 1949 the plenipotentiaries, to whose notice the gaps had already been brought, deliberately decided to retain an ambiguous wording, in order not to restrict the " liberty of interpretation " of the Powers [1].

It is regrettable—though this is a common occurrence in present times—that the authors made provision only for the settlement of individual cases on the basis of past precedents, instead of first laying down general principles and rules for future application as part of a general solution.

Article 17 is almost identical to Article 15 of the 1907 Convention, which in turn corresponded to Article 10 of the 1899 Convention. Only the phrase " where so required by international law " was added ; for the meaning of that expression, reference should be made to the commentary on Article 15 [2].

At the time of signature of the 1899 Convention, Germany, Turkey, the United Kingdom, and the United States of America each entered a reservation in regard to Article 10. The United Kingdom stated that, because it implied internment, the Article was contrary to the law of *habeas corpus*, and that ratification would require the enactment of legislation which the British Government was not disposed to propose. After diplomatic negotiations, Article 10 was subsequently struck out of the Convention by all the States.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 105-106, 181 and 201.

[2] See above, p. 107.

In 1900, the Institute of International Law adopted a recommendation calling for its reinstatement. In 1907, the Article was re-inserted in its place in the Tenth Convention of The Hague without opposition.

When consideration was first given in 1937 to the possible revision of the Maritime Convention, the International Committee of the Red Cross pointed out to the experts that, in its view, it would be useful to supplement and clarify the Article. Various proposals were made, and it must be said that some of them had not been studied sufficiently.

Those efforts eventually proved vain, for the 1949 Diplomatic Conference decided to revert purely and simply to the 1907 text, it being understood that each Power would retain its liberty of interpretation.

2. — *Commentary on the Article*

It is clear from the records of the 1899 and 1907 Conferences, and in particular from the reports of Louis Renault, that the present Article relates solely to wounded, sick or shipwrecked members of the armed forces of the two belligerents [1] who are landed by belligerent warships [2].

The landing of wounded in a neutral country implies agreement between two parties : on the one hand, the belligerent to which the ship belongs, as represented by the commanding officer, and on the other hand the neutral Power, as represented by the port authorities.

A belligerent warship may make a brief call at a neutral port if the neutral country consents ; it is not thereby obliged to land any prisoners whom it may have on board, or *a fortiori* any wounded members of its own forces, and may leave again with them.

The ship's commander may, however, wish to land and leave on neutral territory the wounded or shipwrecked persons on board, for instance because of urgent medical reasons or shortage of accommodation, especially if the ship is a long way from base.

[1] See *Actes* of the 1899 Conference, p. 38.

[2] See *Actes* of the 1907 Conference, Vol. III, p. 311.

The landing is subject to the consent of the local authorities in the neutral country and they are the second party to the agreement. They are not obliged to agree, for in certain cases hospital accommodation for disabled persons, who may be numerous, would prove a heavy burden. It is to be hoped that they will agree when the humanitarian interest of the victims so requires.

It was only after some hesitation that provision was made for this possibility in 1899. It was wondered whether such a practice was compatible with neutrality, since it might be to the military advantage of a belligerent vessel to get rid of the wounded on board ; having discharged its passengers, it could then resume military operations. " Nevertheless," wrote Renault, " it was realized that humanitarian considerations must prevail in this instance . . . for if the voyage were prolonged, the suffering of the wounded and sick would be aggravated to no purpose ".

If it is mutually agreed that the landing can take place, then failing arrangements to the contrary between the neutral State and the belligerent Powers, the wounded and sick as well as the shipwrecked must be so guarded (i.e. interned) where international law so requires [1] that they cannot return to their country and there again take part in operations of war. Neutral territory may be a place of asylum, but it must not be a place of transit on the way to the battle zones. An exception may be made to this principle only where agreement has been reached with the belligerent Powers, that is to say with both camps—the Power of origin of the shipwrecked and the adverse Power—and neutrality implies this condition.

Lastly, the costs occasioned by the presence of such persons must not be borne by the neutral State, but must be reimbursed by the Power on which they depend, in accordance with the general principles of international law (Article 12, Fifth Convention of the Hague, 1907).

3. — *Cases not provided for*

The present Article was intended to cover only wounded persons landed in a neutral country by a belligerent warship. The question naturally arises of how other cases should be settled.

[1] See above, commentary on Article 15, p. 107.

First of all, it seems to us desirable to give a summary table of the most important among them. The solution to some is to be found in the present Convention ; others are answered by provisions contained in other Conventions, or by customary law and still others by established interpretation ; there are also some possible cases which have not been solved, and we shall consider them afterwards.

The table therefore answers the following question : what will be the fate—freedom or internment—of wounded, sick or shipwrecked members of the armed forces and persons with similar status (Article 13) who are landed in a neutral country, according to the kind of ship (or aircraft) on board which they were, and provided that the neutral country accepts them ?

(a) *belligerent warships simply making a call :*
internment (Article 17 of the present Convention)

(b) *belligerent warships disarmed in a neutral country :*
internment for nationals, freedom for enemies (Article 24, Thirteenth Hague Convention, 1907 and interpretation) [1].

(c) *medical aircraft of the belligerents :*
internment (Article 40 of the present Convention)

(d) *neutral warships :*
internment (Article 15 of the present Convention)

(e) *neutral merchant vessels :*
freedom (interpretation—see above, commentary on Article 15, *in fine*).

(f) *shipwrecked and escaped persons who reached neutral territory by their own means :*
freedom (interpretation) [2].

[1] By " nationals " we mean wounded, sick or shipwrecked persons of the same country or the same belligerent camp as the ship which picked them up. By " enemies " we mean nationals of countries in the opposing camp. For case (b) see FAUCHILLE, *op. cit.*, par. 1463 - 28/29. Agreement is not complete, however, regarding the fate of " enemies ". See OPPENHEIM-LAUTERPACHT, *op. cit.*, par. 345 and 348(a).

[2] See FAUCHILLE, *op. cit.*, par. 1463 - 29 ; OPPENHEIM-LAUTERPACHT, *op. cit.*, par. 348 (a) 3.

We now come to two cases which remain unsolved : firstly, wounded or shipwrecked persons who are landed in a neutral port by a hospital ship, and secondly those landed by a belligerent merchant vessel. In this regard, the Conventions contain no reference, existing interpretations are few and imprecise, and doctrine and practice are confused and in conflict.

A. *Hospital ships.* — A distinction must first be made between belligerent hospital ships (including those of a neutral country which have placed themselves under the control of a belligerent, pursuant to Article 25) and the hospital ships of a neutral country which have remained in the service of their own navy and may on occasion pick up shipwrecked persons belonging to the belligerent forces. The latter category is subdivided into military hospital ships and those belonging to relief societies or private persons. The first, being public vessels, are not liable to be searched, and any shipwrecked whom they may have taken aboard cannot be captured. It is precisely because the right of search and surrender can be exercised *vis-à-vis* neutral merchant vessels that it was considered that any shipwrecked persons landed by them should be left free. Conversely, shipwrecked persons landed in a neutral country by a military hospital ship belonging to that country should be interned, in the sense of Article 15 of the present Convention.

The Convention is not applicable to private hospital ships which have remained in the service of the neutral country. They are considered in the same way as neutral merchant vessels. The belligerents can exercise the right of search and surrender with regard to them. Consequently, any shipwrecked persons who may have been picked up by such a ship will remain free after landing in a neutral country.

There remains the more important—and more difficult—case of wounded put ashore by belligerent hospital ships. One can to some extent realise why no provision was made to cover it. The task of hospital ships, particularly in modern times, is to evacuate the wounded to their home country. They were built for that purpose and have all the necessary installations. They would be failing in their normal duty if they disembarked their patients *en route.* The case may, however, arise, for instance if land or sea

engagements have caused so many victims that there is not enough space in the hospital ships for their evacuation to their home country. If a neutral country is near, the hospital ships might then take some of the wounded there.

The 1899 and 1907 Conventions made no reference to this possibility, but an interesting note as regards interpretation appears in the record of the third meeting of Sub-Committee I of the Conference, held on June 1, 1899, in the introduction to the discussion of the new Article 10. Louis Renault made the following statement: " The Sub-Committee would have to examine a case for which no provision was made in the additional Articles: that of a hospital ship carrying sick and wounded persons which called at a neutral port." The speaker recalled that the question had been raised a few years earlier by Commander Houette, and the record then states, a few lines further on, that " Mr. Renault did not consider that attention need be given to the status of the ship from which the wounded were disembarked."

It might have been deduced from the foregoing that Renault and his colleagues had in mind that wounded persons landed by hospital ships should be interned. Renault's own statement was weakened singularly in 1907, however, when in establishing by interpretation that shipwrecked persons landed by a neutral merchant vessel should be free, this same jurist showed that—eight years later at any rate—the status of the ship was considered in determining the situation of war victims on board.

Paul Fauchille had no hesitation in classifying hospital ships among those vessels whose wounded or shipwrecked passengers are liable to internment in a neutral country [1]. Other writers consulted have made no comment on the matter.

When consideration was given in 1937 to the possible revision of the Tenth Hague Convention of 1907, the International Committee of the Red Cross raised this question, but the views expressed by the experts remained divergent. In 1937 and 1947, opinion was divided regarding internment. At Stockholm in 1948, the majority favoured internment, and the draft Convention was thus amended.

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[1] *Op. cit.*, par. 1463 - 28.

At the 1949 Diplomatic Conference, only one delegate spoke out in favour of treating hospital ships and warships alike in the present instance [1]. On the other hand, representatives of countries which had remained neutral during one or other of the world conflicts expressed concern at the idea of such countries being obliged to intern victims, because of the heavy burden which would thus be imposed on them [2]. Their apprehension is perfectly understandable considering that some neutral countries have never been reimbursed for the considerable expense which they incurred in this regard. As we have already said, the delegates to the Conference eventually decided to revert purely and simply to the 1907 text, despite its ambiguity, considering that they were not competent " to interpret international law concerning survivors who had been landed ", it being understood " that each contracting State would have complete liberty of interpretation " [3].

In written law, therefore, one is hardly any further advanced than in 1899, and perhaps even less, since the recent addition of the words, " where so required by international law " seems to indicate that the solution should be found outside the Article itself.

In doctrine, two theories have to be considered. According to the first, which seems the most widespread, wounded, sick or shipwrecked persons depending on a belligerent who are landed in a neutral port by a hospital ship with the consent of the local authorities must be so guarded that they cannot again take part in operations of war. The arguments in favour of this theory are the following : hospital ships are part of the naval armed forces and are therefore covered by Article 17 ; the criterion for internment must be sought not in the status of the ship, but in that of the persons concerned [4].

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 61-62.

[2] *Ibid.*, pp. 61, 105-106 ; Vol. II-B, p. 248.

[3] *Ibid.*, pp. 105-106, 181 and 201.

[4] A number of spurious arguments have also been adduced, such as the following : the belligerents will no longer accept assistance from neutral Powers if their prisoners are to be able to escape capture ; they will not avail themselves of the possibility of landing the wounded in a neutral country ; they will resort extensively to the right of surrender, etc. Those arguments are valueless here, however, for they can be turned one way or the other depending on whether one is considering the case of " nationals " or of " enemies " on board a hospital ship.

According to the contrary theory, such shipwrecked and wounded persons must remain free in a neutral country. It has been pointed out in support of this view that because of their charitable mission, hospital ships must not be considered on the same basis as warships properly so called ; hospital ships are subject to the right of search and surrender by the belligerents just as neutral merchant vessels are, and it is for that reason that disabled persons who have been picked up by the latter are left free [1].

Mention may also be made of the opinion that in cases not specifically covered by the Second Convention, and in view of varying practices in past wars, the neutral country can be considered as under no *obligation* to intern belligerents [2].

We shall indicate later the new solution which we feel might solve the problem.

B. *Belligerent merchant vessels.* — Here doctrine and the records of past conferences are still more imprecise. In support of the theory of internment, one may again cite Louis Renault's interpretation referred to above, which stated that no attention need be given to the status of the ship from which wounded were disembarked. That statement was, however, made in regard to hospital ships and there was no reference to belligerent merchant vessels. Moreover, Renault recognized that shipwrecked persons landed by a neutral merchant vessel should be free.

Article 5 of the Netherlands Proclamation of neutrality of 1939 states that shipwrecked persons landed in a neutral country by merchant vessels are to be free, subject to any other arrangement made with the adverse Party. The text makes no distinction be-

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[1] The solution envisaged by doctrine (see above, ad Article 15, p. 111) for shipwrecked persons picked up by neutral merchant vessels justifies non-internment by the fact that although such vessels were liable to be searched and the persons on board captured, the opposing belligerent did not avail himself of that possibility. If that solution were recognized as just and fully satisfactory, then the same criterion would certainly be valid for the wounded and shipwrecked on board hospital ships or merchant vessels belonging to one of the belligerents. But is that solution in fact fully satisfactory and likely to provide a basis for a general settlement ? That is the question.

[2] See TUCKER, *op. cit.*, p. 123.

tween belligerent or neutral merchant vessels, and that is the line followed by Netherlands practice and doctrine [1].

As in the case of hospital ships, the experts consulted between 1937 and 1948 held various views.

At the 1949 Diplomatic Conference, the Swedish delegate, Mr. Gihl, stated : " If wounded, sick or shipwrecked persons were disembarked in a neutral country by a merchant ship, belligerent or neutral, they should be free. According to a general rule of the law of neutrality, shipwrecked crews of a belligerent warship were not interned if they arrived in a neutral country, since, being deprived of their ship, they would not be able to use neutral territory as a base for warlike operations " [2].

Thus, here again, we are faced with two conflicting theories, which may be summarized as follows : on the one hand, internment depends on whether or not the ship concerned belongs to a belligerent country ; in the second case, it depends not on the status of the ship, but on that of the persons concerned.

The arguments in favour of non-internment may be summed up as follows : belligerent and neutral merchant vessels are more closely related by the fact of belonging to the merchant marine than they are set apart by their belligerent or neutral status ; they are not warships, and the same solution can therefore be applied to them [3].

This seems an appropriate moment to outline the new solution which we propose. It deals at the same time with hospital ships and belligerent merchant vessels.

C. *Solution by the commentator* [4]

It is a striking fact that in both the cases considered above, neither of the opposing theories is fully satisfactory, whether from

[1] See *Oranjeboek*—October 1915-July 1916, p. 29. See also FRANÇOIS : *Handboek van het Volkenrecht*, 1950, Vol. II, p. 676 ; L. CARSTEN : *Maatregelen ten Handlaving onzer Onzijdigheid in den Huidigen Oorlog*, 1916, p. 97. According to doctrine, if a belligerent warship which has stopped a neutral merchant vessel has not taken on board the shipwrecked who were on the latter, it may require their internment in the neutral country.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 61.

[3] See p. 124, note [1].

[5] Proposed on the sole responsibility of its author, J. PICTET.

the point of view of logic, law or humanity. The reason is that originally a solution was sought which could apply without distinction to all wounded, sick or shipwrecked persons on board a hospital ship or merchant vessel of one of the belligerents, regardless of the fact that they might be either " nationals " (belonging to the same country or the same belligerent camp as the ship) or " enemies " (belonging to the opposing camp). One may reasonably assume that the former have every chance of remaining free later, but that the latter will most likely be held prisoner after being handed over to the armed forces of the same nationality as the ship[1].

It seems to us that the problem will always remain unless recourse is had to a more detailed solution. It has been said that the criterion of internment or non-internment depended not on the status of the ship but on that of the individuals concerned. That idea was not fully developed, however, and in fact the status of both must be taken into account.

Any study of this kind must start from fundamental concepts. The Geneva Conventions are based on a proper balance between military requirements and those of humanity. The interest of the victims, of the neutral States and of the belligerent States as well as the general principles of law must therefore all be taken into account.

It is difficult if not impossible to determine the interest of wounded, sick or shipwrecked persons other than that they must be well cared for, which will be the case whether or not they are interned. First of all, their interest will vary according to the hazards of war. If they are on board a ship of their own nationality, they will remain free if it reaches the home country without interference, but will become prisoners of war if the ship is boarded by the enemy and the latter demands their surrender. On the other hand, if they are on board an enemy ship, captivity will await them if the ship continues on its course without hindrance, but they may be set free if the armed forces of their own country intervene. Thus, landing in a neutral country may be an advantage or a disadvantage, depending on military events in an uncertain future.

[1] As regards the fate of the wounded on board a ship belonging to the opposing Party, see the commentary on Article 16 above.

Then too, conditions of internment in a neutral country will depend on many factors which will vary from one case to another : it will be more or less easy or pleasant to bear according to that country's resources, its climate, the attitude of its inhabitants, etc.

For all these reasons, it is difficult to determine the real interest of the wounded [1].

Let us now consider the interest of the neutral country, which has no advantage in having to intern a greater number of persons because of the obligations involved and the uncertainty of being able to recover the costs. On the other hand, the neutral country must observe the rules of neutrality which forbid it to assist the war operations of one belligerent to the detriment of the other. This brings us to the next consideration—the interest of the belligerents.

If a hospital ship or merchant vessel of a belligerent had on board wounded, sick or shipwrecked persons of its own nationality and the latter were to be free after landing in a neutral country, then it would be to the considerable—we would even say overwhelming—advantage of the ship to land them. Space would be made available on the ship, the adversary would no longer be able to exercise the right of surrender, a longer voyage would be avoided and once they had recovered, those members of the armed forces could be taken back again. A neutral country which took part in such an undertaking would be favouring that belligerent unduly. We therefore deduce that wounded and shipwrecked persons of the same nationality as the ship should be interned. There would then be no risk of the belligerent making abusive use of the possibility of landing such persons and swamping the facilities available in the neutral country.

If, on the other hand, the hospital ship were carrying enemy personnel and the latter were to be liable to internment, then

[1] We have considered only their immediate interest. It is still more difficult to make an objective assessment of their long-term interest. Is it preferable for a member of the armed forces to spend the war years in a country at peace, but as a captive and far from his own folk, powerless to defend his native land, or on the other hand for him to return home and regain his freedom, but also be exposed to fresh fighting and perhaps to fresh wounds or even death ? There could be endless discussion of such questions.

again there would be an excessive advantage in landing them. As in the preceding case, the ship would be able to free accommodation, avoid having to surrender its passengers, avoid a voyage and at the same time would be assured that its enemies would be kept out of the fighting, just as if the belligerent was holding them in its own prisoner-of-war camps. By acting as gaoler in its place and on its behalf, the neutral Power would assist the belligerent. We therefore conclude that enemy wounded and shipwrecked persons should remain free. That would also make the belligerent less inclined to flood neutral countries with its captives.

This brings us to the only practical solution, which is that a distinction should be made between persons of the same nationality as the ship and persons of enemy nationality. The fate of these two categories will be different: nationals would have to be interned and enemies would remain free.

Lastly, this thesis is confirmed by the general principles of law. While it does not favour the belligerents unduly, one should not forget that it will nearly always be at the entire discretion of the Party to the conflict to which the ship belongs to land anyone in a neutral port. The Party to the conflict will therefore do so only for serious humanitarian reasons and not merely in order to maintain its own active forces at little cost, while at the same time diminishing those of the enemy. Moreover, it would be neither just nor appropriate to oblige neutral States always to intern war victims. If that were the rule, they would be tempted not to allow wounded and shipwrecked persons to be landed and humanity would not profit thereby. Lastly, the solution proposed is consistent with the principles governing the status of belligerent persons in a neutral country : members of the armed forces who flee from battle and voluntarily come to a neutral country are interned ; those who are brought there as prisoners of war or reach a neutral country after escaping are not interned.

One might therefore complete the summary table on page 120 above as follows :

(g) *neutral military hospital ships in the service of their naval forces :*

internment

(h) *neutral private hospital ships in the service of their naval forces :*
freedom

(i) *hospital ships belonging to and in the service of a belligerent :*
internment for nationals ; freedom for enemies

(j) *belligerent merchant vessels :*
internment for nationals ; freedom for enemies.

It is our earnest hope that this proposal will be taken into consideration when the necessary task of revising and codifying the rights of neutral countries is undertaken. Perhaps in the meantime the Powers will adopt it as a *modus vivendi* for application to any cases which may arise under the present Convention.

Once an official ruling has been given on the two cases considered above for which no provision is at present made, a general review should obviously be made of the solutions accepted hitherto for all other cases, with a view to arriving at a rule applicable to them all.

ARTICLE 18. — SEARCH FOR CASUALTIES AFTER AN ENGAGEMENT

After each engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

With this Article and the two which follow it, the Convention enters a new domain : that of the search for the wounded, the shipwrecked and the dead, their removal, and the recording and forwarding of information about them. The most important of these provisions had already been included in the Tenth Hague

Convention of 1907 (Articles 16 and 17) in order to make it correspond to the Geneva Convention of 1906. The 1949 Conference dealt more fully with the whole subject, adding a considerable number of useful details while leaving the main features unchanged.

Article 18 corresponds to Article 15 of the First Geneva Convention of 1949, the first and third paragraphs of which have been copied almost word-for-word. The second paragraph, providing for a suspension of fire to permit the removal of the wounded left on the battlefield, was not repeated, however, as it could not be applied in war at sea.

PARAGRAPH 1. — SEARCH, PROTECTION AND FIRST AID

The obligation for belligerents to search for and collect the victims of a naval engagement follows logically from Article 12. The requirement that the wounded, sick and shipwrecked must be respected and protected obviously implies that they must first be saved from immediate peril—i.e. in most cases from shipwreck. One may therefore consider that the provision might have been placed more appropriately immediately after Articles 12 and 13, which lay down the principle, and before Articles 14 to 17, which deal with the fate of the shipwrecked once they have been taken on board.

In the Tenth Hague Convention of 1907 (Article 16, paragraph 1) the provision was less imperative ; the belligerents were required to " take measures " to search for the shipwrecked only " so far as military interests permit ". The 1949 Diplomatic Conference nevertheless decided, without discussing the point, that the stricter requirement adopted for war on land (First Convention, Article 15) could also be applied to war at sea. The reference to military interests was therefore dropped, and it was provided that " Parties to the conflict shall without delay take all possible measures ". The obligation to act without delay is strict ; but only measures within the possibilities of the Parties are to be taken ; the military authorities will judge what is possible, and decide to what extent they can commit their units and men to searching for the shipwrecked.

Of course, one cannot always require certain fighting ships, such as fast torpedo-boats and submarines, to collect in all circumstances the crews of ships which they have sunk, for they will often have inadequate equipment and insufficient accommodation. Submarines stay at sea for a long time and sometimes they neither wish nor are able to put in at a port where they could land the persons whom they have collected. Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by so doing, he would expose his vessel to attack [1].

The "possible measures" which may be taken by the belligerents to collect the shipwrecked are, on the other hand, many and varied and in nearly all cases they should enable the purpose of the present paragraph to be achieved.

Thus, a warship which was unable to collect the victims of an engagement should, for instance, alert a hospital ship if there is one in the vicinity, or even a ship of any kind better equipped than itself; otherwise, it should resort to the possibility provided in Article 21, and appeal to neutral vessels. It can also alert the nearest coastal authorities, or request assistance from the air forces. Generally speaking, if a warship is forced to leave shipwrecked persons to their fate, it will endeavour to provide them with the means to enable them to await rescue or reach the coast: life-boats, food, water, a compass, charts, etc. It will do the same for the victims of an engagement with a merchant vessel which refused to stop after being summoned or actively resisted search.

It should be noted here that in the event of an engagement with a vessel of war, the crew and passengers of merchant vessels are protected not only by the present Article but also by the Procès-Verbal of London of 1936 (" relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930 ") which in Rule 2 stipulates: " In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers,

[1] See TUCKER, *op. cit.*, pp. 70-73.

crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board " [1].

The words " after each engagement " with which the paragraph opens were already included in the corresponding provision of the 1907 text, which had taken them from the Geneva Convention of 1906. In the First Convention, the 1949 Conference replaced the phrase by the words " at all times, and particularly after an engagement ", but left the old wording in the Second Convention, thus tacitly accepting the view of the Government experts, who had met in 1947, that the words " after each engagement " were better suited to the special conditions prevailing at sea.

It is nevertheless regrettable that the general wording adopted for war on land was not reproduced here. Whether in peace or in war, and whatever the circumstances of shipwreck, the rescue of shipwrecked military personnel or civilians remains an obligation which can only be evaded because of military necessity or because material conditions make it impossible [2]. The present wording should therefore be considered as a reminder to the belligerents that after an engagement—and that means not only a naval battle, but also any kind of engagement or attack, even from the air, which may have caused victims whether by wounding, illness or shipwreck—it is their duty to search for and rescue the victims. But this in no way affects the duty to search for and collect the victims, whether military or civilian, of any incident occurring at sea.

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[1] This Rule was cited by the International Military Tribunal at Nuremberg during the trial of Admiral Doenitz. During the Second World War, there were many instances where the victims of a naval engagement—mainly the crews of merchant vessels which had been sunk by submarines—were lost at sea for lack of rescue. Some of those cases were brought before war crimes tribunals. See TUCKER, *op. cit.*, p. 72. Some of the judgments are cited below in connection with Article 51. See below, p. 267.

[2] Article 16 of the Fourth Convention of 1949 states that as far as military considerations allow, each Party to the conflict must facilitate the steps taken to search for shipwrecked civilians. Reference should also be made to Article 11 of the Convention for the unification of certain rules respecting assistance and salvage at sea (Brussels, 1910), which states that each captain is required, to the extent that he can do so without serious risk to his ship, crew, or passengers, to give assistance to any person, even an enemy, found at sea in danger of perishing.

The general character of the provision is also emphasized by the use of the term " Parties to the conflict ". It is the duty not only of naval units but also of all authorities on land, whether military or civilian, to search for and collect persons in distress. This will apply particularly in the event of an engagement off the coast or in a port, and in general whenever shipwrecked persons are reported either at sea or on the coast or an island. The authorities on land will also intervene in the case of incidents occurring on inland waterways (rivers or lakes). They must remember, particularly in the case of the victims of fighting between land forces, that the shipwrecked are entitled to respect and protection exactly as the wounded and sick are, and that they must be rescued—as the First Convention does not expressly stipulate.

Not only the living must be searched for and collected, but also *the dead.* It is not always certain that death has taken place. Furthermore, pursuant to Article 20, the dead must be identified and given a decent burial, on land or at sea, and a proper report must be sent to their country of origin.

When the shipwrecked and dead are picked up, all objects belonging to them or found in the vicinity should also be collected, for such objects may make it possible to identify the owners or missing persons. Pursuant to Article 19, paragraph 3, any articles thus found will in case of death be sent to the authorities of the deceased's country.

Once the shipwrecked have been picked up, they must be protected against *ill-treatment,* and any pillage of the dead must be prevented. This follows from the general principle of respect and protection as set forth in Article 12. The wounded, the shipwrecked and the dead must be defended, if need be by the use of arms [1], against all who may seek to lay hands on them [2].

They must also be given *first aid.* The general obligation to care for the wounded and sick irrespective of their nationality arises out of Article 12. The reason for repeating this idea in the present

[1] Article 35 authorizes the crews of hospital ships and sick-bays to carry arms and to use them for their own defence and that of wounded, sick and shipwrecked persons.

[2] It should be noted here that Article 47 prohibits any reprisals against the wounded, sick or shipwrecked.

paragraph as in the corresponding provision of the First Convention, was to emphasize the necessity of giving first aid immediately because it is now recognized that such treatment may have a determining effect on the patient's recovery. That is moreover one of the essential duties of a hospital ship.

PARAGRAPH 2. — EVACUATION OF A BESIEGED AREA

The various meetings of experts held before the 1949 Diplomatic Conference all supported the proposal by the International Committee of the Red Cross for the inclusion of a new and important idea—that of inviting the belligerents to conclude truces to permit the removal of wounded and sick from a besieged area, and to allow medical personnel and equipment to be sent to that area.

In addition, the XVIIth International Conference of the Red Cross rightly pointed out that besieged areas might be on the edge of the sea, or might even be islands [1]; provision should therefore be made for evacuating the wounded by sea, through the insertion of a similar text in the Second Convention. The Diplomatic Conference agreed without discussion, and the relevant clauses are to be found in Article 15, paragraph 3, of the First Convention and the present paragraph of the Second Convention [2].

It should be noted, however, that the repetition of this provision in the present Convention adds nothing either in theory or in practice. The fact that it was included in the First Convention would have sufficed to cover the evacuation of the wounded from a besieged area or the admission of medical supplies by land as well as by sea. Be that as it may, the present paragraph serves to remind the naval forces of the humanitarian task which they may have to carry out, and to ensure that the provisions of the Second Convention will be applied, should occasion arise. In all cases, the authorities on land will probably be responsible for negotiating and

[1] There were a number of such areas during the Second World War, and delegates of the International Committee of the Red Cross succeeded in delivering relief supplies to some of them, for instance Sebastopol, Tobruk, the German pockets on the Atlantic coast, and the Channel Islands (see *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, p. 439 ff.

[2] Article 17 of the Fourth Convention contains a similar provision.

concluding the necessary arrangements, either in the form of an armistice, a suspension of fire or simply a promise not to attack.

The *wounded and sick* referred to here will be those in the categories listed in Article 13. They may also include wounded or sick civilians for whom arrangements for evacuation have been made under Article 17 of the Fourth Convention. The victims may be evacuated by hospital ships, ordinary vessels, or even small craft if the distance involved is not great. Hospital ships or lifeboats should preferably be used, however, for they are entitled to be marked with the red cross emblem [1].

What will *evacuation* of the sick and wounded mean? That will depend on their own status and on the terms of the arrangement concluded. It may merely mean handing them over to the besieger, in which case the nationals of the latter will become free, while the wounded and sick of the same nationality as the besieged forces will become prisoners of war, if they are persons entitled to protection under the present Convention. Evacuation may also mean returning wounded and sick of the same nationality as the besieged forces to a place where they will again meet their own troops, from whom they were cut off by the siege. In that case, evacuation by sea through the blockade of the besieging forces will usually be carried out by hospital ships or other vessels flying the flag of the besieged forces or that of a neutral country. A hospital ship belonging to the besieging forces may also, however, fetch the persons to be evacuated and land them in a neutral port or even in an enemy port if the arrangement provides that they will not be detained there. If wounded and sick persons of the besieged forces belonging to any of the categories listed in Article 13 were landed in this way in a neutral country, they would become free since the enemy landing them would have undertaken not to capture them ; this is consistent with the solution proposed in connection with Article 17, regarding the status of wounded and sick persons landed in a neutral port [2].

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[1] In this connection it may be recalled that under Article 21 of the Fourth Convention, ships conveying wounded and sick civilians must be respected and protected, and are also entitled to display the distinctive emblem.

[2] See above, pp. 121-129.

The commander of a besieged place may request permission to evacuate his wounded and sick or ask the besieger to allow free passage of *medical personnel and equipment* to look after them. But it is conceivable that he will make both requests. The Convention does not treat them as alternatives. As for religious personnel, the most elementary sentiments of humanity demand that they should always be allowed free access.

The nationality of the medical and religious personnel in question is not specified. That is a happy omission. The besieging Power must either permit the passage of enemy personnel of the same nationality as the wounded requiring attention or, if such personnel are not available or other circumstances make it more desirable, send members of its own personnel into the besieged place, in conformity with the general principles of the Convention. In the latter case, the status of the besieger's personnel and the conditions of their stay must then be specified in the arrangement concluded. In any event, the conditions must not be less favourable than those provided in the Convention (see Article 6).

ARTICLE 19. — RECORDING AND FORWARDING OF INFORMATION

The Parties to the conflict shall record as soon as possible in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include :

(a) *designation of the Power on which he depends ;*

(b) *army, regimental, personal or serial number ;*

(c) *surname ;*

(d) *first name or names ;*

(e) *date of birth ;*

(f) *any other particulars shown on his identity card or disc ;*

(g) *date and place of capture or death ;*

(h) *particulars concerning wounds or illness, or cause of death.*

As soon as possible the above mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

As we have seen in connection with Article 16, military personnel and other persons mentioned in Article 13 who are picked up at sea by an enemy hospital ship will become prisoners of war. At the same time, however, they are wounded, sick or shipwrecked and, as such, entitled to special protection. Their position as prisoners of war already exists but will not become fully effective until they have been landed in an enemy country and when the wounded and sick are on the way to recovery. In other words, from the moment when a wounded or shipwrecked member of the armed forces is picked up at sea by the enemy, he is under the protection of the Second and the Third Conventions. But certain provisions of the latter will remain, so to speak, in the background as long as the health of the person concerned requires special protection and care. As he ceases to be a wounded man, the Third Convention will become applicable to him to an increasing extent, until finally it is the only instrument governing his status. After the wounded and sick have been landed, the First Convention will apply to them (instead of the Second) concurrently with the Third.

The First, Second and Third Conventions therefore contain a certain number of provisions in this regard which differ only

slightly from one another. Article 19, the provisions of which deal with the identification of persons picked up at sea and the communication to the enemy of the information obtained, is a case in point.

The present rules must be applied as soon as a member of the armed forces falls into enemy hands. It is important that his own home Power should know that he has been picked up, wounded or dead, by the enemy and should receive preliminary information, even though very brief, regarding him. It was considered necessary to specify this obligation in the First and Second Conventions in order to ensure that such information is supplied.

Despite the means of telecommunication now available to naval units, the conditions of the conflict will in fact only very seldom permit the immediate transmission of the information requested. A warship always has good reasons for communicating by radio as little as possible, and one cannot therefore expect it to transmit by that means sundry information about the shipwrecked or sick whom it may have picked up. It will delay doing so until it has arrived at a port in its home country, and the authorities on land will then have to notify the enemy. The information will thus be communicated pursuant to either the First Convention, if those landed are wounded or sick and are taken over by the Medical Service, or the Third, in the case of able-bodied persons fit to be sent directly to a prisoner-of-war camp.

It was mainly in order to leave no gaps that provisions were included in Article 19 (more especially in paragraphs 2 and 3) which will very seldom be implemented by the authorities responsible for applying the Second Convention. We shall therefore give only the essential explanations here, and refer the reader to the more detailed comments on the corresponding provisions in the First and Third Conventions [1].

PARAGRAPH 1. — RECORDING

The Parties to the conflict are required to forward *as soon as possible* information regarding each person falling into their hands. As we have already seen, it is unlikely that a commander will

[1] First Convention, Article 16; Third Convention, Articles 17, 120 (paragraphs 1 and 2), 122 and 123.

transmit such information to the authorities on land (who are responsible for forwarding it to the opposing Party) so long as his ship is on the high seas, but it is his duty to do so as soon as circumstances permit without risk, and at the latest upon arrival in a port. It is therefore important that the information listed here be collected and recorded as soon as the persons concerned are taken on board. This does not mean the *records* which, under the Convention, it is the duty of the appropriate authorities on land to prepare. It simply means that as soon as possible and at the latest on landing, each commander must provide the authorities with a list containing the information required so as to enable the records to be prepared.

The list of data to be recorded is neither limitative nor imperative ; it merely indicates the particulars which would appear most likely to assist in establishing the identity of an individual. Additions may be made to the list, and where certain of the particulars indicated are missing—such as in the case of persons who are not actually members of the armed forces—others may be supplied in their place (photographs, body measurements, descriptions of teeth or distinguishing marks, etc.). One point about the list is that all particulars can be obtained without any necessity for interrogating the shipwrecked, wounded or sick men, who may often be unable to reply to questions. This point is of particular importance in connection with the identification of the dead. Items (*a*) to (*f*) of the list appear on the identity card which all military personnel should carry on them, while items (*g*) and (*h*) will be supplied by the commander or the officers of the vessel concerned.

The *identity card* referred to in item (*f*) is that provided for in the Third Convention (in Article 17, paragraph 3, in the case of members of the armed forces, and Article 4 A (4) in the case of persons who accompany the armed forces without actually being members thereof). The particulars given on the identity card are sufficient to identify its holder without any possibility of error. Consequently, one can appreciate the value of the card, and how essential it is that all those who are liable to be missing or taken prisoner at sea should be provided with such cards and should, moreover, always carry them on their person. All troops, and

particularly members of the naval forces, should be fully informed of the importance of this.

The *identity disc*, also mentioned under item (*f*), will be referred to below in connection with paragraph 3.

The date of death referred to under item (*g*) cannot always be given exactly, particularly where persons are found drowned at sea. The date is nevertheless important for reasons mainly connected with civil law. It must therefore be determined as precisely as possible and mention should be made of the relevant examination among the particulars which are forwarded.

The *medical particulars* referred to under item (*h*) must be supplied by the ship's doctor or, if there is none, by the best qualified officer. Such information is often very important, especially for the families of the deceased [1].

Lastly, information must be transmitted to the adverse Party in respect of persons whose existence is known or has been detected though there has been no possibility of taking them on board. The enemy should at least be informed without delay of their existence and given all the necessary particulars so that he may rescue them itself.

Paragraph 2. — Forwarding of information

As soon as possible, the commander of a ship which has picked up shipwrecked, sick or wounded persons must forward the information regarding them to the *information bureau* which each belligerent is required to open on its territory. He will do so either directly or—and this will be the usual case—through the competent authorities on land.

The information bureau referred to here is that described in Article 122 of the Third Convention. Such bureaux were in operation

[1] The 1907 Hague Convention, Article 17 of which formed the basis for the present provisions, mentioned one further item of information to be transmitted, which was not reproduced in the Second Convention of 1949 despite its obvious interest from the humanitarian point of view. We mention it here solely as a reminder, for in fact it concerns only the wounded and sick on land who are covered by the First Convention, and it relates to information concerning transfers and admissions to hospital.

during the Second World War, pursuant to Article 77 of the 1929 Convention relative to the Treatment of Prisoners of War ; their importance grew steadily, and was reflected in the provisions adopted in 1949. The activities of the bureaux were originally limited to prisoners of war, but they have now been extended to all persons protected by the First and Second Conventions [1]. As most of these individuals, when they lose their special status as wounded, sick or shipwrecked persons, become ordinary prisoners of war, it was only logical to centralize all the particulars concerning them, advising one and the same office of everything happening to them, whether they came under the First, the Second or the Third Convention.

Information which the bureau receives from the appropriate services of the armed forces is to be forwarded by it to the Power of origin of the persons concerned.

In this connection, one should note what is no doubt a drafting error in the French text, which refers to " la Puissance dont dépendent ces *prisonniers* ". The word " *personnes* " should have been used, as in the corresponding Article (Article 16) of the First Convention, and the English text of the present provision uses the word " persons ". The point is an important one, for the wounded, sick or shipwrecked who fall into the hands of the adverse Party will not all necessarily become prisoners of war. Apart from civilians (excluding those mentioned in Article 13), this will in particular be the case for medical personnel.

The information must be communicated without delay and must be duplicated—that is to say, it must be sent both to the Protecting Power and to the Central Prisoners of War Agency. By Protecting Power we mean the Power which represents the interests of the country of origin of the wounded in the country in whose power they are.

The functions of the Central Prisoners of War Agency are defined in Article 123 of the Third Convention. It does not fall within the scope of the present study to consider here in detail the nature and

[1] The Fourth Convention also makes provision for an information bureau for interned civilians ; but it need not necessarily be the same as the information bureau for which the present paragraph provides.

operation of the Agency, and the reader, if interested in the matter, may refer to the commentary on the Third Convention [1]. It may be briefly noted that the Agency was first opened by the International Committee of the Red Cross in 1870, and it developed considerably during the two world wars. Its essential work is obviously in connection with prisoners of war. One of its functions is to receive particulars relating to the wounded, sick and dead and to forward such particulars, always as rapidly as possible, to the Power on which the victims depend. But its chief task is to keep their families informed and to form a permanent link between them and their captured relatives. It asks the national information bureaux for additional information (including information of a medical character), conducts enquiries of its own, arranges for the exchanging of correspondence (where the ordinary postal channels are closed) and forwards personal assets. Whereas the activities of the Protecting Power are mainly administrative, the Agency is essentially concerned with human relations.

Paragraph 3. — Particulars of the dead

This paragraph deals with the forwarding of everything relating exclusively to the dead picked up at sea or to wounded who die before being landed—that is to say certificates of death and personal assets. As in the case of the preceding paragraph, the competent authorities on land will usually forward such items to the national information bureau. It will be the duty of the responsible officers in each ship either to supply the material to be transmitted to the responsible authorities at the first opportunity, and at the latest upon landing, or to forward it themselves as soon as they are able to do so.

The documents which certify decease are *certificates of death* or *lists of the dead*. They must be duly authenticated, and it will suffice if they are signed by the ship's commander. No further details are given as to what the certificates or lists should consist of and here as in the case of most provisions of this Article, one

[1] See also *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*.

should refer to the Third Convention (Article 120, paragraph 2) which gives all the requisite details [1] in regard to prisoners dying in captivity. Pursuant to that provision, death certificates (preferably in the form indicated in Annex IV D. to the Third Convention) or duly certified lists must be drawn up. They should include (*a*) the particulars found on the identity card, viz. name, first names, rank, date of birth, and army, regimental, personal or serial number and (*b*) mention of the place, date and cause of death, the place and date of burial, and all particulars necessary for subsequent identification of the grave. If the body has been cremated, the fact has to be stated, together with the reasons for such a measure. These last items (burial, identification of graves, cremation) will naturally apply only if bodies picked up at sea are landed. If, as will more often be the case, they are buried at sea, then the position (latitude and longitude) and date alone need be mentioned [2].

The model certificate annexed to the Third Convention was drawn up by the International Committee of the Red Cross on the basis of its experience. It includes two additional headings which are of the greatest interest to the families of the deceased—namely, a reference to the existence of any personal assets and a few details about the last moments of the deceased. It will no doubt only be rarely that particulars can be given under the latter heading but they are nevertheless important from the sentimental and human point of view and should not be neglected.

The paragraph also refers to the *identity disc*, which may be either single or double. This point calls for some explanation.

The practice of providing each member of the armed forces with an identity disc became widespread during the First World War and now appears to be universally accepted. But the need for standardization of the disc also became apparent very soon. Accordingly the question was studied in 1928 by the International Commission for the Standardization of Medical Equipment, which was set up under the auspices of the International Committee of

[1] Those details were included in the 1949 Convention in order to take account of the experience gained by both the national information bureaux and the Central Prisoners of War Agency. They relate to burial and cremation.

[2] Article 20 also refers to this matter. See below, pp. 146-150.

the Red Cross. The Commission produced a model identity disc which could be divided in two. One half, it was proposed, was to remain around the neck of the dead person, while the other was to be detached and sent to the State of which he was a national. The model, or at all events its principle, was approved and the 1929 Convention stated that " one half " of the identity disc was to be transmitted, " the other half to remain attached to the body ". The wording was not clear, however, and the 1949 text speaks of one half of a double identity disc, to show that the disc must in fact be composed of two separate parts, each bearing the same particulars.

Provision is still made for the possibility of military personnel being issued with single discs only, inscribed with the bare particulars. In the case of burial on land, such a disc must remain with the body, so that the latter may be identifiable at any time. In the case of burial at sea, it must be removed and sent to the deceased's home country, for a body buried at sea is usually wrapped in a weighted sailcloth bag and we know of no instance of one having been washed ashore ; there is therefore no question of subsequent identification [1].

Among the objects which must also be collected and transmitted, *wills* and any other documents of legal value are important. Also of importance are articles having an intrinsic or sentimental value ; objects which have little or no apparent value may, for sentimental reasons, be highly prized by near relatives.

There is also a reference to *unidentified articles*. It has often happened that ships or aircraft have been hit so suddenly and with such brutal force that nothing was left of them and their occupants except a few stray objects floating on the sea. If collected and forwarded, such objects may enable the Power of origin to identify the persons who have disappeared. Sometimes, even, a single object of this sort may constitute the only proof of the total disappearance of the entire crew of a ship or aircraft.

All such documents and objects are to be sent in *sealed packets*, accompanied by a *statement* and an *inventory*. Precautions must obviously be taken to ensure that parcels of such value are not lost

[1] In this connection, see also the commentary on Article 20, p. 146 below.

or opened *en route;* in war-time, postal communications are uncertain.

Two provisions of the Third Convention must be mentioned here. They do not appear either in the Second Convention or in the First, and their absence leaves a gap, for they are important and must be observed by those applying the Convention. They relate to the conditions under which the enemy wounded, sick and shipwrecked may be interrogated, and to cards giving notice of capture.

Article 17 of the Third Convention, paragraphs 1, 2 and 4, lays down rules for the *questioning* of prisoners, states what they may be asked and prohibits any form of coercion to secure further information. Its purpose is to protect prisoners against pressure which the Detaining Power might be tempted to put upon them in order to obtain information of a military character. It goes without saying that those safeguards are equally applicable to the shipwrecked, wounded and sick picked up by the enemy. If they are picked up by a warship they will receive the safeguards by right, since they will become prisoners of war ; if they are on board a hospital ship, they will receive the safeguards by analogy and in accordance with the spirit of the Convention, for in that case they will become prisoners of war by law only after they have been landed in enemy territory. It is therefore essential that all persons who are called upon to apply the Second Convention should be fully conversant with the provisions of Article 17 of the Third Convention and should respect them.

Article 70 of the Third Convention provides that each prisoner is to be enabled to send to the Central Agency, at the same time as to his family, and not more than one week after capture, a card known as a " card giving notice of capture ", or for short, " capture card " to say what has happened to him. Its importance in the case of shipwrecked, wounded or sick persons picked up at sea can be realised. Nothing could justify depriving this category of war victims of an advantage to which they are entitled, and which their state of health makes all the more essential.

The attention of the authorities responsible for applying the Second Convention should therefore be drawn to this point, and they must see that not only reception centres in naval bases but also certain ships most likely to pick up shipwrecked persons—and

in any event all hospital ships—are supplied with a sufficient quantity of capture cards.

Recording of civilians.—As we have seen, it is the duty of the Parties to the conflict to collect and assist not only military personnel but also civilians who are the victims of a disaster at sea. The Party to the conflict concerned must also transmit to their country of origin all information which could assist their identification and reassure their families, regardless whether the persons concerned are of allied, enemy or neutral nationality. The humanitarian aspect of this duty and also its consequences in civil law, which may be of capital importance, make it virtually imperative, and a Party to the conflict may be released from it only at the express request of the person concerned.

In the case of civilians who are picked up by an enemy warship or enemy merchant vessel and are landed in an enemy port, the relevant information, together with death certificates, documents and other articles in the case of deceased persons, can also be transmitted through the national information bureau in accordance with the procedure laid down in paragraph 2. Article 136 of the Fourth Convention of 1949 provides for the establishment of such a bureau for protected persons ; the bureau may be the same as that provided for in the Third Convention in respect of military personnel. If civilians are landed in a neutral country, information regarding them can be transmitted through normal diplomatic channels.

ARTICLE 20. — PRESCRIPTIONS REGARDING THE DEAD

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

If dead persons are landed, the provisions 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, shall be applicable.

This Article reproduces that portion of Article 17 of the First Convention which is applicable to war at sea—namely paragraph 1, the words " burial or cremation " being replaced by " burial at sea ". The corresponding provision of the 1906 Convention had already been included in Article 16, paragraph 2, of the Hague Convention, but the reference to burial on land and cremation had been retained, along with the new notion of burial at sea. This will be referred to below.

The provisions in the First and Second Conventions regarding the dead tally with those of the Third Convention which deal with the burial of prisoners who died in captivity (Article 120, paragraphs 3 to 6). At first sight it may seem that a mere reference to the latter Convention would have sufficed ; but the framers of the Convention wished to take account of the fact that the dead picked up by the enemy (and it is to them especially that the present provision refers) have never for one moment been prisoners of war. Again, it is only natural that shipwrecked, wounded or sick combatants who have died shortly after having been picked up should remain subject to the provisions of the Convention under the protection of which circumstances brought them.

PARAGRAPH 1.—EXAMINATION OF BODIES ; BURIAL AT SEA

The form of wording with which the paragraph opens : " Parties to the conflict *shall ensure* . . . " is used here for the first time in the Convention. It is not new, however, having appeared in the corresponding provision of the 1907 Convention (Article 16, paragraph 2) and that of 1906. It must be taken to imply an obligation. It means that the Parties to the conflict must see to it that the prescribed task for which they are responsible is duly carried out. There is no justification for thinking that the task in question is optional. On the contrary, in calling upon the Parties to the conflict to ensure that it is carried out, the Convention once more draws attention to the importance of the task and to the necessity of accomplishing it.

For reasons of logic, the 1949 Diplomatic Conference deleted the reference to burial on land and cremation which had been

included in the 1907 Convention, though the move was perhaps rather precipitate. It was pointed out that if the dead are buried on land or cremated, it means that they have been landed and the First Convention has therefore become applicable to them ; that is the reason for paragraph 2 [1].

The idea is no doubt correct in principle, for in maritime warfare the dead are usually buried at sea. It is also quite possible, however, that a ship may put in at a point on the coast or at an island and bury the dead on land. The commanding officer may not necessarily have to hand the text of the First Convention, in particular Article 17 which is applicable in such a case, and it might have been helpful to reproduce here the essential provisions of that Article, as has been done in other cases. The relevant extracts will be found below, in connection with paragraph 2.

As far as circumstances permit, burial at sea must be carried out *individually*. The idea is taken from the First Convention ; the authors wished to prohibit common graves, which conflict with the sentiment of respect for the dead, in addition to making any subsequent exhumation difficult or impossible. The significance of the provision is, however, a little different here. The intention is not to preclude the committal of several bodies at the same time—for what is the sea if not an immense common grave ?—but to ensure that each body is committed separately in a weighted sailcloth bag.

Before burial, the bodies must be given a *careful examination* in order to make sure that death has occurred and to establish identity. That is the essential point of the provision, and even the main reason for it. Wherever possible, a doctor should confirm that death has taken place ; in ships which have no doctor on board, the best qualified officer will carry out the task. The medical examination also implies that the date of death must be established, as we have seen in connection with Article 19, paragraph 1 [2].

Identification implies a search for the papers carried by the dead man. In the absence of papers, recourse must be had to other

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 155.

[2] See above, p. 140.

methods which will make it possible for the adverse Party itself to establish his identity, e.g. measurements and description of the body, photograph, examination of the teeth, finger-prints, etc.

The examination must be such as to enable a *report* to be made. A minute must therefore be prepared, mentioning all the findings made. To it will be added the date and place of burial, together with a brief description of any ceremony which may have taken place.

The provision concludes with an injunction to the effect that one half of the double identity disc is to remain on the body. We have already referred to identity discs in connection with Article 19, paragraph 1, their purpose being to enable a body to be identified at any time. In the case of bodies buried at sea, there can be virtually no question of identification at a later date, since they are weighted and are not washed ashore. The present injunction was included mainly for reasons of unification and order, and to facilitate the task of the national information bureaux to whom the other half of the disc will be sent.

PARAGRAPH 2. — REFERENCE TO THE FIRST CONVENTION

In the case of burial on land or cremation of enemy dead who had been landed by a ship, Article 17 of the First Convention will be applicable. It reads as follows [1]:

> Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.
>
> Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.
>
> They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service,

[1] See *Commentary I*, p. 175 ff.

to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at the latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves together with particulars of the dead interred therein.

Application to civilians.—This Article, like those preceding it, will apply automatically to civilians collected dead at sea or who die while on board ship, except of course for the rules concerning the double identity disc which relate only to military personnel. Civilians may sometimes wear an identity disc, however [1]. If so, in the case of civilians of enemy nationality, the identity disc should be sent together with the other information and personal assets as referred to in Article 19 to the national information bureau established pursuant to Article 136 of the Fourth Convention.

ARTICLE 21. — APPEALS TO NEUTRAL VESSELS

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

The present Article evolved in the successive versions of the Convention drawn up from 1868 to 1949, in line with the corresponding provisions in the First Convention.

[1] Article 24 of the Fourth Convention recommends that the Parties to the conflict should issue identity discs to all children under twelve years of age.

As compared with Article 9 of the 1907 Convention, this Article contains the following changes: (*a*) a reference to the shipwrecked and the dead has been added in the first paragraph to the statement that neutral vessels may take on board wounded and sick persons; (*b*) in the second paragraph it is now specified that the provision would apply to neutral vessels of any kind; (*c*) in the same paragraph, the term " certain immunities " has been replaced by " facilities to carry out such assistance " which is more satisfactory from the legal point of view.

This provision may be compared with Article 11 of the Brussels Convention of 1910.

PARAGRAPH 1.—APPEALS TO CHARITY

The present provision is based on a fundamental principle of the Red Cross which dates back to the beginnings of that institution. Not only must a wounded, sick or shipwrecked member of the armed forces be respected; he must also be collected and cared for without delay. The task is so urgent that if the navy medical services cannot cope with it, all ships which may be in the vicinity must be asked to help. In the same way, anyone who finds a shipwrecked man can and must pick him up and give him help [1]. At sea, international fellowship is even more necessary than on land.

The provision is nevertheless optional. The Parties to the conflict *may* appeal to the charity of neutral vessels. Similarly, as will be seen from the next paragraph of the Article, such vessels are not bound to give the assistance requested. It is to be hoped, however, that whenever there are lives to be saved and suffering to be assuaged, there will be true co-operation among all concerned.

The terms employed (merchant vessels, yachts or other craft, and vessels of any kind) show that the Article refers also to warships or public vessels used for non-commercial purposes. No special mention is made of neutral warships since in any case they are not

[1] In the event of a naval engagement off the coast of a neutral country, the authorities of that country might conceivably send a hospital ship or coastal rescue craft, similar to those referred to in Article 27 in the case of belligerent countries, to assist the victims.

liable to capture and have no need of any special protection. But the spirit of the provision also applies ; there is no reason why an appeal should not be made to their charity and why they should not respond, and in fact Article 15 expressly refers to the case where shipwrecked persons are taken on board a neutral warship.

PARAGRAPH 2.—PROTECTION AND FACILITIES

As we have already seen, this rule is optional for neutral vessels. The authorities of a belligerent country may try to arouse the humanitarian feelings of those commanding such vessels, but cannot oblige them to act.

The 1864 Convention contained a somewhat sweeping statement : " The presence of any wounded combatant receiving shelter and care in a house shall ensure its protection ". Since that time, there has been a return to more realistic proportions, by referring to special protection and facilities.

The form of the protection and facilities will depend on circumstances. For instance, a safe-conduct may be issued to ships, enabling them to continue on their course without being stopped and boarded by other warships of the same nationality [1]. In no case can this protection imply the right to display the red cross emblem.

The 1949 Diplomatic Conference considered, and rightly so, that the provision should specify that the special protection and facilities mentioned were accorded " to enable ships to carry out such assistance ". Here as elsewhere, the purpose of protection is solely to improve the lot of war victims. The doctor is not protected on his own account, but on account of the treatment he gives. Similarly, no reward is due to neutral vessels which have given charitable assistance.

The necessary protection must be accorded to such vessels by all the belligerents and not merely by the belligerent which has appealed to them for assistance.

[1] When the Commission of Experts met in 1937, the International Committee of the Red Cross proposed a provision specifying that neutral vessels which had picked up shipwrecked persons should not be diverted from their course. In view of imperative military requirements which might arise, however, the suggestion was not adopted.

PARAGRAPH 3. — EXEMPTION FROM CAPTURE

This paragraph is in complement to the preceding one. If charitable vessels receive protection and facilities, all the more reason why they should not be captured while giving assistance.

Neutral merchant vessels may be captured only for violation of neutrality (giving military assistance), transporting war contraband, or for breach of blockade. Tending the sick never constitutes interference in the conflict, it is never a reprehensible act, and this brings us back to one of the fundamental principles of humanitarian law [1].

" On the other hand " wrote Louis Renault in 1899 [2] " such vessels cannot, merely on account of their charitable co-operation, escape the consequences of conduct contrary to the duties of neutrality... They must bear the normal consequences of any such act."

The Convention nevertheless makes a reservation : " in the absence of any promise to the contrary ". This phrase may seem surprising, and R. Genêt wrote recently [3] : " it is hard to imagine what kind of promises to the contrary the belligerents might give to such benevolent helpers so as to render them immune from the consequences of violation of the laws of maritime warfare ".

But Renault had already provided an answer to those objections in 1907 [4]. His statement is so curious that we shall give it in full, and it requires no additional comment : " In fact, it is a matter of a merchant vessel receiving an appeal from a belligerent ship in absolute need of immediate assistance. It might therefore be in its own interest for the warship to overlook any infringements which the merchant vessel may have committed previously and to promise, for instance, not to exercise its right to search it."

[1] See First Convention, Article 18, paragraph 3, and Article 27, paragraph 3.

[2] See *Actes* of the 1899 Conference, p. 35.

[3] See R. GENÊT, *op. cit.*, p. 64.

[4] See *Actes* of the 1907 Conference, Vol. III, p. 301.

CHAPTER III

HOSPITAL SHIPS

INTRODUCTION [1]

Many centuries before our era, the Athenian fleet included a vessel called *Therapia,* while in the Roman fleet was a ship bearing the name *Aesculapius.* Their names have been taken by some authors as indicating that they were hospital ships.

All we know with certainty is that at the beginning of the XVIIth century it became customary for naval squadrons to be accompanied by special vessels entrusted with the task of taking the wounded on board after each engagement.

It was, however, not until the second half of the XIXth century that the practice really developed. During the Crimean War, more than 100,000 sick and wounded were repatriated to England on board hospital transports. Thereafter, no military expedition was ever undertaken without the necessary ships being assigned to evacuate soldiers from the combat area and give them the medical treatment they might require.

During the First World War, hospital ships were used to an increasing extent, despite the serious disputes and grave incidents which arose between the belligerents in this regard and to which we have already referred. In most instances, passenger liners were converted for use as medical transports.

When the Second World War came, hospital ships specially designed for the purpose were built, and consequently the accommodation for patients was greatly improved. Because bases were far apart and hospitals on land in short supply in the Pacific war

[1] The information given here is mainly taken from the following: Dr. Robert M. GARRAUD : " Les hôpitaux flottants ", *Vie et Bonté,* Paris 1952 ; and Vice-Admiral GRANDCLÉMENT : " Les navires-hôpitaux ", *Revue internationale de la Croix-Rouge,* May 1938, p. 395.

theatre, the American forces brought into service ships which were really floating hospitals, able to give complete medical and surgical treatment.

By way of example, the characteristics of one such ship, in the *Haven* class, are as follows : displacement 15,000 tons, speed 17.5 knots, range 12,000 miles. The medical personnel consists of 21 doctors, 32 nurses, 238 nursing orderlies. The crew comprises 61 officers and 230 men. There is accommodation for 802 patients (for 1,000 in case of need). There are three operating theatres, with X-ray and sterilizing units as well as the necessary laboratories. Each ship can quickly set up a field hospital of 100 beds on land. Lastly, it is equipped with up-to-date hoisting apparatus which simplifies the trans-shipment of the seriously wounded—always a very difficult operation at sea.

As may be seen from the foregoing, the hospital ship serves a number of purposes. In maritime warfare, it follows at some distance behind naval squadrons and takes the wounded on board after an engagement ; in continental warfare, it is used to evacuate and transport the wounded and sick ; in " amphibious " operations, it serves as a floating hospital, replacing a hospital on land and giving complete treatment to those taken on board. Whenever possible, hospital ships are specially equipped for the type of work which they will have to perform.

ARTICLE 22. — NOTIFICATION AND PROTECTION OF MILITARY HOSPITAL SHIPS

Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.

The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

The present Article contains no great changes of substance as compared with Article 1, paragraph 1 [1], of the 1907 Convention, which in turn was taken from the corresponding provision in the 1899 Convention.

The two most important changes are, in the first place, the introduction of a stipulation that at least ten days must elapse after the notification of a hospital ship before it is put into service and, in the second place, the requirement that the notification must give not only the name of the ship but also its characteristics.

The text contains additional details in three respects. The task of a hospital ship is no longer defined as being to assist the wounded, sick and shipwrecked, but also to treat and transport them. Hospital ships are no longer required to be merely " respected " but to be " respected and protected " ; this corresponds to the traditional wording of the Geneva Conventions. It is now specified that they " may in no circumstances be attacked or captured ", whereas this was formerly merely implicit in the reference to respect.

Then there are a few modifications of form which concern only the French text. Here, as in the rest of the Convention, the word " *bâtiment* " has been replaced by " *navire* " to avoid any possible confusion. Similarly, the term " *navires-hôpitaux* " has been used throughout to indicate military hospital ships as well as private vessels, which in the earlier Conventions had been referred to as " *navires hospitaliers* ". All enjoy the same status. The difference in terminology had perhaps survived from the 1868 Draft, in which military hospital ships remained liable to capture. Some experts proposed that Articles 22, 24 and 25 should be merged into a single provision. That recommendation was not adopted, in order better to stress the difference in origin of the three categories of hospital ships [2].

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[1] Article 1, paragraph 2, of the 1907 Convention has become Article 32 of the 1949 Convention.

[2] For the origin of this Article, see *Actes* of the 1899 Conference, pp. 31-32 ; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 63 ff., 71 ff., and 108 ff.

PARAGRAPH 1. — PROTECTION AND CONDITIONS THEREFOR

1. *Protection*

This provision extends to hospital ships the immunity which Article 12 confers on the wounded, sick and shipwrecked. Hospital ships are entitled to protection regardless whether or not they are carrying victims on board. They are protected not only because they carry wounded persons, but also in their capacity as an instrument ready to assist the victims.

For the sense in which the words " respected and protected " are traditionally used, reference should be made to the comments on Article 12 [1]. Respect for such ships means first of all that they may not be attacked, harmed or impeded in any way, with the exception that certain rights expressly mentioned in Article 31 may be exercised by the belligerents—namely the right of control and search. One may therefore wonder whether it was really necessary to add here that such ships " may in no circumstances be attacked ". Be that as it may, the expression is absolutely clear and explicit. To respect such ships means, secondly, not to interfere with their work or with the accomplishment of their task. To protect them is to ensure that they are respected, that is to say to oblige third parties to respect them. It also means coming to their help in case of need. It involves " active co-operation in rescue work " [2].

Hospital ships are entitled to immunity " at all times ", in all circumstances. They will therefore be protected even if they are lying in a port where the installations may be considered to be military objectives. In such a case, however, although the hospital ship is still legally entitled to protection, in fact its security will be impaired. If the port installations were bombed, the hospital ship would also inevitably be endangered. The attacker must take every precaution in order to reduce risks to a minimum, but at the same time the commander of the ship must evaluate the danger involved and must not expose his ship more than is absolutely necessary.

[1] See above, pp. 89-90.

[2] See R. GENÊT, *op. cit.*, p. 66.

The Maritime Convention does not actually contain a provision corresponding to Article 19, paragraph 2, of the First Convention of 1949, which recommends that medical establishments should not be situated in the vicinity of military objectives ; that is undoubtedly a general principle, however, valid also at sea, all the more so because a hospital ship can move easily.

In addition to respect and protection, there is an express reference to the fact that hospital ships may not be captured, nor may they be detained for more than seven days (Article 31). This rule is absolute, more categorical than anywhere else in the Geneva Conventions in the case of the wounded, land vehicles and even medical personnel. The privilege is granted because in wartime ships are in short supply, and hospital ships even more so. It would have been a very serious blow to the victims of conflicts to allow such floating hospitals to be taken out of service.

Although hospital ships (Articles 22, 24 and 25) make up the largest single class of vessel protected by the Geneva Conventions, they are not the only ones to which immunity is accorded. Lifeboats of hospital ships (Article 26), coastal rescue craft (Article 27) and small craft used by the Medical Service (Article 43, paragraph 3) are also entitled to protection. In addition the International Committee of the Red Cross might have occasion to operate ships carrying out humanitarian tasks [1]. Similarly, the Fourth Geneva Convention affords protection to vessels conveying wounded and sick civilians [1].

2. *Conditions for protection*

There are two conditions for according immunity to hospital ships : they must be intended solely for use in that capacity, and their name and characteristics must have been duly notified [2].

A. *Exclusive use.*—This condition is stated in the present Article in the form of a definition of hospital ships. In order to be entitled to protection under the Convention, they must have been " built

[1] See below, p. 228.

[2] In addition, marking should be mentioned, pursuant to Article 43, and the reader should refer to the commentary on that provision. Further, Article 34 indicates the possible causes for discontinuance of protection.

or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them ". This provision is supplemented by Article 33, which specifies that merchant vessels which have been transformed into hospital ships may not be put to any other use throughout the duration of hostilities. Thus, the States are free to prepare hospital ships for service as they wish—either by building them for that particular purpose or by converting other vessels, such as passenger liners ; nor are they restricted as to the type of vessel. But in return for the complete immunity granted to such ships, they must be solely and definitively assigned to service as hospital ships. There is some analogy between this rule and those governing the status of medical personnel of the armed forces, who must be exclusively employed on their own particular duties. The charitable mission of hospital ships must therefore be entire, obvious and durable so that their unimpaired status may be assured. It was in order to prevent any possible abuse that improvised and temporary transformation was excluded.

There was lengthy discussion at the Diplomatic Conference as to whether or not a minimum tonnage should be specified for hospital ships entitled to protection. It was finally decided not to include such a requirement, but Article 26 remains and the reader should refer to the commentary on that provision. The very notion of a " hospital ship ", the wording used and the characteristics mentioned—all these indicate that the Article concerns vessels of some size, for otherwise " small craft used by the Medical Service " would be involved, and provision is made for the latter in Article 43.

The charitable mission of hospital ships has been better defined. In addition to " assisting " the wounded, sick and shipwrecked [1], it also involves " treating " them—i.e. giving them medical care—and " transporting " them ; the latter reference was inserted following a suggestion made by the International Committee of the Red Cross in 1937. In the earlier Conventions, these notions were implied in the general term of " assisting " the wounded, sick and shipwrecked.

[1] Article 30 of the present Convention defines the task of a hospital ship as being to afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.

In order to be recognized as such, must a hospital ship have all the installations and equipment necessary for the accomplishment of these three duties ? We would be inclined to reply in the negative, and we do not believe that such was the intention of the plenipotentiaries at the 1949 Diplomatic Conference, any more than they intended the enumeration to be restrictive. And yet the Rapporteur of Committee I states quite categorically : " It is not sufficient for the vessel in question to be merely capable of rescue operations. It must be so equipped that it is in a position to care for and transport the wounded, sick and shipwrecked. A very clear distinction is therefore drawn between hospital ships and lifeboats " [1].

We do not consider the problem as being of very great importance here. In practice, one cannot imagine a hospital ship treating wounded or sick persons without being able to transport them, or transporting men who by definition are in need of virtually constant attention without being able to give them treatment at least of a summary nature. The three duties listed—namely to assist, treat and transport the victims—constitute the special mission of hospital ships. As for determining whether or not a vessel is actually a hospital ship, that is a matter of common sense and good faith.

The extension now afforded by Article 13, paragraph (5), means that hospital ships may now carry sick, wounded or shipwrecked members of the merchant marine as well as those belonging to the armed forces [2].

B. *Notification.*—The name and characteristics of a hospital ship must be notified to the Parties to the conflict ten days before it is put into service. This is a new rule. At the Stockholm Conference, the experts had proposed a time-limit of thirty days, but at the suggestion of the International Committee of the Red Cross

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 202.

[2] That was in fact the practice during the Second World War (see TUCKER : *op. cit.*, p. 119). Moreover, a hospital ship will not be deprived of protection if it transports sick civilians. See the commentary on Article 35 (4), p. 196 below.

it was reduced to ten days. This period should suffice, in view of the means of rapid communication now available.

The time-limit was introduced in order to guarantee the security of hospital ships. The belligerent Powers must have time to advise their armed forces everywhere, including even the most remote stations. The commissioning of a hospital ship is an important event, and as we have seen above, it cannot be improvised. Furthermore, there is no reason why the notification should not be sent when the ship is nearing completion, so that not a single day need be lost.

If the notification is made during hostilities, it will usually be through the intermediary of the Protecting Power. And although the Convention does not say so, it would also be advisable to notify neutral countries, since hospital ships may have occasion to put into a neutral port.

If the notification is made in peace-time [1], it can be sent direct by the State concerned to all the other Powers party to the Convention. In that case, it would be desirable, by way of precaution, to confirm earlier notifications at the opening of hostilities.

Since the signature of the 1949 texts, the Belgian Government has proposed, at the suggestion of a Norwegian ship-owner, Mr. Paust (who was Chairman of the International Conference of Lifeboat Organizations in 1947), that the International Committee of the Red Cross should be asked to centralize information regarding the characteristics of rescue craft, and to send periodic notifications to the States bound by the Geneva Conventions. Certain States have suggested that the procedure should be extended to hospital ships. The International Committee of the Red Cross has indicated that it would be prepared to take on that duty if the majority of States so desired. Switzerland, as depositary of the Geneva Conventions, has conducted consultations on the matter but the results have not hitherto proved sufficiently conclusive for any decision to be taken, and the question remains open [2].

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[1] Although the Convention refers to " Parties *to the conflict* ", the validity of a notification sent before the commencement of a conflict cannot be disputed, as the purpose is fully achieved.

[2] For further details, see Gilbert GIDEL : " La protection des embarcations de sauvetage ", *Revue internationale de la Croix-Rouge*, September 1955.

The 1907 text required notification only of the names of hospital ships. In 1949, on a proposal by the United Kingdom and Denmark, it was wisely decided to add a reference to the characteristics [1]. We shall consider what they comprise.

PARAGRAPH 2. — CHARACTERISTICS

Under this paragraph, the characteristics to be included in the notification are the registered gross tonnage, the length from stem to stern and the number of masts and funnels.

There is, of course, no reason why a fuller description may not be given. It seems to us highly desirable that a ship's silhouette should be included in the notification for it is the best means of identification and is widely used in the navy. This would illustrate and supplement the characteristics enumerated in the Convention.

As regards the indication of tonnage, it should be briefly noted that warships are described in terms of displacement tonnage (i.e. weight), while in the case of merchant vessels what is always referred to is the " registered tonnage ", i.e. the usable volume of the ship, one ton being equivalent to 100 cubic feet (2.83 cubic metres). The " registered gross weight " corresponds to the whole volume of the ship ; the " registered net weight " is that volume less the volume taken up by the engines, crew's quarters, supplies of fuel, food, water, and so forth.

In this respect, hospital ships are considered like merchant vessels, the determining factor being the hospital accommodation in them.

ARTICLE 23. — PROTECTION OF MEDICAL ESTABLISHMENTS ASHORE

Establishments ashore entitled to the protection 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, shall be protected from bombardment or attack from the sea.

[1] Whereas the English text speaks of " descriptions " in paragraph 1 and " characteristics " in paragraph 2, the French text (which is equally authentic) uses the word " *caractéristiques* " in both places.

This provision, which was introduced by the Diplomatic Conference of 1949, should be read in conjunction with Article 20 of the First Geneva Convention of 1949, which is also new and its exact counterpart. The latter Article lays down that hospital ships are not to be attacked from the land.

These provisions may appear surprising and superfluous at first sight. For it is obvious that the undertaking given by the Powers to protect medical establishments on land, under the First Convention, is general and absolute in character and applies as much to artillery of the naval forces as to that of the land forces or aircraft. Article 1 specifies that the Convention is applicable " in all circumstances ". In the same way, the Second Convention undoubtedly protects hospital ships against all attacks, whether from sea, land or air [1]. One might also invoke the Ninth Hague Convention of 1907 respecting bombardment by naval forces in time of war.

The only value of the above Articles is therefore as a reminder ; as such, they are useful. Article 23 should be read in conjunction with Article 4, to which it is a supplementary provision, and the reader should refer to the commentary on that Article. It provides that in case of hostilities between land and naval forces, the Maritime Convention will apply only to forces on board ship, while forces put ashore will be subject to the First Convention. Each Convention therefore seems to have its own field of application : one on land and the other at sea. The purpose of the present Article is, so to speak, to link up the two fields of application, and make provision for any overlapping.

From the practical point of view, some experts expressed the fear—which it is to be hoped will prove unjustified—that certain members of the land forces might be conversant only with the First Convention, and that certain members of naval forces might only know the terms of the Second. That might lead to serious consequences in the event of amphibious operations. Article 23 is therefore a precautionary measure.

[1] The English text states that medical establishments ashore " shall be *protected* from bombardment or attack ". This must obviously be taken as prohibiting attack, and not as an obligation to afford protection. Article 20 of the First Convention states : " *Hospital ships*... shall *not be attacked from the land* ", and that wording is more satisfactory.

There is one other provision of the present Convention which affords protection to installations on land, namely Article 27, paragraph 2, and reference should be made to the commentary thereon.

ARTICLE 24. — HOSPITAL SHIPS UTILIZED BY RELIEF SOCIETIES AND PRIVATE INDIVIDUALS OF I. PARTIES TO THE CONFLICT

Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships and shall be exempt from capture, if the Party to the conflict on which they depend has given them an official commission and in so far as the provisions of Article 22 concerning notification have been complied with.

These ships must be provided with certificates of the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.

PARAGRAPH 1. — ASSIMILATION TO HOSPITAL SHIPS

Whereas Article 22 deals with official hospital ships belonging to the Medical Service of the naval forces, the present Article and Article 25 refer to hospital ships utilized by private relief societies (the so-called voluntary aid societies) which have undertaken to assist the Medical Service of the armed forces, and also to hospital ships owned by private persons. When such vessels belong to one of the Parties to the conflict, the present Article is applicable ; if they belong to a neutral country, then Article 25 is the relevant provision.

Officially recognized relief societies can assist the Medical Service by making available medical units on land [1], and they can also help by sending a hospital ship. The Maritime Convention differs from the First Convention in that it even provides for the

[1] See Article 26 of the First Convention and the commentary on that provision.

assistance which a private person can give ; the drafters had in mind generous owners of pleasure-craft who might convert them into hospital ships to assist war victims.

The 1907 Convention, like the Geneva Convention of 1929, spoke only of " officially recognized relief societies ". The term naturally included the National Red Cross Societies which are by far the most important among the societies assisting the Medical Service. They were not specifically named, however, and the 1949 Diplomatic Conference repaired that omission.

The National Red Cross Societies are not the only societies assisting Medical Services. Others exist in various countries and more may be created.

Among such societies, the oldest are the Knights of Malta and the Order of St. John of Jerusalem. Consequently, Article 24 mentions other " officially recognized relief societies " in addition to the Red Cross Societies, and places them both on the same footing. Such societies must therefore have been duly recognized by the Government of their country and authorized to assist the Medical Service of the armed forces.

The 1907 Convention mentioned " hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies ". The present text speaks merely of " hospital ships utilized by... ". Since 1937, it had been recognized that it made no difference who had actually financed the fitting out of hospital ships and similarly that the matter of ownership was immaterial. It is sufficient for them to be at the disposal of the societies.

Hospital ships of relief societies or private persons are eligible for the same treatment and receive the same protection as military hospital ships. They were naturally made subject to the new conditions for protection specified in Article 22, to which Article 24 refers expressly. The comments already made on Article 22 are therefore equally valid in the present instance, and we shall not repeat them here, but shall merely point out that the Government of the belligerent country to which the hospital ship is giving assistance is responsible for sending the notification.

In addition to the conditions laid down in Article 22, two further requirements are applicable to hospital ships utilized by

relief societies and private individuals : they must have been given an official commission and must be provided with control certificates. In view of the fact that such vessels are supplied by private institutions, additional safeguards were considered necessary.

The hospital ship must have received an official commission from the Party to the conflict on which it depends, that is to say an authorization by that State for the ship to be put into service. The authorization is usually in the form of a separate document, but a notation in the ship's log might be considered sufficient. The second additional condition is referred to in the next paragraph.

PARAGRAPH 2. — CONTROL CERTIFICATE

Ever since 1899, in addition to the official commission, the Maritime Convention has required a document issued by the appropriate authorities and certifying that the vessel concerned has been under their control while fitting out and on departure.

One may ask whether such a certificate does not duplicate [1] the official commission and whether it is really necessary. Be that as it may, the requirement is laid down in the Convention and must be respected now as in the past.

" Fitting out " means equipping a vessel with all the necessary equipment and instruments for it to sail.

" Departure " obviously means " first departure " or " putting into service ". There could be no question of making a check of the ship each time it has to put to sea. In the 1899 and 1907 Conventions, the term " final departure " was used. The word " final " was deleted during the preparatory studies (at Stockholm in 1948), for it was misplaced and even contradictory in this context ; it did not qualify " departure ", but merely meant : following completion of fitting out. What matters is that the hospital ship should be examined by the responsible authorities as soon as it is

[1] R. GENÊT states : " It is obvious that an officially commissioned ship will not put to sea until the authorities on which it depends have verified scrupulously that all the relevant requirements have been met." (*Op. cit.*, p. 69.)

ready to be put into service, once all work connected with construction or equipment has been completed. The expression " while fitting out and on departure " must be taken as a whole.

ARTICLE 25. — HOSPITAL SHIPS UTILIZED BY RELIEF SOCIETIES AND PRIVATE INDIVIDUALS OF II. NEUTRAL COUNTRIES

Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own Governments and with the authorization of the Party to the conflict concerned, in so far as the provisions of Article 22 concerning notification have been complied with.

This Article applies, like the preceding one, to hospital ships utilized by private relief societies and assisting the Medical Service of the armed forces, and also to those belonging to private individuals. In this instance, however, such societies or private individuals belong to a neutral country.

The present Article makes provision in the case of war at sea for what has been referred to as " neutral voluntary assistance " in the Commentary on the First Geneva Convention, to which reference should be made [1]. The National Red Cross Societies, other officially recognized relief societies [2] or even private individuals in neutral countries can give assistance to the Medical Service of one of the belligerents by making a hospital ship available.

Such hospital ships giving neutral assistance are entitled to the same protection as other hospital ships, and the reader should therefore refer to the commentary on Article 22.

Two of the conditions for protection are the same as in the case of all other hospital ships: namely, they must be used for no other purpose, and they must be notified. As regards the latter

[1] See *Commentary I*, p. 230 ff.

[2] See above, the commentary on Article 24.

condition, the provision refers back to Article 22, and the commentary on that Article should therefore be consulted.

Two other conditions, however, are rather different. There is no reference to an official commission or a control certificate as in the case of the ships to which Article 24 applies. The present provision states that such hospital ships must be placed under the control of one of the Parties to the conflict, with the authorization of that Party and with the previous consent of their own Governments. This calls for a brief historical account.

Under the Third Hague Convention of 1899, hospital ships giving neutral assistance had retained a very special status. They depended only on their Power of origin. One might say that they were considered as " charitable privateers " and as such needed to remain fully independent, able to give assistance wherever they thought fit, even, for example, passing from one camp to the other. It was considered contrary to the notion of neutrality that they should submit to the authority of one of the belligerents. The Powers at war had authority over such ships only through Article 4 (Article 31 of the present Convention) [1].

When the 1907 revision was drawn up, that arrangement had not been tried out in practice, and the contrary opinion was adopted. Consistently with the rules laid down for medical units ashore giving neutral assistance, it was specified that neutral hospital ships must in future be placed under the control of one of the Parties to the conflict. They are thus incorporated, as it were, in the navy of that belligerent, which will decide on its own responsibility what use shall be made of the hospital ship [2].

This solution seems the only one consistent with the needs of a unified command, the maintenance of discipline, and sound administration, as well as with the guarantees of security which military operations demand.

The hospital ship must therefore opt for one or other of the opposing sides ; once this has been done, it will in no way prevent the ship from rescuing and treating without regard to nationality or any other form of discrimination the wounded and shipwrecked

[1] See *Actes* of the 1899 Conference, p. 33.

[2] See *Actes* of the 1907 Conference, Vol. III, pp. 293-296.

in need of assistance, in accordance with the cardinal principle of the Red Cross and the Geneva Conventions.

The text of the present Article reproduces that contained in the 1907 Convention, and it gave rise to no discussion at the 1949 Diplomatic Conference.

Permission must still be obtained from two sources before a neutral hospital ship can be put into service for one of the Parties to the conflict : the country of origin and the belligerent concerned must both give their consent. It could not be otherwise. These authorizations must obviously be included in the notification to be sent to the Parties to the conflict in time of war, and to all the contracting States in time of peace [1]. They will also be recorded in the ship's log. As already stated in connection with Article 24, the Government of the belligerent State under whose authority the hospital ship has been placed will be responsible for sending the notification.

In conclusion, we wish to point out that the principle set forth in Article 27, paragraph 3, of the First Convention is equally valid here, because of its general character. It specifies that in no circumstances may the assistance given to a belligerent by a neutral Society be considered as interference in the conflict, that is to say as participation in the hostilities or as a breach of neutrality [2].

ARTICLE 26. — TONNAGE

The protection mentioned in Articles 22, 24 and 25 shall apply to hospital ships of any tonnage and to their lifeboats, wherever they are operating. Nevertheless, to ensure the maximum comfort and security, the Parties to the conflict shall endeavour to utilize, for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross.

This is a new provision.

After the Second World War, when the revision of the humanitarian Conventions was under study, the International Committee

[1] The notification sent by the neutral country when the hospital ship was brought into service by it is obviously not sufficient.

[2] See *Commentary I*, pp. 232-233.

of the Red Cross drew the attention of the experts to disputes which had arisen between belligerents regarding the tonnage of hospital ships. In 1940, for instance, Great Britain refused to recognize as hospital ships sixty-four small vessels which Germany proposed to use in the Channel to search for airmen who had come down at sea. Great Britain announced that for reasons of military security it would not recognize hospital ships of less than 3,000 tons ; it was facing the enemy across a narrow stretch of water, invasion seemed imminent, and Great Britain considered that it could not permit rapid small craft to operate in the vicinity of its coast [1].

At the preliminary conferences and then at the 1949 Diplomatic Conference, experts from a number of countries proposed that the Convention should set a minimum tonnage below which hospital ships would not be protected ; the figures suggested ranged from 1,000 to 6,000 tons, and 2,000 was finally adopted as a criterion. The arguments for and against the idea were briefly as follows [2]. Some delegations pointed out that hospital ships should be as large as possible to ensure the necessary comfort and proper care for the wounded ; moreover, it would be easier to identify large ships, their distinctive markings would be more clearly visible and thus they would be afforded greater security. Other delegations, in particular those of the Scandinavian countries, stressed in reply that if a minimum tonnage was set, the small countries would be virtually deprived of hospital ships, since they would be unable to assign large ships for the purpose, and moreover such vessels would be unsuitable for use along coasts studded with islands where the water was shallow.

After lengthy discussion, the Conference abandoned the idea of setting a compulsory limit, but Article 26 reflects the concern of the experts, and contains a simple recommendation ; in order to ensure the maximum comfort and security, the Parties to the conflict are asked to endeavour to utilize, for the transport of wounded over long distances and on the high seas, only hospital ships of over 2,000 tons gross [3].

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[1] See OPPENHEIM-LAUTERPACHT : *op. cit.*, Vol. II, p. 503.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 63, 71, 108, 145 and 202.

[3] As regards the assessment of tonnage, see above, p. 162.

The purpose of the provision is thus to afford additional guarantees of security to hospital ships, but the legal protection to which they are entitled remains full and complete regardless of their tonnage and wherever they are operating, as specified in Article 26.

They must still be " hospital ships " in the true sense of the two components of the term [1]. Vessels below a certain size are only small craft used by the Medical Service, for which special provision is made in Article 43. As we have already said in connection with Article 22, the determination as to what a hospital ship is must be a question of common sense and good faith.

Article 26 also affords protection to lifeboats belonging to hospital ships ; such protection was provided only indirectly in the 1907 Convention, in Article 5, paragraph 3, relating to marking.

ARTICLE 27. — COASTAL RESCUE CRAFT

Under the same conditions as those provided for in Articles 22 and 24, small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.

The same shall apply so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions.

PARAGRAPH 1. — RESCUE CRAFT

Most of this Article is new. The Tenth Convention of The Hague of 1907 ensured some protection for " small craft which may be used for hospital work ", but the reference appeared only in Article 5, paragraph 3, concerning the distinctive marking, which is rather odd, to say the least of it. One might also mention Article 4 of the Eleventh Convention of The Hague of 1907, which provided that vessels charged with philanthropic missions were exempt from capture.

[1] In this connection, see the statement by the Rapporteur of Committee I at the 1949 Diplomatic Conference (*Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 202).

At the 1948 Stockholm Conference, thanks to the efforts of the various sea rescue organizations [1], it was acknowledged that coastal rescue must be afforded adequate protection through appropriate regulations. In many countries, and in particular the Scandinavian countries where off-shore fishing is on a large scale, such craft are of great importance from the humanitarian point of view.

The new Article 27 was drawn up by the Diplomatic Conference on the basis of the text proposed by the Stockholm Conference, and it was discussed in close conjunction with Articles 22, 24 and 26 [2].

Coastal rescue craft must be respected and protected in the same way as hospital ships, wherever they are operating. Article 30 refers to their use, and the commentary on that provision should be consulted. The protection is not absolute, however ; it is afforded " so far as operational requirements permit ". This wording was used in order to take account of the risks incurred by such craft, because of their small size, in a zone of military operations. The limitation also has regard to past events and to the requirements of military security [3]. Thus, although lifeboats may in practice be exposed to certain risks, a belligerent which has recognized them will never be allowed to make a deliberate attack on them, unless they have committed a grave breach of neutrality. Reference should be made to the commentary on Article 30, paragraph 4, in this regard.

In order to be entitled to immunity, small craft must fulfil certain conditions. First, they must be utilized by the State or by officially recognized lifeboat institutions. As regards the status and duties of such institutions, the reader should refer back to the commentary on Article 24 [4]. In the case in question, it is clear from the English text that the lifeboat institutions are not required to be officially recognized solely for coastal rescue work.

It should not be inferred from the reference in Article 27 to Article 22 that rescue craft should in wartime be solely, or at

[1] See Gilbert GIDEL : " La protection des embarcations de sauvetage ", *Revue internationale de la Croix-Rouge*, September 1955.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 71, 108, 152 and 202.

[3] See above, p. 170.

[4] See above, p. 164 ff.

least principally, used for assisting shipwrecked military personnel. Article 27 mentions " coastal rescue operations " in general. Moreover, the purpose of the provision is to enable relief societies to continue their charitable work even in time of conflict, though it will more often be for the benefit of civilians. The present Article is therefore applicable to rescue craft for the assistance of victims who may be military personnel, or civilians, or both, according to circumstances.

The expression " coastal rescue operations " does not mean that the small craft concerned may operate only near the coast. If humanitarian considerations obliged a small craft to go to a point some considerable distance from the coast, it would none the less remain protected. This is obvious from Articles 30 and 31, which will be referred to later.

It was proposed at Stockholm in 1948 that vessels used by private persons should also be protected ; that idea was dropped in 1949, as it would have opened the way for abuse, in the absence of any proper control. One can well conceive that the owners of small pleasure craft might describe them as rescue craft in order to keep them safe. All desirable guarantees would seem to be afforded if such craft are employed by the State or by relief societies.

There is a further requirement—namely, that the conditions provided for in Articles 22 and 24 (relating to hospital ships) must be observed. That means that the names and characteristics of such small craft must be notified to the Parties to the conflict at least ten days before they are employed in war-time ; furthermore, small craft utilized by relief societies must also have been given an official commission and must be provided with certificates of the responsible authorities, stating that they have been under proper control. For further details, the reader may refer to the commentary on Articles 22 and 24 [1].

As regards the centralization of descriptions of rescue craft and periodic notification to the Powers, the reader should refer to the commentary on Article 22 [2].

At Stockholm and subsequently at Geneva, a number of delegations proposed that protection under the Convention should be

[1] See above, p. 155 and p. 164.
[2] See above, p. 155.

granted only to slow craft, i.e. of a speed not exceeding twelve knots. The intention was to prevent any possible abuse, such as their use for military reconnaissance. The Diplomatic Conference was not persuaded by such arguments, but considered that it was in the interest of the wounded and shipwrecked to be rescued and landed as rapidly as possible.

Lastly, rescue craft must be marked, and this will be referred to again in connection with Article 43 [1].

As regards the status and protection of the crews of such craft, the reader should refer to the relevant passage in the commentary on Article 36 [2].

Paragraph 2. — Installations on Land

This provision was drawn up at the Diplomatic Conference, as a consequence of the preceding paragraph. The services which rescue craft are supposed to provide would be jeopardized if they could be deprived of their fixed bases ashore. Prior to the 1949 Convention, the Ninth Convention of The Hague of 1907 might have been invoked in this connection.

What do such installations comprise in practice ? They may consist of medical establishments (first-aid stations, stores of medical supplies, etc.) and buildings and the like used for technical purposes (boat-houses, repair workshops, fuel dumps, etc.).

Under the present Article, such coastal installations must be protected " so far as possible ". This phrase is never very welcome in a Convention because of its vagueness and is similar to that mentioned above, in paragraph 1 : " so far as operational requirements permit ". It was introduced partly for the same reason, namely the difficulty of identifying small establishments in the event of operations directed against a point on the coast.

Protection is naturally valid as regards land or air forces [3] just as in the case of naval forces, and whether in the case of an

[1] See below, p. 243.

[2] See below, p. 205.

[3] Whenever attention is given to the possibility of revising the First Convention of 1949, it would be appropriate to insert in it a reference to coastal installations of this kind.

attacking or an occupying Power. In this regard, reference should be made to the commentary on Article 23.

Protection is dependent on an obvious condition—namely, that the coastal installations concerned must be used exclusively by rescue craft for their humanitarian missions. It is a cardinal principle of the Geneva Convention that immunity is granted only to those who observe strict neutrality.

We shall examine the problem of marking coastal installations in the commentary on Article 43 [1].

ARTICLE 28. — PROTECTION OF SICK-BAYS

Should fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible. Sick-bays and their equipment shall remain subject to the laws of warfare, but may not be diverted from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after ensuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity.

This Article is taken from Article 7 of the 1907 text, with a few minor modifications as to form. It did not give rise to any discussion at the 1949 Diplomatic Conference.

Although included in the Chapter entitled "Hospital Ships", the present provision in no way relates to them. It deals with respect for the sick-bays on warships and with the fate of equipment therein.

A. *Respect for sick-bays.*—At the 1907 Conference at The Hague, the Rapporteur, Louis Renault, explained that " this Article constitutes the application to war at sea of the principles contained in Articles 6 and 15 of the 1906 Geneva Convention. It can apply only in the case of fighting on board, which is very rare in naval warfare nowadays. The provision is self-explanatory." The Article was then adopted without discussion [2].

[1] See below, p. 244.

[2] See *Actes* of the 1907 Conference, Vol. III, p. 300.

The above remarks apply mainly to the first sentence of the Article. Fifty years later, there is little to add except perhaps that the possibility of boarding has become still more unlikely.

The experts who met in 1937 and 1947 acknowledged that the provision was somewhat obsolete, but decided that it should be maintained, in order to conform to the First Convention, and since the stipulation was in no way objectionable. In fact, it expresses a general principle of the Geneva Conventions : all installations devoted to tending the wounded must be respected.

The reader should also refer to the commentary on Articles 34 and 35 which deal in part with sick-bays of vessels.

B. *Equipment.*—On the other hand, the two remaining sentences of the Article are fully justified, since they concern the fate of sick-bay equipment following the capture of a vessel, and there is nothing outdated about this possibility.

Here the provision must be compared with Article 33 of the First Convention, and the commentary on that clause should be referred to. The wording corresponds to that of paragraph 2.

As in the case of fixed medical establishments of land forces and the equipment of such establishments, sick-bays and their equipment " shall remain subject to the laws of warfare ".

On this point as on others, the Convention limits itself in part to a reference to the laws of war in force under other provisions of international law. In general, recourse to such references is justified, since the laws of war may change.

We are not called upon here to comment on the laws of war, except those contained in the Geneva Conventions themselves. It will suffice to recall those rules very briefly. In the present case of warships, the question is a simple one : ships belonging to the enemy armed forces together with their contents are liable to be destroyed or to be captured forthwith, without any other formalities [1].

Thus, the rather euphemistic statement that the sick-bays of warships and the equipment therein will remain subject to the

[1] See FAUCHILLE, *op. cit.*, paragraph 1322 ; see also OPPENHEIM-LAUTERPACHT, *op. cit.*, II, p. 476.

laws of warfare simply means that the captor will be at liberty to take whatever action he thinks fit in regard to them.

The present Article refers to the application of the laws of war, but there is an important limitation : sick-bays and their equipment " may not be diverted from their purpose so long as they are required for the wounded and sick ". In other words, the captor may not make use of them so long as the interests of the wounded and sick nursed there demand that he should not do so.

In accordance with an accepted principle of international law, this humanitarian ruling—which recurs several times in the Geneva Conventions—is in turn subject to the exception of urgent military necessity. If tactical considerations demand that a sick-bay be used for another purpose or that the vessel be destroyed, they will be imperative. But here we find a further exception : before resorting to such a measure, the belligerent must first make arrangements for the safety and welfare of the wounded and sick nursed in the sick-bay, in other words must have them transferred to another vessel with adequate equipment and installations for them to be given the treatment and accommodation which their condition requires [1].

Thus, by a succession of alternate compromises, a balance can be found between military needs and the dictates of humanity.

ARTICLE 29. — HOSPITAL SHIPS IN OCCUPIED PORTS

Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port.

This Article is new. It was proposed by the Netherlands Delegation at the Stockholm Conference in 1948, and was adopted with hardly any discussion at the 1949 Diplomatic Conference. One delegate proposed omitting the provision, on the grounds that it was only a simple statement of established practice, but in reply the Netherlands representative pointed out, on the basis of the experience of the Second World War, that the Article was intended

[1] Here the English text " ensuring the proper care " is more satisfactory than the French : " *assurer le sort des blessés* ".

to prevent a belligerent from claiming the right to seize a hospital ship found in a port occupied by its forces, pursuant to Article 53 of the Regulations annexed to the Fourth Convention of The Hague of 1907 [1].

It nevertheless seems to us that the Article is purely expletive. Article 22 provides hospital ships with absolute protection, valid everywhere in all circumstances, from armed forces ashore as well as naval forces. A hospital ship is exempt from capture or seizure in a port just as in the territorial sea or on the high seas. It may be called upon to proceed to an enemy port ; it will be free to leave it again. It may be obliged to go there by the adverse Party, but the latter may not detain it for more than seven days, and then only if the gravity of circumstances so requires, pursuant to Article 31. Why should the situation be different when a port is occupied while a hospital ship is there ? If such an incident occurred during the last war, then a breach of the 1907 Convention was committed. In addition, the 1949 Convention also states, in Article 2, paragraph 2, that " the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party " [2].

This being said, the provision can certainly do no harm. The Geneva Conventions contain many provisions which merely serve to make the general principle more explicit and precise.

ARTICLE 30. — EMPLOYMENT OF HOSPITAL SHIPS AND SMALL CRAFT

The vessels described in Articles 22, 24, 25 and 27 shall afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.

The High Contracting Parties undertake not to use these vessels for any military purpose.

Such vessels shall in no wise hamper the movements of the combatants.

During and after an engagement, they will act at their own risk.

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[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 73.

[2] See above, p. 28.

This Article corresponds to the first four paragraphs of Article 4 of the Tenth Hague Convention of 1907 ; the last two paragraphs of that Article have been embodied in Article 31 of the present Convention. The text is almost identical to that of 1907, 1899 and even 1868. Through the reference to Article 27, however, it no longer applies only to hospital ships, but also to coastal rescue craft. At the various Diplomatic Conferences, this provision has not given rise to any noteworthy discussion.

Paragraph 1, relating to the charitable mission of hospital ships and rescue craft, is explicit and merely serves as a reminder of the ideas already expressed in Articles 12 and 22. The reader should therefore refer to the commentary on those provisions.

One remark is called for: the great principle of " non-discrimination " is stated here in the concise wording used in earlier Conventions. Only the criterion of nationality is mentioned, but the other similar distinctions mentioned in Article 12 are certainly also forbidden here.

Paragraph 2 is self-explanatory. In return for the immunity which they enjoy, hospital ships must refrain from participating in any way in the armed conflict or war effort. This refers to acts even more serious than the " acts harmful to the enemy " referred to in Articles 34 and 35 [1]. What sanction is applied if a hospital ship commits a flagrant violation of its neutral status ? It simply loses its right to protection.

Paragraph 3 does not call for much comment. During an engagement, hospital ships must not hamper the movements of other vessels, and the authors might have added that they must not get in the line of fire. Any deliberate breach of the present

[1] By way of example, two cases well known in doctrine may be cited : (1) During the Russo-Japanese war, the Russian hospital ship *Orel* was condemned by a Japanese prize court for having transported able-bodied prisoners of war and military equipment. (2) During the First World War, the German hospital ship *Ophelia* was convicted by a British court of having carried signalling equipment (lamps and rockets) without adequate justification for doing so. It had also thrown documents overboard and sent a message in code just before being boarded. (See HURST and BRAY, Vol. II, *Russian and Japanese Prize Cases*, 1912-1913, p. 354 ; PITT COBBETT, *Cases on International Law*, Vol. II, London 1937, pp. 164, 224-226 ; *American Journal of International Law*, 1916, p. 653 ff.).

provision would constitute an act harmful to the enemy, in the sense of Article 34, and the hospital ship committing it would then lose its right to protection under the Convention, according to the procedure laid down in that clause. If, on the other hand, it had not acted with intent, the case would then be very close to that dealt with in the following paragraph, which should be referred to. The hospital ship would not lose its right to protection, but it would in fact be deprived of security.

Paragraph 4 specifies that during and after an engagement, hospital ships will act at their own risk. To act means to advance into the combat area in order to give assistance to the victims. As has already been pointed out, and rightly so [1], " after " an engagement means " immediately after ", that is to say when danger may still be present, in particular when there may be mines laid by the combatants. Otherwise the expression would be absurd.

Even if hospital ships do not hamper the combatants, in the sense of the preceding paragraph, they may be hit accidentally by shots wide of the mark.

In 1937, the question was raised as to whether a hospital ship should not waive the protection of the Convention when being escorted by warships since it would then no longer be possible to stop and search it. In fact, that was the position taken by certain countries during the Second World War [2]. A hospital ship is obviously bound to lose its immunity under the Convention if it is being escorted by warships [3], except when the escort vessels are minesweepers in order to ensure a safe passage. One would, however, have to be able to prove the fact conclusively, which would most often be impossible. In the course of their duties, hospital ships are often obliged to get in touch with warships, and one of their tasks is to follow naval squadrons. It would be

[1] See Julius STONE : *Legal Controls of International Conflict*, p. 676, note 69.

[2] See MOSSOP : *op. cit.* ; see also the case of the hospital ship *America-Maru*, in B. H. BRITTIN : *International Law for Sea-going Officers*, U.S. Naval Institute, Annapolis, 1956, par. 1025.

[3] Which does not mean that the humanitarian principles would not be applied in such a case, or that one would be justified in deliberately firing on the hospital ship.

difficult to determine objectively whether a hospital ship was accompanying warships or was being escorted by them.

On the basis of the opinion expressed by the experts in 1937, one may therefore formulate the following principle as being necessary and sufficient to solve this problem and any others which may arise in connection with the interpretation of the present paragraph : if hospital ships draw near to warships, they do not lose the protection of the Convention but they may in fact expose themselves to danger.

The expression " act at their own risk " must be understood in that sense. In such a case, the enemy would never be authorized to fire deliberately on a hospital ship, but the latter must take the responsibility for any damage which it may incur accidentally.

ARTICLE 31. — RIGHT OF CONTROL AND SEARCH

The Parties to the conflict shall have the right to control and search the vessels mentioned in Articles 22, 24, 25 and 27. They can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.

They may put a commissioner temporarily on board whose sole task shall be to see that orders given in virtue of the provisions of the preceding paragraph are carried out.

As far as possible, the Parties to the conflict shall enter in the log of the hospital ship, in a language he can understand, the orders they have given the captain of the vessel.

Parties to the conflict may, either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention.

This provision dates back to the 1868 Draft ; it was subsequently expanded in 1907 (Article 4, paragraphs 5 and 6) and 1949. The principal changes made by the 1949 Conference are the following : the reference to Article 27 means that the provision

applies not only to hospital ships but also to coastal rescue craft: the belligerents are now authorized to control telecommunication by hospital ships; the right to detain a hospital ship has been limited to a period of seven days; the task of a commissioner who may be put on board has been defined; and a new paragraph permits the belligerents to put neutral observers on board hospital ships.

PARAGRAPH 1. — EXERCISE OF CONTROL

In the preceding Article, the Powers have undertaken not to use hospital ships and rescue craft for any military purpose. They must be able to assure themselves that this is indeed the case, to take practical precautions on occasion and, since hospital ships can move about freely because of their duties and their immunity, the Powers must, if necessary, be able to ensure that no secret information regarding military operations will be divulged by the crew.

The States are given five means of exercising such control: they may search a hospital ship, give it certain orders, control the use of telecommunication, detain it, or put a commissioner on board. The last of these means is provided for in paragraph 2.

A. *Search.*—The inspectors belonging to the adverse Party may make a thorough search of the hospital ship, examine its equipment and supplies, verify lists of patients, check the identity of the crew, etc.

A search may serve not only to make sure that a hospital ship is not being used for any other purpose, but also to determine the situation of the wounded on board, in accordance with Articles 14 and 16.

B. *Orders.*—The Parties to the conflict may refuse assistance from hospital ships and rescue craft, order them off or make them take a certain course, for reasons of military security [1].

[1] A similar provision was included in the Report of the Commission of Jurists at The Hague in 1922-1923 (Part I, Articles 7 and 8).

C. *Telecommunication.*—If the need and occasion arise, the adverse Party may control the use by a hospital ship of wireless and other means of communication, that is to say both visual and auditory [1].

As will be seen in connection with Article 34, hospital ships may not use a secret code for telecommunication.

At the 1899 Hague Conference, the Rapporteur for the Maritime Convention, Louis Renault, noted a proposal that certain signals should be established for use by vessels requesting assistance and by hospital ships offering such assistance. The Conference considered, however, that the International Code of Signals, adopted by all navies, seemed sufficient for the purpose [2].

At the 1949 Diplomatic Conference, the Italian Government stressed the advisability of regulating and improving means of communication between hospital ships, on the one hand, and warships and aircraft on the other hand, and proposed that an international code be drawn up for the purpose. The Conference considered that it was not competent to study the question, but it stressed the importance of the matter in resolution No. 6 of the Diplomatic Conference, and expressed the hope that the Powers would entrust the matter to a committee of experts for study [3].

The Swiss Government has consulted the maritime Powers regarding the resolution, in its capacity as depositary of the Geneva Conventions, and a committee of experts will probably be asked to study the problem at some future date.

D. *Detention.*—In order to ensure absolute secrecy regarding a military operation, the adverse Party may even be justified in detaining a hospital ship temporarily. Such a measure must be considered as exceptional, for the text states " if the gravity of the circumstances so requires ".

The 1907 Convention merely stated that hospital ships might be detained, without specifying for how long such a measure might be imposed. The provision was clearly inadequate and dangerous,

[1] A similar provision was included in the Report of the Commission of Jurists at The Hague in 1922-1923 (Part I, Articles 7 and 8).

[2] See *Actes* of the 1899 Conference, p. 34.

[3] See below, p. 287.

and moreover it actually led to a hospital ship being immobilized for eight months [1].

In order to prevent the detention of a hospital ship from amounting to capture, the 1949 Diplomatic Conference adopted a proposal by the Netherlands Delegation [2] that such detention should not last longer than seven days. The time-limit is counted from the time of interception, that is to say from the time when the hospital ship is located and an order given to it.

A week seems a reasonable period. It covers the possible duration of an engagement, with a few days to enable warships to proceed elsewhere in all security.

Under *paragraph 2*, a belligerent may put a commissioner temporarily on board a hospital ship of the adverse Party. A similar provision was included in the earlier Conventions, but the task of the commissioner was not defined. Renault wrote in 1899 that his task was " to ensure the proper execution of the orders given " [3]. The 1949 text is now explicit: " whose *sole* task—the emphasis does away with any need for further comment—shall be to see that orders given in virtue of the provisions of the preceding paragraph are carried out " [4].

Can a belligerent take prisoner a commissioner who has been placed on board a hospital ship if the latter is joined by a warship of the same nationality? This curious question was raised during the discussion at the 1907 Conference, and a negative conclusion was arrived at, in the following terms: " Since the armed personnel put on board hospital ships may not be taken prisoner, then neither may the commissioner who has been put on board to supervise and direct the personnel " [5]. Some confusion is involved here, in our

[1] The Netherlands hospital ship *Op ten Noort*, detained in Japan during the Second World War, before being finally captured.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 75.

[3] See *Actes* of the 1899 Conference, p. 34.

[4] Here the French text differs slightly, and states : " *assurer l'exécution des ordres donnés* ", making the commissioner responsible for acting, and not merely seeing that the orders are carried out.

[5] See *Actes* of the 1907 Conference, p. 300. The case considered was only that of a belligerent commissioner on board a hospital ship when the latter was stopped by a warship. There seems no reason, however, why the problem should not be considered on a more general basis.

view. Those incorrectly referred to above as " armed personnel " are actually the medical personnel. The term relates to a category of persons who, by tradition, are not involved in the conflict and enjoy a status of immunity. If the commissioner were a member of the medical personnel, then indeed he could not be taken prisoner but would have to be treated in the same way as other persons in that category. It is hardly conceivable, however, that a member of the Medical Service would be made responsible for giving orders of a military character to a ship's commanding officer. The commissioner would more probably be a naval officer, and one cannot see how or why he could escape capture.

In conclusion, the fate of the commissioner will be determined by his personal status.

Paragraph 3 already existed in substance in the earlier Conventions. Renault wrote as follows on the subject [1]: " In order to avoid any dispute as to the existence or meaning of an order, it is desirable that the belligerent enter it in the log of the hospital ship. One can understand that this may not always be possible: conditions at sea or extreme urgency may prevent this formality being carried out, and it cannot therefore be made a compulsory requirement. The hospital ship would not be allowed to cite the fact that orders had not been entered in the log as justification for not obeying them, if there was some other evidence of the existence of such orders ".

The 1949 text specifies—and rightly so—that orders must be entered in the log in a language which the captain of the vessel can understand.

PARAGRAPH 4. — NEUTRAL OBSERVERS

This paragraph is entirely new. It was inserted because of the serious events which occurred during the First World War, when the belligerents accused each other of making improper use of hospital ships and a number were sunk. Following the conclusion of an agreement between some of the belligerents in 1917, Spanish officers went on board hospital ships as observers in order to ensure,

[1] See *Actes* of the 1899 Conference, p. 34.

as direct and permanent witnesses, that the ships were used properly. The agreement seems to have brought at least some improvement in the situation [1]. At the 1937 meeting of experts, and subsequently in 1946 and 1947, it was therefore recommended that provision should be made for such a procedure in the revised Convention.

This was done but in the form of an optional and not a compulsory clause. Even without it the belligerents could have had recourse to such a measure, as a token of their good faith. It was nevertheless a good thing to make it official and bring it to the attention of the Powers. The procedure may be initiated either unilaterally by a belligerent, or by special agreement between two or more Parties to the conflict. The observers, who must be of a neutral nationality, will no doubt usually be representatives of the Protecting Power.

Their task will be to " verify the strict observation of the provisions contained in the present Convention ". One must add that they must verify in order to make a report. Their objective evidence will make it possible to prove any breach which may be committed, or to clear the captain of the vessel of any unfounded accusations and thus to prevent reprisals. Observers must not give orders to the captain, who must retain full freedom of action. They may, however, always give an opinion if consulted or if circumstances so warrant.

In accordance with the general right of scrutiny which Article 8 confers on the Protecting Powers, the latter may themselves take the initiative of placing observers on board hospital ships.

ARTICLE 32. — STAY IN A NEUTRAL PORT

Vessels described in Articles 22, 24, 25 and 27 are not classed as warships as regards their stay in a neutral port.

This Article was first included in the 1899 Convention, but it referred only to military hospital ships. In 1949, its application

[1] See *Bulletin international de la Croix-Rouge*, October 1917 ; FAUCHILLE : *op. cit.*, p. 515.

was extended to hospital ships of relief societies or private persons, as well as to coastal rescue craft.

It is by no means a superfluous provision. As we have seen, hospital ships are not warships, even though they may be part of the navy. Having regard to their mission, it would have been unjust to submit them to the restrictions applicable to warships of the belligerents in a neutral port. Such restrictions result from the Thirteenth Convention of The Hague of 1907, which in fact makes an exception in the case of ships entrusted with a philanthropic mission (Article 14). In particular, warships may not stay in a neutral port for more than twenty-four hours, save in the event of circumstances beyond their control.

Renault wrote as follows on the subject in 1899 : " Otherwise the authorities in such ports could claim that hospital ships must be treated in the same way as naval vessels of the belligerents to which they belong, and could regulate the length of their stay, as well as the conditions of departure and the provision of supplies, as strictly as in the case of warships properly so called, which would hardly be reasonable. A specific rule is needed to preclude any difficulty between hospital ships and the authorities in neutral ports, and to avoid any complaints by belligerents " [1].

ARTICLE 33. — CONVERTED MERCHANT VESSELS

Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities.

This Article is new and was inserted following a recommendation made by the experts in 1937. It sets forth a rule which was

[1] See *Actes* of the 1899 Conference, p. 32. RENAULT added the following sentence : " Apart from the circumstances indicated above, military hospital ships must naturally be treated as warships, in particular as regards entitlement to extra-territorial status." This statement does not seem correct. In the first place, we would repeat, hospital ships are not warships—which have been defined in the Seventh Convention of The Hague of 1907 and, more recently in the Convention on the High Seas signed at Geneva in 1958 (Article 8, paragraph 2). Secondly, a hospital ship is liable to search and possibly to inspection by a commissioner who may be put on board, and cannot therefore claim extra-territorial status. This is also borne out by the fact that in 1904 a Convention on hospital ships was concluded at The Hague, exempting them from duties and taxes levied by the State.

previously implicit. In this connection, Louis Renault wrote as follows in 1899 : " It goes without saying that, if a ship is assigned to duty as a hospital ship and the adversary is notified thereof, there must be no change in its status throughout the duration of the war. Otherwise abuse might occur ; a ship might be assigned to hospital duties in order to enable it to reach a given place in safety, and there it could be converted for use in hostile operations "[1].

A hospital ship may be put out of service. But, as the English text states clearly, it " cannot be put to any other use ".

In our opinion, the Article is not applicable to hospital ships belonging to neutral countries (Article 25). In such a case there is no risk of abuse and it would be a strange reward for the charitable endeavours of neutral countries to limit their liberty in this way !

There are two reasons for the present provision. In the first place, it is designed to prevent a merchant vessel from being camouflaged as a hospital ship for the purpose of crossing a danger zone or breaking through a blockade and then resuming its original course in complete safety, or even being used as an auxiliary cruiser or troop transport. Secondly, the provision is intended to afford to hospital ships all desirable stability and permanence. It is, in a way, the price to be paid for the immunity granted to enemy ships even in the midst of hostilities. Much confusion would arise if hospital ships could be converted repeatedly. They must be known and recognized so that their safety may be ensured. If the belligerents know that such ships can never be used to supplement the adversary's war strength, they will be more inclined to respect them and encourage their use. Moreover, in the interests of persons in need of treatment, any hasty or superficial conversion is to be deprecated.

Mossop has given examples of hospital ships put to other uses in special conditions. He adds in the same publication [2] that the corollary of this provision is that it should not be possible for any merchant vessel in a besieged port to be converted into a hospital ship and notified as such in order to escape the enemy.

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[1] See *Actes* of the 1899 Conference, p. 32.

[2] See MOSSOP, *op. cit.*, p. 404. See also OPPENHEIM-LAUTERPACHT, *op. cit.*, Vol. II, p. 503, note 1 (par. 206).

A provision of this kind, intended to prohibit any last-minute conversion, was included in the draft Convention revised at the Stockholm Conference in 1948. It was rejected by a majority of one at the Diplomatic Conference. The delegate who successfully opposed the proposal spoke as follows : " If the ship notified was really a hospital ship, there was no reason for not protecting it ; if it was not a hospital ship, the interceptor had the right to seize it " [1].

Since no general provision was adopted on the matter, each case must be considered individually. It is to be hoped that here as elsewhere the belligerents will act in all sincerity, and will neither prevent the commissioning of a hospital ship which has been properly equipped in order to meet real needs, nor use the Geneva emblem to cloak a ruse of war.

ARTICLE 34. — DISCONTINUANCE OF PROTECTION

The protection to which hospital ships and sick-bays 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.

In particular, hospital ships may not possess or use a secret code for their wireless or other means of communication.

This provision dates back to 1907, in connection with the adaptation to maritime warfare of the principles contained in the Geneva Convention of 1906. It was developed further in 1949, because of the clarifications added to the text of the First Convention.

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 72.

PARAGRAPH 1. — REASONS AND CONDITIONS RELATING TO THE LOSS OF PROTECTION

The present paragraph is identical to Article 21 of the First Convention of 1949. We shall examine the two sentences which it contains.

A. *Acts harmful to the enemy.*—The protection to which hospital ships and sick-bays are entitled cannot cease unless they are used to commit acts harmful to the enemy. The wording adopted by the 1949 Diplomatic Conference—i.e., the negative form—was intended to make it clear that protection could cease only in the one case mentioned, whereas in 1907 it had merely been stated that protection would cease if such acts were committed.

Was the omission of any reference in this provision to coastal rescue craft deliberate, despite the fact that they are considered together with hospital ships in Articles 30, 31 and 32 ? The documentation available does not provide an answer to the question. If rescue craft commit acts harmful to the enemy, then they will certainly be deprived of protection, in accordance with the general principles of the Convention and with Article 30 in particular. But it is less certain, in the absence of any reference to them in the present paragraph, that they can claim entitlement to the procedures mentioned in the second sentence, regarding due warning and a reasonable time-limit. For reasons of military security, it might have been difficult to extend those procedures to them, precisely because they are small and may be very rapid.

In 1949 as in 1929, and as in the case of the First Convention, it was considered unnecessary to define "acts harmful to the enemy", for the meaning of the expression is self-evident and must remain quite general.

While the International Committee of the Red Cross shared that view, it had prepared an alternative wording expressing the same idea in case the Conference should wish to be more explicit. We quote it here, as it may throw light on the meaning to be attached to the words " acts harmful to the enemy ". It read as

follows : " acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations ".

Such harmful acts would, for example, include carrying combatants or arms, transmitting military information by radio, or deliberately providing cover for a warship [1]. The sense will become still clearer when we consider Article 35, which quotes a series of conditions not to be regarded as harmful to the enemy.

One thing is certain. Hospital ships must observe towards the opposing belligerent the neutrality which they claim for themselves and which is their right under the Convention. Being placed outside the struggle, they must loyally refrain from all interference, direct or indirect, in military operations. When committed by a hospital ship, an act harmful to the enemy is to be condemned not only for its treacherous nature, but also because the life and security of the wounded may be very seriously affected by its consequences.

The text states specifically that protection may cease only in the case of harmful acts committed by hospital ships and sick-bays " outside their humanitarian duties ". It is indeed possible, as was stated at the 1949 Diplomatic Conference, for a humane duty to involve some harm to the enemy, or for it to be wrongly interpreted as harmful by an enemy lacking in generosity. But although the provision is justified in the First Convention, it is not so important in the present instance because of Article 30, paragraph 3, which stipulates that hospital ships may in no wise hamper the movements of the combatants.

B. *Warning and time-limit.*—The corresponding Article of the 1907 Convention merely provided that the protection to which hospital ships and sick-bays were entitled would cease if use were made of them to commit acts harmful to the enemy. The 1949 Conference added a further sentence with the object of tempering the possible consequences of too strict an application of the above principle. Safeguards had, in fact, to be provided in order to ensure the humane treatment of the wounded themselves, who could not be held responsible for any unlawful acts committed.

[1] For the last instance, see the commentary on Article 30, p. 179 above.

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 has therefore to warn the hospital ship to put an end to the harmful acts and must fix a time-limit on the expiry of which he may proceed to capture the vessel or even attack it 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, but must be long enough to enable the ship to stop the unlawful acts or to reply to an unfounded accusation and clear itself. The main purpose of the time-limit is undoubtedly to delay any attack on a hospital ship, for seizure would not involve comparable risks for the wounded.

As we have seen, a time-limit is to be named " in all appropriate cases ". There might obviously be cases where no time-limit could be allowed. Suppose, for example, that the crew of a hospital ship were to fire on a warship approaching it in order to search it. Fire would be returned immediately. Similarly, if the search revealed that the hospital ship was carrying not wounded persons but munitions, then it could be seized and the flagrant nature of the offence would justify the suppression of any time-limit.

In any case of doubt as to the interpretation of the present provision, one must bear in mind that it is based on humanitarian considerations.

As far as possible, a belligerent which deprives a hospital ship of protection because it has been guilty of a violation of the rules must take appropriate measures for the safety of the wounded on board before taking any extreme action.

PARAGRAPH 2. — PROHIBITION OF SECRET CODE

This provision is new and was proposed by the experts who met in 1937 and subsequently in 1946 and 1947.

Under Article 35, sub-paragraph (2), hospital ships are authorized to carry radiotelegraph apparatus, but it was only after some hesitation that that clause was adopted in 1907.

The present paragraph is therefore an amendment to the earlier provision. The fact that the use of any secret code is prohibited affords a guarantee to the belligerents that hospital ships will not make improper use of their transmitting apparatus or any other means of communication. Hospital ships may only communicate in clear, or at least in a code which is universally known, and rightly so, for the spirit of the Geneva Conventions requires that there should be nothing secret in their behaviour vis-à-vis the enemy.

ARTICLE 35. — CONDITIONS NOT DEPRIVING HOSPITAL SHIPS OF PROTECTION

The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them :

(1) *The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.*

(2) *The presence on board of apparatus exclusively intended to facilitate navigation or communication.*

(3) *The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.*

(4) *The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.*

(5) *The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.*

The principle of this Article was contained in the 1907 Convention. Like the preceding provision, it was adopted with a view to concordance with the First Geneva Convention. In 1949, the last three sub-paragraphs were added.

The Article sets out five conditions not depriving a hospital ship or sick-bay of protection, or, in other words, which must not be regarded as acts harmful to the enemy. They are particular

cases where hospital ships and sick-bays retain their character as such and their right to immunity, despite certain appearances which might have led to the contrary conclusion or at least given rise to some doubt. The object of the provision was to avoid disputes which arise only too easily between opposing Parties.

The list is not, in our opinion, to be considered as comprehensive, even though the customary " in particular " has been purposely omitted. Cases can be imagined where the good faith of a hospital ship remains beyond question despite certain appearances to the contrary. For each Party, the question will always be one of good faith.

(1) Medical personnel have the right to bear arms and may, in case of need, use them in their own defence or in that of the wounded and sick in their charge. That is the most important of the provisions which we are studying here. It already existed in the 1907 Convention (Article 8) and has a counterpart in Article 22 of the First Convention of 1949 [1].

The purpose of the provision is undoubtedly to make it possible for the medical personnel to ensure the maintenance of order and discipline in a hospital ship or sick-bay, as in a hospital on land, and protect it against individual hostile acts (by pillagers or irresponsible members of the armed forces). A medical establishment is under military discipline, and must be provided with the necessary guards, if only to prevent patients from leaving the premises without permission or from committing hostile acts, to ensure that nurses enjoy the respect to which they are entitled, and so forth. Similarly, access must be denied to unauthorized persons, for instance members of the armed forces who might seek refuge there though not entitled to do so. Medical personnel will, therefore, need only individual portable weapons, such as side-arms, revolvers or even rifles.

On the other hand, a medical establishment, whether on land or at sea, cannot have a real system of defence against military operations. It is inconceivable that a medical unit could resist by force of arms a systematic and deliberate attack by the enemy.

[1] In the present study, we must supplement and modify what has already been stated on this point in the Commentary on the First Convention, p. 203.

Forces of considerable strength would be needed, and by definition a medical establishment cannot have such forces at its disposal. If such an attack were made, any resistance by a few orderlies would be ridiculous and would probably serve only to intensify the attack. It is the business of the armed forces alone to repulse attacks, and only they can do so successfully.

If by chance a medical unit were attacked — though it is to be hoped that this will never occur—the personnel should use all the means at their disposal to warn the enemy of the error and of the consequences entailed (by signals, notification, sending a spokesman bearing a flag of truce, etc.).

If, despite the warnings given, it became apparent that the enemy was making a deliberate attack on the hospital ship or medical unit, in flagrant violation of the Geneva Conventions, then the medical personnel would have no option but to surrender and hoist the white flag. If the adversary were to announce his criminal intent of destroying the establishment and killing its occupants, the medical personnel could obviously use their weapons. One cannot expect men to allow themselves to be slaughtered like sheep. But one fails to see how such desperate action could change the situation. In no case, however, may the fact that a member of the medical personnel defends himself or the wounded in his charge against an illicit attack be considered as an " act harmful to the enemy " depriving him of his right to protection. Similarly, if a neutral State has resort to arms in order to defend itself against a violation of neutrality, that may not be considered as a hostile act (Fifth Convention of The Hague of 1907).

(2) Hospital ships may possess apparatus exclusively intended to facilitate navigation or communication. This provision existed partially in the 1907 Convention. At that time, for reasons of military security, the question was raised as to whether hospital ships should be allowed to possess radio equipment. It was decided that they should, in recognition of the fact that radio was so important in telecommunication that hospital ships could not be deprived of it [1]. Half a century later, the need for such apparatus is still more obvious.

[1] See *Actes* of the 1907 Conference, Vol. III, pp. 300-301.

The experts who met in 1937 proposed the insertion of a provision permitting hospital ships to carry small signal guns or line-carrying guns [1]. This reference was not inserted because it is self-evident. A child could see that such guns are not weapons.

(3) Wounded, sick or shipwrecked persons who are picked up may still be in possession of small arms and ammunition, which will be taken from them and handed to the proper service—here this means a warship or the military authorities on land. That may take a certain time, however. Should a hospital ship be inspected by the enemy before it has been able to get rid of those arms, it must not be liable to be accused of bad faith as a result. The clause is new and its insertion was recommended by the experts who met in 1937. It corresponds to Article 22, sub-paragraph (3), of the First Geneva Convention of 1949.

(4) This provision, which is also new, is very important. It was formulated by the experts who met in 1948, and has its counterpart in Article 22, sub-paragraph (5), of the First Convention. It lays down that hospital ships and sick-bays are not to be deprived of protection when their humanitarian activities extend to the care of wounded, sick or shipwrecked civilians. At sea as on land, military medical establishments may take in civilians. Similarly, civilian establishments may take in wounded members of the armed forces [2].

The extension was essential in view of the character which modern warfare has taken on ; military personnel and civilians may now be struck down on the same spot and by the same act of war. In such cases, they must be able to be treated by the same orderlies and accommodated in the same ships or establishments. Since a soldier, whose particular function is to kill, is entitled as soon as he is placed *hors de combat* to the compassion of his actual enemy, how can an inoffensive civilian be any less deserving of such compassion ?

The Convention contains no restriction, and the term " wounded, sick or shipwrecked civilians " must therefore be taken in its

[1] As recommended by the London Convention of June 10, 1948, for the Safety of Life at Sea.

[2] Fourth Convention, Article 19, paragraph 2.

broadest sense. It does not refer merely to civilians who are in distress because of an event which occurred at sea, although the provision was inserted with a particular view to such cases. In view of the fact that the present Article is complementary in character, it is neither the purpose nor the effect of this sub-paragraph to extend the benefits of the Second Geneva Convention to all sick civilians in general. If disabled civilians are taken on board a hospital ship, it must be as an exceptional measure resulting from force of circumstances. One cannot envisage that a hospital ship would regularly transport large numbers of civilians whose health was affected, for that should be arranged pursuant to Article 21 of the Fourth Geneva Convention. The present provision means, however, that if a belligerent had any objection to such a practice on the part of the adversary, it would in no way be justified in depriving the hospital ship of protection, but should merely make representations through the Protecting Power.

(5) Hospital ships may transport medical personnel and equipment over and above their normal requirements. This provision was formulated at the 1949 Diplomatic Conference, and in connection with it the rapporteur wrote as follows : " The intention of this provision is to prevent hospital ships being used as a means of transport for large quantities of material, in particular rolling-stock, or large units of medical personnel. Had this paragraph not been inserted, difficulties might have arisen from the presence on board a hospital ship of personnel on their way to undertake the care of wounded and sick, on the pretext that they were not members of its usual personnel " [1].

Ships used for the conveyance of medical equipment are the subject of Article 38, and the reader should refer to the commentary

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 203. This view is confirmed by Mossop (*op. cit.*, p. 401) : " ... The fact that they (the hospital ships) usually have a one-way flow of passengers —from the fighting line overseas to base at home—makes it economical to use them to transport medical stores and supplies for the forces in the field on the outward voyage... The carriage of such supplies must be subordinate to the dominant object of the voyage, i.e. to pick up casualties at its destination, so that it would not be a legitimate use of a hospital ship simply to visit neutral ports and there collect medical stores under the immunity afforded by the Convention."

on that provision. As regards hospital ships, we have already seen in connection with Article 22 that they have been specially equipped with a view to assisting the wounded, treating and transporting them. In the normal course of events, they should retain their special character. If, however, because of special requirements—not as a general rule but in isolated cases—it is found necessary to use them for the transport of medical equipment and personnel over and above their normal requirements, no complaint must be made [1]. That is the purpose of the provision.

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[1] During the Second World War, in the Pacific theatre, hospital ships transported a mobile field hospital ready for installation on land.

CHAPTER IV

PERSONNEL

1. *The various categories of personnel*

Personnel protected by the present Convention comprise the following five categories :

(a) Medical personnel of the navy and the merchant marine exclusively engaged in the care of the wounded, sick and shipwrecked (Articles 12 and 13) ;

(b) Personnel of the navy and the merchant marine exclusively engaged in the administration of medical services, including members of the crew of hospital ships ;

(c) Chaplains attached to the navy and the merchant marine ;

(d) The staff of National Red Cross Societies and other recognized relief societies, employed on the same duties as the personnel mentioned under *(a)* to *(c)* above and subject to military laws and regulations[1] ;

(e) Personnel of relief societies of neutral countries who lend their assistance to a belligerent and are duly authorized to do so[1].

In view of the scope of the Maritime Convention, the medical and religious personnel covered by it are mainly and normally those attached to the naval forces. Pursuant to Article 4 and Article 35, sub-paragraph (5), however, medical personnel attached to the land or air forces may on occasion be transported by sea, and would be entitled to like protection.

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[1] Including the medical personnel of hospital ships belonging to private persons (Articles 24 and 25). In this connection, reference should be made to the commentary on Article 36.

By virtue of the reference in Article 37 to Articles 12 and 13, the Convention now applies, as we have already seen[1], to the medical personnel and chaplains of the merchant marine. This extension, which was recommended by the International Committee of the Red Cross, is important and is to the advantage of one category of personnel whose status was previously not well defined.

2. *The general principles applicable*

Only a summary definition of the status of medical personnel is given in the two Articles which will now be commented upon and which constitute Chapter IV, dealing with personnel. For the rest, one must refer to the provisions of the First Convention which by tradition governs this subject (Chapter IV). This is not actually specified in the Geneva Conventions, but results implicitly from their general structure and historical development : although they constitute separate legal instruments, the Conventions are nevertheless inseparable from one another on certain points. Thus, we repeat, from the outset the Convention under consideration constituted the *adaptation* to maritime warfare of the principles of the Convention applicable to hostilities on land. The First Geneva Convention, which governs the main subject, contains certain general principles to which one must refer in regard to medical personnel, the red cross emblem, etc. and certain details relating to application.

In the light of the foregoing, it therefore seems appropriate here to repeat certain concepts which arise from the First Convention and are equally valid in the case of war at sea. We shall do so in connection with each category of protected personnel.

The *medical personnel proper* are those who give direct care to the wounded, sick and shipwrecked of the navy and the merchant marine : doctors, surgeons, dentists, chemists, orderlies, nurses, stretcher-bearers, etc.

It is for each Power to decide the composition of its Medical Service and say who shall be employed in it. To be assured of protection, however, they must be exclusively employed on medical

[1] See the commentary on Article 13, paragraph 5.

duties. This exclusive assignment to certain duties applies only to medical personnel, and it was at this price that the States agreed in the Geneva Conventions to accord special immunity, even in combat areas, to members of the enemy's armed forces.

The duties of medical personnel consist not only of giving medical treatment to war victims, but also of searching for and collecting them, feeding them, etc.

The *administrative staff* are persons who, without being directly concerned in the treatment of the wounded and sick, contribute to it by looking after the administration of the hospital services. They include office staff, cooks, cleaners, etc. and in particular the crew of hospital ships to whom Article 36 refers. Like the previous category, they form part of the Medical Service, and accordingly had to be given the same immunity as the personnel actually giving treatment, for without their contribution the hospital services could not carry out their task. The persons in this category too must be exclusively assigned to those duties.

Chaplains are priests or ministers of any religion who are attached to the navy or merchant marine and whose task in regard to war victims and the sick is not medical but spiritual in nature, although they are frequently called upon to give material aid as well as religious assistance to the wounded. They hold services, comfort the dying, hear any requests the latter may have to make, officiate at burials, etc. Unlike medical personnel, chaplains need not be exclusively or even partially assigned to the wounded and sick. They are protected solely in their capacity as chaplains, even when—as most often happens—their duties extend to a whole ship or to a whole naval unit. Like medical personnel, they must obviously abstain from all hostile acts.

On the other hand, to be accorded immunity, chaplains must be attached in that capacity to the navy or the merchant marine. The decision will rest with the competent authorities and the relationship must be an official one. Accordingly, ministers of religion who wish to serve voluntarily and in a private capacity are not covered by the Convention. Until such time as they have been regularly appointed, they act at their own risk and peril.

The *personnel of National Red Cross Societies and other recognized relief societies* belong to the private relief societies (the so-called

voluntary aid societies) which have undertaken to assist the Medical Service of the armed forces. The expression " voluntary aid societies " does not mean that the staff of such societies are necessarily unpaid. It means that their work is based not on any obligation to the State, but on an engagement of their own free will.

The 1949 Conventions, like their forerunners, grant the staff of Red Cross Societies and other relief societies the same legal status as medical personnel of the armed forces, both categories being placed on the same footing in all aspects. They will have the same right to protection, and the same treatment in the event of capture. The reader should therefore refer to what has already been said in connection with the personnel of the Medical Service and also to the commentary on Article 24 of the present Convention.

In order that the staff of voluntary aid societies may be placed on the same footing as medical personnel of the armed forces, such societies must have been duly recognized by the Government of their home country and must have been authorized to lend their assistance to the Medical Service of the armed forces.

In addition, the staff must be employed on the same duties as the personnel of the Medical Service, and exclusively so. Those duties consist mainly of the care of the wounded, but also include administrative tasks (for instance in the case of the crew of hospital ships). It may also be noted that chaplains may sometimes belong to a recognized relief society, in the sense of the Geneva Conventions.

The *personnel of a relief society of a neutral country* which gives assistance to a belligerent, who are employed on the tasks mentioned above, are also protected by the present Convention.

The society must obviously fulfil the same conditions as the society of a belligerent which assists the Medical Service of its own country, as mentioned above. Thus, it must be recognized by its Government, and be authorized by it to assist the Medical Service of a nation at war.

The society must also obtain authorization from the two States concerned. This is indicated in Article 25, which sets forth the rules relative to the provision of a hospital ship—the only case of assistance by neutral societies expressly provided for in the present Convention.

Moreover, the personnel made available in this manner will be subject to military authority (" under the control of one of the Parties to the conflict ..." states Article 25) and will in practice act as part of the Medical Service of the belligerent. For obvious reasons of order and discipline, such personnel cannot retain an autonomous status.

Lastly, as already mentioned in connection with Article 25, the principle laid down in Article 27, paragraph 3, of the First Geneva Convention is equally valid here—that is to say, in no circumstances may neutral humanitarian assistance be considered as interference in the conflict.

ARTICLE 36. — PROTECTION OF THE PERSONNEL OF HOSPITAL SHIPS

The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

This provision is new. Neither the 1899 Convention nor that of 1907 contained a provision granting protection to the personnel of hospital ships. It has, nevertheless, never been disputed that such personnel enjoy full security and are exempt from capture. Renault wrote as follows in 1899 : " In principle, there is no need to consider the case of medical personnel on board a hospital ship ; since the ship must be respected, the personnel on board will not be hindered in carrying out their duties " [1].

It is a good thing that the gap has now been filled, as the International Committee of the Red Cross had proposed in 1937. It would have been inconceivable to devote a whole Chapter to the protection of medical personnel without in the first place mentioning the personnel of hospital ships. It was still more necessary to specify that the crew of such ships were also entitled to immunity.

In the Commentary on the First Convention, we have emphasized the great change made in 1949 in the status of medical personnel attached to the armed forces on land who fall into the

[1] See *Actes* of the 1899 Conference, p. 36.

hands of the adverse Party : the latter is fully entitled to retain some of them in order to assist in treating prisoners of war.

The solution adopted in regard to maritime warfare is fundamentally different, particularly in the case of the personnel of hospital ships. The liberal conception adopted in 1864 and 1907 has been maintained completely, and the religious, medical and hospital personnel assigned to a hospital ship, likewise the crew, may not be either captured or retained. The difference is fully justified : a hospital ship could no longer carry out its duties if it were deprived of its personnel and crew, for those men constitute, so to speak, an integral part of the ship. As has been said, the ship would be merely a derelict. The protection which the preceding Chapter of the Convention affords to hospital ships would become illusory.

The protection of the personnel and crew is strengthened by two additional references. Such persons are to be protected throughout the time they are in the service of the hospital ship, and so may not be retained if they have had to leave their ship temporarily or to land. Similarly, their immunity may not be suspended if at any time there are no wounded or sick on board, for the ship must be able to move freely, even with no passengers, and must be ready to put to sea at any moment.

As regards the various categories of medical personnel considered here and the general principles applicable to them, the reader should refer to the introduction to the present Chapter.

Article 36 covers only the personnel necessary for the hospital ship to function properly. It cannot cover any excess medical personnel whom the ship is authorized to transport pursuant to Article 35, sub-paragraph (5) ; Article 37, which will be commented upon below, refers to such personnel.

As we have seen, the medical personnel of hospital ships will belong either to the Medical Service of a belligerent, or to a National Red Cross Society or another recognized relief society of a belligerent or a neutral country. As regards the personnel of a hospital ship made available by a generous private person (pursuant to Articles 24 and 25), there would be every advantage in enrolling them in the Medical Service or a relief society, if they were not already members. If, however, that formality had not been carried

out for some reason, such personnel would naturally continue to be protected by the present provision, though in a private civilian capacity.

It is no innovation for the crew of hospital ships to be protected by the Geneva Conventions. The members of a ship's crew are part of the administrative staff of the medical services, just like an ambulance driver on land. They will therefore belong to the Medical Service or to a recognized relief society. Members of the crew of a yacht made available by a private individual could be enrolled in the official or voluntary medical services. If that had not been done, they would still remain members of the merchant marine, but would enjoy all the protection afforded by Article 36.

It remains for us to consider the status and protection to be accorded to the crews of coastal rescue craft and coastal installations. Pursuant to Article 27 of the present Convention, they will be protected from attack while they are an integral part of such craft and installations. Apart from that, however, are they covered by Articles 36 and 37 and can they claim the special status and constant protection specified in those Articles ? In our opinion, they cannot. Indeed, lifeboat crews are not mentioned. Article 36 refers only to the personnel of hospital ships, while Article 37 applies only to personnel assigned to the care of the persons designated in Articles 12 and 13 — that is to say, members of the armed forces and persons assimilated thereto who are the victims of war at sea. The Second Geneva Convention is not intended to protect civilian personnel who are searching for shipwrecked civilians. Such personnel may not wear the red cross armlet or carry the identity card mentioned in Article 42. On the other hand, Articles 16 and 63 of the Fourth Geneva Convention of 1949, relative to the protection of civilians, contain provisions intended to assist rescue operations. Certain facilities must be afforded to those participating in such operations.

It should also be noted that the personnel of hospital ships are given constant protection because they are exclusively assigned to hospital duties. Lifeboat crews, on the other hand, will sometimes consist of part-time volunteers, that is to say, persons who are normally engaged in some other activity and take up rescue duties only in case of need.

The Seventh International Conference of Lifeboat Organizations, held at Estoril in 1955, adopted a resolution reading in part as follows: " . . . 6. Considering that the protection of personnel, of which the extent derives from the protection stipulated in favour of the coastal lifeboats and their shore installations when the personnel is in service in these boats and at these installations, and that the Geneva Convention relative to the Protection of Civilian Persons in Time of War contains in Articles 16 and 63 dispositions made to promote rescue operations; Recommends that this protection should be rendered effective by the delivering to this personnel, by the national authorities, of a special identity card and, during their service at the boats, of a distinctive armlet "[1].

This is one more humanitarian problem in urgent need of solution since the Second Convention does not settle all its various aspects—and indeed it is not within the scope of that instrument to do so.

ARTICLE 37. — MEDICAL AND RELIGIOUS PERSONNEL OF OTHER SHIPS

The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable. They may take with them, on leaving the ship, their personal property.

If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.

Retained personnel shall be subject, on landing, to the provisions 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.

Paragraph 1 is almost identical to the corresponding provision in the 1907, 1899 and 1868 texts. There is, however, no longer a

[1] See Gilbert GIDEL: *op. cit.*, p. 549.

reference to a " captured ship " for it was too restrictive. The provision must be applicable to all medical personnel of the navy and the merchant marine, for they may fall into enemy hands other than through the capture of the ship in which they serve. It is no longer stated that such personnel are " inviolable " or " neutral ", but that they must be " respected and protected ", in the wording now consecrated by the Geneva Conventions.

Paragraphs 2 and 3 are new, and their purpose is to adapt the Maritime Convention to the system of retention of medical personnel instituted by the First Geneva Convention of 1949.

PARAGRAPH 1. — PROTECTION AND RETURN

Article 37 concerns religious and medical personnel—other than those serving in a hospital ship, to whom the preceding Article refers—who fall into enemy hands. As we have already said, it covers all medical personnel of the navy and the merchant marine ; in practice, however, it will apply most frequently to the personnel of captured ships, who will belong to the Medical Service or the chaplaincy and will be respected and protected[1] in the same way as the personnel of hospital ships and the corresponding personnel attached to the armed forces on land, so that they may continue to tend the sick and wounded.

What will be their fate if they fall into enemy hands ? For the reasons indicated in the commentary on the preceding Article, the 1949 Diplomatic Conference did not adopt the same solution for naval medical personnel as for personnel attached to the armed forces on land. The former are entitled to treatment which is more liberal—though less favourable—than that accorded to the personnel and crew of hospital ships.

Thus, the Convention stipulates that the personnel referred to here may continue to carry out their duties as long as is necessary for the care of the wounded and sick. That does not mean, as the next sentence makes clear, that they may get out of those duties ; but they may not be prevented from carrying them out. As for the

[1] As regards the meaning of this term, the reader should refer to the commentary on Article 12, p. 89 above.

wounded and sick referred to here, there is no doubt—and this too is borne out by the context—that they are only those carried on board the ship in which the personnel are, whether the captured ship or the captor vessel.

Once the medical personnel are no longer required in the ship, they must be sent back as soon as the Commander-in-Chief in whose power they are considers it practicable. " Sent back " means that they must be returned to their country and to the forces to which they are attached.

The Article adds that on leaving the ship, medical personnel may take with them their personal property. The 1907 Convention specified that they could take with them " the objects and surgical instruments which are their own private property ". It is self-evident that the term " personal property " in the present Convention includes surgical instruments [1].

Article 13, sub-paragraph (5), specifies that the present Convention is applicable not only to members of the armed forces at sea, but also to members of crews of the merchant marine and of civil aircraft who are wounded, sick or shipwrecked and who do not benefit by more favourable treatment under any other provisions of international law. As we have seen in the commentary on Article 13, from the medical point of view there is no treatment more favourable than that provided under the present Convention in the case of members of such crews who are wounded, sick or shipwrecked at sea. Article 37 protects medical personnel assigned to the care of the persons designated in Article 13, and therefore applies to medical personnel of the merchant marine, who are thus covered by the same provisions as medical personnel attached to the navy. They may wear the red cross armlet and carry the identity papers provided for in Article 43.

On the other hand, the question does not arise for civil aviation, since the latter does not possess any medical service comparable with that of the merchant marine. Because of the limited passenger capacity of aircraft and the speed at which they travel, in present times it is not necessary to have medical personnel on permanent duty in aircraft. But if by chance a doctor or nurse attached to

[1] Article 30 of the First Convention still contains a reference to " instruments ".

the civil aviation services were shipwrecked, he or she would be protected by the Convention because of the reference in Article 37 to Article 13. That in no way entitles such personnel to use the armlet or the identity card for which provision is made in the present Convention. The applicability of the Convention to such personnel is purely accidental and momentary. It is not the purpose of the Maritime Convention to make provision for the civil aviation services. Once they have been landed, such doctors or nurses would be covered by the Fourth Geneva Convention, and in particular Articles 16, 30 and 63. Medical personnel attached to the civil aviation services should request from their authorities a special identity card and they may use the emblem which the medical organizations have endorsed for use by members of the medical and allied professions who are not entitled to display the red cross emblem [1].

PARAGRAPH 2. — RETENTION

Paragraph 1 lays down the general principle that medical personnel must be returned, unlike the case of the armed forces on land and in accordance with the traditional concept followed in 1864, 1899 and 1907. Here, however, the rule is no longer given in an absolute form as it is in the case of the personnel of hospital ships ; an exception is provided. Paragraph 2 entitles the captor Power to retain some of the medical personnel if it proves necessary to do so owing to the medical or spiritual needs of prisoners of war. In that case, persons whose assistance is required should be landed as soon as possible.

Does the term " prisoners of war " refer only to those taken prisoner on board the ship ? We hope so and we trust that it will be interpreted in this way. Moreover, it is usual for the medical personnel to accompany the crew of a captured ship. Logically, however, the interpretation of the text does not permit us to affirm this and the provision should have been made more explicit [1]. Nevertheless, if a Power were to cite the present Article as justifi-

[1] See Supplement to the *Revue internationale de la Croix-Rouge*, September 1957.

cation for retaining medical personnel in order to help care for prisoners of war on land, such prisoners must at least belong to the navy, save in case of emergency, for the Second Convention does not recognize any others. Moreover, the medical personnel attached to the navy, who are specialized and accustomed to travelling by sea, are few in number as compared to the corresponding personnel attached to the armed forces on land. They should therefore be able to serve preferably at sea.

Similarly, it would be unsatisfactory if medical personnel attached to the merchant marine were retained in order to help care for prisoners of war belonging to the armed forces. Wherever possible, they should therefore be assigned only to caring for merchant seamen in the hands of the adverse Party.

Generally speaking, if the present paragraph made it possible to retain for any length of time medical personnel attached to the navy in order to perform their duties in camps on land, in behalf of prisoners in any category, there is a risk that the very principle of repatriation set forth in the first paragraph would be nullified. And the desire of the authors of the 1949 Convention to accord a more liberal status to medical personnel attached to the navy than that accorded to the corresponding personnel attached to the armed forces on land would thus be thwarted.

The 1907 Convention also provided that the belligerents must guarantee to medical personnel who had fallen into their hands the same allowances and pay as were given to personnel of corresponding rank in their own navy. That provision was dropped in 1949, and understandably so since, after landing, such personnel will be subject to the provisions of the First Geneva Convention, which on this point makes a reference to the Third Convention, relative to the treatment of prisoners of war. Until such time as they are landed or repatriated, however, what pay should such personnel receive ? At least that specified in the Third Convention for prisoners of war. But it also seems equitable that, as in the past, they should receive the same pay as members of the Medical Service of the captor Power.

[1] This is a question which might be settled in the agreements on the retention of medical personnel which the High Contracting Parties are invited to conclude under Article 31 of the First Convention.

Paragraph 3 provides that retained personnel are to be subject. on landing, to the provisions of the First Convention of 1949, In this connection, the reader should therefore refer to the commentary on Articles 28 to 32 of that Convention. Retained personnel will not merely be subject to the treatment instituted by the First Convention ; they will also benefit by the provisions relating to repatriation, if circumstances no longer require them to remain with prisoners of war or if arrangements are made for them to be relieved.

It should be emphasized here that since the present Convention applies in certain cases to medical personnel attached to the merchant marine, after landing they are therefore covered by the First Geneva Convention, which is thus extended in scope although that is not actually specified therein.

CHAPTER V

MEDICAL TRANSPORTS

A chapter with the title of the present one might well include all the provisions of the Convention dealing with hospital ships, which are, after all, " medical transports " in the highest sense of the term.

As it is, the Chapter comprises three Articles, all of them new as compared with the 1907 text. The first extends international humanitarian law to a fresh category of vessels now entitled to immunity—namely, those used for the conveyance of medical equipment ; the other two are merely a repetition of the provisions of the First Geneva Convention of 1949 which relate to medical aircraft.

ARTICLE 38. — SHIPS USED FOR THE CONVEYANCE OF MEDICAL EQUIPMENT

Ships chartered for that purpose shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them nor to seize the equipment carried.

By agreement amongst the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose, free access to the equipment shall be given.

Following the suggestion made by the government experts who met in 1947, the 1949 Diplomatic Conference introduced

this new provision into the Convention ; it is truly humanitarian in scope and is moreover fully consistent with the spirit of the Geneva Conventions and the fundamental principle which dissociates the wounded from the fighting and demands that they be cared for without distinction of nationality [1].

In addition to hospital ships, this Article adds a new category of vessel to those entitled to protection. It provides safe conduct at sea for medical equipment intended for wounded and sick members of the armed forces, even if those persons are in their home country. It may be compared with Article 23 of the Fourth Convention of 1949, which lays down a similar rule in the case of civilians. In accordance with the terminology of the First Geneva Convention, " medical equipment " must be taken as denoting not only instruments and all necessary supplies for dressing wounds, but also medicaments.

The Convention goes still further and authorizes the conveyance of " equipment "—that is to say, pharmaceutical products—intended for the prevention of disease. Since the reference is to the prevention of disease, it cannot be asserted that such medicaments are intended for sick persons ; they may therefore be given to able-bodied military personnel in combat units, in order to keep them in good health. That is certainly a very liberal provision. Were the plenipotentiaries who met in 1949 fully aware that they had gone so far ? Until then, the concessions made by the military authorities to humanitarian requirements had benefited only victims or human beings in a weakened state, who were thus incapable of doing harm. That is no longer the case here. Be that as it may, a concept of this kind is consistent with the Red Cross spirit which holds that the fight against suffering must have priority and, at the same time, that prevention is better than cure. The Red Cross would be only too happy to see unrestricted exchange of medicaments at all times in the world, as of all medical discoveries.

[1] During the Second World War, the vessel *Awa-Maru* was granted a safe-conduct to transport relief supplies intended for Allied prisoners of war in Japanese hands. It was torpedoed by a submarine, and the commander of the latter was held responsible. See Rear-Admiral VOGE : *Too much accuracy*, U.S. Naval Institute Proceedings, March 1950, pp. 257-263.

By specifying that the equipment in question must be " exclusively intended " for its humanitarian purpose, the text excludes the transport of products such as raw cotton or crude rubber which could also be used for the war effort.

There is a further condition for the granting of protection to such vessels ; they must have been chartered for the purpose, that is to say must have no cargo other than the equipment authorized under the present Article. It is, however, not necessary for such ships to be permanently assigned to the transport of equipment of this kind. They may be used for other purposes during a subsequent voyage, but obviously would then enjoy no special protection.

Lastly, the particulars regarding the voyage must have been notified to and approved by the adverse Power. These conditions having been fulfilled, the adverse Power remains entitled to board the carrier ships in order to inspect them, but not to capture them or seize the equipment carried.

The adverse Power is not called upon to approve the principle of such transport, for it is fully authorized by the Convention [1]. Only the " particulars regarding the voyage " may be contested by it, namely the course to be followed, the date, the speed of the vessel, its marking, etc. Any objections which the adverse Party may wish to make must be in the nature of reasons, not pretexts.

Under the second paragraph of this Article, the belligerents may agree that neutral observers should be placed on board such ships to verify the equipment carried. This provision is similar to that contained in Article 31, paragraph 4, which provides that neutral observers may be placed on board hospital ships to verify the strict observance of the Convention. The reader should therefore refer to the commentary on that provision.

In order to facilitate verification, the last sentence provides that the equipment transported must be easily accessible (in French " *aisément accessible* "). This recommendation seems superfluous, for if the equipment is not easily accessible, those responsible for the transport will be the ones to suffer the conse-

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 140-141 and 204-205.

quences, since the adverse Power is entitled to carry out an inspection [1]. In this respect, the English version of the Convention, which speaks of " free access " (equivalent in French to " *libre accès* ") is preferable.

ARTICLE 39. — MEDICAL AIRCRAFT

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.

They shall be clearly marked with the distinctive emblem prescribed in Article 41, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification which may be agreed upon between the Parties to the conflict upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any.

In the event of alighting involuntarily on land or water in enemy or enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Articles 36 and 37.

This Article and the following one are merely a repetition of the corresponding provisions of the First Convention of 1949 (Articles 36 and 37), with the addition of references to the shipwrecked and to alighting on water.

The Commentary on the First Convention contains general remarks concerning medical aircraft, and reference should be made to that volume [2].

[1] See R. GENÊT : *op. cit.*, p. 85.

[2] See *Commentary I*, p. 285.

PARAGRAPH 1. — DEFINITION AND PROTECTION

Medical aircraft have the same rôle under the 1949 Convention as in the past : flying alone or in convoy, they may be used both for the evacuation of wounded, sick or shipwrecked members of the armed forces and persons on a like footing (as referred to in Article 13) [1] and for transporting medical personnel and property. Like any other means of transport, they may be the property of the armed forces, or of voluntary aid societies, or may have been requisitioned [2]. As in 1929, it was not considered possible, for reasons of military security, to accord protection to aircraft searching for wounded [3].

The nature of the protection accorded remains the same : the aircraft, like medical transport on land, are placed on the same footing as mobile medical units.

Nevertheless—and this is the main difference as compared with 1929—they are to be respected only " while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned ". The experts who recommended this solution pointed out that, under conditions of modern warfare, systems of identification based only on the painting of planes were useless. Aircraft were sometimes fired upon from the ground, from a ship or from other planes before their colour or markings could be distinguished. Only previous agreement as to routes, heights and times of flight could, in their opinion, afford medical aircraft a real degree of security and provide belligerents with adequate safeguards against abuse.

The solution adopted makes any future use of protected medical aircraft dependent on the conclusion of an agreement between the belligerents. As it will be a matter of fixing routes and times of flights, such agreements will no doubt usually be made for each specific case and by a simple exchange of communications between the military commands. But there might also be an agreement of longer duration.

[1] The transport by air of sick and wounded civilians is covered by Article 22 of the Fourth Geneva Convention.

[2] A medical aircraft is never a military aircraft, just as a hospital ship is never a warship. See above, p. 113.

[3] See MOSSOP : *op. cit.*, p. 403.

If there is no agreement, belligerents will be able to use medical aircraft only at their own risk. It is, however, to be hoped that in such cases the enemy will not resort to extreme measures until he has exhausted all other means of control at his disposal.

Today as in 1929, in order to be protected an aeroplane need not be specially equipped or permanently detailed for medical work. It may therefore be used temporarily on a relief mission. This liberal conception is entirely justified, as medical aircraft are called upon to bring help in emergencies—often under improvised arrangements. At times, if land or sea routes are blocked by military operations, aircraft may offer the only available means of transport. An aircraft used temporarily on a relief mission should, of course, bear the distinctive sign only while on the mission, and will be respected only for its duration.

On the other hand, it is clear from the text of the Convention that, to be protected, a medical aircraft must, during its relief mission, be used exclusively for that purpose and consequently be completely unarmed. That is obvious.

Lastly, we may note that the Article speaks of " medical aircraft " and not of aeroplanes. An airship, if such a craft should still be used, could therefore receive protection under the Convention. This is also true of sea-planes, helicopters and any new type of flying machine.

Paragraph 2. — Marking and recognition

In studying the preceding paragraph we have already touched on the matter of marking. Strictly speaking, this should have come under Chapter VI, which deals with the distinctive emblem. It was, however, more convenient to include all the rules concerning medical aircraft in a single Article.

As in the 1929 text, the first sentence of paragraph 2 lays down that medical aircraft are to be clearly marked with the distinctive emblem of the Convention, together with their national colours, on their lower, upper and lateral surfaces. Wings have purposely not been mentioned, as an airship or helicopter does not have any.

The 1929 Convention laid down that medical aircraft should be painted entirely white, like hospital ships. For the reasons

indicated in our comments on the preceding paragraph, this stipulation, which was declared by some to be out of date and unnecessary, was not retained. Certain experts regret this, for they consider that the colour white, which offers good visibility, is clearly distinguishable from that of military aircraft and should be kept for everything connected with the Medical Service. It is, of course, still permissible for those who prefer the old method to use it, and this even seems desirable. At the same time it is worth noting that the fact that the use of white paint is no longer compulsory will save time in converting aircraft, thus facilitating their use in cases of emergency.

It must be remembered that the distinctive emblem of the Convention is a red cross *on a white ground*. It is not, therefore, sufficient to paint the red cross on the aircraft itself if the background is not white.

The second sentence of paragraph 2 lays down that medical aircraft are to be provided with any other markings or means of identification that may be agreed upon between the belligerents concerned. The provision is a wise one as it leaves the way open for any technical improvements in this field.

Certain facts lead one to suppose that, with the resources available today, great improvements could already be made in the methods by which medical aircraft are identified. The main means of establishing the authenticity of the relief mission of an aircraft would appear to be permanent radio contact with the ground or with ships or other aircraft. Every aircraft now has its own code signal[1]. Surely a special international signal for medical missions could be agreed upon ? Similarly an abbreviated international code, like that already used at sea and in the air, would make it possible to communicate with the aircraft during its mission and question it as to the nature of the latter and the way in which it was to be carried out. The same means could be used to give an aircraft instructions regarding its flight and, if necessary, order it to land.

The Diplomatic Conference of 1949, in Resolution 6 of its Final Act, recommended that a committee of experts should examine improvements in the means of communication between hospital

[1] Technical progress may, perhaps, make it possible to produce a code signal which could be picked up by radar. Flares might also be used.

ships and other ships and aircraft, as well as the possibility of drawing up an international code for the purpose. It would appear most desirable that the study should be extended to the means of communication of medical aircraft. This has, incidentally, been done in the draft regulations which were produced by the Italian Government on March 1, 1950, in pursuance of the said Resolution and which have been submitted to the Powers signatory to the 1949 Conventions.

Paragraph 3. — Prohibition of flight over enemy territory

The question of flight over enemy territory was the one stumbling-block in 1929. On this point it was found necessary to bow to the demands of military security, as otherwise the Conference might have been forced to abandon all ideas of securing protection for medical aircraft; the general staffs considered that the risk of unwarranted observation from such aircraft would have been too great.

Prohibition of flight over enemy territory would not, however, appear to be as prejudicial to the interests of humanity as has been believed. For what does a medical aircraft actually do ? It takes medical personnel and equipment to the wounded and brings the latter back to hospitals behind the lines. For these purposes it flies over the territory of the country it is serving or territory occupied by the armed forces of that country. Besides, the new text adopted was considerably less rigid than the old one. In 1929 it was not only flights over enemy territory that were prohibited, but also flights over the firing line and over the zone in front of the main clearing or dressing stations. In the 1949 Convention, the reference is only to enemy or enemy-occupied territory[1].

[1] In this Article and the Article following, the word " territory " should be understood in the sense in which it is used in international law. It may be mentioned in this connection that, according to Article 2 of the Convention on International Civil Aviation concluded at Chicago on December 7, 1944, the territory of a State is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, or mandate of such State. It did not appear necessary to enter into these details in the Geneva Convention.

The States have not yet reached agreement as to the limit of the territorial sea. Some States have claimed a limit of three miles and others of twelve and even two hundred miles.

Finally, it must not be forgotten that the present paragraph begins with the words " unless agreed otherwise ". On certain occasions when circumstances so require, e.g. when there are wounded in a besieged zone or area, special permission to fly over enemy-controlled territory may be requested. Such a solution is in full accordance with Article 18, paragraph 2, of the Convention[1].

What is to happen if, as the result of an error for example, a medical aircraft fails to comply with the rule prohibiting flight over enemy-controlled territory ? It will obviously lose its right to special protection and will be exposed to all the accompanying risks. Nevertheless, every belligerent conscious of his duty would warn the offending plane by radio or order it to alight (paragraph 4) before resorting to extreme measures. It is clear that once an aircraft is on the ground or the water, the wounded and the medical personnel will be entitled to the full to the protection which must be accorded to them in all circumstances.

PARAGRAPH 4. — SUMMONS TO ALIGHT

The summons to alight on land or water provides the adverse Party with a safeguard ; it is his one real means of defence against abuse. This very important provision dates from 1929 ; it states explicitly that medical aircraft must obey every summons to alight. It applies in the first place to aircraft flying over enemy or enemy-occupied territory, whether or not authorized to do so, and also applies to aircraft which are over their own territory, but close to enemy lines.

If the aircraft refuses to obey, it does so at its own risk, and it is then lawful to open fire on it. If the aircraft is already out of reach, 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.

The Convention does not state how the summons is to be given ; there was no need to enter into the details of such a technical question.

[1] See above, p. 134 ff.

What is to happen to a plane after it has obeyed the summons to alight ? The enemy can examine it and will, in normal cases, be able to convince himself that it is being used exclusively for medical purposes. The necessary steps will then be taken to ensure that the wounded do not suffer from the enforced delay.

The 1929 Convention, treating this case and an involuntary landing alike, determined that the wounded and sick in the plane, the medical personnel and material, including the aircraft itself, should continue to have the protection of the Convention. That meant that the wounded and sick of enemy nationality would become prisoners of war as they do when a belligerent intercepts a medical convoy on the ground. The medical personnel and material, including the aircraft, were to be treated in accordance with the general rules of the Convention, or, in other words, were to be returned according to the usual procedure. The crew was to be sent back, on condition that its members took no part in operations until the end of hostilities, medical service excepted.

On this point, the 1949 Convention has adopted a more liberal formula : the aircraft, with its occupants, may resume its flight. This appears just. The object of medical aviation is to permit the rapid evacuation of certain wounded and sick. They should not have to suffer from the fact that the enemy exercises his right of examination—all the more so (always presuming that the crew of the aircraft are guilty of no irregularities) because the summons has, so to speak, been wrongly given. Moreover, the Parties to the conflict have entered into a sort of contract regarding the flight, and retention of the aircraft would constitute a breach of that contract. Finally, it should not be forgotten that the plane has obeyed the summons to alight ; that fact must be placed to the credit of its occupants.

What would happen—and it is to be hoped that such cases will be the rarest of exceptions—if examination reveals that an act " harmful to the enemy ", in the sense of Article 34 (or Article 21 of the First Convention), has been committed, i.e. if the plane is carrying munitions or has been used for military reconnaissance ? The aircraft loses the protection of the Convention ; the enemy may confiscate it, take the wounded prisoner, and treat the medical personnel and equipment according to the general rules of the Convention.

PARAGRAPH 5. — FORCED LANDING

A medical aircraft may be forced to alight when, without receiving a summons, it is obliged by weather conditions, engine trouble or any other cause to come down in territory or territorial waters belonging to or controlled by the enemy.

Certain delegations proposed that the solution in this case should be the same as that adopted for landings made in answer to a summons, but the Diplomatic Conference did not consider that feasible. It was held that considerations of military security must have priority. It was feared that, for purposes of espionage or sabotage, aircraft might pretend to have been forced to alight in remote areas where immediate examination was not possible. The adverse Party may therefore take the wounded and sick and the crew prisoner. The medical personnel are to be treated in accordance with the general rules of the First Geneva Convention (Article 24 ff.). Even though Article 39 does not actually say so, the equipment will be governed by the provisions of Articles 33 and 34 of the First Convention. The aircraft itself will become war booty, as would a medical vehicle on the ground in similar circumstances. If, however, it belongs to a relief society protected by the Convention, it will be regarded as private property.

ARTICLE 40. — FLIGHT OVER NEUTRAL COUNTRIES ; LANDING OF WOUNDED

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. They shall give neutral Powers prior notice of their passage over the said territory, and obey every summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless otherwise agreed between the neutral Powers and the Parties to the conflict, the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

This Article is completely new and represents an advance in humanitarian law.

For several years, the International Committee of the Red Cross, faced with certain specific cases, had felt that it was necessary to make such provision [1]. Two requirements had to be reconciled —humane considerations on the one hand, and on the other the rights of neutral States. The problem of meeting those two requirements was already a dominant factor in the discussions which took place on the wording of Article 14 of the Fifth and Article 15 of the Tenth Conventions, during the Peace Conference at The Hague in 1907.

PARAGRAPHS 1 AND 2. — CONDITIONS FOR FLIGHT AND LANDING

For the reasons already given, it did not seem possible to impose on a neutral State the duty of allowing the unconditional flight of aircraft over its territory [2]. On the other hand, it did not seem feasible to leave neutral States at liberty to permit or refuse at will the access of medical aircraft to their territory. It was accordingly decided to adopt the general rule that medical aircraft of belligerents could fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call, and at the same time to give neutral Powers the right to place conditions or res-

[1] The International Committee of the Red Cross would like to express its gratitude to Professor Alex Meyer, expert in air legislation, for his valuable help in the wording of the draft Article which the Committee submitted to the XVIIth International Red Cross Conference, and which with slight changes has become Article 40 of the present Convention.

[2] In time of war, a neutral State has absolute sovereignty over its air space. See OPPENHEIM-LAUTERPACHT : *op. cit.*, Vol. II, p. 725.

trictions on the passage or landing of medical aircraft on their territory, with the proviso that they were to apply such conditions or restrictions equally to all the belligerents.

The Convention itself imposes three express conditions or restrictions, based on the preceding Article dealing with the rights of belligerents. Medical aircraft must give neutral Powers previous notice of passage over their territory ; they must obey any summons to alight ; and they are to be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the belligerent Power and neutral Power concerned [1].

Paragraph 3. — Landing of wounded

When a medical plane lands in a neutral country, either of its own accord or in response to a summons, it may leave again with its occupants, after being examined by the neutral Power if this is thought necessary. It may be retained only if it is discovered that acts incompatible with the humane rôle of such aircraft have been committed. Although these considerations have not been mentioned explicitly in the Convention, they follow clearly from the whole text of the Article and from the general principles of international law.

The officer in charge of the aircraft may, however, be anxious —for example because of their state of health—to land the wounded or sick he is transporting in neutral territory, not merely for the short time he stops there, but to leave them there. He may do so if the local authorities in the neutral country agree. In such a case, unless there is an agreement to the contrary between the neutral Power and the Parties to the conflict, the wounded and sick must be detained by the neutral Power in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment is to be borne by the Power on which they depend.

[1] This formula is based on the one which appears in the preceding Article. Here the word " attack " is surely inappropriate : such attacks could only be made by the armed forces of the neutral country. Belligerents obviously have no right to pursue or attack over neutral territory.

The obligation imposed on the neutral Power to intern wounded and sick landed by a medical aircraft belonging to a belligerent is qualified by the words " where so required by international law ". As regards the meaning of that phrase, the reader should refer to what has already been stated above, on p. 109.

In addition, readers particularly interested in the principles governing the situation of war victims landed in a neutral country may refer to the passage of the present Commentary which deals with this matter in detail, in connection with wounded, sick and shipwrecked persons landed by hospital ships [1]. The elements of the problem are, however, different in the case of aircraft ; for instance, the right of inspection as exercised by ships on the high seas does not exist here.

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[1] See above, p. 121 ff.

CHAPTER VI

THE DISTINCTIVE EMBLEM

For all general information regarding the distinctive emblem, the reader should refer to Chapter VII of the Commentary on the First Geneva Convention of 1949. In this regard, the First Convention constitutes *sedes materiae.*

The marking of medical aircraft is not dealt with in this Chapter of the Convention, but in Article 39.

ARTICLE 41. — USE OF THE EMBLEM

Under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, these emblems are also recognized by the terms of the present Convention.

This Article did not exist in the 1907 Convention. Paragraph 1 corresponds to Article 39 of the First Geneva Convention, and paragraph 2 to Article 38, paragraph 2.

PARAGRAPH 1. — USE OF THE EMBLEM

1. *Nature and use*

The sign of the red cross on a white ground [1] came into being in 1863 at the same time as the Red Cross movement and was sanctioned at international level by the Geneva Convention of

[1] With a view to avoiding confusion, " red cross " is printed in small letters when it refers to the heraldic emblem, capitals being reserved for the " Red Cross " as an institution.

1864 ; it is above all the distinctive emblem of the Medical Service of the armed forces. It is also the emblem of the Red Cross movement, and one of the special duties of the National Red Cross Societies is to serve as auxiliaries to the Medical Service. Although not specifically referred to here, those Societies and other bodies officially recognized as auxiliaries to the Medical Service of the armed forces are entitled to use the red cross emblem, on land or at sea [1].

The present Convention refers only to the " protective sign " as it has been called, that is to say to the cases where the sign is a virtually constitutive element of protection, displayed on the buildings, persons and objects entitled to respect under the Convention. In other cases, which follow from the First Geneva Convention (Article 44, paragraph 2) and to which we need not refer at length here, the sign is purely indicatory, i.e. it is used only to designate persons or objects connected with the Red Cross ; this does not, and is not intended to, imply the protection of the Convention.

The emblem naturally has its essential significance when used as a protective sign. Its use becomes of practical importance in time of war, particularly in the zone of military operations.

In principle, a red cross on a white ground should be displayed on the buildings, persons [2], vehicles and objects protected by the Convention.

The following are entitled to the protective sign under the present Convention :

(a) hospital ships belonging to the State, to relief societies and to private persons (Articles 22, 24 and 25) ;

(b) hospital ships belonging to relief societies or private persons of neutral countries which give assistance to a belligerent (Articles 25 and 43) ;

[1] In accordance with Article 44 of the First Geneva Convention, and with Articles 42 and 43 of the present Convention by virtue of the reference therein to Articles 36, 37, 24, 25 and 27.

[2] "Persons " clearly means medical and religious personnel, and not the wounded themselves. We do not, however, exclude the possibility that in case of emergency a group of wounded or shipwrecked persons might be indicated to the enemy by means of a red cross flag, for instance, in order that any attack may cease. After all the emblem would protect them if they were in a hospital or a medical vehicle.

(c) lifeboats of hospital ships, coastal lifeboats and small craft used by the Medical Service (Articles 27 and 43) ;

(d) fixed coastal installations used by rescue craft (Articles 27 and 41) ;

(e) sick-bays of ships (Articles 28 and 41) ;

(f) the medical and religious personnel of hospital ships and their crews (Articles 36 and 42) ;

(g) the medical and religious personnel of the navy and the merchant marine (Articles 37 and 42) ;

(h) medical equipment (Article 41) ;

(i) medical aircraft (Article 39).

It should also be noted that, under Article 44, paragraph 3, of the First Convention of 1949, the international Red Cross organizations are permitted to use the red cross emblem, and the sign will have protective value when the nature of their work so requires. The International Committee of the Red Cross might therefore be led to display the emblem on ships chartered by it, for instance, in order to convey relief supplies for war victims, as it did during the Second World War [1].

Similarly, the Fourth Geneva Convention (Article 21) states that vessels specially provided for conveying wounded and sick civilians, the infirm and maternity cases are to be respected and protected in the same way as civilian hospitals on land. Such vessels may therefore display the red cross emblem.

If enemy troops at a distance are really to be able to accord these persons, objects, buildings or vehicles the respect required by the Convention, they must be in a position to recognize them for what they are. As the Convention specifies, the emblem will generally be displayed by means of flags and armlets. It may also, however, be painted on the roof of buildings, on the ground, or on the sides and the deck of hospital ships (Article 43), etc.

We have used the qualification " in principle " for two reasons. In the first place there is no obligation on a belligerent to mark

[1] See *Commentary I*, p. 335, and *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. III, p. 124.

his medical units with the emblem. Sometimes military commanders have camouflaged such units—i.e. have abstained from marking them and even tried to conceal them—in order to conceal the presence or real strength of their forces. This is more likely to occur on land than at sea. Obviously, respect for camouflaged units will be purely theoretical. The enemy can respect a medical unit only if he knows of its presence. If the unit is exposed to long-range enemy fire, it will thus lose a large part of its security. If however, the enemy approaches, for instance, and recognizes the the medical unit as such, he must obviously respect it. That is why we have stated above that the emblem is a *virtually* constitutive element of protection under the Convention.

The second reason is that it will not always be physically possible to mark each object with the emblem. Small surgical instruments are a case in point. But such articles will form an integral part of a larger unit, which will be marked.

The distinctive sign under the Geneva Conventions is not a red cross alone : it is a red cross on a white ground. The red cross should therefore be displayed on a white ground. In the case of hospital ships—the most important here—this will naturally be so since Article 43 specifies that all exterior surfaces of such vessels must be white. Obviously, however, should there be some good reason why an object protected by the Convention can be marked only with a red cross without a white ground, belligerents may not make the fact that it is so marked a pretext for refusing to respect it.

The statement in the First Geneva Convention that the emblem of the red cross on a white ground is " formed by reversing the Federal colours " has sometimes been thought to mean that the red cross must necessarily have the same form as the Swiss cross —which has been fixed .[1] That is obviously not so. The word " colours " should be taken to refer simply to the colours white and red. If it had been intended to speak of the Federal flag, the word " reversing " would not have been used. The records of the Diplomatic Conference of 1906 are, moreover, explicit : the Conference deliberately refrained from defining the form of the cross,

[1] This is a " cross humetty ", having arms equal to each other and of a length exceeding their breadth by one-sixth.

since definition might have led to dangerous abuses. The reasons are clear. If the form of the cross had been rigidly defined, attempts might have been made to justify attacks on objects protected by the Convention on the pretext that the emblems displayed were not of the prescribed proportions. Similarly, unscrupulous persons could have taken advantage of a rigid definition to use a slightly larger or slightly smaller red cross for commercial purposes.

For the same reasons, the Convention does not specify the shape of the white ground or the exact shade of red in the cross, as Switzerland has done for its flag.

It has, however, become a general practice to use a Greek cross as the distinctive emblem. This is a cross formed of four arms equal to each other, consisting of two bars, one vertical and the other horizontal, which cross in the centre and do not extend to the edges of the shield. The Swiss cross is a Greek cross.

It is to be hoped that this practice will continue, for too much diversity might give rise to confusion and doubt. The word " cross " is applied to an infinite variety of signs : to cite only the most simple among them, the cross of Saint Andrew (which is in the form of an X), the cross of Saint Anthony (which is tau-shaped) and the Egyptian cross (key of life).

2. *Control by the military authority*

The initial phrase of the present Article is most important : use of the emblem is to be " under the direction of the competent military authority ".

This wording shows that it is the military command which controls the emblem and can give or withhold permission to use it. Moreover, only that command can order a medical unit to be camouflaged.

The wording also shows that the military authority is at all times responsible for the use made of the emblem, must keep a constant check on it, and see that it is not improperly used by the troops or by individuals.

It is understood that it is not necessary to obtain special permission each time the flag is used. In practice, a general order will usually be given once and for all. So far as the Medical Service

of the armed forces is concerned, the authorization must be largely presumed.

Who is the " competent military authority " ? A definition was deliberately avoided so as to allow of flexibility. The question is a private one for the armed forces of each country. If an officer exceeds his competence, he is responsible to his superiors alone. The wounded cannot be allowed to suffer thereby, and an enemy could scarcely plead lack of competence to justify his denying protection to a medical unit which fulfilled the requirements of the Convention.

What is essential is that all armed forces should exercise official control over the use of the emblem.

PARAGRAPH 2. — AUTHORIZED EXCEPTIONS

The founders of the Red Cross intended the emblem to be international and neutral, a symbol of disinterested aid to the wounded soldier, be he friend or foe. It was not the Swiss armorial bearings which were adopted ; the reversal of the Swiss colours created a new emblem, devoid of any national association. Similarly, the emblem chosen was intended to be without any religious significance, since it was to be employed by persons of all beliefs [1].

It was rightly regarded as essential to have a single emblem only, but although unity was universally established—at least legally—by the 1864 Geneva Convention, it was not to endure for long. It was precisely during the drafting at The Hague in 1899 of the Maritime Convention, the revised version of which we are studying here, that the delegates of certain Eastern countries requested the introduction of other emblems, alleging that in their countries any cross symbolized the Christian religion. The Conference was not competent to deal with a matter relating to the Geneva Convention. The same scene again took place at The Hague in 1907. In 1929, the two emblems authorized as exceptions were introduced into the Geneva Convention—namely the red

[1] In *Commentary I*, p. 302, we have given proof of the neutrality of the emblem.

crescent, and the red lion and sun [1]. In 1949, the text of the Maritime Convention was brought into line with that of the First Convention, which maintained the two exceptions already authorized as regards the emblem, while at the same time refusing to accept any others [2].

The present Article, like the corresponding provision in the First Convention, recognizes the exceptions " in the case of countries which already use " them. " Already " means before 1949.

The International Committee of the Red Cross has hitherto taken the view that it should not oppose recognition of relief societies of Moslem countries even if they have adopted the red crescent emblem since 1949. That is not the problem.

The important thing is that some day, it is to be hoped in the near future, all countries will agree to revert to a single emblem throughout the world. The red cross is an international sign, devoid of any religious significance, and it would be illogical to try to replace it by national or religious emblems which, in time of war, are symbols of belligerency and not of immunity. It is to be hoped that in the Middle Eastern countries steps will be taken to explain the real and universal significance of the red cross emblem. Humanity would stand to gain thereby.

ARTICLE 42. — IDENTIFICATION OF MEDICAL AND RELIGIOUS PERSONNEL

The personnel designated in Articles 36 and 37 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 19, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the

[1] Most of the Moslem States have adopted the red crescent. The red lion and sun is used only by Iran, which is a Moslem country but of the Shiite rite and cannot therefore use the red crescent emblem. Iran has not ratified the 1929 Convention but has done so in the case of the 1949 instruments.

[2] Thus the Diplomatic Conference rejected a request by Israel for recognition of the red " shield of David ".

national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his finger-prints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In cases of loss they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

This Article is new and represents the adaptation to conditions at sea of the corresponding provision of the First Convention (Article 40).

PARAGRAPH 1. — THE ARMLET

1. *Wearers*

Those entitled to wear the armlet—the distinguishing sign which allows medical personnel to be recognized from far off—are the persons referred to in Articles 36 and 37—namely members of the medical services (whether of the regular navy or the merchant marine) and members of a Red Cross Society or other recognized relief society of a belligerent or a neutral country assisting the Medical Service of one of the Parties to the conflict. Such " voluntary personnel " may or may not wear uniform.

2. *Description of the armlet*

The armlet is to bear the distinctive emblem. This being a red cross on a white ground, there is no necessity, in theory, for

the armlet itself to be white, provided the cross is surrounded by a white ground.

In any case, it is now the custom everywhere for all medical personnel to be provided with a white armlet bearing a red cross and it is to be hoped that this practice will remain. Besides being easier to manufacture, such armlets are the only ones which give good visibility, owing to the contrast of colours.

The armlet is to be " water-resistant ". This provision, which aims at keeping it in good condition, must be regarded as being in the nature of a recommendation. The fact that an armlet is not waterproof could obviously not be held to deprive it of its protective value.

As in the case of the red cross emblem generally, the form and dimensions of the armlet are not specified—and for the same good reasons. It is again laid down, however, that it is to be affixed to the left arm—" affixed ", because it is not intended to be taken off and put on again at will, and the risk of loss must be avoided ; " to the left arm ", because it is desirable that it should be worn in a stated position, where the eye will naturally look for it. Here again, a belligerent could not claim the right to deny protection to a medical orderly who for some plausible reason wore the armlet on his right arm.

3. *Stamp of the military authority*

What is above all essential is to ensure the *bona fides* of the wearer : the armlet must be worn only by those who are entitled to it under the Convention.

The armlet is not in itself sufficient evidence ; as has been remarked, it is a simple matter to make an armlet and slip it on —in which case the wearer is liable to a penalty, even if he wears the armlet for its legitimate purpose while coming to the assistance of the wounded. The belligerents must have proper safeguards.

The armlet will have no protective value, and cannot be lawfully worn, unless it has been stamped and issued by the military authority. This time the condition is an essential one admitting of no exception. Issue alone does not suffice ; the official stamp must be there to show that the armlet has been issued by, and

on the responsibility of, the military authority. The enemy can, of course, only satisfy himself on this point in case of capture ; but a check of this sort is most valuable and should prevent abuses.

What " military authority " is competent to stamp and issue the armlet ? As we pointed out in reference to Article 41, where the expression " competent military authority " is used, the point was deliberately left vague, and with good reason. The important thing is that the use of the emblem must be controlled by an official military authority fully aware of its responsibility, and cannot be left to the initiative of the first comer. What is necessary under the present Article is that an official military authority, whose name appears on the stamp, should be responsible for issuing the armlet.

As the benefits of the Convention have now been extended to apply also to the merchant marine, the medical personnel of the latter are entitled to use the red cross emblem. The drafters of the 1949 Conventions were certainly not all aware of this, for the present paragraph states that the military authority is to issue and stamp the armlet ; the next paragraph states that the same authority will stamp the identity card ; lastly, the model identity card annexed to the Convention mentions only medical and religious personnel attached to the armed forces at sea. Yet the merchant marine is not part of the navy.

Be that as it may, it is perhaps a good thing in practice that the military authority is thus given general control over the use of the distinctive emblem.

4. *Use of the flag by medical personnel*

Useful though the armlet is, it cannot be said to be perfect as a means of identification. Being small, it will not always be sufficiently visible at a distance to ensure the safety of those wearing it. A practice frequently adopted by medical orderlies and stretcher-bearers detailed to collect the wounded between the lines is for one of them to carry and wave a white flag bearing the red cross. They could no doubt do the same thing when in a rescue craft, trying to pick up shipwrecked persons.

There is nothing to prevent this in the Convention. A group of medical orderlies, however small—even one person—must be regarded as a medical unit. Use of the flag in such circumstances must naturally be absolutely *bona fide* ; it may not in any circumstances be used to cover fighting troops.

The best way to ensure the security of medical personnel would undoubtedly be for them to wear a special uniform, the same in all countries and different in colour from the uniforms worn by fighting troops. This idea was suggested when the Red Cross was first founded, but it has not so far been adopted. Perhaps one day it will be taken up again.

PARAGRAPHS 2 AND 3. — THE IDENTITY CARD

The armlet is not in itself sufficient to establish the status of the wearer. If he falls into enemy hands, he must be able to prove that he is entitled to wear it. He must also be in a position to prove that he is a member of the medical or religious personnel, in order that he may enjoy the status accorded to him under the Convention, and be eligible for repatriation. A special identity card is therefore necessary.

1. *Standardization*

To eliminate serious drawbacks which were found to exist during the Second World War [1], the 1949 Diplomatic Conference adopted a proposal in the draft revised texts to make the identity card uniform throughout the same armed forces. All permanent staff, whether medical personnel, administration personnel (for instance crews of hospital ships) or chaplains, and whether they belong to the navy, the merchant marine or a Red Cross Society, will now have the same type of identity card.

It is also recommended that the card should be of the same type in all armed forces. A specimen is annexed to the Convention

[1] See *Commentary I*, pp. 312-313.

as a model [1]. It is hoped that the Powers will use it. At all events, the Parties to the conflict must, at the outbreak of hostilities, inform one another of the model they are using.

Identity cards should be made out, if possible, in duplicate, one card being issued to the bearer and the other kept by the home country. If he is taken prisoner and has lost his card, it will be possible to prove his status by referring to the duplicate. This precaution was recommended by the International Committee of the Red Cross, and should help to avoid disputes. During the preparatory work of revision, certain experts had proposed that duplicates of all identity cards issued should be sent to the International Committee. That course did not appear feasible, however, as Governments are not always prepared to disclose the exact numbers of their medical personnel.

2. *Description of the card*

The various features of the identity card designed by the Conference and the information it is to contain make it a document of real practical value.

First of all it is to bear the red cross emblem.

To make it more durable, the card, like the armlet, is to be water-resistant. In some countries it is now entirely covered by a transparent, non-inflammable plastic coating which cannot be removed.

The card is to be pocket-size. There is a good reason for this ; it was found that when identity cards were too big, their owners were apt to keep them in their packs—which are not normally worn on the battlefield—or to leave them in their billets.

The card must be worded in the national language. For practical reasons, the Conference rejected an earlier proposal which would have made it obligatory for the data to be given in several languages ; that may obviously still be done if desired, and countries with little-known languages will probably prefer to use a second

[1] The model will be found on p. 284. Its title should be modified in the case of the medical personnel of the merchant marine, who are not attached to the armed forces.

and more generally known language in addition to their own. Countries with more than one national language will be in a similar position.

The particulars which must be given are the surname and the first names of the bearer, his date of birth, his rank and his service number. States may add whatever further details they desire.

The card must also indicate in what capacity the bearer is entitled to the protection of the Convention. As a minimum, it would appear necessary to state whether he is a member of the medical personnel or chaplains' branch, the medical staff proper or the administrative staff, whether he belongs to the Medical Service or to a recognized relief society and, in the latter case, whether the society is from a belligerent or neutral country.

Further details seem highly desirable in the interest of the wounded and sick. It should be possible for retained medical staff to be detailed at once for employment in accordance with their particular qualifications. At the Conference, the delegation which proposed the provision suggested that the " qualification and/or medical duty for which trained " should be specified. That expression does not appear in the final text, but we feel the idea should be kept in mind. Not only would it be useful to distinguish between physicians, surgeons, dentists, medical orderlies, stretcher-bearers, etc., but also to sub-divide physicians still further into eye specialists, neurologists, and so on.

The card must bear the photograph of the owner. This essential means of identification, which was considered too complicated in 1929, is now so widely used that it was accepted without discussion at the Conference.

The same thing was not true in the case of finger-prints. The proposal to make them obligatory was rejected, even although they offer a surer means of identification than photographs, and are more easily obtained. The difficulties were of a psychological nature : in some countries only criminals, or at all events those accused of offences, have their finger-prints taken, and the public has this association in mind. With time, the prejudice will probably disappear.

At present, finger-prints are optional ; so is the bearer's signature, because illiteracy still exists, in the twentieth century, to

a greater extent than is generally supposed. Consequently, Governments may decide to have either the bearer's finger-prints, or his signature, or both, on the card ; but one or the other must appear. It cannot be too highly recommended to have both whenever possible, as that will provide a double check.

The final condition imposed by the Convention is the most important : the card must be embossed with the stamp of the military authority. It is this stamp which makes the card, like the armlet, authentic. It will be noted that the word " embossed " —i.e. stamped by pressure—is used ; experience has shown that the usual wet stamps can rub off, and can be imitated with comparative ease [1].

3. *The identity disc*

At the beginning of paragraph 2, in the sentence which lays down that medical personnel are to carry an identity card, we find the words " in addition to wearing the identity disc mentioned in Article 19 ". These words refer to the disc—preferably double—which all military personnel must wear, so that their bodies can be identified in case of death. Further details are given in the commentary on Article 19 [2].

PARAGRAPH 4. — CONFISCATION PROHIBITED : REPLACEMENT

This paragraph expressly confirms the right of medical personnel to keep their identity papers and wear the armlet in all circumstances, i.e. even when retained by the adverse Party to assist their fellow-countrymen who are prisoners.

The provision is a necessary one. In both World Wars medical personnel sometimes had their armlets and cards taken from them—a convenient way for the captor State to evade its obligations. Such practices must be strictly forbidden ; the special insignia and cards of medical personnel may be withdrawn only by the military authorities of their own armed forces.

[1] In a final Resolution, the Diplomatic Conference recommended that States and National Red Cross Societies should take all necessary steps, in time of peace, to provide medical personnel with their identity cards and armlets. See below, p. 286.

[2] See above, p. 143.

Should the armlet be lost or destroyed, the owner must be issued with a new one. If he loses his identity card, he is entitled to a duplicate. This provision lays an obligation not only on the Power of origin, but also on the captor Power which must do all it can to facilitate the transmission of new cards and armlets for captured enemy medical personnel who are found to be without them. During the Second World War a large number of identity cards were transmitted to medical personnel in captivity through the intermediary of the International Committee of the Red Cross.

ARTICLE 43. — MARKING OF HOSPITAL SHIPS AND SMALL CRAFT

The ships designated in Articles 22, 24, 25 and 27 shall be distinctively marked as follows :

(a) *All exterior surfaces shall be white.*

(b) *One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.*

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral State, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

The above-mentioned ships and craft, which may wish to ensure by night and in times of reduced visibility the protection to which they are entitled, must, subject to the assent of the Party to the conflict under whose power they are, take the necessary measures to render their painting and distinctive emblems sufficiently apparent.

Hospital ships which, in accordance with Article 31, are provisionally detained by the enemy, must haul down the flag of the Party to the conflict in whose service they are or whose direction they have accepted.

Coastal lifeboats, if they continue to operate with the consent of the Occupying Power from a base which is occupied, may be allowed, when away from their base, to continue to fly their own national colours along with a flag carrying a red cross on a white ground, subject to prior notification to all the Parties to the conflict concerned.

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41.

Parties to the conflict shall at all times endeavour to conclude mutual agreements in order to use the most modern methods available to facilitate the identification of hospital ships.

This long provision merely develops and brings up to date Article 5 of the 1907 Convention, which in turn was an expanded version of the corresponding provisions in the 1899 and 1868 Conventions. Paragraphs 6 and 8 are, however, completely new.

PARAGRAPH 1. — METHODS OF MARKING

It had long been acknowledged that the system of marking hospital ships adopted in 1907, at a time when air forces did not exist, was completely inadequate. Hospital ships were to be painted white outside with a horizontal band of green or red, and were to fly the red cross flag. The experts who met in 1937 recommended that large red crosses on a white ground should be painted on the hull and deck of hospital ships. During the Second World War, the belligerents often adopted that means of identification. It is clear from the records that the lack of an up-to-date system of marking, visible at a great distance, was the cause of most of the attacks made on hospital ships during the Second World War [1].

On this point, the 1949 Diplomatic Conference therefore adopted far-reaching amendments to the 1907 text. It did not, however, adopt the radical innovations proposed by certain delegations such as, for instance, that the whole ship should be painted orange and black. The intention was to reach a simple, practical solution, not involving marking on the superstructure.

[1] See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 213.

A uniform system of marking was adopted for hospital ships, whether they belong to a State or to a belligerent or neutral relief society, whereas under the 1907 Convention—as a survival from the 1868 text in which ships were treated differently according to their origin—some were to bear a green band, and others a red band. The 1949 Diplomatic Conference decided to do away with bands of any kind, in order to make the red cross more clearly visible.

As in the past, all exterior surfaces of the ship are to be white. Any mention of ships being " painted " white was omitted deliberately, for there may be other more convenient and more durable means of applying the colour [1]. On the other hand, the word " painted " was retained in the case of lifeboats (paragraph 3) and the red crosses.

The text specifies that *all* exterior surfaces must be white, and this therefore applies also to the visible parts of the deck. A great deal of maintenance might be entailed, and it would be inappropriate to reproach a ship's captain with the fact that small patches of the deck were worn or soiled by footmarks. The essential thing is that an aircraft should at first glance be able to identify the deck as being white.

The provision also stipulates that one or more dark red crosses, as large as possible, are to be painted on each side of the hull and on the horizontal surfaces, so as to afford the greatest possible visibility from the sea and from the air. The number and size of crosses to be painted was intentionally not specified, for they will depend on the size and shape of the vessel [1]. The essential thing is that it should be as clear as possible that the vessel is a hospital ship. Similarly, the reference to " dark red " obviously does not mean that a ship on which the red crosses were of another shade would not be protected. This is merely a recommendation intended to increase the effective security of a floating hospital by providing a better colour contrast.

In accordance with the references to other Articles of the Convention, the present paragraph applies not only to hospital

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol.II-A, p. 160.

ships but also to coastal rescue craft. By another reference, in paragraph 3, it also applies " in general " to lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service.

PARAGRAPH 2. — FLAGS

This provision lays down rules regarding the three types of flag applicable to hospital ships (and also to other protected craft in virtue of the reference made in paragraph 3).

The national flag of the belligerent must be flown. On the other hand, a hospital ship will not fly the pennant hoisted by warships.

Hospital ships belonging to a neutral State and assisting a belligerent must fly their national flag as well as that of the belligerent concerned. The records of the 1907 Conference at The Hague indicate where the flags should be flown : the flag of the neutral State is to be flown in its usual place, and the flag of the belligerent together with the red cross flag is to be flown from the mainmast [1].

Last and most important, hospital ships must fly a white flag with a red cross. That provision already existed in the earlier instruments, but the 1949 Diplomatic Conference decided to specify where it should be flown, although that place had already become traditional as may be seen from the reference above : it is to be flown at the mainmast, as high as possible. Why should this be so ? Because it is the part of the ship which first appears over the horizon. The white flag with a red cross will therefore be placed above the flag of the belligerent.

PARAGRAPH 3. — LIFEBOATS

This provision indicates the method of marking to be used for *(a)* lifeboats of hospital ships (which are protected pursuant to Article 26) ; *(b)* coastal lifeboats (which are protected pursuant to Article 27) ; and *(c)* small craft used by the Medical Service.

[1] *Actes* of the 1907 Conference, Vol. III, p. 296.

There is no other provision specifying that the latter category is to be protected, and a similar anomaly existed in the 1907 text: the three categories of craft mentioned above were granted protection only indirectly under Article 5, relating to marking. The situation was put right in 1949 in the case of the first two categories, but the anomaly still remains in the case of the third. This means that " all small craft used by the Medical Service " are protected only pursuant to a single reference, that in the present paragraph, which is included in an Article relating to the distinctive emblem. The reference nevertheless establishes the fact of protection, but the anomaly as regards form means that it will not be compulsory to send a notification to the other Parties to the conflict concerning such small craft. In practice, however, the Powers would do well to send a notification, in accordance with the rules set forth in Article 22.

For these three categories of small craft, there are two compulsory rules in regard to marking: firstly, they must be painted white, and secondly, dark red crosses must be prominently displayed on them. There are other stipulations which are not compulsory, such as, for instance, that such craft " shall, in general, comply with the identification system prescribed above for hospital ships ". The identification system, in addition to the requirements repeated here, includes those which follow from paragraphs 1 and 2 (marking on the deck, flags). " In general " means to the extent possible having regard to the size and shape of such craft, for some of them are not decked over or have no masts.

Reference should be made here to the problem of *the marking of fixed coastal installations* used exclusively by coastal rescue craft and protected under Article 27. The Second Geneva Convention does not actually stipulate that such installations may or must be marked with the emblem of a red cross on a white ground, but that is an obvious gap in the provisions. It seems to us sound doctrine and a reasonable interpretation of the relevant texts to acknowledge that such installations may, in war-time, display the distinctive emblem even though they are not hospital buildings accommodating wounded persons, but boat-houses, hangars or workshops. If the enemy is to be able to respect them, as required under the Convention, he must be able to identify them from far off.

What method of marking should be used for coastal installations ? Need they only display the red cross emblem, or should all the external surfaces of the installations be entirely painted white ? The Convention makes no reference to this point, and it seems to us sufficient if they display the sign of the red cross on a white ground. Only in the case of vessels are all exterior surfaces required to be white, and there is no similar provision regarding hospitals on land. Obviously, however, there is nothing to prevent coastal rescue installations from being painted white.

As regards *paragraph 4*, concerning *marking at night*, we will merely quote the relevant passage by the Rapporteur of Committee I at the 1949 Diplomatic Conference :

" At night and at times of reduced visibility, hospital ships are to display their various markings, unless the belligerent in whose hands they are prohibits them from doing so. The Committee was not prepared to dictate any system of lighting, floodlighting, crosses illuminated from within, etc. The solution chosen will, for that matter, vary with the size and special construction of the ship, and with geographical and meteorological conditions, etc. " [1].

Paragraph 5, which relates to detained hospital ships, is self-explanatory. If a hospital ship is provisionally detained by the enemy for the specified maximum period of seven days, in exceptional circumstances, pursuant to Article 31, that ship must haul down the flag of the belligerent in whose service it normally is, in order to make clear its special position. It will not be required to fly the flag of the belligerent detaining it.

Paragraph 6 is entirely new and was proposed by the Netherlands Delegation. As stated in the Final Record of the Diplomatic Conference of 1949, it " met the wishes of a great number of national lifeboat institutions belonging to formerly occupied countries which had experienced difficulties during the last war. Crews of lifeboats had refused to put to sea under the flag of the Occupying Power. He (Rapporteur of the working party which considered these questions) would have preferred such lifeboats to have been

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 205.

able to operate under the red cross flag only. The suggestion, however, had been considered dangerous by other delegates, who thought it necessary to be able to recognize the country of origin of the lifeboats " [1].

The wording of the paragraph shows that in certain cases where circumstances so warrant, the Occupying Power might refuse to consent to the use of lifeboats. In general, however, such consent must be given pursuant to the principles resulting in particular from Article 27 of the present Convention and Article 16 of the Fourth Geneva Convention. The expression " when away from their base " must be interpreted as meaning when lifeboats put to sea, when they leave harbour.

The notification mentioned here, which is in addition to the notification specified in Articles 27 and 22, will normally be sent by the Occupying Power, through the intermediary of the Protecting Power.

Paragraph 7 may seem superfluous in view of Article 41, the commentary on which should be referred to.

Paragraph 8 is new and the idea it contains is a good one. With the speed of technical progress, the Convention was always liable to be one war behind in this domain. All the methods of marking referred to above may therefore be brought up to date at a later stage. In 1949 new inventions were referred to, but the Parties to a conflict would have to agree on their use.

At the 1949 Diplomatic Conference, it was proposed that hospital ships should " try to make known, periodically and adequately, their position, course and speed ". The suggestion was rejected [1], but it was embodied in a Resolution of the Conference (Resolution No. 7) [2].

ARTICLE 44. — LIMITATION IN THE USE OF MARKINGS

The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 161.

[2] For the text of the Resolution, see below, p. 287.

the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

This provision is virtually identical to Article 6 of the 1907 Convention, and gave rise to no discussion in 1949.

The phrase " except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned " was, however, added in 1949. Article 21 of the Fourth Geneva Convention provides that vessels conveying wounded and sick civilians are to display the red cross emblem. In addition, as we have already seen [1], the International Committee of the Red Cross may be called upon, as in the past, and subject to the consent of the Parties concerned, to bring into service ships marked with the same emblem, in particular to carry relief shipments for war victims. Provision is made for the possible use of such ships in Article 75 of the Third Convention of 1949 and Article 111 of the Fourth Convention.

As it stands, the present Article gives rise to no problems. It serves as a useful addition to the preceding Article, by making clear that except in those cases already mentioned, the special marking may be used only in order to indicate or protect hospital ships, rescue craft and small craft used by the Medical Service.

ARTICLE 45. — PREVENTION OF MISUSE

The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43.

This provision corresponds to part of Article 21 of the 1907 Convention. The other prohibitions contained in that Article are now covered by Article 51 of the present Convention.

Article 21 of the 1907 text nevertheless contained one stipulation which is no longer included, namely for " punishing, as an unjustifiable adoption of naval or military marks " the unauthorized use of the red cross emblem by ships. That severe rule, made

[1] See above, p. 228.

effective by the reference to criminal legislation, was well suited for offences which, in view of the special conditions prevailing at sea, are in most cases very grave [1].

The rule was considered too strict to be retained in the Convention, but nothing prevents national legislators from resorting to it for the repression of serious cases such as deliberate misuse of the protective emblem for the purposes of war.

On the other hand, the new Article is broader in scope than the earlier one, since it now applies not only to the emblem of a red cross on a white ground, but also to the other two emblems now recognized by the Convention—namely the red crescent, and the red lion and sun—by virtue of the reference to Article 43, paragraph 7.

The present Article is a shortened version of Articles 53 and 54 of the First Geneva Convention of 1949. Since the latter instrument is *sedes materiæ* as regards the distinctive emblem, as we have already seen, the reader should refer to the commentary on those Articles. Moreover, Article 45 of the present Convention refers only to Article 43 and is intended merely to prevent misuse of the emblem displayed on ships. Reference must be made to the First Convention in regard to the uses of the emblem mentioned in Articles 41 and 42 (personnel, equipment, etc.).

The clauses of the Convention which protect ships claiming immunity by means of the red cross emblem must be enforced in all States by national legislation. Apart from the measures of an administrative nature which the competent authorities must take at all times, each country must enact legislation to prohibit and punish abuses, both collective and individual.

Offences against the protective sign in war-time (which will be the most frequent case here) come naturally under the penal legislation which deals with offences against the laws and customs of war. Other abuses will usually form the subject of special laws in application of the Geneva Conventions in which might be included a provision giving effect to the prohibition laid down in

[1] In parallel, Article 23 *(f)* of the Regulations annexed to the Fourth Convention of The Hague of 1907 forbids the " improper use of ... the distinctive badges of the Geneva Convention " together with improper use of a national flag or military insignia and uniform.

the present Convention, and in particular in Article 45. In this connection, reference should be made to the " Model Law for the protection of the Red Cross name and emblem " which was drawn up by the International Committee of the Red Cross to serve as a general guide with a view to assisting the legislative task of the States in this regard [1].

Whereas Article 44 is rightly included in the Chapter on the distinctive emblem, it would have been more logical to place Article 45 in Chapter VIII, relating to the repression of abuses and infractions. It might even have been incorporated in Article 50 (by which the Powers undertake generally to take the measures necessary for the suppression of all acts contrary to the provisions of the Convention). At the 1949 Diplomatic Conference, Article 45 was drawn up as a separate provision to avoid re-opening discussion on Article 50 which had been formulated by the Joint Committee as one of the Articles common to all four Conventions.

Article 45 is mandatory, whereas the corresponding provision in the 1907 Convention was not. The earlier clause merely laid down that the signatory Powers whose legislation was inadequate were to adopt or propose to their legislatures the measures necessary to prevent abuse of the emblem. As in the case of the First Convention, which contains a corresponding provision, the Diplomatic Conference rightly rejected a wording which gave legislators the option of refusing the Government's " proposals " partly or *in toto*. It is the Contracting Parties themselves—in other words, sovereign States, whose will is expressed by their plenipotentiaries and then by parliamentary votes—which, on drafting and ratifying an international Convention, accept all the obligations resulting from it. There is no reason why the protection of the red cross emblem, which is so important a case, should constitute a less imperative duty. This singular anomaly has fortunately now disappeared.

Wherever legislation is inadequate—and this is so in the case of all countries, if only as regards the newly-prescribed protection accorded to the red crescent and the red lion and sun—it must be amended. The Convention sets no time-limit. If at all possible,

[1] The text of this model law may be found in *Commentary I*, p. 395 ff.

the necessary changes in the legislation of each country should already have been made by the time the Convention comes into force for it, that is, six months after ratification or accession.

Finally, it is not sufficient merely to enact legislation, however adequate in itself. Orders must be given, a close watch kept, and those responsible prosecuted. For it is only at the cost of unremitting effort that the responsible authorities can succeed in defending the red cross emblem and preserving inviolate its protective value and profound significance. Let it never be forgotten that human lives may be at stake.

CHAPTER VII

EXECUTION OF THE CONVENTION

ARTICLE 46. — DETAILED EXECUTION. UNFORESEEN CASES

Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.

This provision is not new; Article 19 of the Tenth Hague Convention of 1907 contained a similar provision, except that it put the whole of the responsibility on the Commanders-in-Chief. The present Article designates them as intermediaries but places the primary responsibility for application of the Convention on each " Party to the conflict ". If this rule is to be put into practice, executive measures must be taken in order to regulate in minute detail the actual situations which arise.

Commanders-in-Chief will have, for example, to take the necessary action on the spot, during the fighting, to ensure respect and protection for the wounded, sick and shipwrecked (Article 12, paragraph 1). After an engagement, they will have to make local arrangements for searching for and collecting the shipwrecked, wounded and sick (Article 18, paragraph 1) and make sure that care is given first to those in most urgent need of medical treatment (Article 12, paragraph 3). They will also try to make local arrangements for the evacuation of protected persons (Article 18, paragraph 2). They will appeal to the charity of merchant ships, yachts or neutral vessels to take on board and care for the wounded and sick and to collect the dead, if circumstances so require (Article 21, paragraph 1).

During the fighting, Commanders-in-Chief will see to it that the enemy's sick-bays are protected and once the engagement is

over they will have to decide whether they need them for the care and treatment of their own wounded and sick, according to the conditions specified in Article 28, paragraph 2. Similarly, they will be responsible for deciding to what extent the religious, medical and hospital personnel who have fallen into their hands should be allowed to continue their duties in behalf of the wounded and sick whom they were attending at the time of capture (Article 37, paragraph 1).

Further, in the same way, Commanders-in-Chief will have to provide for cases which are not catered for in the Convention. For the latter could not make specific provision for all the possible situations which might arise during a conflict. Article 46 gives us the criterion which should be applied in order to find a solution in such cases—namely, that the general principles of the Convention must always be followed. Among those principles, there is one which summarizes them all : it is that the wounded, sick and shipwrecked are to be protected in all circumstances and cared for without distinction of nationality.

It is by their compliance with this dual duty of detailed execution and provision for unforeseen cases that the Powers will meet in full the obligation they have incurred under Article 1 of the Convention, of which the present Article is a complementary part.

ARTICLE 47. — PROHIBITION OF REPRISALS

Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.

1. *General*

The Second World War served to confirm the conclusions already drawn from the 1914-1918 conflict : in the psychological tension of war and by an inevitable train of events, resort to reprisals may often lead to serious abuses, while at the same time completely failing to attain the object—namely the reassertion of

rights [1]. We shall not go here into all the complex aspects of the question of reprisals in international law, but it may be noted that during the second half of the XIXth century, every effort was made to remind all concerned that recourse to such an extreme measure in war-time must not lead to a violation of fundamental principles. Thus, in its Manual of the Laws of War on Land, drawn up in 1880, the Institute of International Law laid down in particular that reprisals " must conform in all cases to the laws of humanity and morality [2].

Besides this effort aimed at limiting the means of legal recourse constituted in theory by reprisals, another more radical tendency became apparent after the First World War. That was the absolute prohibition of reprisals against certain categories of war victims, first introduced into humanitarian law by the 1929 Prisoners of War Convention. This great step forward was motivated by the memory of the useless suffering which prisoners of war had endured during the First World War, when measures of reprisal were systematically applied.

It seems strange that the 1929 Diplomatic Conference should not also have included this express prohibition in the Wounded and Sick Convention ; the public conscience having disavowed reprisals against prisnoers of war, that disavowal is *a fortiori* applicable to reprisals against military personnel like the wounded, sick and shipwrecked, who are defenceless and particularly worthy of protection.

The omission must have been due to an oversight. Moreover, one might justifiably assert that the prohibition is already implicit in that Convention and in particular in the phrase " in all circumstances " which was inserted in 1929 in the Article on the respect due to the wounded and sick.

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[1] In regard to maritime warfare, see especially the Order issued by the German Government on January 29, 1917, which stated that all hospital ships bearing the red cross emblem would be considered as warships and would be attacked and sunk as such in a specified area of the Channel and the North Sea (*Bulletin international de la Croix-Rouge*, 1917, pp. 140, 260, 384). See also, in regard to the Second World War, *Revue internationale de la Croix-Rouge*, 1944, p. 2. During the Second World War, however, it would seem that most of the attacks made on hospital ships were usually due to inadequate marking (see *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, p. 215).

[2] See Oxford Manual, Articles 85 and 86.

Be that as it may, the gap was filled in 1949 when the First Geneva Convention was under study, and the new provision concerning reprisals was naturally included also in the Second Convention.

One would certainly have liked to see a principle of such importance placed at the beginning of the Convention among the other fundamental principles. It was placed in Chapter VII purely for reasons of general order, but it was in no way the intention of the authors of the Convention to deprive it of any of its importance, which is *essential.*

2. *Scope of the provision*

The prohibition of reprisals is absolute, and remains so when an offence which would formerly have justified reprisals under international law is committed, no matter what the nature of the offence may be.

When the offence has no connection whatsoever with persons or property covered by the Geneva Convention—for example the illicit destruction of a fishing fleet—it is readily agreed that retaliation, if any, by the adverse Party cannot be against the wounded and sick or the medical personnel in his hands. On this point, the prohibition is in full accordance with public sentiment, as reflected, in the attempts to produce rules governing reprisals, by the principle of proportionate action.

But the prohibition goes further than that. It applies equally to a form of reprisals which public opinion, basing itself on the *lex talionis,* would be more readily inclined to accept—namely, reprisals against persons or property protected by the Geneva Convention where such reprisals are in response to an offence of the same nature. A belligerent may sometimes be tempted to reply to an offence by taking identical, or at any rate similar, action. The temptation may be increased—quite mistakenly—by a desire for rapid results, or by the pressure of excited public opinion, or even by the opinion of jurists who regard reciprocity as the basis of humanitarian law [1].

[1] For example, Alfons WALTZOG, in his work *Recht der Landkriegsführung,* Berlin 1942, justifies reprisals against prisoners of war despite the prohibition of 1929, even when the offence leading to the reprisals was of an entirely different nature.

A. *Theoretical and practical justification of the prohibition of reprisals.*—The Government concerned should therefore realize, and make its population realize, that recourse to reprisals exposes protected persons on each side of the conflict to the risk of rapid and disastrous increases in the severity of the measures taken against them, and that it is essential to resort instead to the various means afforded by the Convention for the settlement of differences (good offices of the Protecting Powers, enquiry procedure, etc.). The Government concerned must also insist on the formal and absolute nature of the obligation it assumed on becoming a party to the Convention, and on the fact that to violate the latter with the idea of reasserting one's rights is only to add a further offence of one's own to the offence for which the enemy is blamed.

It should also be remembered, and brought home to others, that one reason why the Convention was able to exclude the traditional system of reprisals was that it introduced in their place more advanced methods of asserting rights—in particular, control by the Protecting Powers and the universal obligation to punish individuals responsible for grave breaches. And quite apart from legal measures, there are certain other means, such as an intensification of the war or appeals to neutral public opinion, by which a belligerent can reply to breaches by the adverse Party.

The ability of a Government to resist the forces which urge it to resort to reprisals will therefore depend on the extent to which the population has been informed, in advance, of the underlying reasons which have led to the prohibition of reprisals in the humanitarian Conventions, and, above all, of the new character which this prohibition, in conjunction with other principles, has given the Conventions.

The prohibition of reprisals is in fact closely connected, as was realized by the Commission of Naval Experts convened by the International Committee of the Red Cross in 1937, with those provisions (such as Articles 1, 6 and 7) which, by affirming the applicability of the Convention " in all circumstances ", have changed its character. For, thanks to those Articles, the Convention is no longer a legal instrument dependent on the will of the States and subject to considerations of reciprocity, but is essentially concerned with human rights. When once the authors of the Con-

vention had presented it as a corpus of inalienable rights conferred upon the wounded and sick and upon medical personnel, there could no longer be any question of those rights being liable to withdrawal or restriction as a result of a violation with which the above persons had absolutely nothing to do.

Reprisals were, in short, a collective punishment inflicted on those who least deserved it. In future it is the author of the offence who is to be punished. The penalty is no longer collective, but is individual. The cardinal importance of the step forward marked by the new Geneva Conventions will be apparent.

B. *Scope of the prohibition in the case of retortion.*—One last point calls for comment. Should the Article be interpreted as applying equally to measures of retortion?

Unlike reprisals, retortion is in principle concerned only with acts which are in themselves lawful. Suppose, for example, that in two opposing countries medical personnel have been granted certain privileges over and above the treatment to which they are entitled under the Convention. If one of the two countries withdraws those privileges, is the other entitled to do the same by way of retortion? It has already been pointed out that the treatment to be accorded to protected persons is not a question of reciprocity, and the International Committee of the Red Cross has always endeavoured to bring the conditions in which they live up to the most favourable, and not down to the least favourable, standard. It would therefore appear desirable that measures of retortion should also be banned in this connection.

What matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum. In the case of benefits which go beyond that minimum, it is admissible that a belligerent should not agree to accord them except on the basis of reciprocity. There might even be a risk of discouraging the granting of such benefits, if it were insisted that they should in no case be subject to retortion. It therefore appears more prudent to conclude that Article 47 applies only to reprisals as defined at the beginning of the commentary on the present Article.

ARTICLE 48. — DISSEMINATION OF THE CONVENTION [1]

The High Contracting Parties undertake, in time of peace as in time of war, to dissemate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

In subscribing to Article 1, the Powers undertook to respect and ensure respect for the Convention in all circumstances. If a Convention is to be properly applied, however, a thorough knowledge of it is necessary. One of the worst enemies of the Geneva Conventions is ignorance.

It was important, therefore, that the Contracting Parties should be required to disseminate the text of the Convention as widely as possible in their respective countries. That is the purpose of the present Article, which is worded in almost identical terms in all four Conventions.

Article 48 originated in Article 20 of the Tenth Hague Convention of 1907, and Article 27 of the Geneva Convention of 1929.

The obligation imposed on States under Article 48 is general and absolute. It has to be complied with both in time of peace and in time of war. Two specific measures are to be taken—namely military instruction and civil instruction, on both of which the Convention lays special emphasis.

In the first place, the Convention should be known to those who will be called upon to apply it ; the latter may have to render an account of their deeds or shortcomings before the courts, or may even benefit by the provisions of the Convention. The study of the Convention must therefore be included in the training programme of the armed forces, the instruction given being adapted to the rank of those for whom it is intended [2].

[1] Article common to all four Conventions. See First Convention, Article 47 ; Third Convention, Article 127 ; Fourth Convention, Article 144.

[2] In 1951, the International Committee of the Red Cross issued for the use of military personnel and the public a summary of the Geneva Conventions of 1949, in the form of a booklet in French, English and Spanish. In 1956, it also published an illustrated booklet, printed in nine languages.

In case of mobilization the essential points must be gone through again, so that they are fresh in the minds of all those who are called up. In certain countries, the essential provisions of the Convention are printed in the army book of each member of the armed forces. That arrangement should be general.

Article 48 expressly mentions two classes of persons other than combatants, who require special instruction—namely, medical personnel and chaplains. As those persons enjoy rights under the Convention, they must make a special point of scrupulously observing the corresponding duties which the Convention imposes on them.

With a view to dissemination among the armed forces, the text of the Conventions should first be distributed to the officers, who, in case of war, would be responsible for applying the Conventions, and courses of instruction should also be organized; this has already been done by some Governments [1]. It means that the necessary translations must first be prepared. In the light of the experience of the Second World War, such courses should be accompanied by practical training, particularly in regard to the marking of hospital ships and rescue craft.

The Conventions must also be widely disseminated among the population. Provision has therefore been made for the study thereof to be included in syllabuses of civil instruction, but this is an optional requirement [2].

Action should be taken first by the National Red Cross Societies, which must train a staff with specialized knowledge of the Conventions [3].

The general public can be informed by extracts or summaries of the Conventions, articles in the press, radio talks which might be given some topical interest, to enable a courageous and independent press to speak in the name of humanity and in a manner devoid of all partiality.

[1] At the 1949 Diplomatic Conference, it was suggested that such courses should be organized. See J. de PREUX : " The Dissemination of the Geneva Conventions of 1949 ", *Revue internationale de la Croix-Rouge*, Supplement, April 1955, pp. 59-60. See also *Report on the Work of the Conference of Government Experts*, pp. 261-262.

[2] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 70 and 112.

[3] See J. de PREUX : *op. cit.*, p. 60 ff.

Lastly, it would be most advantageous to introduce the study of humanitarian law into the syllabuses of faculties of law.

Certain provisions of the Conventions also affect civilians, and it is from among the latter that the military personnel are recruited. It is possible to go even further, however, and say that men must be trained from childhood in the great principles of humanity and civilization, so that those principles may take deep root in their conscience.

Here again, provision has therefore been made for the inclusion of the study of the Convention in syllabuses of instruction.

The requirement is, however, preceded by the words " if possible ". It is not that the 1949 Diplomatic Conference thought it any 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 necessities which may be thought unfounded, considered that they must safeguard the freedom of decision of the provinces [1].

Lastly, everyone, whether military personnel or civilians, should have a good knowledge of the Convention and themselves be imbued with the sentiments of which it is so profound an expression. That is the best means of guaranteeing that the Convention will be respected. No effort should be spared to achieve this supremely important aim. The States, which can easily make the practical efforts which the Article requires, will be anxious, no doubt, to fulfil this duty.

Widespread dissemination of the Geneva Conventions will not merely facilitate their application in time of war ; it will also spread the principles of humanity and thus help to develop a spirit of peace among the nations.

ARTICLE 49. — TRANSLATIONS. RULES OF APPLICATION [2]

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 70 and 112.

[2] Article common to all four Conventions. See First Convention, Article 48 ; Third Convention, Article 128 ; Fourth Convention, Article 145.

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 English, French, Russian and Spanish should be excluded, however, since the first two are the authentic texts of the Convention, while the last two have been officially prepared by the Swiss Federal Council under the terms of Article 54. At the time of publication of the present Commentary, the translations made by Governments have added to these four texts official versions in Arabic, Czech, Danish, Dutch, Finnish, German, Greek, Hebrew, Hungarian, Indonesian, Italian, Japanese, Norwegian, Persian, Polish, Rumanian, 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 instruments issued by the executive and legislative authorities connected in any way with the application of the Convention. Thus, the States will have to communicate to one another laws enacted in application of the Articles of the Convention. The Articles concerned are : Article 13 : definition of protected persons (particularly a determination of those considered as members of the armed forces) ; Article 42, paragraph 3 : identity cards for medical and religious personnel ; Article 20 : prescriptions regarding the dead ; Articles 22, 24 and 25 : characteristics of hospital ships (registered gross tonnage, length from stem to stern, number of masts and funnels and, if possible, photograph and silhouette) ; Article 45 : prevention of misuse of the distinctive emblem ; Article 39, paragraph 2 : marking of medical aircraft ; Article 48 : dissemination of the Convention ; Articles 50 to 52 : repression of abuses and infractions.

It is important that the parties to the Convention should be informed of such laws and regulations, and the most appropriate procedure would seem to be to use as intermediary the Swiss Federal Council, which is the depositary of the Geneva Conventions.

CHAPTER VIII

REPRESSION OF ABUSES AND INFRACTIONS

PENAL SANCTIONS

(ARTICLES 50 TO 52)

The Geneva Conventions form part of what are generally known as the laws and customs of war, violations of which are commonly called " war crimes ".

The punishment of breaches of the laws and customs of war is not new. Ever since the XVIIIth century there have been examples of the trial and punishment of offences of this nature ; but such instances were few and far between and could hardly be said to form a body of precedent. Nor did the codification of the laws of war, which began first in the second half of the XIXth century, in particular at Geneva and The Hague, result in the establishment of international rule in this particular connection.

In line with the Geneva Convention of 1906, however, the Tenth Hague Convention of 1907 contains a coherent group of rules for repressing any violations of its provisions [1].

The other Hague Conventions of 1899 and 1907 made no great contribution in the matter of repressive measures. They contained a series of prohibitions, but did not require the Contracting Parties to enact the legislation necessary to punish violations. In other words, punishment depended on the existence or absence of national legislation for the punishment of the acts committed.

At the end of the First World War, however, this system was felt to be unsatisfactory and provision was made in the Treaty of Versailles for punishing nationals of the conquered countries who

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[1] For an account of the historical background of the corresponding provisions of the 1906 Convention, see *Commentary I*, pp. 351-357.

had committed against the Allied troops acts which were contrary to the laws and customs of war.

It was chiefly during the Second World War and the years that followed that the problem of punishing war criminals arose and that the authorities of various countries were led to promulgate special laws for the repression of crimes committed by the enemy against their civilian population and troops.

During the work in preparation for the 1949 Diplomatic Conference, the International Committee of the Red Cross drew the attention of the experts to the need to include a separate chapter on the repression of violations of the Convention. In 1948, it submitted the following draft Article to the XVIIth International Red Cross Conference :

> The legislation of the Contracting Parties shall prohibit all acts contrary to the stipulations of the present Convention.
>
> Each Contracting Party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be considered as war crimes, to indict such persons before its own tribunals, or to hand them over for judgment to another Contracting Party [1].

At the request of the XVIIth International Conference of the Red Cross, the International Committee continued its work on the question, and at the beginning of 1948 made a thorough study of the question with four international experts ; the outcome was a new draft text [2].

At the Diplomatic Conference of 1949, the problem of penal sanctions was entrusted to the Joint Committee appointed to consider the provisions common to all four Conventions. It had not been possible for the draft texts prepared by the International Committee of the Red Cross to reach the Governments until just before the opening of the Conference, and consequently certain

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[1] See *XVIIth International Conference of the Red Cross, Draft Revised or New Conventions for the Protection of War Victims*, p. 134.

[2] A brief statement on the considerations which led the International Committee to submit these draft Articles may be found in the booklet *Remarks and Proposals*, pp. 18-23.

delegations opposed their being taken as a basis for discussion. The Netherlands Delegation, however, submitted them as its own, so that they came officially before the Conference [1].

ARTICLE 50. — PENAL SANCTIONS : I. GENERAL OBSERVATIONS [2]

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie *case.*

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

PARAGRAPH 1. — SPECIAL LEGISLATION

The present provision must be put into effect in peace-time, in anticipation of the situations listed in Article 2 [3]. The laws

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 42.

[2] Article common to all four Conventions. See First Convention, Article 49 ; Third Convention, Article 129 ; Fourth Convention, Article 146.

[3] A number of States have already fulfilled this obligation, including Yugoslavia, Switzerland, the Netherlands, Thailand, Ethiopia, the United Kingdom, Australia and New Zealand.

enacted on the basis of this paragraph should, in our opinion, fix the nature and duration of the punishment for each offence, on the principle of making the punishment fit the crime [1].

In order to make easier the implementation of these provisions, and at the same time to create a certain uniformity of legislation, when the four Geneva Conventions were adopted the International Committee expressed the wish to draw up a model law on which the national legislation in the various countries could be based [2].

The sanctions to be provided will be applicable to persons who have committed or ordered to be committed a grave breach of the Convention; it will thus be possible to prosecute as accomplices both the author of an act and the co-author. There is no mention, however, of the responsibility which may be incurred by persons who do not intervene to prevent or put an end to a breach of the Convention. This is nevertheless an important question which will have to be determined under national legislation.

As regards the guilt of a person who has acted under superior orders, one may refer to the wording adopted by the International Law Commission of the United Nations, which might be taken as a basis for national legislation: " The fact that a person charged with an offence defined in this Code acted pursuant to orders of

[1] Thus, in the United Kingdom, the Geneva Conventions Act, 1957, provides that any grave breach such as those defined in Article 51 below (First Convention, Article 50; Third Convention, Article 130; Fourth Convention, Article 147) which has brought about the death of a protected person is punishable by life imprisonment; in the case of a grave breach which has not brought about the death of a person, the punishment is not to exceed fourteen years' imprisonment.

[2] The Sixth International Congress of Penal Law, held at Rome in the autumn of 1953, had on its agenda the protection through penal law of the international humanitarian Conventions. Reports were submitted to the Congress from various countries and a general report was presented by Mr. Claude PILLOUD, 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, 3 and 4).

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 national legislation in each country.

In the course of the discussions, however, such divergent opinions were expressed that there is little hope of arriving at an overall solution for the time being.

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 ".

PARAGRAPH 2. — SEARCH FOR AND PROSECUTION OF PERSONS WHO HAVE COMMITTED GRAVE BREACHES

A State must spontaneously institute a search for persons accused of having committed grave breaches, whatever the nationality of the person concerned; moreover, whether the accused are nationals or foreigners, allies or enemies, all must be subject to the same rules of procedure and must be judged by the same courts.

Extradition is restricted by the legislation of the country which detains the accused person and in addition the Contracting Party which requests the handing over of an accused person must make out a *prima facie* case against him. If the national legislation does not contain the relevant details, the term " *prima facie* case " should be interpreted as implying one which in the country requested to hand over would involve prosecution before the courts.

If handing over cannot take place because of the nationality of the accused, the State detaining him must bring him before its own courts [1].

PARAGRAPH 3. — SUPPRESSION OF OTHER BREACHES

Apart from the grave breaches defined in Article 51, the Contracting Parties must take measures necessary for the suppression of all other acts contrary to the Convention. The expression " *faire cesser* " used in the French text is not very precise, but there seems no doubt that what is primarily meant is the repression of the incriminated acts, and only in the second place administrative measures to ensure respect for the provisions of the Conventions.

The Contracting Parties which have taken measures to repress the various grave breaches of the Convention and have fixed an

[1] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 114-115. The Netherlands considered it necessary to enact a special law on handing over for war crimes (Law No. 215 of May 19, 1954).

appropriate penalty in each case should therefore insert in their legislation a general clause providing for the punishment of other breaches.

PARAGRAPH 4. — PROCEDURAL GUARANTEES

The procedural guarantees are those provided by the Convention relative to the Treatment of Prisoners of War [1], which are based in part upon the experience gained by the International Committee of the Red Cross during and after the Second World War. That experience showed the need for persons accused of war crimes to have certain procedural guarantees and the right of free defence. At the 1949 Diplomatic Conference, the French Delegation therefore proposed the present paragraph, which was based on a suggestion made earlier by the International Committee of the Red Cross and provides for the same system to be applied to all accused, whatever their personal status.

In referring to the rules contained in Article 105 and those following of the Third Convention, the Diplomatic Conference took a wise decision. Rather than establish a new law, it referred 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 persons 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 verdict to be passed before the end of hostilities will doubtless remain an exception.

ARTICLE 51. — PENAL SANCTIONS : II. GRAVE BREACHES [2]

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or

[1] See *Commentary III*, pp. 625-626.

[2] Article common to all four Conventions. See First Convention, Article 50 ; Third Convention, Article 130 ; Fourth Convention, Article 147.

property protected by the Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The idea of defining grave breaches in the Convention itself must be laid to the credit of the experts convened in 1947 by the International Committee of the Red Cross, which envisaged that repression should be universal.

A. *Wilful killing.*—" Wilful killing " also covers faults of omission, provided the omission was intended to cause death. In the same way, any putting to death as a reprisal also comes within the definition of wilful killing, since reprisals are forbidden by Article 47. Wilful killing as referred to by the Convention might also be committed either against persons who have fallen into enemy hands, or against military personnel fighting with their own armed forces, as for instance in the case of the killing of shipwrecked persons.

At the Nuremberg trials, Admiral Doenitz was accused of having given orders forbidding any attempt to rescue shipwrecked persons of enemy nationality [1]. The International Military Tribunal found that it had not been established with sufficient certainty that Admiral Doenitz had given orders for the execution of shipwrecked persons, but held that his ambiguous orders were open to grave reproach [2].

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[1] According to statements made during another trial by an accused German, those orders forbade picking up persons from the sea, putting them in lifeboats, righting capsized lifeboats or giving food and water to shipwrecked persons. Only those who could give important information were to be rescued. (*Trial of Karl-Heinz Moehle* in : *Law Reports of Trials of War Criminals*, Vol. IX, p. 75.)

[2] The commander of the Fifth Submarine Flotilla was, on the other hand, sentenced to a term of punishment by a British tribunal for having added comments to the orders of Admiral Doenitz. For instance, he had stated that the crew of a submarine which came across a raft on which were five enemy airmen should have destroyed it instead of leaving it to go on its way as had actually been done. He had also criticized the fact that, after sinking an enemy ship, a submarine had let the crew get away. (See *Trial of Karl-Heinz Moehle, Law Reports of Trials of War Criminals*, Vol. IX, p. 75 ff.)

Mention may also be made of the Greek vessel *Peleus* which was sunk in mid-Atlantic on March 13, 1944, by a German submarine which then opened fire on the crew who had taken to rafts. The accused were found guilty by a British tribunal and three of them were executed [1].

The killing of shipwrecked persons therefore constitutes wilful killing as referred to in the Convention.

As regards the fate of crews, the London Protocol of 1936 provides that a submarine commander may not sink a merchant vessel unless he is in a position to rescue the crew. The International Military Tribunal, at Nuremberg, found that Admiral Doenitz had violated the Protocol by giving orders contrary to that rule. The accused was, however, not charged on this count, since similar orders had been given to American and British submarines.

B. *Torture.* — The word "torture" refers here especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information. Since judicial torture was abolished at the end of the XVIIIth century, this notion has disappeared from national penal codes. It is to be deplored that in fact, usually under special legislation, resort is still sometimes had to this odious practice. If necessary, national legislation should be amended so as to forbid any such practices [2].

C. *Inhuman treatment.* — The Convention provides, in Article 12, that protected persons must always be treated with humanity. The sort of treatment covered here would therefore be whatever is contrary to that general rule. 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 protected persons who are in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals. Certain measures, for example, which might cut off prisoners of war completely from the outside world and in particular from their families, or which would cause great injury to their human dignity, should be considered as inhuman treatment.

[1] See *Law Reports of Trials of War Criminals*, Vol. I, p. 1 ff.

[2] Article 17 of the Third Convention of 1949 expressly forbids the use of coercion during the questioning of prisoners of war.

D. *Biological experiments.* — Biological experiments are injurious to body or health and as such are dealt with in most penal codes. The memory of the criminal practices of which certain prisoners were victim led to these acts being included in the list of grave breaches. The prohibition does not, however, 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.

This interpretation is fully consistent with the provisions of Article 12.

E. *Wilfully causing great suffering.* — This refers to suffering inflicted as a punishment, in revenge or for some other motive, perhaps out of pure cruelty, as apart from suffering which is the result of torture or biological experiments. 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, the provision can quite legitimately be held to cover moral suffering also.

F. *Serious injury to body or health.* — This is a concept quite normally encountered in penal codes, which usually take as a criterion of seriousness the length of time the victim is incapacitated for work.

G. *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.* — This definition covers, in particular, cases of destruction of hospital ships, rescue craft or medical installations, and medical aircraft, in violation of the corresponding Articles of the Convention [1]. It also covers cases where medical equipment or transport are seized without the prescribed conditions being respected [2].

[1] Articles 22, 23, 24, 25, 27, 28, 38 and 39.

[2] See in particular Article 28.

It will be for the courts to decide whether the conditions set forth by the above definition are fulfilled.

The destruction of hospital ships or rescue craft will almost always lead to wilful killing, inhuman treatment, great suffering or serious injury for wounded, sick or shipwrecked persons and the crew of such vessels. A grave breach of the Convention will thus have been committed. The various trials for war crimes which were held at the end of the Second World War did not include any case where a person was accused of having caused the destruction of a hospital ship.

ARTICLE 52. — PENAL SANCTIONS : III. 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 50 makes absolute. If, however, any doubt existed on that point, this Article would clear it up completely.

According to the comments on this provision by the Italian Delegation, which proposed it, the State remains responsible for breaches of the Convention and may not absolve itself from responsibility on the grounds that those who committed the breaches 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 states the same principle.

Article 52 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

[1] Article common to all four Conventions. See First Convention, Article 51 ; Third Convention, Article 131 ; Fourth Convention, Article 148.

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 breaches 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 53. — 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.

In 1929 a provision similar to that above was inserted in the First Convention, and in 1937 the International Committee convened a Commission of Experts to revise and develop the text. At the 1949 Diplomatic Conference, the Joint Committee adopted the 1929 text with some modifications and decided to introduce it into all four Conventions, without taking into account the proposals made by the Commission of Experts in 1937 [2]. Thus, since 1929 no progress has been made in regard to the automatic operation of the enquiry procedure or the choice of those responsible for carrying it out. That is undoubtedly the greatest obstacle to the application of the present Article.

Paragraph 1 states that an enquiry is obligatory when one of the belligerents requests it ; in asking for the opening of an enquiry, the Party to the conflict concerned will probably also propose the methods by which it should be conducted.

[1] Article common to all four Conventions. See First Convention, Article 52 ; Third Convention, Article 132 ; Fourth Convention, Article 149.

[2] See *Commentary I*, pp. 375-377.

It should be pointed out that this Article has never been applied, to the best of the International Committee's knowledge [1].

Paragraph 2 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. The Convention does not state what is to happen if the Parties fail to reach agreement on the choice of an umpire. It should be noted, however, that Resolution No. 1 of the Diplomatic Conference recommends that the Parties to the conflict refer to the International Court of Justice a dispute between them which cannot be settled by other means.

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.

Paragraph 3 requires the Parties to the conflict to put an end to the violation in the case of a permanent or continuous violation of the Convention (such as the permanent marking with the protective emblem of a vessel not entitled to protection), and to punish those responsible. It should be noted, in this connection, that the obligation is already contained in Articles 50 and 51.

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. 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.

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[1] An attempt to apply Article 30 of the 1929 Convention was made during the Italo-Abyssinian conflict (1935-1936).

FINAL PROVISIONS

The formal or diplomatic provisions which it is customary to place at the end of an international convention are grouped together under this heading[1]. They are similar in all four Conventions of 1949 and, except for Article 54, correspond closely to the 1929 provisions.

ARTICLE 54. — 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 states that the English and French versions are equally authentic ; indeed, during the Diplomatic Conference and earlier during the preparatory work, both these languages were used as working languages.

Where divergencies exist, those responsible for applying the Convention will have to find out 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[3].

Paragraph 2 makes the Russian and Spanish versions official in that the body which prepared them—the Swiss Federal Council—

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[1] For general remarks on the final provisions of multilateral Conventions, see Michael BRANDON : " Final Clauses in Multilateral Conventions ", *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. See First Convention, Article 55 ; Third Convention, Article 133 ; Fourth Convention, Article 150.

[3] This procedure is generally followed in countries which, like Switzerland, promulgate their national laws in several languages, each version being equally authentic.

was specified in the Convention itself. Unlike the English and French, however, the Russian and Spanish versions are not authentic.

ARTICLE 55. — SIGNATURE [1]

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949 ; furthermore, by Powers not represented at that Conference, but which are parties to the Tenth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, or to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

Powers which, under the present provision, may not sign the Convention because they were not represented at the Diplomatic Conference and are not parties to the Tenth Hague Convention of 1907 or to the Geneva Conventions of 1864, 1906 and 1929, may nevertheless accede to it.

The date of February 12, 1950 (that is to say, six months from August 12, 1949, the date of signature) is the same in the case of all four Conventions [2].

The importance of signature, which marks the agreement of the plenipotentiaries to a text that cannot thereafter be altered, must not be disregarded ; States are not bound by the Convention, however, until they have ratified it, and ratification is the subject of the next Article.

It should also be mentioned that some delegations made reservations at the time of signature [3].

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[1] Article common to all four Conventions. See First Convention, Article 56 ; Third Convention, Article 136 ; Fourth Convention, Article 151.

[2] 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.

[3] For the text of the reservations, see *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, pp. 342-357. Such reservations do not remain in force, however, unless they are confirmed when the instrument of ratification is deposited.

ARTICLE 56. — RATIFICATION [1]

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.

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.

Paragraph 1, which states 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 entrusted to the Swiss Federal Council, the traditional depositary of the Geneva Conventions.

Paragraph 2 lays down that copies of the record of deposit of each ratification are to be sent to all Powers party to the Convention ; the Powers will thus be informed of any reservations which may accompany the ratification.

The absence of any objection to a reservation on the part of a State to which it is thus communicated may be taken as denoting assent. There are a number of opinions regarding the consequences of an objection, but it seems consistent with humanitarian spirit to consider that the Convention binds together all the parties thereto in respect to all those provisions which have not been the subject of a reservation.

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[1] Article common to all four Conventions. See First Convention, Article 57 ; Third Convention, Article 137 ; Fourth Convention, Article 152.

Similarly, it is obvious that a reservation which is accepted, expressly or tacitly, will affect only 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 valid only if it is confirmed at the time of ratification [1].

ARTICLE 57. — COMING INTO FORCE [2]

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instruments of ratification.

Paragraph 1 states that the Convention will enter into force six months after deposit of the second instrument of ratification ; it will, of course, enter into force at that juncture only between the first two States which ratify it.

That date marks an event of some importance, however ; it is the date on which the Convention becomes an integral part of international law, and thereafter non-signatory States may accede to it.

When the Convention enters into force in a country, it does not follow that it becomes applicable, since according to Articles 2 and 3 provision is only made for implementation in the event of armed conflict. Certain Articles may nevertheless take effect in peace-time [3].

The six months which must elapse in the case of each State before its ratification or accession takes effect should give it time to take such preliminary steps, particularly legislative and administrative measures, as are necessary in view of the obligations it has assumed.

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[1] As regards reservations and their effect, see Claude PILLOUD : *Reservations to the 1949 Geneva Conventions*, Geneva 1958.

[2] Article common to all four Conventions. See First Convention, Article 58 ; Third Convention, Article 138 ; Fourth Convention, Article 153.

[3] For example, Article 48 (dissemination of the Convention), Articles 50 to 52 (penal sanctions), Article 43 (marking of hospital ships), Article 39 (medical aircraft), Article 19 (information bureau, identity discs).

The present Convention 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 provides that, for each State which subsequently ratifies it, the Convention will enter into force six months after deposit of the instrument of ratification ; from that date, the State in question will be bound in regard to all Powers which have ratified the Convention not less than six months before. Thereafter, it will become bound in its relations with other Powers six months after each of them has ratified the Convention.

ARTICLE 58. — RELATION TO THE 1907 CONVENTION

The present Convention replaces the Tenth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, in relations between the High Contracting Parties.

According to the present provision, the Convention replaces the Tenth Hague Convention of 1907 in relations between the High Contracting Parties. That means that the Convention has mandatory force only between the States party to it, and the Hague Convention continues to bind in their mutual relations States which are party to it without being party to the present Convention. In the same way, the Hague Convention will govern the mutual relations between States when one is party only to it, the other being party to both the Hague Convention and the present Convention.

In accordance with Article 25 of the Tenth Hague Convention of 1907, this is also the case as regards the Convention of July 29, 1899, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The fact that the present Article mentions only the Hague Convention of 1907 and not the 1899 Convention in no way implies that the authors intended to abrogate the latter, since the 1907 Convention states expressly that it continues in force.

Three successive Conventions thus co-exist in international law.

What would be the position with regard to two States, one of which was party to the 1949 Convention only and the other to the 1907 Convention only?

If the Conventions were not of such vital importance for mankind, one might consider that in strict law the two States would not be bound in their mutual relations by either Convention. But the very nature of the Conventions of Geneva and The Hague, which deal with respect for the human person, demands a less academic interpretation.

The 1949 Convention contains the substance of the 1907 instrument, of which it is really a revised and corrected version, just as in the case of the Geneva Conventions which were drawn up successively on the occasion of each revision. The more recent version is not necessarily, however, the more liberal in all respects. It is not necessarily the older version which contains the more limited provisions and must therefore be taken as applicable.

The following general principle is therefore justifiable: the States should consider themselves bound, at any rate morally, by everything which is common to the two Conventions, beginning with the great humanitarian principles which they contain. An effort should be made to settle by special agreement matters dealt with differently in the two Conventions; in the absence of such an agreement, the Parties would apply the provisions which entailed the least extensive obligations.

Above all, however, it is to be hoped that a State involved in armed conflict will hasten to accede to the 1949 text if it has not already done so. Such a case is actually becoming less and less probable as the 1949 Conventions approach universality.

ARTICLE 59. — 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 ad-

[1] Article common to all four Conventions. See First Convention, Article 60; Third Convention, Article 139; Fourth Convention, Article 155.

dressed 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 [1].

Accession is exactly the same in its effects as ratification, to which it is equivalent in all respects.

An accession can, however, take place 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 60. — NOTIFICATION OF ACCESSIONS [2]

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 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 60 does not state, as Article 56 did for ratifications, that the Federal Council must draw up a record of the deposit of each accession, or that it must transmit a copy of that record to the other Powers. There is no reason, however, 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.

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[1] The Geneva Convention of 1906, however, gave all Contracting Powers the right to oppose the accession of any other Power (Article 32, paragraph 3).

[2] Article common to all four Conventions. See First Convention, Article 61 ; Third Convention, Article 140 ; Fourth Convention, Article 156.

ARTICLE 61. — IMMEDIATE EFFECT [1]

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. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Should war or armed conflict break out, making Article 3 applicable, the entry into force of the Convention obviously cannot be subject to the six-months waiting period which follows ratification or accession under normal peace-time 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 deposit of the ratification if it is deposited later.

The 1929 Conventions contained a similar provision, but referred only to " a state of war ". The 1949 text refers to Articles 2 and 3, since an essential object of those two new Articles is to define the situations in which the Convention is to be applied—namely cases of declared war or of any other armed conflict, even if a state of war is not recognized by one of the Parties (Article 2, paragraph 1) [2], the total or partial occupation of a territory even if it meets with no armed resistance (Article 2, paragraph 2), and, lastly, armed conflicts not of an international character (Article 3).

The 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 56, paragraph 2, is in that case no longer required. Suitable means such as a telegram will be used.

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[1] Article common to all four Conventions. See First Convention, Article 62; Third Convention, Article 141; Fourth Convention, Article 157.

[2] The ratification or accession of a Power will also take effect immediately even if the opposing Power is not party to the Convention (Article 2, paragraph 3).

ARTICLE 62. — DENUNCIATION [1]

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Paragraph 1 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 Powers.

Since the first Geneva Convention came into existence almost a century ago, no State has ever withdrawn. It is inconceivable that a Power could ever repudiate such elementary rules of humanity and civilization.

Even if a State were to denounce the Convention and were not party to either the 1907 or the 1899 Convention, it would still be morally bound by the principles of the present instrument, which are today the expression of valid international law in this sphere.

Paragraph 2 provides a procedure for denunciation similar to that laid down for accession.

[1] Article common to all four Conventions. See First Convention, Article 63 ; Third Convention, Article 142 ; Fourth Convention, Article 158.

Paragraph 3 states that under normal peace-time conditions a denunciation will take effect only after one year has elapsed.

If the denouncing Power is involved in a conflict [1], the waiting period will be prolonged until peace has been concluded [2], or, where the case arises, until the release and repatriation of protected persons are completed.

Although according to the actual letter of the Convention, the prolongation of the waiting period affects only denunciations notified in the course of conflicts, it may be assumed that the prolongation should also be applied whenever denunciation is notified less than one year before a conflict breaks out ; such a denunciation would then become effective only at the end of the conflict.

Paragraph 4 relates to the omission of the *clausula si omnes* contained in Article 18 of the Tenth Hague Convention of 1907. The reminder that humanitarian principles continue to apply, despite denunciation, thus limiting the consequences of the latter, is obviously closely related to the eighth paragraph of the Preamble to the Fourth Hague Convention of 1907—the so-called Martens clause.

As is self-evident, the denunciation has effect only in respect of the denouncing Power. It does not 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 though it is, the clause is useful in that 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 the field covered by it. The clause shows clearly, as we have said above, that a Power which denounced the

[1] The word " conflict " must be understood as covering 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.

Convention would nevertheless remain bound by the principles contained in it in so far as they are the expresion of inalienable and universal rules of customary international law.

ARTICLE 63. — REGISTRATION WITH THE UNITED NATIONS [1]

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 1929 Convention 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 [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 1949 Diplomatic Conference in fact recommends [3]. Registration with the United Nations also helps to make treaties more widely known.

It is naturally the Swiss Federal Council which has to arrange for 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 ; Third Convention, Article 143 ; Fourth Convention, Article 159.

[2] See Article 18 of the Covenant of the League of Nations and Article 102 of the United Nations Charter.

[3] See Resolution 1, p. 285 below.

ANNEX

Model identity card for medical personnel and chaplains (see above, p. 236).

Front

(Space reserved for the name of the country and military authority issuing this card)

IDENTITY CARD

for members of medical and religious personnel attached to the armed forces at sea

Surname .....

First names .....

Date of Birth .....

Rank .....

Army Number .....

The bearer of this card is protected by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, in his capacity as

.....

Date of issue

.....

Number of Card

.....

Reverse Side

Photo of bearer

Embossed stamp of military authority issuing card

Signature of bearer or fingerprints or both

Height	Eyes	Hair
.....	.....	.....

Other distinguishing marks

.....

.....

.....

.....

.....

RESOLUTIONS OF THE DIPLOMATIC CONFERENCE OF GENEVA, 1949

In addition to the four Geneva Conventions which it produced, the Diplomatic Conference of 1949 adopted eleven resolutions. They are given below, with references where necessary to the relevant passages of the Commentary.

Resolution 1. — The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice [1].

Resolution 2. — Whereas circumstances may arise in the event of the outbreak of a future international conflict in which there will be no Protecting Power with whose 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 ;

[1] See above, p. 81.

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 Wounded and Sick in Armed Forces in the Field of August 12, 1949, provides that the Parties to the conflict shall, during hostilities, make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief ;

whereas Article 31 of the same Convention provides that, as from the outbreak of hostilities, Parties to the conflict may determine by special arrangement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps,

the Conference requests the International Committee of the Red Cross to prepare a model agreement on the two questions referred to in the two Articles mentioned above and to submit it to the High Contracting Parties for their approval [2].

Resolution 4. — Whereas Article 21 [3] 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 [4].

[1] See above, p. 70 ff.

[2] See above, pp. 203, 209-211.

[3] The original text refers to " Article 33 " ; this is an obvious error.

[4] See above, p. 236 ff.

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].

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 [2].

Resolution 7. — The Conference, being desirous of securing the maximum protection for hospital ships, expresses the hope that all High Contracting Parties to the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, will arrange that, whenever conveniently practicable, such ships shall frequently and regularly broadcast particulars of their position, route and speed.

[1] See above, p. 247.

[2] See above, p. 183.

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 the currency at their disposal, and that prisoners of war shall likewise benefit by these facilities in cases of urgency ; and

whereas to reduce the cost, often prohibitive, of such telegrams or cables, it appears necessary that some method of grouping messages should be introduced whereby a series of short specimen messages concerning personal health, health of relatives at home, schooling, finance, etc., could be drawn up and numbered, for use by prisoners of war in the aforesaid circumstances,

the Conference, therefore, requests the International Committee of the Red Cross to prepare a series of specimen messages covering these requirements and to submit them to the High Contracting Parties for their approval.

Resolution 10. — The Conference considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions [1].

[1] See above, p. 38.

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.

TEXT 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

with, for comparison, the

TEXT OF THE TENTH HAGUE CONVENTION OF OCTOBER 18, 1907

1907

[Names of Heads of States . . .]

Animated alike by the desire to diminish, as far as depends on them, the inevitable evils of war;

And wishing with this object to adapt to maritime warfare the principles of the Geneva Convention of the 6th July, 1906;

Have resolved to conclude a Convention for the purpose of revising the Convention of the 29th July, 1899, relative to this question, and have appointed the following as their Plenipotentiaries:

[names]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

1949

PREAMBLE

The undersigned, Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Tenth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, have agreed as follows:

CHAPTER I

GENERAL PROVISIONS [1]

Article 1

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

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[1] The Chapter titles and order of Articles are those of the 1949 Convention.

1907

Article 18

The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

1949

Article 2

In addition to the provisions which shall be implemented in peace-time, 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.

Article 3

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

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

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

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

(b) taking of hostages ;

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(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, sick and shipwrecked shall be collected and cared for.

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

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

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

Article 22

In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship.

Article 4

In case of hostilities between land and naval forces of Parties to the conflict, the provisions of the present Convention shall apply only to forces on board ship.

Forces put ashore shall immediately become subject to the provisions 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 5

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

Article 6

In addition to the agreements expressly provided for in Articles 10,

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18, 31, 38, 39, 40, 43 and 53, 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 wounded, sick and shipwrecked persons, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

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

Article 7

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

Article 8

The present Convention shall be applied with the 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.

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

Article 9

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

Article 10

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

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

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

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Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

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

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

Article 11

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

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

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CHAPTER II

WOUNDED, SICK AND SHIPWRECKED

Article 11

Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

Article 12

Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term " shipwreck " means shipwreck from any cause and includes forced landings at sea by or from aircraft.

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

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

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

Article 13

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories :

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

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operat-

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

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

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

(c) that of carrying arms openly ;

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

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

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

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

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

Article 12

Any warship belonging to a belligerent may demand that sick, wounded,

Article 14

All warships of a belligerent Party shall have the right to demand that

1907

or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

Article 13

If sick, wounded, or shipwrecked persons are taken on board a neutral warship, every possible precaution must be taken that they do not again take part in the operations of the war.

Article 14

The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated can not serve again while the war lasts.

Article 15

The shipwrecked, sick or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

Article 16 (paragraph 1)

After every engagement, the two

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the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered, whatever their nationality, provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

Article 15

If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

Article 16

Subject to the provisions of Article 12, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor's own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

Article 17

Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war.

The costs of hospital accommodation and internment shall be borne by the Power on whom the wounded, sick or shipwrecked persons depend.

Article 18

After each engagement, Parties to

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belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

Article 17

Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

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the conflict shall without delay take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

Article 19

The Parties to the conflict shall record as soon as possible in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include :

(a) designation of the Power on which he depends ;

(b) army, regimental, personal or serial number ;

(c) surname ;

(d) first name or names ;

(e) date of birth ;

(f) any other particulars shown on his identity card or disc ;

(g) date and place of capture or death ;

(h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the

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same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

Article 16 (paragraph 2)

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpses.

Article 20

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

If dead persons are landed, the provisions 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, shall be applicable.

Article 9

Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

Article 21

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

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CHAPTER III

HOSPITAL SHIPS

Article 1 (paragraph 1)

Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.

Article 22

Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.

The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

Article 23

Establishments ashore entitled to the protection 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, shall be protected from bombardment or attack from the sea.

Article 2

Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

Article 24

Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships and shall be exempt from capture, if the Party to the conflict on which they depend has given them an official commission and in so far as the provisions of Article 22 concerning notification have been complied with.

These ships must be provided with certificates of the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.

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Article 3

Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case, before they are employed.

Article 7

In the case of a fight on board a warship, the sick wards shall be respected and spared as far as possible.

The said sick wards and the material belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

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Article 25

Hospital ships utilized by National Red Cross Societies, officially recognised relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own Governments and with the authorization of the Party to the conflict concerned, in so far as the provisions of Article 22 concerning notification have been complied with.

Article 26

The protection mentioned in Articles 22, 24 and 25 shall apply to hospital ships of any tonnage and to their lifeboats, wherever they are operating. Nevertheless, to ensure the maximum comfort and security, the Parties to the conflict shall endeavour to utilize, for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross.

Article 27

Under the same conditions as those provided for in Articles 22 and 24, small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.

The same shall apply so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions.

Article 28

Should fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible. Sick-bays and their equipment shall remain subject to the laws of warfare, but may not be diverted from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after

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The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

Article 4 (paragraphs 1 to 4)

The ships mentioned in Articles 1, 2 and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

Article 4 (paragraphs 5 and 6)

The belligerents shall have the right to control and search them ; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board ; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them.

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ensuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity.

Article 29

Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port.

Article 30

The vessels described in Articles 22, 24, 25 and 27 shall afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.

The High Contracting Parties undertake not to use these vessels for any military purpose.

Such vessels shall in no wise hamper the movements of the combatants.

During and after an engagement, they will act at their own risk.

Article 31

The Parties to the conflict shall have the right to control and search the vessels mentioned in Articles 22, 24, 25 and 27. They can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.

They may put a commissioner temporarily on board whose sole task shall be to see that orders given in virtue of the provisions of the preceding paragraph are carried out.

As far as possible, the Parties to the conflict shall enter in the log of the hospital ship, in a language he can understand, the orders they have given the captain of the vessel.

Parties to the conflict may, either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention.

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Article 1 (paragraph 2)	*Article 32*
These ships, moreover, are not on the same footing as warships as regards their stay in a neutral port.	Vessels described in Articles 22, 24, 25 and 27 are not classed as warships as regards their stay in a neutral port.
	Article 33
	Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities.
Article 8 (paragraph 1)	*Article 34*
Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.	The protection to which hospital ships and sick-bays 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. In particular, hospital ships may not possess or use a secret code for their wireless or other means of communication.
Article 8 (paragraph 2)	*Article 35*
The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.	The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them : (1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded. (2) The presence on board of apparatus exclusively intended to facilitate navigation or communication. (3) The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service. (4) The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.

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(5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

CHAPTER IV

PERSONNEL

Article 36

The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

Article 10

The religious, medical and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the Commander-in-Chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

Article 37

The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 shall, if they fall into the hands of the enemy, be respected and protected ; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable. They may take with them, on leaving the ship, their personal property.

If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.

Retained personnel shall be subject, on landing, to the provisions 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.

CHAPTER V

MEDICAL TRANSPORTS

Article 38

Ships chartered for that purpose shall be authorized to transport equip-

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ment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them nor to seize the equipment carried.

By agreement amongst the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose, free access to the equipment shall be given.

Article 39

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.

They shall be clearly marked with the distinctive emblem prescribed in Article 41, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification which may be agreed upon between the Parties to the conflict upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any.

In the event of alighting involuntarily on land or water in enemy or enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft shall be prisoners

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of war. The medical personnel shall be treated according to Articles 36 and 37.

Article 40

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. They shall give neutral Powers prior notice of their passage over the said territory, and obey every summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless otherwise agreed between the neutral Powers and the Parties to the conflict, the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

CHAPTER VI

THE DISTINCTIVE EMBLEM

Article 41

Under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a

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Article 5

Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a metre and a half in breadth.

The ships mentioned in Articles 2

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white ground, these emblems are also recognized by the terms of the present Convention.

Article 42

The personnel designated in Articles 36 and 37 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 19, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his finger-prints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In cases of loss they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

Article 43

The ships designated in Articles 22, 24, 25 and 27 shall be distinctively marked as follows :

(a) All exterior surfaces shall be white.

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and 3 shall be distinguished by being painted white outside with a horizontal band of red about a metre and half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of Article 4, are detained by the enemy must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

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(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

The above-mentioned ships and craft, which may wish to ensure by night and in times of reduced visibility the protection to which they are entitled, must, subject to the assent of the Party to the conflict under whose power they are, take the necessary measures to render their painting and distinctive emblems sufficiently apparent.

Hospital ships which, in accordance with Article 31, are provisionally detained by the enemy, must haul down the flag of the Party to the conflict in whose service they are or whose direction they have accepted.

Coastal lifeboats, if they continue to operate with the consent of the Occupying Power from a base which is occupied, may be allowed, when away from their base, to continue to fly their own national colours along with a flag carrying a red cross on a white ground, subject to prior notification to all the Parties to the conflict concerned.

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41.

Parties to the conflict shall at all times endeavour to conclude mutual agreements in order to use the most

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	modern methods available to facilitate the identification of hospital ships.
Article 6	*Article 44*
The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.	The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.
	Article 45
See Article 21.	The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43.

CHAPTER VII

EXECUTION OF THE CONVENTION

Article 19	*Article 46*
The Commanders-in-Chief of the belligerent fleets must see that the above Articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.	Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.
	Article 47
	Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.
Article 20	*Article 48*
The signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity. and for making them known to the public.	The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed

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fighting forces, the medical personnel and the chaplains.

Article 49

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 there of.

CHAPTER VIII

REPRESSION OF ABUSES AND INFRACTIONS

Article 21

The signatory Powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention.

They will communicate to each other, through the Netherlands Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention.

Article 50

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

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Article 51

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 52

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 53

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.

FINAL PROVISIONS

Article 54

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Article 55

The present Convention, which bears the date of this day, is open to

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Article 23

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers taking part therein and by the Netherlands Minister for Foreign Affairs.

Subsequent deposits of ratifications shall be made by means of a written notification addressed to the Netherlands Government and accompanied by the instrument of ratification.

A certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be at once sent by the Netherlands Government through the diplomatic channel to the Powers invited to the Second Peace Conference, as well as to the other Powers which have acceded to the Convention. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 26

The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, and, in the case of the Powers which

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signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Tenth Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, or to the Geneva Conventions oj 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

Article 56

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 57

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

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ratify subsequently or which accede, sixty days after the notification of their ratification or of their accession has been received by the Netherlands Government.

Article 25

The present Convention, duly ratified, shall replace as between contracting Powers, the Convention of the 29th July, 1899, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.

The Convention of 1899 remains in force as between the Powers which signed it but which do not also ratify the present Convention.

Article 24 (paragraph 1)

Non-signatory Powers which have accepted the Geneva Convention of the 6th July, 1906, may accede to the present Convention.

Article 24 (paragraphs 2 and 3)

The Power which desires to accede notifies its intention to the Netherlands Government in writing, forwarding to it the act of accession, which shall be deposited in the archives of the said Government.

The said Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of accession, mentioning the date on which it received the notification.

Article 27

In the event of one of the contracting Powers wishing to denounce the present Convention, the denun-

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months after the deposit of the instruments of ratification.

Article 58

The present Convention replaces the Tenth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, in relations between the High Contracting Parties.

Article 59

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Article 60

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 61

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. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Article 62

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

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ciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them at the same time of the date on which it was received.

Article 28

A register kept by the Netherlands Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 23, paragraphs 3 and 4, as well as the date on which the notifications of accession (Article 24, paragraph 2) or of denunciation (Article 27, paragraph 1) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the eighteenth day of October, one thousand nine hundred and seven, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

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The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Article 63

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

In witness whereof the undersigned, having deposited their respective full powers, have signed the present Convention.

Done at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

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