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LAW AND WAR SINCE 1945 – Geoffrey Best

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Introduction

War, Law, and the Laws of War

This chapter's premiss is that there is more armed conflict in the world than is good for its inhabitants and the reputation of their species as one characterized by the faculty of reason and a sense of morality. War always has been and still remains a problem and puzzle from many points of view. The author does not believe that war must in all circumstances be a bad thing or the worst of all conceivable things, but he is among those who believe that there has often been and that there continues to be more war and armed struggle than there should be, and that much of it is more deadly, destructive, and cruel than it need be. Law is far from being the only means by which humankind and its civilizations have sought to reduce the incidence and to mitigate the effects of public and political violence, but it is-not least because of its ties to religion and ethics-one of the most interesting of them; one moreover which contemporary preoccupations with humanitarianism and human rights have made rather fashionable. The purpose of this chapter is to examine, its place and usefulness in this global context.

What, then, has law to do with war? The question is all the more worth putting because at first sight law and war appear to be opposites. The Romans, who knew a lot about both, left a broad hint that indeed they were so: *inter arma silent leges*. If law signifies the calm hearing of ordered arguments and the settlement of disputes not by violence but by lights of justice and reason, how can it be consistent with an institution which represents the turning from rational discourse in order to settle disputes by a trial of armed strength? Resort to the violence of armed conflict, with all its usual chances and accidents, its frequent furies and inhumanities, its lists of casualties, trails of desolation, and legacies of hatred, looks like the antithesis of everything comprised in that ark of civilization's' covenant, the rule of law. War unquestionably has those unruly, disreputable, and horrid attributes. They are a truth-telling and legitimate way of representing it. They are among the reasons why pacifists decide to have nothing to do with it and why conscientious non-pacifists hesitate before resorting to war or (supposing that they have any choice) letting it be forced upon them. But they are not the whole of the story. There is a more acceptable version of it; the other side of the coin, bearing another dimension of its paradoxical meaning.

What happens in war is one thing; why war happens is another. considered as a political institution, as 'organized violence carried on by political units against each other' and as 'an inherently normative phenomenon' distinct from mere violence, war can look less formless.[1] This is war's less unacceptable aspect, which lends a degree of respectability to its title to a central place in international history and in the study of international relations. Seen in this light, war (which for the political scientist includes the threat and capability of it) is simply an irreducible matter of historical and political fact of which it is sensible to make the best rather than the worst because it can be seen as indispensable to the making of necessary change in the relations of States and the maintenance of desirable order among them. No wonder, then, that international law from its earliest days-when of course it went under other names, e.g. in Romano-Europe, *jus gentium*, more or less translatable as the law of nations-had close to its heart the laws and customs of war .

Part I of this chapter offers a sketch of the essentials of the history of that branch of international law from those earliest days until the first half of the present century. Readers who are inclined to be sceptical about the possibility of law restraining war will there find evidence of its having sometimes and to some extent done so; certain periods of history and certain circumstances having been more propitious for it than others. The historical record of the law of war does not support the proposition, beloved of some men (I am not sure whether I ought to say 'men and women') of violence and self-styled 'realists', that the very idea of it is absurd or delusory; although, as shall be shown in Part III, contemporary history and circumstances have in many respects proved so unpropitious as to give the cynics and sceptics a good deal of encouragement. That apart, the idea of an international law of war, paradoxical though it must at all times seem and peculiarly difficult for it though present times are, is as valid and valuable as ever it has been. The evidence presented in these pages speaks for itself.

Public International Law, and the Law of War as Part of It

But, some readers may be asking themselves, what of international law itself? Our war-laden branch of the legal tree cannot be isolated from the trunk that bears it. The part should be considered in the context of the whole, and one does not have to go far along any channel of international studies nowadays before bumping into questions about the nature and status of international law; meaning in this context, of course, *public* international law, as distinct from the overlapping more private sort which is indispensable for most of the conduct of trade, finance, personal disputes, property dealings, and so on. This is no place, nor am I a properly qualified person, for comprehensively making the case for international law's reality and importance. But something of the sort must be attempted, lest the sceptic, recovered from the rebuff he received in the last stage of the argument, find an opening for the renewal of his criticisms in this one.

The prima-facie complaint about international law is simply this: that it holds together better on paper than in practice, and that States determined to ignore it can do so more or less with impunity; and can find, it must be added, international lawyers to produce a reading of the law in their favour. The Kaiser and his ministers have for many decades been held up to

[1] Hedley Bull, from whom these quotations are taken (The Anarchical Society: A Study of *Order in World Politics* (London, 1977), 184 and his review of Walzer in *World Politics*, 31 {1979), 588-99), thus {in the former work) elaborates this crucial definition: 'Violence is not war unless it is carried out in the name of a political unit; what distinguishes killing in war from murder is its vicarious and official character, the symbolic responsibility of the unit whose agent the killer is. Equally, violence carried out in the name of a political unit is not war unless it is directed against another political unit.'

obloquy for calling a treaty 'a scrap of paper', but that is because of the power of British and French propaganda and because Britain and France won the war; not because Germany was by any means the only country to have treated instruments of international law as so much waste paper .

This weakness of the law is a consequence of the fact that international law is first and foremost inter-State law, made by States for their own purposes and advantages; which have not so far been perceived to demand, on occasions when their 'vital interests' are dramatically at stake, sub-mission of their independent freedom of action ('sovereignty') to effective supranational institutions. In other words, and arguing from the national analogy which comes naturally to all of us, if States wish to break or bend the law, there is no force corresponding to the policeman, the bailiff, and the court officer to stop them doing so; not to mention superior enforcement by the judge, the prison governor, and the commander of troops called out to aid the civil power .

The weakness cannot be denied, but it is not nearly so damaging as is easily suggested by surveying the workings of international society from the outside. The showy, notorious breaches are relatively rare. States observe all of the law most of the time and most of it all the time because they find it convenient, profitable, and helpful. It is the normal and regular guide to the conduct of relations between States when they are 'at peace' with one another; the practice of States is one of its main sources, and not surprisingly therefore one of its main functions is to assist the practice of States.

Rules and practices like this in a numerous and mixed society demand a certain amount of give and take from the members. States do not always relish the immediate consequences of their obligations but by and large they honour them. States that pick and choose which rules to keep and which to break risk getting a bad name and sooner or later suffering in consequence. They may, if they are superpowerful or especially egoistic, desperate or ideologically obsessed, decide on particular occasions not to mind the name-calling and to bear with the consequences. Instances from events of the past few decades flock at once to mind, not to mention the lamentably special case of the breaches of human rights law which are standard practice in many countries, and to a smaller extent persistent in most. The heavens have not fallen upon the doers of these calculated illegalities and (placing on some of them the most favourable interpretation) extra legalities. The lawbreakers and law-benders have, in popular parlance, got away with it. But the efforts that have in almost all instances been made to produce legal (at any rate, legal-sounding) justifications, and to excuse the denounced deeds as exceptional, speak volumes. No State denies the virtue of the idea of international law , and the particular breaches of the present system of it which States may exceptionally engage in are not necessarily to be read as gestures towards the invalidation of the system as a whole. States which take liberties with the system nevertheless assume that the system survives and will continue to survive despite them: an assumption which evidently has some rude truth in it, although one may well ask whether the system can forever stand such strains.

The sceptic's second line of attack proceeds directly from this latter point. Still inclining to brand as bogus a legal system which lacks a sovereign power of enforcement, he returns to the charge by comparing this international system, so-called, with what he holds up by contrast as a *real* legal system: a national one. It is real and respectable, he says, because it is unitary and coherent, a pyramid or scaffolding of authorities crowned by a sovereign power able to make the law work and to guarantee that lawbreakers suffer. Anything less, he likes to maintain, is not worth the great name of law.

This argument sounds impressive but its premisses are faulty. Its description of a national system of law is an ideal one, not overly recognizable in reality. This is what political and legal theorists want us to believe national systems are like, not what they actually are like. Are there many countries in which every subject or citizen obeys every law and every disobedient act is infallibly detected and punished? There are not; and the very idea of such countries, incidentally, is apt to make one wonder whether they would be pleasant to live in. On the other hand, there are plenty of countries, both pleasant and unpleasant to live in, where many laws are repeatedly broken, where the rule of law is just a sinister bad joke, and where lawbreakers are rarely brought to chapter. If the argument is pursued to the point of observing that desuetude and neglect of law, carried beyond a certain just-bearable point which will vary from place to place, undoes a State's claims to respect (because it is failing to do what States exist to do), the answer can only be that States of such disreputable character nevertheless usually continue to be accepted as members of international society, albeit subject to various degrees of cold-shouldering. Whether international law is less observed in its proper sphere than is the national law of some of the disreputable States that will by now be in the reader's mind, must be difficult to determine.

Differences between the legal systems of States and the inter-State legal system are of course much more significant than likenesses; their juxtaposition in the previous paragraph was simply to help make the point that, whatever the latter's defects, they cannot be called into evidence to damn it without implicitly damning many of the former too. But one of the apparent differences between the systems invites reflective comment, because it constitutes one of international law’s more peculiar characteristics. Much international law of the contemporary age, not least in the humanitarian and human rights fields, and especially where the General Assembly of the UN is involved, is 'normative'. Normative means standard-setting; adding to established State practice, the aspirational concept of State practice as it is expected, intended, or hoped to become at some future date. The common man may find it bothersome that the great word Law can now be used in two such different senses: what is to be observed and enforced here and now, and what is aimed at as observable and enforceable later on. The international affairs community has sought to make the best of this split by inventing a distinction between two sorts of law: 'hard' and 'soft', the difference being that whereas there is some possibility of retribution being presently visited upon breaches of the first, no such possibility is attached to the second. If the sceptic, persistently returning to the fray, eggs on the common man to note that 'soft law' is not what he is used to in his own country, the answer to both of them is, again, that national law may actually not be of such uniformly 'hard' consistency as its political theorists and propagandists like to claim. A Briton, for example, finds it difficult to find much hardness in the laws supposed to regulate the speed and sobriety of drivers of vehicles on his country's roads, the fouling by dogs of his country's pavements and public parks, and such public use of radio and cassette head-sets as may annoy fellow passengers in trains and buses. It is not only in the international field that the power to set standards may turn legislators into visionaries.

International law and national law are least alike in their sources. Here at any rate, in national systems of law, the theorists' sovereign stands more or less unchallenged, allowing a clear view of where law comes from and how it is made. The legislature or legislative branch is a familiar facet of every constitution. But the sources of international law are more complicated and confusing, largely because there is so much overlapping between them. State practice, already mentioned, is one of them. Practices and standard observances which States generally find so helpful to their intercourse that they become formalized and habitual tend to turn into Customary Law. Somewhere beneath customary law's foundations are certain general or fundamental principles, e.g. 'elementary considerations of humanity'.[2] Some of the most fundamental of these are said by some experts to be *jus cogens*, i.e. to be 'peremptory norms', which there can be no argument about. (Nevertheless there is!) Formal arrangements and contracts between States (on matters which, by the way, may already be lodged in customary law) are registered in Treaties, Conventions, and Covenants; also, as has within the last generation become increasingly apparent, under such less impressive titles as Agreements and Accords. International law thus originated is generally called 'conventional law', which is confusing to the common man, whose natural inclination is to think that conventional means customary. He must become even more bewildered when informed that (parts of) 'conventional law', when accepted by almost all States for some considerable length of time, can actually become 'customary law', as for example the International and other Military Tribunals after the Second World War considered to have happened to parts, at least, of the fourth Hague Convention's Land-Warfare Regulations, and the 1929 POW Convention.[3]

Such are the several springs from which public international law-otherwise and more comprehensively known as the international law of peace, war, and neutrality-originates and the channels through which it flows: ' A mighty maze, but not without a plan.' The plan is the wish and will of States that this body of law which they have caused or permitted to come into being shall do what it is meant to do: ease and sweeten their relations not only in peace (supposedly their usual relationship) but also in war, which political theory generally has viewed as the less usual state of affairs and which therefore, if moderated by law, may be hoped not to mark more than a passing storm in States' normal relations.

The idea of the rule of law in international relations has reference to war no less than tp peace, and in the international law of war that idea becomes flesh. Our sceptic may here insist on making another intervention. He will argue that *this* branch of international law , whatever its occasional limited successes, is in the final account nothing more than camouflage and fraud; not the astonishing paradoxical achievement of civilization that it is sometimes represented to be, but rather a convenient means by which some theorists of civilization cast a comforting veil over the frightening features of the juggernaut from whose

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[2] The Corfu Channel case: International Court of Justice, Judgment on the merits, 9 Apr. 1949, p. 22 of the official report (Leyden, Sijthoff, n.d.)

[3] I cautiously say 'parts, at least' because of the caution expressed by Theodor Meron, 'The Geneva Conventions as Customary Law' in *AmJIL* 81 (1987),348-70 at 359, and because of the way it was put by Lauterpacht in his magisterial article in the 1952 BYIL 373 n.: 'The IMT at Nuremberg and various other war crimes tribunals affirmed expressly, in relation to the treatment of paws, that numerous provisions of the Hague and Geneva Conventions were merely declaratory of existing international law.' Even Kalshoven, as authoritative as any contemporary writer can be, seems to tread a bit warily when he refers to this matter in *Constraints on the Waging of War* (Geneva, 1987) at 18: 'It remains for us to mention here that according to a widely held view, the principles and rules embodied in [the Hague Regulations] had, by the time of the outbreak of World War II, been so widely accepted by States that they had become part of international customary law. After the war, this view was endorsed in so many words by the IMT at Nuremberg.' The IMT's endorsement appears in its much-reproduced judgment; section headed 'The Law relating to War Crimes and Crimes against Humanity', fifth paragraph. It comes on p. 65 of the British HMSO's official publication of it (London, 1946, Cmd. 6964). Intertwining with conventional and customary law is the other, slighter, contributive source of case law, as determined in the variety of courts (many of them national, like maritime prize courts and military tribunals) where international law may be administered.

progress its own seems inseparable. On this occasion, the sceptic may be more difficult to silence. The law of war has never functioned as well as has, for much of the time, the law of 'peace. The reasonable civilized man, knowing what war means, could never have expected it to; he would be content with it as the lesser of a choice of evils; as, at least, better than nothing. Its history contains ups as well as downs. In course of the ups-in certain relatively happy times, places, and episodes-it has achieved more than the sceptic allows. It has shown that it can approximate to the civilized idea of it. But whether or not the ups can be judged collectively to outweigh the downs, and whether the downs can be so prolonged and terrible as effectually to discredit the whole idea and to signify that belief in the law of war is *not* better than nothing-these are questions the sceptic remains free to pose because neither the historian nor any other scholar can pretend to answer them. The best that any of us can do is to learn from the historians and social scientists who study the causes of armed conflicts and what goes on in them; attempt to distinguish the cultural and political circumstances which minimize rather than maximize the risks and evils of armed conflicts; consequently to promote and support such policies in our own and other reachable States as are calculated to create those circumstances; and to be ready to bear the unpopularity of them, for they are likely to be strong-minded and forceful.

Objectives, Methods, and Limitations of this chapter

My aim and hope in writing this chapter have been that it will interest readers in realms as different as politics, history, ethics, military studies, and law. Let me explain to these different interest-groups and the more general readers ranged behind them, what they may respectively get out of it-and what they may not.

In a world where news of armed conflicts comes before us every day and comment on them is often in terms of their lawlessness, there is no need to point out the relevance of a chapter about those parts of international law which purport to moderate the violence of wars and to protect and succour their victims. It cannot be said that chapters in this field are lacking. The international law of war, alias humanitarian law, has become something of a boom industry in the legal realm and raises a regiment of professional experts. The way in which those experts write about it and debate it among themselves, however, is not often directly communicable to all the others who also have pressing interests of their own in the subject and who, some of them, also write and confer increasingly about it, conscious that, beyond the legal experts with whom they may happily have contact, are many from whom they are cut off.

I began my professional career as a historian mainly of British religious and cultural matters. Becoming interested in the ethics and sociology of war, I moved from insular to international and from civil towards military subjects in mid-career; applied myself to the history and present state of the law of war and the working of its institutions; and concluded at last that the best base from which to conclude my work and to write this chapter is the branch of studies loosely known as International Relations, with whose representatives at the London School of Economics and the University of Oxford I have happily been associated over the past ten years.

If the chapter is a mixture of bits of all the so-called academic disciplines with which I have had dealings over the past forty years, that is the inevitable outcome of the way my mind has moved. I have had to follow where the argument has led, and I truly believe that an adequate appreciation of the importance to the world of international humanitarian law-an appreciation, that is, of how it has become part of what we think of is civilization, and of how much civilization depends upon it-does in principle require the fraternizing of all the disciplines and interests involved in it. The subject has too much of humanity's blood and future in it to be safely confided to the care of anyone of the several parties with claims on it. But whether my own attempt to bring them together turns out to be successful, only my critics (I hope they will not be too sectarian in spirit) will be able to judge.[4]

To one group of readers however I must issue the warning that this chapter, if taken in the wrong way, could seriously endanger their professional health. I refer to law students. I hope many of them *will* read it, and enjoy my explanations of how this great subject of their studies has come to be as it is, how much besides law has gone into the making of it, and how it functions within the politics of international society. But I am not a lawyer, I am under no obligation to think about law as lawyers have to, nor do I try to write about it as they do, e.g. when I write of a practice being conventional, I mean conventional in the sense of customary, habitual, not in the international-legal sense of deriving from a convention alias treaty. The aspects of it which seem important to the conduct of my analysis and the telling of my story are not necessarily coextensive with those which must be important in legal exegesis and disputation; nor do I, writing with such purposes and within such limits, pretend to cover the ground as comprehensively as a professional expert has to do. Anyone who uses this chapter in preparation for an academic examination in the international law of war is asking for trouble!

Terminology and Abbreviations

I have not striven for overall consistency in my references to the principal subject of the chapter, because styles of referring to it have changed over the years and I have allowed the form of my reference to change with them. By the later nineteenth century, this subject was known in the English-speaking world as 'the law of war' or some close variant thereof, e.g. 'laws and customs of war' or 'international law of war and peace'. In Germany and Fiance, where most of the scholarly writing then came from, it was respectively *Kriegsrecht* and *Droit de la guerre*. Within the past generation, for reasons explained in due course, it has become fashionable to give it softer-sounding titles, substituting 'armed conflict' for 'war' and introducing the word 'humanitarian'. My admired colleague Adam Roberts, Professor of International Relations at Oxford and a noted expert on my subject, is of sterner stuff and continues in the second edition of his (co-edited) collection of documents to call them the laws of war. The other standard collection, by the Swiss experts Schindler and Toman, calls them *the laws of armed conflict*. In the voluminous collections of essays (a.k.a. Festschriften)

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[4] There is one area of IHL to which I may not have given, within my chosen frame, sufficient space, and that is the law of war at sea. The reader will indeed find pages on submarines, hospital ships, mines, and blockade; he will not find much on the matters of which so much was heard during the Iran-Iraq war of the 198os: rules of engagement, reflagging, territorial waters, and war zones. For this lack I have no better excuse to offer than that the law of war at sea has always been something of a subject apart {which is how naval authorities like to have it!) and that the current efforts of the ICRC and other bodies to promote a clarification and modernization of it have not yet come to anything. There is a good survey of the present situation by Ross Lebow. 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones', in ICLQ 37 {1988),629-44. See further, Dieter Fleck, 'Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter', in German Yearbook of IL, 31 {1988),166-86, and W. J. Fenrick, 'Legal Aspects of Targeting in the Law of Naval Warfare', in Canadian Yearbook of I L, 29 { 199 I), 238-8 I.

recently presented to two of its most distinguished dignitaries, Jean Pictet and Frits Kalshoven, it is called (*international*) *humanitarian law of armed conflicts*. Many people nowadays shorten it for convenience into simply 'humanitarian law'. I am not myself much a.ttracted by this fashion, for reasons which will appear below, but I understand why it has happened and I am very anxious not to deter its followers from reading what I have to say, because they cannot care more about the subject than I do. Therefore I have let the law (s) of war of the earlier part of the chapter become international humanitarian law in the later. But with so much cross-referencing, some inconsistencies are bound to occur, for which I apologize to those whom they offend.

International humanitarian law being something of a mouthful, I shall consistently abbreviate it into IHL. There will be other space-saving abbreviations, which it is convenient to introduce here as part of a thumbnail sketch of the main lines of the subject's history. The legal instruments at the heart of it have since 1864 been the Geneva Conventions, the GCs; the latest and current GCs date from 1949, and the third of them deals with paws, prisoners of war. There are also the Hague Conventions of 1899 and 1907 and the Land War Regulations annexed to the 4th Convention of 1907 (not abbreviated); and since 1977 the two Protocols Additional to the Geneva Conventions, AP1 and AP2. These Protocols themselves are the product of a great 1974-7 conference which will appear under the initials CDDH, the accepted shortening for the Geneva Conference *Diplomatique sur la Reaffirmation et le Developpement du Droit International Humanitaire applicable dans les Conflits Armes*. The institutions most important to IHL are the various elements of what is now properly known as the International Red Cross and Red Crescent movement; the reader will often meet the International Committee of the Red Cross as the ICRC and sometimes simply the RC, the Red Cross, to indicate the movement at large. When explaining the treaties and their supposed operation, I shall shorten High Contracting Parties to HCPs and Protecting Powers to PPs. No need, I'm sure, to explain what is meant by the UN. PR must also be familiar to the contemporary reader. Its occurrence here may surprise him; but the fact is that it is impossible realistically to discuss the uses of humanitarian and human rights law without taking note of the part they are made to play in the booming political business of public relations; something which includes the age-old concern of propaganda but nowadays has much more to it. Human rights law has come to matter more and more in this field; UDHR is how its chapter of Genesis, the 1948 Universal Declaration of Human Rights, will be referred to.

International Humanitarian Law – Hans Gasser

Contents

1. The protection of the defenceless in war- the true " law of Geneva" or "Red Cross law"

Article 6 of the 1864 Geneva Convention reads, "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for". This one sentence aptly sums up the *law of Geneva*, also known as *Red Cross law*. Since 1864, however, this law has been very considerably expanded, and now includes protection for captured combatants and for civilian war victims, as well. It has thus become more complex, not because of any lawyers' delight in complications and convoluted clauses, but because many of the questions raised call for careful consideration of the interests involved and the drawing of fine distinctions.

The pages that follow contain an overview of the rules of international humanitarian law which protect defenceless persons in international armed conflicts. (The situation in non-international armed conflicts will be dealt with in Section 5 of this chapter) "Defenceless" is understood to mean those persons who, while nationals of the belligerent nations, have ceased to fight owing to wounds, are shipwrecked, or have voluntarily laid down their arms; our definition also covers military and civilian captives, and finally, civilians in the power of the adversary, especially those under military occupation.

The applicable law is to be found in the four Geneva Conventions of 1949, supplemented in certain aspects by Additional Protocol I of 1977. Thus, all five of these international treaties must be examined together.

The treaty law discussed here largely expresses principles and rules that are also valid as customary law among nations. In the field of international humanitarian law, customary law is usually absolutely binding. However, this does not mean that the written law of treaties is meaningless -on the contrary .It is only by codifying them that unwritten principles can be made clearly comprehensible, their details understood and therefore applicable in actual situations. Yet at the same time, important principles relating to the protection of the defenceless in war, as embodied in humanitarian law, take precedence and are not subject to modification by the States, i.e., they are valid independently of the will of the States as expressed in written law.

A. The general obligation of humane treatment

All the Conventions preface their provisions with a directive that the defenceless should receive humane treatment, the wording in each case being adapted to the specific categories of persons covered by the Convention. Article 12, paragraphs 1 to 4 of the First Convention, for example, reads:

> "Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.
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> They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.
>
> Only urgent medical reasons will authorize priority in the order of treatment to be administered.
>
> Women shall be treated with all consideration due to their sex".

Article 12 of the Second Convention, relating to war at sea, Article 13 of the Third Convention, relating to prisoners of war, and Article 27 of the Fourth Convention, relating to civilians, are similarly worded.

In order to close any possible loopholes, Additional Protocol I contains an extensive provision on the treatment of persons in the power of a party to the conflict. Article 75 of Section III, entitled "Fundamental guarantees", reads like a condensed version of the Declaration of Human Rights, framed for the special conditions of war. I t represents a minimum provision which is subordinate to the more extensive guarantees contained in the individual Geneva Conventions or in the human rights treaties. We will briefly consider this article of the Protocol, before turning to the description of the different series of rules applicable to protected persons.

Under Article 75 of Additional Protocol I, all persons in the power of one of the parties to the conflict "shall be treated humanely in all circumstances". They must enjoy the protection described in the article "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria " -in short, a comprehensive ban on discrimination, which in wartime, when captives are in the power of the enemy, takes on special significance .

Article 75 contains a long list of obligations and prohibitions. It is thus prohibited to commit "violence to the life, health, or physical or mental well-being of persons, in particular murder", with special emphasis on the ban on "torture of all kinds, whether physical or mental". A similar absolute prohibition of torture is contained in each of the four Geneva Conventions: torture is completely forbidden under the law of Geneva, with no exception whatsoever. There are no circumstances in which the resort to such inhumane conduct could be permitted, and there is no "higher value" (such as, for instance, "liberty" or "the nation's survival") that could justify torture. The use of torture is always a grave breach of the Geneva Conventions and must therefore be punished as a war crime.[52]

Another perversion of human behaviour must be mentioned in the same context: medical, or rather pseudo-medical, experiments on human beings. Such procedures are prohibited.[53]

A carefully graded rule was formulated on the removal of blood or skin for therapeutic purposes. The ban on experimentation on the human person covers all those who, for whatever reason, are in the hands of the adversary .No exception is made in the event of possible agreement by any person, since the extraordinary circumstances (captivity, occupation) do not guarantee that decisions are freely made. In severe cases, such experiments are a grave violation of humanitarian law.

Article 75 forbids "outrages on personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", "the taking of hostages" and "collective punishments", and also threats to commit such acts. It further contains requirements to ensure proper and fair judicial procedures before a court. A series of guarantees are intended to ensure that anyone accused of an offence shall receive a fair trial, and shall be judged and sentenced by a court acting in accordance with the law.

Section III of Additional Protocol I, which contains minimum provisions for the treatment of persons in the power of the opposing party to the conflict, names other groups who, because of their great vulnerability in conflict conditions, need extra protection: refugees and stateless persons (Article 73), families dispersed owing to the -war (Article 74), women (Article 76) and children (Articles 77 and 78) and journalists (Article 79). These provisions will be considered in greater detail later .

The guarantees of Article 75 of Protocol I represent a minimum, the requirements embodied in the Conventions relating to different categories of people being stricter. Nevertheless, Article 75 constitutes a "safety net for human rights" that is of inestimable value. Article 75 is therefore of special interest, forming as it does the link between protection of human beings through international humanitarian law and the guarantees contained in human rights treaties. Since 1977, the "hard core of human rights" has been more or less uniformly defined in the laws applying to war and peace.

Before entering into a discussion of the rules for individual categories of persons, we should first briefly study the meaning of the concept of protection. A careful reading of Article 12 of the First Convention or of Article 75 of Protocol I, mentioned at the beginning of this section, shows that they require certain kinds of action to be taken on the one hand, while prescribing abstention from other kinds of action on the other. Persons must be treated humanely (action) and must not be ill-treated or tortured (abstention from action). For the opposing party in

[52] First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 147.

[53] Protocol I, Article 11

whose hands the protected persons fall, however, the duty to refrain from certain actions translates as a duty to take action, namely, to take all necessary measures to ensure that protected persons in the power of that party suffer no injury and thus no injustice: the party concerned must protect them.

B. Wounded, sick and shipwrecked persons

The texts referring to this category of persons are to be found in the (First) Geneva Convention for the *Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the (Second) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the (Fourth) Convention relative to the Protection of Civilian Persons in Time of War*, Part II (General protection of populations against certain consequences of war), and Additional Protocol of 1977, Part II (Wounded, sick and shipwrecked).

Under the Geneva Conventions, two different series of rules are brought into application, depending on whether the wounded, sick or shipwrecked persons are members of the armed forces or civilians. Protocol I did away with this distinction and created a single law for both categories, which greatly simplifies the practical application of the provisions.[54] There are now only "wounded" and ""sick" , whether military or civilian, and only "medical units", whether under military or civilian administration. Civilian wounded can therefore be treated in military hospitals, and combatants in civilian establishments. The protection is linked with the person or the unit, and not with their military or civilian nature.

Under the title "Protection and care", Article 10 of Protocol I states:

> "1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
>
> 2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones " .

The provision says a lot in a few words. It obliges the belligerents to take the following measures regarding the wounded, sick and shipwrecked:

-*respect*: defenceless persons must be treated as their condition requires, and always with humanity;

-*protection*: they must be shielded from injustice and danger, that is, the effects of hostilities, and against possible assaults on the integrity of their persons. Suitable measures must be taken to guarantee such protection;

-*medical care and attention*: these persons are entitled to medical care, and may not be neglected as enemy persons on account of their origin (general prohibition of discrimination). They need not, however , receive more than is actually possible: the wounded and sick of the

[54] Protocol I. Article 8.

opposing side do not have to be treated better than the party's own combatants in the same circumstances.

This covers the entitlement of wounded, sick and shipwrecked persons, whether civilians or members of the armed forces, to care and medical help. Yet how can those who wish to provide such help survive on the battlefield ?

If we look again at the historical beginnings and remember the short 1864 Convention, we see that its Article 1 declared field hospitals to be neutral, while Article 2 stated that the personnel, including "the quartermaster's staff, the medical, administrative and transport services, and the chaplains shall have the benefit of the same neutrality when on duty" .This is still the position today, except that modern Geneva law no longer speaks of the neutrality of military medical services, but merely recognizes that they have special legal status, which is linked with a general obligation of protection. Under the three Conventions already mentioned and Additional Protocol I, medical units, medical personnel and medical transports are all placed under such protection.

Medical units are protected.[55] They may note be used for other purposes or subjected to attack. Medical units include fixed or mobile hospitals, field hospitals or other installations used for medical care, for example, pharmaceutical stores. Civilian medical units, particularly hospitals, must be designated as such by the authorities of the State concerned. The opposing party must respect medical units at all times, i.e. , they must not be attacked or hampered in their functions. The protection ceases only if such a unit is misused to commit acts harmful to the opposing party, "outside their humanitarian function". Naturally, protection does not cease if wounded combatants are housed in the medical units together with their arms and equipment.

In particular, the presence of armed guards does not deprive a hospital of its protected status.[56] For it is allowed, indeed required, of medical personnel that they shield the sick and wounded in their keeping from violence and prevent pillage (e.g. , of the store of medicines), and this may require the use of weapons, in the sense of police action. Such use of weapons is permitted.

However, medical units may not be defended against take-over by the enemy's armed forces. They should, instead, be handed over to an approaching enemy in good order. In this sense, a field hospital is neutral. Medical units that fall into the hands of the adverse party should, as a general principle, be allowed to continue their work. In order that medical units may benefit from protection even in the midst of battle, they should not be situated near military objectives.

At sea, hospital ships perform the functions of hospitals on land.[57] They are protected under the Second Geneva Convention, provided that they are marked as such and that their characteristics have been notified to the parties to the conflict.

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[55] First Convention, Articles 19 to 23; Protocol I, Articles 8 (e) and 12 to 14

[56] First Convention, Article 22; Protocol I, Article 13

[57] Second Convention, Articles 22 to 35.

Medical personnel, including those employed in the search for and/or the collection of wounded, are to be respected and protected, whether they are civilian or military.[58] They may not be attacked, and they must in principle be allowed to continue performing their duties if they fall into the hands of the enemy. In particular, captured military medical personnel must be employed to care for prisoners of war.[59] Any personnel not required for such duties shall be repatriated.

For the first time in the history of international humanitarian law, Additional Protocol I contains detailed provisions concerning the nature of medical duties: "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom".[60] No doctor may be compelled to perform acts contrary to the rules of medical ethics, or to divulge the identity of the persons in his care, except as required by the law of his own party. Military and civilian religious personnel are entitled to the same protection.[61] Their status is similar to that of medical personnel.

Equivalent to military medical personnel, finally, are "the staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments " , provided that they are subject to military laws and regulations.[62] Additional Protocol I broadens the range of activities of the National Societies in wartime, in that it explicitly permits them, in invaded or occupied areas, to provide help to the population on their own initiative. The parties to the conflict may also employ these Societies to collect and care for the wounded, sick and shipwrecked. "No-one shall be harmed, prosecuted, convicted or punished for such humanitarian acts".[63]

Here we should recall to mind the women of Lombardy, who brought help and consolation to the wounded and dying after the Battle of Solferino, and their cry of *"Siamo tutti fratelli"*. The idea of altruistic and spontaneous help for friend and foe by villagers near the battlefield has into the wars of today. It found expression in the First Geneva Convention of 1949 and was strengthened by Protocol I in 1977. In accordance with these texts, the civilian population is allowed to bring aid to those on the battlefield, that is, to collect and care for wounded, sick and shipwrecked persons, without being punished. Anyone who, whether spontaneously or at the request of a party to the conflict, takes part in such humanitarian work may not be penalized or punished: charitable work must always be respected. Obviously the civilian population, on the other hand, must not cause any harm to the wounded, sick and shipwrecked of the opposing side.[64]

This brings us to another matter of far-reaching humanitarian importance, the question of persons "missing in action". Everybody agrees how important it is to have news of close relatives or friends, especially in misfortune. Yet only those who have had the experience can

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[58] First Convention, Articles 24 to 32; Second Convention, Articles 36 and 37; Protocol I, Articles 8(c) and 15.

[59] First Convention, Article 28

[60] Protocol I, Article 16

[61] First Convention, Article 24; Protocol I, Article 8(d).

[62] First Convention, Article 26

[63] Protocol I, Article 17.

[64] *Ibid.*

realize what it means to be without news of a relative during wartime, without even a notification of death. Article 32 of Additional Protocol I now establishes, for periods of armed conflict, "the right of families to know the fate of their relatives". In practical terms, this means that each side has an obligation to search for the wounded and the dead as soon. as circumstances permit. Each party to the conflict has a special duty to search for persons reported missing.[65] On the outbreak of war, they must at once set up information bureaux to gather information concerning protected persons.

Tracing requests from one side to the other and the relevant replies are usually dealt with by the Central Tracing Agency of the ICRC,[66] which also keeps records of all information.

In the same context, it should be pointed out that the mortal remains of members of the armed forces of the opposing side and of civilians must be respected and burial sites maintained and marked. As soon as possible, the surviving family members must be allowed access to the graves of their relatives.[67]

Another section of the chapter on the protection of wounded, sick and shipwrecked persons deals with the rules relating to *medical transports*.[68]

Civilian or military vehicles used to transport the wounded and sick enjoy comprehensive protection. The same applies to the transport of medical personnel and supplies. Vehicles used for such purposes may not be attacked, nor may they ever be used for any purpose other than medical transportation. Experience has shown that the risk of misuse of medical vehicles (for instance, using an ambulance to carry combatants, weapons or ammunition) is great. The consequences of such misuse are usually immeasurable, since once confidence in the adversary is lost it is not rapidly re-established.

At sea, all types of ships may be used to transport the wounded and sick and to rescue the shipwrecked, provided such ships are properly marked.[69]

The use of medical aircraft raises extremely difficult questions, given that at high speeds aircraft can no longer be distinguished as medical with the naked eye, and that therefore a medical aircraft, which is protected, cannot be distinguished from one with a military mission. The 1949 texts, assuming that nothing could be done to overcome these difficulties, provided protection only for medical aircraft following a flight plan previously agreed by both sides.[70] In the actual conditions of war, this meant that medical aircraft could fly only on their own side of the front, since agreements between enemies are difficult to reach at short notice in the heat of battle.

On the basis of experience with medical aviation in various conflicts since the Second World War (especially the use of medical helicopters in the war in Viet Nam), the 1974-1977

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[65] Protocol I, Article 33.

[66] See Chapter II, Section 1, B. bbb

[67] Protocol I, Article 34.

[68] First Convention, Article 35; Protocol I, Articles 8(g) and (h), and 21

[69] Second Convention, Article 38; Articles 22 and 23

[70] First Convention, Articles 36 and 37; Second Convention, Artiles 39 and 40

Diplomatic Conference created a comprehensive system of protection for air transport of the wounded and sick. Article 24 of Additional Protocol I now states that medical aircraft shall be respected and protected. The protection varies in extent depending on whether the medical aircraft (usually a helicopter) is over its own area,[71] over the "contact zone" (where military operations are taking place),[72] or over areas controlled by the adverse party.[73] The explanation for this new and positive attitude concerning medical aviation is to be found chiefly in the development of new techniques that make possible the prompt identification of aircraft in flight (flashing blue light, radio signal, secondary radar systems).[74]

This brings us to a topic which merits more detailed discussion: the identification of protected persons or objects by means of the protective sign, the *emblem*.

Even before the 1864 Geneva Convention was signed there had arisen the very practical question of how something that must not be attacked - for example, a "neutral" object that must not be drawn into the conflict by either side -could possibly be recognized as such on the battlefield. The question had to be answered by the national representatives at the 1864 Conference, since the new Convention provided for the neutralization of field hospitals. By association with long-standing military traditions, there arose the idea of flags, to be placed in a clearly recognizable way beside the objects to be protected. The persons to be protected, who at the time were solely military medical personnel and army chaplains, would wear an armlet. Consequently, Article 7, paragraph 3, of the 1864 Convention was adopted: "Both flag and armlet shall bear a red cross on a white ground". The protective sign of a red cross on a white ground had come into existence .

The 1929 Convention noted that the red cross emblem had been formed by reversing the colours of the Swiss flag.[75] Since the revised Conventions of 1949, the red cross on a white ground designates all persons, buildings, means of transport, etc. that are entitled to protection and respect under international law, irrespective of whether they are civilian or military in character. This was the first protective sign enabling those engaged in combat to identify an object or a person to be protected, to hold their fire or to take other measures, in order to respect and protect human beings seeking the protection of the Red Cross.

The effectiveness of the protection offered by the emblem depends on the trust that the parties to the conflict have in the correct use of the protective sign by the adverse party. For this reason, the use of the emblem must be strictly regulated, not only through international law,[76] but also in domestic legislation.[77] Such rules must then be strictly enforced. The responsibility for this lies with the parties to the Conventions, and, in the event of conflict, above all with the belligerents.

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[71] Protocol I, Article 25

[72] Protocol I, Article 26

[73] Protocol I, Article 27

[74] Annex I to Protocol I : Regulations concerning identification.

[75] Convention of 27 July 1929, Article 19.

[76] First Convention, Articles 38 to 44,53 and 54; Annex I to Protocol I, Articles 3 and 4.

[77] Through domestic laws for the protection of the emblem.

Misuse of the emblem is forbidden; deliberate use of the protective sign with the intention of abusing the trust of the adversary (for example, by making a military advance under the protection of the red cross, or transporting arms by means of a marked ambulance or similar vehicle) is perfidy, and in certain circumstances must be considered as a war crime.[78] Such conduct is extremely grave, since misuse destroys confidence in the protective sign and can therefore lead to the loss of its protective effect even for installations, means of transport and persons legitimately marked with the sign. Experience has shown how hard it is to restore lost confidence, especially in the conditions of combat, in which mistrust, hate and contempt are particularly common.

Shortly after the red cross had been introduced as the protective sign in 1864, Turkey decided to use, in its place, the red crescent on a white ground, giving as the reason that the red cross offended the religious feelings of Muslims. This sign was incorporated into the law of Geneva when the Geneva Convention was revised, in 1929, as was the sign preferred by Persia, the red lion and sun (now no longer used). The departure from a single protective sign is to be regretted, since it can lead to confusion. Most importantly, however, the reason given for adopting another sign is unfortunate, since it attributes to the original emblem of the red cross a religious significance which it never had and never should have.

Today the red cross and the red crescent are used with equal entitlement by States and National Societies of all States party to the Geneva Conventions. Israel uses the red shield of David, which is not recognized in international law, to mark persons and objects protected under the Geneva Conventions. This sign appears to be respected in the various conflicts in the Middle East. A national society in Israel carries on its activities under the name of the red star of David. Since it has not adopted either of the two emblems stipulated in the First Geneva Convention, that society cannot be recognized by the Red Cross Movement.

The Diplomatic Conference of 1974-1977 paid special attention to the marking and identification of medical units and transports and, as already stated, worked out new solutions based on modern technology.[79] For example, medical aircraft were to be recognized by means of a blue light signal. Identification procedures using radio signals or secondary radar were introduced. Hospital ships, for instance, must identify themselves by means of specially arranged radio signals.

Finally, and by way of summary, it should be borne in mind that National Red Cross and Red Crescent Societies may also use the sign of the red cross or the red crescent to identify their own activities, in as far as they are conducted within the framework of the Fundamental Principles of the Red Cross.[80] In wartime they may, when on duty, use the emblem in the form of a large protective sign visible from a long distance, as military medical services do. In peacetime, on the contrary, the emblem may be used only to indicate that an object or a person belongs to a Red Cross organization: it has no protective function within the meaning of the Geneva Conventions.

ICRC delegates carrying out their duties are allowed to wear the emblem of a red cross on a white ground, without any restriction. Their protective sign bears the words "*Comite*

[78] Protocol I, Article 85.3(f).

[79] Annex I to Protocol I

[80] First Convention, Article 44.

international de la Croix-Rouge". Representatives of the International Federation of Red Cross and Red Crescent Societies are also entitled to use the protective sign in the exercise of their duties.

C. Prisoners of war

The (third) Geneva Convention relative to the Treatment of Prisoners of War deals extensively with the plight of those taken captive in war. Its content may be summarized as follows: "Prisoners of war shall at all times be treated humanely".[81] Prisoners of war are members of the armed forces of one of the parties to the conflict who fall into the hands of the adverse party during an international armed conflict. During captivity, prisoners of war retain their legal status as members of the armed forces, as indicated externally by the fact that they are allowed to wear their uniforms, that they continue to be subordinate to their own officers -who are themselves prisoners of war- and that (as is explained below in more detail) at the end of hostilities they have to be returned to their own country without delay. It is, moreover, explicitly stated that prisoners of war are not in the hands of individuals or military units, but are in the care of the adverse State, since it is the State, as a party to the Geneva Conventions, that is responsible for fulfilling its international obligations.[82] Being a prisoner of war is in no way a form of punishment.

A number of other categories of persons are listed in the Third Convention as having the same status as members of the armed forces. First come members of a resistance movement belonging to a party to the conflict who satisfy the following four requirements: they must be commanded by a person responsible for his subordinates; they must have a fixed distinctive sign which is recognizable at a distance (if they have no uniform of their own); they must carry arms openly; they must respect the law and customs of war.[83] Resistance movements must comply with all four conditions if their members are to be treated as prisoners of war .

Certain persons authorized to accompany the armed forces without belonging to them are also to be treated as prisoners of war (e.g. civilian members of ship and aircraft crews, war correspondents, though not those journalists who are to be treated as civilians under the rules of Protocol I).[84] Lastly, members of the population who spontaneously take up arms to resist approaching enemy forces (*levee en masse*) are entitled to be treated as prisoners of war .[85] Members of medical services who are taken prisoner are granted special status: they must be given the care of prisoners of war of their own side, or be returned to the party to which they belong.[86] In general, any doubt as to the status of a captured person must be cleared up by a competent tribunal.[87]

Prisoners of war keep their legal status from the time they are captured until they are repatriated. They cannot lose this status during their captivity, either by any measure of the

[81]Third Convention, Article 13

[82] Article 12.

[83] Article 4.A(2).

[84] Article 4.A(4) and (5).

[85] Article 4.A(6).

[86] First Convention, Articles 30 and 31; Third Convention, Article 33.

[87] Third Convention, Article 5, para. 2

authority in charge or by their own action. Protected persons may in no circumstances renounce the rights to which they are entitled under the Geneva Convention.[88] This protection from their own, possibly unthinking, conduct, which may have major consequences in wartime, is extremely important.

The Third Convention -the "*POW Convention*" -regulates to the smallest detail the treatment of prisoners of war (Articles 21 to 108). A comprehensive overview may be obtained by studying the Convention and the specialized literature. A few brief comments will suffice here.

- When captured, prisoners of war are obliged to give name, military rank, date of birth and serial number only. They cannot be compelled, in any circumstances, to provide further information.[89] Also under the Third Convention, torture and other severe ill-treatment are considered war crimes.[90]

- Prisoners are entitled, immediately upon capture, to complete what is called a capture card,[91] which is then sent, via the ICRC Central Tracing Agency, to the official information bureau in the prisoners' own country.[92] The latter has the task to inform the prisoners' relatives. In this way, links with home and family can be rapidly re-established.

- Prisoners of war must be transferred as soon as possible out of the danger zone and brought to a place of safety, in which the living conditions must be "as favourable as those for the forces of the Detaining Power who are billeted in the same area".[93] Neither ships nor civilian prisons, for example, meet these requirements.

- As far as possible, the conditions of captivity should take account of the habits and customs of the prisoners.[94]

- Prisoners of war in good health may be required to work,[95] but may be employed in dangerous work only if they volunteer. Removal of mines is explicitly mentioned as dangerous work.[96] Although the use of prisoners of war with suitable training to remove mines may appear appropriate - particularly if they have personal knowledge of the mines' location -this also may be done only if the prisoners freely consent.

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[88] Third Convention. Article 7.

[89] Article 17.

[90] Article 130, and Protocol I. Article 85.5.

[91] Article 70 and Annex IV:

[92] Article 122.

[93] Article 25

[94] Ibid.

[95] Articles 49 to 57.

[96] Article 52, para. 3.

- Prisoners of war are entitled to correspond with their relatives (letters and cards being exchanged usually through the ICRC Central Tracing Agency).[97] They may also receive aid in the form of individual parcels.[98]

- A prisoner of war is subject to the law in the country of the detaining power, especially the regulations applying to the armed forces.[99] In the event of offences, judicial or disciplinary measures may be taken against him, in accordance with the law. The Detaining Power may also prosecute paws for offences committed before capture (e.g., alleged war crimes committed in an occupied territory or on the battlefield) .

- However, prisoners being so prosecuted are entitled to a properly conducted trial and, even if convicted, retain their legal status as prisoners of war. Nevertheless, they may have their repatriation deferred until they have served their sentences.

- Measures of reprisal against prisoners of war are forbidden without exception.[100]

A very important group of provisions in the Third Convention is that dealing with the repatriation of prisoners of war.[101] Three categories are distinguished :

- The severely wounded and sick must be repatriated directly and without delay, i.e. , as soon as they are fit to travel.[102] This is a humane gesture towards combatants who will never again be involved in the war. Mixed medical commissions decide who will be repatriated.[103] ICRC delegates possess the necessary experience to carry out repatriations of this kind at any time.

- All other prisoners of war must be released and repatriated "without delay after the cessation of active hostilities" ; [104]

- Without waiting for the war to end, the parties to the conflict should repatriate prisoners of war on humanitarian grounds, possibly on a reciprocal basis, i.e., by means of an exchange of prisoners. The ICRC tries constantly to bring about agreements of this kind. As a neutral intermediary between the parties, it is, as already mentioned, always prepared to carry out repatriations and exchanges of POW’s.

It should be recalled that, as a rule, prisoners of war cannot refuse repatriation. Article 118 of the Third Convention provides for no exception to their being sent back to their own country, indeed it stipulates that all prisoners of war must be repatriated. This provision gave rise to difficulties already in the Korean War, when many North Korean POW’s did not wish to

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97 Third Convention, Article 71.
98 Article 72.
99 Articles 82 to 108
100 Article 13, para. 3.
101 Articles 109 to 119
102 Article 109
103 Article 112
104 Article 118

return to their country. [105] Forced repatriation may, however, run counter to human rights considerations or the rights of refugees, especially if the returning prisoner faces persecution in his own country. This may be the case, for example, if the political regime has changed since his capture. In such circumstances, each individual case must be handled in a way that is humanely acceptable, yet without weakening the obligation of the parties to the conflict to repatriate all POW's at the end of active hostilities, as laid down in Article 118. For if individual prisoners were allowed to decide for themselves whether or not to return home, the detaining power would soon claim the right to make its own decisions concerning their repatriation. It might exert pressure on the prisoners to make them stay. It is thus the role of lCRC delegates to determine objectively each prisoner's will. The ICRC takes part in the repatriation of paws only if its delegates have really been able to verify that each prisoner's decision was freely made.

Unjustified delay in repatriating prisoners of war is a grave breach of Protocol 1.[106] To conclude this review of humanitarian law relating to prisoners of war, we would like to draw the reader's attention to an institution that is especially indicative of the association of the armed services with chivalrous conduct: release on parole.[107] In accordance with this custom, instead of being interned, POW's may be freed on parole by the Detaining Power and sent back to their own country, provided that they have solemnly sworn no longer to take part in the fighting against the State that had captured them.

D. Civilians

The greatest achievement of the 1949 Diplomatic Conference was the (fourth) *Convention relative to the Protection of Civilian Persons in Time of War*, which states that persons who fall into the hands of the enemy are protected under international law .Additional Protocol I contains provisions supplementing this protection .

A glance at the history of war shows that it is the civilian population that suffers most from the consequences of hostilities. This seems to have been especially true since the beginning of the 20th century. And yet, the law of war is based on the very simple idea that hostilities should take place exclusively between the armed forces of the conflicting parties. War must therefore keep out of the way of civilians. Military operations against civilians are not and never have been a permissible method of winning the war. The civilian population must not be involved in fighting, but instead has to be respected in all circumstances. This requirement results from the (unwritten) law of humanity and from the dictates of public conscience, as the Martens Clause so appropriately puts it.

In the reality of modern warfare, however, the civilian population is exposed to numerous dangers. For the purpose of international humanitarian law, two types of hazards, each calling for different protective provisions, must be distinguished:

- the dangers caused by military operations themselves; and

[105] Christiane Shield-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, 1977, pp.157 ff.
[106] Protocol I, Article 84.4(b).
[107] Third Convention, Article 21, para. 2.

- the threats to which vulnerable persons are exposed when in the powerof the enemy.

Civilians are all those who are not members of the armed forces.[108] As such they are entitled to the protection of international humanitarian law. As "non-combatants", civilians may therefore not take part in hostilities. Any civilians who do so must reckon with the loss of protection and the use of force against them. Yet they retain their status as civilians and, in particular, they do not become combatants. Usually national law severely penalizes acts of violence by "irregulars". In some cases, the mere possession of a weapon may be a punishable offence. International humanitarian law does not oppose such severe national legislation. The ban on violence does not apply, as already stated, to members of a resistance group within the meaning of Article 4. A(2) of the Third Convention or to persons who spontaneously take up arms on the approach of an enemy (*levee en masse*).

The Fourth Convention prohibits the use of civilians as a shield to protect certain areas or installations, usually of military importance, from enemy at tack.[109] The collective punishment of civilians and measures aimed at intimidating or terrorizing the civilian population,[110] pillage, hostage-taking and reprisals against civilians are also forbidden.[111]

To protect the civilian population as a whole, or groups of specially vulnerable people (the wounded and sick, the infirm and elderly, children, etc.) , safety zones may be set up with the consent of both sides, during the conflict (e.g., in the form of an "open city") or in time of peace already (demilitarized zones).[112] Such zones may not be subjected to military attack; on the other hand, they may not be defended against an enemy advance. Their sole purpose is to guarantee the physical survival of the population sheltering within them.

It has already been mentioned that hospitals may not be attacked and that persons belonging to medical services may not be hindered in their work.[113] Provided that they are carrying out the duties to which they have been originally assigned, such persons may not be transferred to other work. The same holds true for medical transports.

The parties to the conflict are urged to take special care of children under fifteen years old who have been orphaned or separated from their families. Searches for missing relatives should also be facilitated.

The legal status and the protection of civilians in the power of the enemy are comprehensively and well regulated in the Fourth Convention. Those taking part in the 1949 Diplomatic Conference still had vivid memories of the crimes committed against civilians during the Second World War, in occupied Europe and in the Far East. Additional Protocol I therefore had only to fill certain loopholes or to amend a few unsatisfactory regulations. It is thus made clear, for example, that refugees and stateless persons in the territory of a party to

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[108] Protocol 1, Article 50.

[109] Fourth Convention, Article 28. reinforced by Protocol I, Article 51(7).

[110] Article 33, para. 1.

[111] Articles 33, paras. 2 and 3, and 34.

[112] Articles 14 and 15; Protocol I, Articles 59 and 60.

[113] See section 3.B; Fourth Convention. Articles 16 to 22 and 24 to 26

the conflict must be treated as protected persons in the same way as nationals of the power of origin.[114] Special efforts must be made to reunite families.[115]

In addition to a comprehensive article on the protection of women,[116] Additional Protocol I contains new and important obligations for the treatment of children.[117] They stipulate that children are entitled to the care and help required by their age. In particular, children under fifteen years of age may not be enrolled in the armed forces nor may they take part directly in hostilities. If children are nevertheless involved in military operations - something that in fact happens all too often -then when captured they must receive the special treatment appropriate to their age. The death penalty may not be carried out on youngsters who had not reached the age of eighteen at the time the offence was committed.

Protocol I also redefines the conditions in which children can be evacuated from dangerous areas,[118] providing for a series of checks to prevent abusive and permanent evacuation of children from their own country . These rules are intended. above all, to act as a hindrance to abusive adoption. The new provisions are a welcome reinforcement of the protection to which children are entitled even in war.

The Protocol also deals with the situation of journalists engaged in dangerous professional missions. Article 79 makes it clear that journalists performing "dangerous missions", i.e., working in a theater of war, are to be considered as civilians in every respect. They are therefore entitled to the protection normally due to civilians; however, they cannot claim any special rights. They must comply with the restrictions pertaining to civilians and in particular must not take part in hostilities. If they expose themselves to unusual dangers, then they must accept the consequences.

In addition to these generally applicable provisions, the Fourth Convention contains special rules for three typical situations in which civilians need protection from the enemy. Below are brief descriptions of the most important of these rules.

a. Aliens on the territory of a party to the conflict

When war breaks out between two States, nationals of one of them may, for a number of reasons, be on the territory of the other State. They thus find themselves suddenly deprived of diplomatic and consular protection and in the power of the enemy State, since a state of war usually sets aside the international rules governing peaceful relations between States.

The Fourth Geneva Convention regulates the situation of such persons, who were previously often without any legal protection. Regularly the first victims of armed conflict, they are now "protected persons".[119] Under Geneva law, the Detaining Power must allow the nationals of the adverse State to leave, but only if their return to their own country is not contrary to its own interest. Persons who remain, voluntarily or forcibly, in the power of the enemy State

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[114] Protocol I, Article 73.

[115] Article 74

[116] Article 76

[117] Article 77

[118] Article 78

[119] Fourth Convention, Articles 35 to 46.

must be treated in accordance with the legislation applying to foreign nationals in peacetime (law on aliens). Naturally, the authorities must guarantee the minimum protection stipulated in the human rights treaties. Accordingly, such persons must be enabled to have paid employment, receive aid parcels and medical care, etc.

Nevertheless, the Detaining Power is permitted to take the necessary control measures (e .g ., regular reporting to a police station) or, if urgent security considerations so require, to order assigned residence or internment.[120] Persons affected by such measures are entitled to have such action reconsidered by a court or by administrative bodies. Protected persons may of course be transferred to their own country at any time, and must be repatriated at the latest at the end of hostilities. The Detaining Power may hand them over to a third State, but only if the latter is a party to the Fourth Convention and provides guarantees that the persons concerned will not be persecuted for their political or religious convictions.

b. Persons living in occupied territories

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." With these classic words, Article 42 of the 1907 *Hague Regulations on the Law and Customs of War on Land* defined belligerent occupation. The article now forms part of customary law. As the Fourth Geneva Convention of 1949 contains no new definition, the present law relating to the protection of persons living in occupied territory is based on the traditional concept of belligerent occupation. It is immaterial whether the occupation was carried out with or without the use of force.

The inhabitants of occupied territories are protected by all the provisions laid down in the Fourth Convention for the benefit of the civilian population as a whole, by the Hague Regulations of 1907, and by the Section of the Fourth Geneva Convention devoted to occupied territories.[121] The fundamental rule is set forth in Article 47 of the Fourth Convention, under which the rights of persons living in occupied territory are fully protected by international law .The occupying power may not alter their legal situation by either a unilateral act or annexation of the territory: the inhabitants are and remain protected persons. Individuals living in occupied territory may also not renounce their status or waive their rights under the Fourth Convention. The reason for this rule is to prevent abuse and attempts at forced consent.

The aim of the law on belligerent occupation is to maintain the existing situation in the occupied territory, the *status quo ante*. The military occupation is considered as a temporary situation. Thus, national legislation remains in force, and the occupying power may not abolish it. Local authorities, including the law courts, must be able to continue their activities. With today's rapid advance of economic and social development, however, this is not always possible, especially in the event of long-term occupation. The law as it stands at present takes only partial account of this fairly new phenomenon. The special problems raised by long-term occupation must in practice lead to solutions that better serve the interests of those living in occupied territory .

[120] Article 42.

[121] Fourth Convention, Articles 47 to 78.

There is no pretext under which the occupying power may disregard the fundamental rights of protected persons. For example, persons living in occupied areas may not be sent to the unoccupied part of their own country , or deported- into the territory of the occupying power, either individually or collectively. Within the occupied territory , protected persons may be transferred to another area only for imperative security reasons. Forced labour, such as was imposed during the Second World War, is not allowed. The occupying power may not settle part of its own population in the occupied territory , a prohibition aimed at preventing de facto annexation or colonization. The occupying power must likewise care for children, in cooperation with the local authorities, and schools must continue to function. Persons living in occupied territory may not be compelled to serve in the armed forces of the occupying power, and local police forces are to be employed to maintain public order in the territory.

It is forbidden for the occupying power to destroy personal or real property (e.g., houses) unless for imperative military reasons and in the course of a military operation. The occupying power may not alter the legal status of officials or judges, and must allow ministers of religion to exercise their spiritual activities. It must provide the occupied territory with food and medical supplies, if necessary by authorizing third parties (such as the Protecting Power or the ICRC) to carry out relief operations. The occupying power is responsible for maintaining health services, and hospitals and other .establishments of the public health service must be enabled to continue their work. The National Red Cross or Red Crescent Society must also be able to go on providing its services to the population.

The occupying power may take all measures, e.g. , pass laws, that it considers indispensable for the administration of the occupied territory , in particular to ensure law and order. It may set up its own courts, for example, to judge offences against its own security. Protected persons may be convicted by a court set up by the occupying power only on the basis of a regular and fair trial. The Fourth Convention describes the rights of the accused. They may be condemned to death, but only for grave offences and if the death penalty is permitted by law. The Protecting Power or the ICRC must be informed of all criminal proceedings and its representatives must be able to attend the trial.

The occupying power may, for imperative security reasons, order persons to assigned residence or issue an administrative order for them to be taken, without trial, to a camp. Such internment is not punishment. The internment order must be subject to review, and must be officially re-examined at intervals to ascertain whether it is justified.

A lamentable breach in the rights of persons suspected of a criminal offence is defined in Article 5 of the Fourth Convention, under which protected persons suspected of being spies or saboteurs or "detained under definite suspicion of activity hostile to the security of the Occupying Power" forfeit their right to contact with third parties (relatives, lawyers, representatives of the Protecting Power or delegates of the ICRC). This legalization of "incommunicado detention" should have no place in international humanitarian law.

The provisions relating to belligerent occupation of foreign territory apply for as long as the occupation continues, at least as far as the most important rules are concerned. On the other hand, Article 6 of the Fourth Convention states that a number of provisions shall cease to apply one year after the end of military operations.

To sum up: life under occupation may appear to be extremely harsh to the population concerned. This lies in the nature of belligerent occupation, which is a form of foreign domination. The law can do little more than what those responsible for security in the occupied territory are willing to allow. Despite this limitation, international humanitarian law relating to protected persons in occupied territory has special merit. It reduces the otherwise unlimited authority of the occupying power, whose conduct is subjected to international scrutiny. The Fourth Convention is a kind of constitution, an albeit limited "bill of rights" that takes effect when a territory falls to a foreign army and becomes occupied, one that takes effect, moreover, with no action on the part of the occupier or the occupied. The "constitution" protects the inhabitants against unjustified interference by the occupying power. In so doing, international humanitarian law makes a significant contribution to safeguarding human dignity in extraordinary circumstances .

c. Treatment of internees

We have already stated that in certain circumstances protected civilians may be interned. This applies both to persons in the hands of the adversary on his territory and to the inhabitants of an occupied territory .

During the Second World War, internees were subjected to appalling abuses of power. Who can forget, to give but one example, the concentration camps in Central and Eastern Europe and in the Far East? To prevent such events from recurring, the Fourth Convention contains a particularly well developed section on the internment of civilians.[122] The new provisions cover the legal status of internees in every detail and prescribe their treatment on the lines of that specified for prisoners of war. The differences arising from the nature of the internees as civilians are duly taken into account. It is made abundantly clear that internment is not a punishment, but a measure ordered for security reasons only.

All information concerning internees must be sent via the National Information Bureaux to the ICRC's Central Tracing Agency for forwarding to the internees' own country .

d. Aid to the civilian population: special measures

War not only takes away life, health and hope, it also destroys material goods: dwellings are rendered unfit for habitation and entire cities flattened. Hospitals can no longer fulfil their function, transport facilities cannot be used, farm land is poisoned, mines make roads and pastures inaccessible to people and livestock, and so on. War's potential for damage has no boundaries, it is immeasurable.

The direct consequences of warfare are always shortages and distress. Deliveries of food, for instance, are no longer certain, water may become unsafe to drink, and badly damaged buildings remain desolate ruins. Medical services are greatly hampered or non-existent, any remaining hospitals are overcrowded, medical supplies run short, and the injured cannot be treated in time because of damaged roads and railways, lack of vehicles, etc. Yet even without shelling and air raids, war can cause great distress to civilians. The insecurity that is always prevalent in time of conflict upsets the rhythm of daily life. For example, the fields go uncultivated; yet without sowing there can be no harvest. Lastly, people living under a

[122] Fourth Convention, Articles 79 to 135.

government of occupation must always accept privations, even when they are not directly endangered by military operations.

International humanitarian law helps to relieve this distress, by regulating the conditions for providing aid. There are two ways in which aid can be given to war victims extremely effectively. One is by relief operations for the civilian population, the other through civil defence services.

During a war, belligerents are obliged to permit relief operations for the benefit of civilians, even if they are enemy civilians. This important principle is laid down in Article 23 of the Fourth Convention, i.e., among the provisions dealing with the general protection of the civilian population from the consequences of war. Under that article, each of the contracting parties, i.e. , each party to the conflict and each third-party State not involved in the conflict, must allow the free passage of relief supplies for civilians in need. In the case of medicines and medical equipment, this obligation is not subject to any conditions, and the same is true for consignments of essential foodstuffs, clothing and tonics for children under fifteen and expectant and nursing mothers. The State that allows the consignment to pass has the right to inspect the contents and verify the destination of the relief supplies, and may refuse to allow them through if it has sound reasons for suspecting that they may fall into the wrong hands, i.e. , that they will not be distributed to the victims but diverted to military use. In order to prevent abuses, Article 23 explicitly stipulates that distribution of the supplies may be supervised locally by representatives of the Protecting Power. In practice, it is usually the delegates of the ICRC who conduct or supervise the distribution. They have much experience of such relief operations, and it has been found that belligerents and donor States alike have confidence in the ICRC's impartiality.

The position thus is: States have the duty to allow free passage to relief consignments for sick and wounded persons, children and expectant and nursing mothers, but may demand to inspect such consignments. This duty also applies to the adverse party, which may thus be required to permit the transport of relief supplies through the front lines to enemy territory. However, the scope of Article 23 is limited, inasmuch as it names only a small, though very vulnerable, section of the population as recipients of those relief consignments which must be allowed to pass. Additional Protocol I introduced something really new: under Article 70, relief operations must be carried out for the benefit of the entire population of the belligerents if there is a general shortage of indispensable supplies. However, there is a weakness in this otherwise very welcome new provision, in that all the parties affected must give their consent, especially the State receiving the aid. In other words, Article 70 attempts to provide a large-scale solution, not only in relation to the groups of those receiving aid, but also with respect to the relief supplies; the price for this generosity is the need to obtain the consent of all the States affected in every case. States are under an obligation to give their consent if famine threatens the survival of the civilian population. Article 54 of Protocol I bans starvation as a method of warfare against civilians. This is the first time that the law explicitly states that an offer of relief shall in no circumstances be regarded as an unfriendly act.

The Fourth Convention and Additional Protocol I contain other provisions concerning relief operations for the population in occupied territory. Under the law of belligerent occupation, the occupying power is obliged to make sure that the population receives food and medical supplies.[123] If this is beyond its possibilities, then that power is obliged to permit relief operations by third States or by an "impartial humanitarian organization " (usually the ICRC), and to facilitate such operations.[124] Distribution of the relief supplies must take place under the supervision of representatives of the Protecting Power or of ICRC delegates, to ensure that the goods are used in an impartial way and in proportion to needs.

A separate section is devoted to relief shipments for prisoners of war and civilian internees. It does not deal, however, with large-scale relief operations, since the detaining power is responsible for the t:naintenance of prisoners and internees. The Third and Fourth Conventions, on the other hand, state that those held in prisoner-of-war or internment camps shall be allowed "to receive by post or by any other means individual parcels or collective shipments", and goes on to list such items as food, clothing, medical supplies and books for study or recreation.[125] Individual parcels come as a rule from families, while collective shipments come from Red Cross and Red Crescent Societies or from the ICRC, which takes responsibility in both cases for transport and distribution.

To sum up, there are two main ideas relating to the question of relief operations in wartime.

- Relief operations in time of armed conflict must always and without exception be subject to the principles of neutrality, impartiality and non-discrimination, and the dictates of actual need. Discriminatory treatment of people not based on objective grounds is incompatible with international humanitarian law. The ICRC, which is entrusted with carrying out relief operations during war, is explicitly pledged to observe these principles, which are included in the seven Fundamental Principles of the Red Cross Movement.

- Offers of relief and (permitted) relief operations are not to be regarded as interference in the internal affairs of a third State or as an unfriendly act. They are, far more, an expression of the States' general obligation to show solidarity towards another State in distress.

Additional Protocol I, for the first time in the history of international humanitarian law, mentions civil defence[126] which is defined as "the performance of. ..humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival".[127] The tasks listed include warning, evacuation, collection of the injured and dead, first aid, firefighting, the provision of emergency accommodation, emergency repairs (of, for example, water supply systems), and many others, all aimed at enabling the civilian population to survive disasters brought about by war .

Civil defence organizations, which are purely civilian in character and subordinate to the civilian authorities, must not be placed under the orders of military forces. As civilian organizations they are fully protected. "They shall be entitled to perform their civil defence

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[123] Fourth Convention, Articles 55 and 56

[124] Article 59; Article 69

[125] Third Convention, Article 72, and Fourth Convention, Article 108.

[126] Protocol I, Articles 61 to 67.

[127] Article 61(a).

tasks except in case of imperative military necessity".[128] In particular, the civil defence services must be allowed to continue their work in the event of belligerent occupation, and the occupying power must provide them with the facilities necessary to do so. Civil defence personnel and installations are identified by a special emblem: a blue triangle on an orange ground.[129]

Protocol I even stipulates that members of the armed forces may belong to civil defence organizations[130] provided, naturally, that they do not perform any combat duties. If they fall into the power of an adverse party, they must be treated as prisoners of war .

Civil defence organizations of neutral or other States not party to the conflict that come to the assistance of the population of one of the belligerents are also entitled to protection. Such assistance is not considered as (unneutral) interference in the conflict.[131]

e. Pro memoria

Finally, it should be recalled that the provisions for the protection of the civilian population in times of armed conflict form part of general international law for the protection of the individual. The Genocide Convention, which makes the most extreme form of assault on individual persons an international crime, and the universal and regional conventions on human rights must therefore be observed also in wartime, although certain derogations are permitted in exceptional circumstances. They are applicable simultaneously with the Geneva Conventions and their Additional Protocols. In this way, comprehensive legal protection of human dignity should be ensured in the extreme conditions of war .

4. *Limitations on warfare- international rules relating to military operations (Hague law)*

This chapter is devoted to the restrictions placed by international humanitarian law on the waging of war itself. While the law of Geneva, discussed in section 3, stipulates how victims of the hostilities (the wounded, prisoners of war, inhabitants of occupied territory, etc.) are to be treated by the adversary, the rules about to be described set limits to the conduct of military operations. They are thus intended to prevent, or at least reduce, death and destruction, as far as the hard reality of war allows. Since these rules exert a direct influence on the planning and execution of military operations in war, they are addressed directly to the high command of the armed forces, to commanders of military formations and to members of the general staff, while humanitarian law relating to the protection of the wounded and sick, prisoners of war and civilians in occupied territory is the responsibility of services in the rear and of the civilian authorities.

International law relating to the limitation of warfare dates back to the Hague Conventions of 1899 and 1907- the first codification of this area of law. For this reason it is still called

[128] Article 62.

[129] Article 66(4) and Annex I, Article 15.

[130] Article 67.

[131] Protocol I, Article 64.

"Hague law". It is also known, not without justification, as "the law of war" or, more accurately, "the law of the conduct of war".

International Humanitarian Law and the Protecting Power System

R. Venkata Rao[*]

Contents

Introduction

Rapid changes have been taking place in International Humanitarian Law whose avowed objective is to care for friends and enemies alike, to promote respect for human dignity and to ban inhuman treatment. The Protecting Power System is an important innovation to supervise the implementation of the law of International armed conflict.

The Protecting Power System or the system of supervision, one of the most important subjects in humanitarian law, is also among the most delicate ones as it involves such actors besides the belligerent parties as third states, the ICRC and the United Nations. The subject of the Protecting Power System contains the rights and duties of neutral states and others to supervise the implementation of the law of international armed conflict. The functions of the Protecting Powers are mainly twofold -(1) to see that the Conventions are applied under their scrutiny[1] and (2) to safeguard the interests of the belligerent powers in enemy countries.

The Protecting Power acting on behalf of the State can bring to the attention of the other belligerent or the international organisations any violations of the conventions committed by the state. Thus it acts as an effective deterring force.

Role of Protecting Power during the course of a trial

The Protecting Power has an important role to play during the course of a trial by an occupation court. The Protecting Power must be informed of proceedings involving the death penalty or imprisonment for two years and has the right, on request, to be informed of any

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[*] Professor of Law, Andhra University, Visakhapatnam, Andhra Pradesh

[1] Article 9, Convention IV: "The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.
The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.
The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present conviction. They shall, in particular, take account of the imperative necessities of the security of the state wherein they carryout their duties."

other proceedings (Art. 71, IV)[2]. It has the right to attend the hearing of any trial of a protected person unless, in the interests of security, the hearing is to be in camera. Even then the Protecting Powers must be notified that the hearing is taking place (Art. 74, IV)[3].

The results of the trial and of any appeal or petition must also be notified to the Protecting Power and, in particular, no death sentence may be carried out before the expiration of at least six months from the date of notification to the Protecting Power. In circumstances of grave emergency constituting a threat to the security of the occupant, the period may be reduced (Art. 75, IV)[4] Even where death penalty is imposed for espionage, notice to the Protecting Power and a six month's stay of execution is required so that the enemy belligerent will have to he informed that one or its spies has been caught, tried and sentenced (Art. 3. 68, IV)[5]. The convicted person has the right to be visited by representatives of the Protecting

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[2] Article 71, Conviction IV: "No sentence shal1 be pronounced by the competent courts of the Occupying Power except after a regular trial.
Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trail as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against Protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shal1 be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.
The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shal1 in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the fol1owing particulars :

(a) Description of the accused;
(b) Place of residence or detention;
(c) Specification of the charge or charges (with mention of the penal provisions under which it is brought);
(d) Designation of the court which will hear the case;
(e) Place and date of the first hearing."

[3] Article 74 : "Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.
Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71, and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgment has been received by the Protecting Power".

[4] Article 75 : “In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.
No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.
The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is give reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences”.

[5] Article 68 : "Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided

Power and of the ICRC (Art. 76, IV)[6]. Finally the Protecting Power along with the Central Information agency[7]. is to collect all the salient information from the National Information Bureau (Art. 136, IV)[8] as regards the interned or imprisoned protected persons and transmit the same to the States on which they depend. Let us study the evolution of this system in brief.

Evolution of the Protecting Power System

Powerful states often resorted to this system in the beginning[9]. It seems to have been utilised for the first time in the Franco-Prussian War of 1870. It was accepted as a part of customary international law by world War I. It was accepted that a state of origin had a right to protect its nationals in the state of residence through a Protecting Power and the state of residence must adopt such protection. Though the Protecting Power had some rights since 1870, these rights were never made clear. World War I which saw the operation of the Protecting Powers also provided for the unofficial supervision of the ICRC and National Red Cross Societies. By entering the places of detention to provide medical and material assistance to individuals, the officials of the Red Cross used to make observations to the authorities regarding the standards of detention. The Supervision, though unofficial, was 'not ineffective'. As Siordet

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the duration of such internment or imprisonment is proportionate to the offence committee. Furthermore, internment or imprisonment shall, for such offences be the only measure adopted for depriving protected persons of liberty. the courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.
The penal provisions promulgated by the Occupying Power in accordance with articles 64 and 65 may impose the death penalty on a protected person only in cases where the person in guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.
The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.
In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."

[6] Article 76 : "... Protected person who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143."

[7] Article 123, Convention III : "A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency. The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties tb the conflict all facilities for effecting such transmissions.
The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.
The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief Societies provided for in Article 125."

[8] Article 136, Convention IV: "Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.
Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provided the aforesaid Bureau promptly with information concerning all changes pertaining to these protected person as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, birth and death."

[9] J. Pictet, *Geneva Conventions of 12 August 1949, Commentary*, pp. 92-103 (1960).

points out, "if the lot of the prisoners had been slightly improved, and the Hague Regulations had not been completely ignored, it was in many cases because there had been some sort of scrutiny, in fact, if not in law. "[10]

The experience in World War I prompted ICRC to prepare a mandatory system of third party supervision in the 1929 Diplomatic Conference on Prisoners of War : "The Contracting governments, in case of War, shall mandate to the ICRC the mission of approving roving commissions, composed of citizens of neutral states, whose duty it shall be to ensure that the belligerents made regular application of the provisions of the present convention."[11]

While rejecting this proposal, the conference adopted a non-mandatory system. In fact, it was the first treaty provision relating to the protecting powers. Article 86 reads: " A guarantee of the regular application of the present Convention will be found in the possibility of collaboration between Protecting Powers ...". In Article 88, it affirmed the right of the ICRC to practise humanitarian protection and assistance with the consent of the parties.

Changes brought in during the Second World War

During the Second World War, the number of neutral states which could act as Protecting Powers was very small: Switzerland represented 35 belligerents while Sweden and Switzerland represented practically all of them. These two twin neutrals helped the operation of the Protecting Power System, considerably. The ICRC also played a very useful role by its traditional humanitarian work of protection and assistance to individuals.

The 1949 Conference scrutinising the subject made three useful changes:

1. The Protecting Power System was extended to all the four Conventions produced by this conference;
2. The authority of the Protecting Power was made mandatory; and
3. Mention was made for the first time of official substitutes.

As regards the function of the Protecting Power, the common Article 8/8/8/9 reads in point :

> "The present Convention shall be applied with the cooperation and under the scrutiny of Protecting Powers whose duty it is to safeguard interests of the parties to the conflict ...The said delegates (of Protecting Powers) shall be subject to the approval of the Power with which they are to carry out their duties".

Article 10 of the Prisoners of War Convention deals with the official substitutes :

> "The High Contracting Parties may at any time agree to entrust to any organisation which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.
>
> "Where prisoners of war do not benefit or cease to benefit, no matter for what reason by the activities of a Protecting Power, or of an organisation provided for in the first paragraph above, the Detaining Power shall request a neutral state or such an organisation

[10] . F. Siordet, "The Geneva Conventions of 1949 : The Question of Scrutiny" (1957).
[11] *Id.*, p.12.

> to undertake the functions performed under the present Convention by a Protecting Power to a conflict. If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provision of this article, the services of a humanitarian organisation, such as the ICRC to assume the humanitarian functions performed by Protecting Powers under the present Convention."

The ICRC was also entrusted with the task of carrying out its traditional duties with the consent of the parties.

Article 9 of Prisoners of War Convention states :

> "The provisions of the present Convention constitute no obstacle to the humanitarian tasks which the ICRC or any other impartial humanitarian organisation may, subject to the consent of the parties to the conflict concerned, undertake for the protection of prisoners of war and their relief."

Besides these, the ICRC was empowered by Article 140 of the Civilians Convention to engage in such specific tasks such as operating the Central Information Agency. It had the right to visit places of detention, to decide whether a Protecting Power or official substitute was designated by belligerants. The notable point here is that the ICRC visits are to take place automatically subject only to the Detaining State's consent to the particular ICRC delegate but not the visits in principle. In spite of the clarity with which the Geneva Conventions provide for the establishment of Protecting Powers, they do not explicitly require the appointment of either a Protecting Power or a substitute for a Protecting Power. The ICRC, whose traditional humanitarian functions are recognised by countries, is given no treaty right to operate on the territory of a party unless the party decides to authorise it in a specific case. As a result States have been reluctant generally to accept the official supervision and supervision has remained unofficial through the ICRC.

The above situation clearly indicates the following:

1. A dedicated effort to introduce Protecting Power or its official substitutes in situations of international armed conflict to guarantee the- application of the law;
2. Increasing importance of the unofficial supervision of the law enforcement through the Red Cross;
3. Occasional recourse to Protecting Powers since 1949 and no recourse to official substitute;
4. Too much reliance on the ICRC even where the Protecting Powers are appointed.

The unofficial supervision which has gained much importance as Protecting Powers in the forms of neutral states do no seem to have provided an answer to the need for supervision of the law of armed conflict especially since 1949. With such development of the system of the Protecting Powers behind it, in 1976 the Diplomatic Conference at Geneva discussed the issue about the Protecting Powers. Article 5 of Protocol I adopted by the Committee I of the Conference, approved a supplementary Protecting Power System that is mandatory in international armed conflicts, reinforces the process of appointing Protecting Powers, and provides for substitutes. This Article makes more obvious the mandatory nature of the appointment of Protecting Powers in international armed conflicts than under the 1949 Conventions.

> "It is the duty of the parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Convention of the present Protocol by the application of the system of Protecting Powers, including *inter alia* their designation and acceptance, in accordance with the following paragraphs. Such powers shall have the duty of safeguarding the interest of the parties to the conflict."

Paragraph II of Article 5 envisages quicker action in the appointment and acceptance of the Protecting Powers : "From the beginning of a situation referred to in Article 1, each party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall likewise without delay and for the same purpose permit the activities of a Protecting Power which has been accepted by it as such after designation by adverse party."

The process of appointment, which has not been incorporated in the 1949 Conventions, is dealt in Paragraph III of Article 5 :

> "If a Protecting Power has not been designated or accepted from the beginning of the situation referred to in Article I of the present Protocol, the ICRC without prejudice to the right of any other impartial humanitarian organisation to do likewise, shall offer its good offices to the parties to the conflict with a view to the designation without delay or Protecting Powers to which the parties to the conflict consent. For that purpose, it may, *inter alia*, ask each party to provide it with a list of at least five states which that party considers acceptable to act as Protecting Power on its behalf in relation to an adverse party, and ask each adverse party to provide a list of at least five States which it would accept as the Protecting Power of the first party; these lists shall be communicated within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists."

Paragraph 4 of Article 5 deals with the appointment of a substitute such as the ICRC. It states:

> "If, despite the foregoing, there is no Protecting Power, the parties to the conflict shall accept without delay an offer which may be made by the ICRC or by any other organisation which offers all guarantees of impartiality and efficacy after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol."

The above provisions clearly indicate that the 1975 Conference adopted an attitude of compromise between the desire for more effective supervision of the law of armed conflict and the desire for adoption by consensus and universal application of norms. It resulted in confusion. The appearance of automaticity is created by the wording"... the parties to the conflict shall accept without delay an offer ...after due consultations with said Parites and taking into account the result of these consultations, to act as substitute," yet the functioning of the substitute is subsequently made explicitly dependent on consent of the state. As unofficial supervision has played a more useful role than the official supervision, Article 81 has strengthened the general and specific functions of the ICRC. It states :

> "The Parties to the conflict shall grant to the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the ICRC may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

Article 81 conveys the expectations that the ICRC will be functioning properly. Though Red Cross protection and assistance is undefined in law and undefinable in practice, it certainly includes most of the Protecting Power's tasks. It performs “Many of its functions of substitutes for Protecting Powers as part of its traditional activities.”[12] Thus a minimally adequate supervision is possible through the ICRC action, regardless of the disposition of new article 5. It may be worthwhile to recollect that a minimally adequate supervision involves two things: one is the ability to identify humanitarian need to respond to it legalistically and technically and in terms of material goods. The excellent record of the ICRC including its recent efforts clearly shows that it is capable of effective protection and assistance. The second requirement is the ability to get states to change their policy when such policies are outside the rules. In this regard the ICRC by taking the approach of a' friendly legal advisor' rather than a police man' has been really successful.

Role of ICRC

In fact the ICRC has been more successful in the effective supervision of the law than have governments that assumed the role of the Protecting Power. The ICRC supervises the implementation of humanitarian norms quite aside from any reference to its functions in the law of armed conflicts, international and .non international. The presence of the ICRC in a situation of violence, even if the ICRC is not an official substitute, is generally more efficacious than the authority of the Protecting Powers. Moreover, the ICRC is likely to be less handicapped by any legal dispute as.to the overall nature of the conflict.

So, what is likely to be more important in the near future, as in the past, is the unofficial supervision by the ICRC. Though the 1975 Conference took no revolutionary steps with regard to the rights of -substitutes for Protecting Powers, it certainly has laid the basis for the step in future.

Article 5 does not provide for any automatic functioning, either of the Protecting Powers or of a substitute organisation. More so, it does not place any obligation on the lCRC to offer to act as substitute irrespective of its own assessment of the willingness of the parties- to the conflict to accept its supervisory activities. It does not make provision for the functioning of the United Nations organ or some other body under the aegis of the organisation. These defects clearly indicate that although the proposed provisions once accepted would bring a distinct improvement to the system of supervision, it would be wrong to expect too much of them.

[12] Statement of the ICRC Representative Antonie Martin at the 1975 Diplomatic Conference in Geneva, CDDH/1/(SR 17 at II).

The most frequent reason why the Protecting Power ceases to function is the lack of staff and expertise involved. Unfortunately the Protocol makes no provision for the reimbursement of expenses and this matter is thus left to agreement between the states concerned. Organisations such as UN and NATO will certainly find it practicable to have one Protecting Power for all the member nations participating in the joint military action. Such considerations had led the UN Secretary General to observe that :

> "While the ICRC and certain organisation play a most useful role, there would be pressing need for measures to improve and strengthen the present system of international supervision and assistance to parties to armed conflicts in their observance of humanitarian norms of international law. These measures based on what already exists, should be regarded as complementary rather then competitive."[13]

The need for strengthening and improving the existing system has led the Secretary-General to put forward the suggestion that an international agency of independent character, possibly within the framework of the UN system should be set up in order to experience the necessary functions. The wilfulness of a UN organ to discharge humanitarian functions is illustrated by the record of service of the International Refugee Organisation, UNRWS, UNICEF and the office of the High Commissioner for Refugees.

This suggestion is not meant to be in any way to the detriment of the ICRC but is put forward in the belief that an inter-governmental organisation, financed by governments, would probably have possibilities of action and financial resources greater than those of the ICRC. A possible variant of the idea would be to entrust the proposed functions to the ICRC by enlarging its competence and increasing its budget by international agreement in order to enable it to carry out the additional tests" involved.

It may be suggested that an High International Committee consisting of 30 members who would be eminent personalities known for their independence and services they have rendered to humanity can be instituted to supervise the implementation of the norms. It is highly desirable that the States should always accept the ICRC or any other impartial organisation as the substitute in the absence of a Protecting Power. It is all the more better if the words "subject to the consent of parties" are deleted from the new Article 5.

All said, it should be remembered that the functions of the Protecting Power or agency should not be, as in classic conception, to look after the interests of the belligerent party; what is required, in the context of humanitarian law is a system to look after the interests of, and secure the humane treatment of, the sick, the wounded, the prisoner and other victims of armed conflicts.[14]

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[13] UN Report, DOC A/7720, Para. 215.
[14] A. H. Robertson, *Human Rights in the World, Manchester University Press*, 1972, p. 173.

PRISONERS OF WAR - PROTECTION OF THE VICTIMS OF ARMED CONFLICTS - CLAUDE PILLOUD

Contents

A. Introduction

Respect for prisoners of war -for their person, honour, physical and mental health -is a relatively recent notion.

In ancient times, warriors who fell into the power of their enemies were almost invariably exterminated. But it did not take long for the victorious forces to discover that prisoners constituted a useful and very cheap supply of manpower. That is how the custom gradually grew, in Egypt, Athens, and later Rome, of reducing the captured enemy combatants to slavery, although from time to time it did happen that prisoners of war were butchered.

With the rise of chivalry of Europe, in the early medieval period, the practice of releasing a prisoner of war on payment of a ransom was introduced, a practice that found additional favour when, in the eleventh century, the Church forbade the enslavement of people of the Christian faith. Islam, too, had adopted a generous attitude towards captured combatants. Nevertheless, the wars between Muslims and Christians were marked by wholesale massacres or by the cruel and inhumane treatment of prisoners of war. Some generous gestures towards captured combatants, however, did take place, as also occurred within the areas of other civilizations, for instance in India.

From the 16th century onwards the situation improved considerably in Europe and the exchange of prisoners of war at the close of hostilities became a rule as from the 18th century. Under the influence of the philosophers and publicists, it was felt that the captured enemy combatant was not, in principle, responsible for acts committed by his government; consequently he should not be the victim of revenge and should be treated humanely for the duration of his captivity. Conventions drawn up between States during the l8th century provided for humane treatment of POW's, and during the French Revolution unilateral decrees stipulated that no act of violence should be committed against POW's.

This liberal tendency continued during the 19th century and in 1899 the Hague Regulations Concerning the Laws and Customs of War on Land were adopted; the second chapter of these regulations deals with prisoners of war and is the first international ruling in this field. Revised in 1907, the Convention covered treatment of POW's until 1929 when a special Convention concerning their treatment was drawn up in Geneva. Revised in 1949 and completed in 1977 by an Additional Protocol, this Convention constitutes a charter or, as it is sometimes called, the POW Code. Considerable service has been rendered by this Convention in the course of innumerable conflicts: it has become an essential safeguard for millions of individuals subjected to trying and often painful conditions of captivity.

B. Definition

Taken generally, combatants who fall into enemy hands become prisoners of war.[1] The idea of what constitutes a combatant is described in Chapter VIII so that reference should be made to this chapter for further detail.[2]

Likewise, when they fall into enemy hands, persons not directly belonging to the armed forces but who nonetheless are attached thereto are considered as POW's, i.e., civilian members of airforce crews, war journalists, caterers, members of welfare services attached to the armed forces; these persons should be supplied with a special identity card.[3] The same applies to members of the merchant navy not benefitting from more favourable treatment.[4] Finally, the population of non-occupied territory who spontaneously take up arms at the approach of the enemy without having had the time to set up a regular armed force, but openly carry arms and respect the law and customs of war, should also be considered, if captured, as prisoners of war.[5]

Members of the armed forces who have returned to civilian life and who, for security reasons, have been interned by the occupying power in occupied territory, should be granted POW status. Furthermore, a Neutral Power which interns military personnel who have sought refuge on its territory, should grant them POW if not more favourable treatment.[6]

C. Capture

Captivity starts on the combatant falling into enemy hands. Capture can take different forms., i.e., the combatant can give himself up to the adverse force by throwing away his weapons, hoisting the white flag or raising his hands. Surrender can be collective or the result of local or general capitulation. Capture can also take place if the combatant is wounded and prostrate, showing no resistance, on territory captured by the enemy. Persons giving themselves up or who are *hors de combat* as the result of wounds or illness, should not be attacked; they should, however, abstain from any hostile act and not attempt to escape.[7]

Where an army contingent has taken POW s and cannot evacuate or handle them in accordance with international rules, they should be liberated with all due precautions to ensure their safety, and after their being disarmed where necessary.[8]

Certain forms of warfare make it very difficult for the individual to show his intention to surrender. Where, however, the individual is in obvious danger, he should not be attacked. No drowning persons should be attacked.[9] Occupants of an aircraft in difficulty, who have abandoned the aircraft by parachute, should not be shot down, and once they land should be given the opportunity to surrender before being attacked; nor should they counter-attack. This ruling evidently does not apply to troops transported by air.[10]

Anyone taking part in hostilities who falls into the hands of the adverse Party can be considered as a POW. Should there by any doubt as to an individual having the right to the status of POW, such a person will continue to be protected by the Convention and the Protocol whilst clarification of his status by a competent tribunal is awaited.[11]

D. Basic Protection

a. Basic Notions of Protection

As seen from the above, progress over the years has been slow in its effort to show that the captured enemy combatant should not be held responsible for the war and the manner in which it is carried out. For this reason captivity as a result of war should not be considered as ofa punitive or infamous character;[12] its sole objective is to make the combatant incapable of doing harm and to prevent him from re-engaging in hostilities.

During their captivity POWs remain members of their armed forces but are subject to the laws, regulations and general orders in force within the armed forces of the Detaining Power,[13] without, however, being in duty bound to the latter (Detaining Power).[14]

b. Humane Treatment

Prisoners of war must at all times be humanely treated.[15] They are entitled to respect for their person, both physical and moral. The following acts, for example, are contrary to respect for the physical person: any unlawful act or omission causing death or seriously endangering the health of a prisoner of war, not to mention physical mutilations, medical or scientific experiments which are not justified by the patient's treatment, removal of tissue or organs for transplantation;[16] acts of violence on the part of civilians or military persons;[17] prolonged questioning, whether or not accompanied by acts of brutality, with the aim of extracting information;[18] continual harassment; omission of medical care to the wounded and sick;[19] prolonged deprivation of sanitary facilities[20] or of physical, intellectual and recreational pursuits;[21] inadequate conditions of food,[22] quarters[23] and clothing[24] extended over any length of time; keeping prisoners in a danger zone;[25] making them do labour of a dangerous nature or one which does not take into account the prisoners' physical aptitude or their professional qualifications.[26]

Respect for prisoners means respect for their person and honour[27] and protection against public curiosity.[28] Humiliating and degrading treatment is therefore banned, as is the internment of prisoners in penitentiaries,[29] degrading and humiliating labour or labour directly connected with war operations,[30] lack of separate quarters for women and men,[31] insults uttered against a prisoner's person, flag, country, religion or beliefs,[32] forcing prisoners to wear their enemy's uniform, the prohibition of wearing badges of rank and decorations and the confiscation of such insignia,[33] refusal to reply to prisoners' salutes.[34]

c. Reprisals

Measures of reprisal against prisoners of war are prohibited.[35] Reprisals are unlawful measures resorted to by a belligerent to counter and eliminate unlawful acts committed by an adversary. No reprisals may be made against persons protected by the 1949 Geneva Conventions and the 1977 Additional Protocol or against cultural property. Reprisals may be resorted to only if understood in the manner of conducting hostilities.[36]

d. Responsibility

The Detaining Power is responsible for the treatment given by its agents to prisoners of war, irrespective of the individual responsibilities that may exist.[37] Any breaches of the provisions of the Convention involve the responsibility of the violators of those provisions and must be repressed. Persons having committed breaches may be brought before the courts of the High Contracting Party holding such persons, or it may hand them over for trial to another High Contracting Party concemed.[38] Grave breaches against prisoners of war shall be those involving any of the following acts: wilful killing, torture or inhumane treatment, including biological experiments, wilfuly causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention, unjustified delay in the repatriation of prisoners of war, practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.[39]

Prisoners of war may only be transferred to a Power which is bound by the Geneva Convention of 1949 and is willing and able to apply the Convention.[40] This latter Power is then responsible for the treatment given to the transferred prisoners of war.

e. Maintenance

The Power detaining prisoners of war shall be bound to maintain them free of charge -their quarters, clothing, food and medical attention.[41] The upkeep provided must be sufficient to maintain the prisoners in good health.

f. Equality of Treatment

Taking into consideration rank and sex, all prisoners shall be treated alike. Any adverse distinction based upon race, colour, language or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria shall be prohibited.[42] For example, it is unlawful to give privileges to those prisoners who accept to take part in ideological or political propaganda courses, or who agree to sign statements in favour of or against other prisoners, to reveal military information, to encourage minorities who might militate in favour of separatist activities, to keep apart on racial or colour grounds men belonging to the same unit and to treat them differently. On the other hand, should there be amongst prisoners tensions which might imperil the lives or physical integrity of some prisoners, it would not be unlawful to put the opposing groups in separate camps or in separate sections of a camp.

The Convention itself provides for privileged treatment for officers: exemption from work,[43] higher pay;[44] for sick prisoners: appropriate diet,[45] isolation wards,[46] early repatriation;[47] for women, separate dormitories and conveniences.[48] The prisoners' age and professional qualifications may also be taken into consideration for any privileged treatment.[49]

g. Discipline

Under the reservation of guarantees in the IIIrd Geneva Convention, prisoners of war shall be subject to the discipline in force in the armed forces of the Detaining Power.[50] Orders must be given in a language which they understand.[51]

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by appropriate warnings.[52]

h. Disciplinary Punishments

The only disciplinary punishments applicable to prisoners of war are: a fine which shall not exceed 50 per cent of the advances of pay and working pay, discontinuance of privileges, fatigue duties not exceeding two hours daily, and confinement. The duration of any disciplinary punishment shall not exceed thirty days.[53] Fatigue duties shall not be applied to officers.[54] A period of at least three days shall elapse between two successive punishments.[55] A prisoner of war-undergoing confinement shall continue to enjoy the benefits of the Convention.[56]

i. Judicial Proceedings

A prisoner of war shall be tried only by a military court offering guarantees of independence and impartiality and affording the accused the rights and means of defence provided for by the Convention.[57] He shall, in particular, be entitled to choose counsel for his defence, to call witnesses and to obtain the services of a competent interpreter; the representatives of the Protecting Power shall be entitled to attend the trial and give assistance to the accused,[58] who shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition.[59] If the death penalty is pronounced on a prisoner of war the sentence shall not be executed before the expiration of a period of six months.[60]

Prisoners prosecuted and convicted for acts committed prior to capture shall retain the benefits of the Convention ;[61] they may not be punished more than once for the same act and may not be sentenced to any penalties except those provided for in respect of members of the armed forces of the Detaining Power.[62] No coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.[63]

E. Protecting Powers -International Committee of the Red Cross

The 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 delegates of the Protecting Powers may go to all places where prisoners of war may be and freely interview prisoners, without witnesses. The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. Prisoners may at all times lodge complaints with the Protecting Power and send appeals to any of the benevolent organizations which might extend them their aid and, in particular, to the International Committee of the Red Cross.[64]

F. Non-Renunciation of Rights

Prisoners of war may I not renounce the rights secured to them by the 1949 Convention and the 1977 Additional Protocol. Any renunciation of such rights, even if made voluntarily by a prisoner, shall be void and no special agreement concluded by the Detaining Power may deprive him of his rights.[65]

The intention here is to protect the prisoners against any action they themselves might take and any agreements which their Power of origin might be compelled under duress to conclude with the Detaining Power. A prisoner, for example, must not accept certain privileges in exchange for his consent to work in an armaments factory; he would be liable, after his repatriation at the end of hostilities, to be prosecuted in his own country. Similarly, prisoners of war may not renounce their status and become civilian workers.
Furthermore, a prisoner may accept his release on parole only if the law of the Power to which he belongs allows him to do so.

G. Beginning of Captivity

a. Questioning

When questioned, a prisoner of war is bound to give only four items of information: his surname and first names, rank, date of birth and army or equivalent number. These indications are given on the identity card normally carried by the prisoner; the card should not be taken away from him. If he refuses to give this information he may render himself liable to restriction of the privileges accorded to his rank, even should the Detaining Power get to know of it later.

Prisoners who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment.[66]

b. Personal Property

Prisoners may keep effects and articles of personal use, such as those serving as clothing and protection, and for eating. Examples of articles of clothing are: all garments, underwear, footwear (shoes and boots), belt, overcoat, knapsack; for eating: billycan, water-bottle, eating utensils, rations and haversack; for personal protection: helmet, gas-mask, groundsheet, packet of dressings, identity disc; other personal objects: toilet articles, watch, wallet, keys, prayer-book, pencil, fountain-pen, pocket torch, eye-glasses, badges of rank, decorations.[67]
Sums of money and articles of value may be taken away but a receipt must be given for them, and such objects and sums of money must be returned at the termination of captivity. Objects of a personal and sentimental value, but of small commercial value -such as photographs, wedding rings, medals -may not be taken from prisoners of war.

On the other hand, arms, munitions, means of transport (horses, vehicles, motors), portable wireless equipment, optical instruments and military documents, such as maps, plans, written orders, etc. may be confiscated.[68]

c. Evacuation

Prisoners captured in a fighting zone shall be evacuated as soon as possible to camps situated in an area far enough for them to be out of danger.[69] The evacuation shall always be effected humanely and the prisoners shall be provided with potable water, food and, if necessary, clothing and medical attention. A list of the prisoners who are evacuated shall be established as soon as possible.[70]

d. Capture Cards

As soon as possible after capture, and not more than one week after arrival at a camp, every prisoner shall be given the possibility of sending a card to his family and also one to the Central Agency (see below), informing them of his capture, state of health and, if possible, his address.[71]

e. Official Information Bureaux

The Parties to the conflict and the neutral States who may have accepted to take in members of the belligerent armies shall institute, upon the outbreak of the conflict, an official Information Bureau for prisoners of war who are in their power[72] and in respect of dead combatants whose remains have been collected.[73]

The official bureaux shall receive full information on the identity of the prisoners, on any changes in the conditions of captivity or in their status (transfers, releases, repatriations, admissions to hospital, escapes, deaths) and on their state of health.

In the case of prisoners who have died in captivity and also as regards the bodies of combatants collected by the adverse party, the information will refer to the place of internment in order that graves may always be found. Such information shall be immediately forwarded to the enemy Power concerned through the intermediary of the Protecting Powers, and likewise to the Central Agency mentioned below. The same provisions shall apply to personal valuables, sums of money and documents left by the deceased.[74]

The Bureau shall also be responsible for replying to enquiries sent to it; it will make any enquiries necessary to obtain the information asked for if it is not in its possession.[75]

The organization of the Bureau may be entrusted to the military services or to a civilian administration; in some countries, the work is done by their National Red Cross (Red Crescent) Society. Prisoners of war may be employed in such a Bureau.[76]

f. Central Agency

Under the Convention, a Central Prisoners of War Information Agency shall be created in a neutral country by the International Committee of the Red Cross.[77] The Agency, which is known as the Central Tracing Agency, is in Geneva and operates whenever there is a conflict.

The functions of the Agency are to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin.[78] It endeavours to reply to enquiries sent it by the families of missing combatants.

g. Relief Organizations

All facilities shall be granted to religious organizations and relief societies wishing to assist prisoners. The number of such societies may be limited. The special position of the International Committee of the Red Cross in this field shall be respected. Both material and spiritual relief may be offered.[79]

H. Internment of Prisoners of War

The provisions in respect of internment are laid down in the 1949 Convention in considerable detail, no doubt as a result of the excesses noted during the second world war. It must not be forgotten, moreover, that the monotony of life in captivity is relieved by details which assume great importance for the prisoners.

a. Places of Internment

Prisoners of war may be interned in camps which are fenced in, or they may be placed in other camps or establishments with an obligation not to go beyond certain bounds. They may be interned only in premises located on land, in a place where there are no extremes of climate and in reasonable conditions of safety.[80]

It is therefore prohibited to put prisoners on board vessels or in establishments located in the fighting zone. They shall have shelters against air bombardment, to the same extent as the civilian population.[81] The camps shall be indicated by the letters PW or PG, and the Detaining Powers shall communicate to each other the geographical location of prisoner of war camps.[82]

b. Quarters

Prisoners shall be quartered under conditions as favourable as those under which the forces of the Detaining Power are billeted in the area; the said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.[83]

Provision should be made for adequate surface and cubic space,[84] as well as for heating, lighting, precautions against fire hazard and protection from dampness.[85]

c. Food

Food rations shall be sufficient in quantity, quality and variety to keep prisoners jn good health; account shall be taken of their habitual diet; prisoners who work shall be issued with appropriate rations.

Prisoners shall be associated with the preparation of their meals. Collective disciplinary measures affecting food are prohibited.[86] Canteens shall be installed in camps where prisoners may procure foodstuffs, soap and tobacco, and ordinary articles in daily use. The tariff shall not be in excess of local market prices.[87]

d. Clothing

Clothes, underwear and footwear shall be supplied in sufficient quantities by the Detaining Power, who shall make allowance for the climate and for the type of work the prisoners may be made to do.[88]

e. Hygiene and Medical Attention

All sanitary measures shall be taken to ensure the cleanliness and healthfulness of camps. Prisoners shall have for their use conveniences maintained in good and clean condition and suitable premises where they can wash themselves, take showers and do their personal laundry,[89] Every camp shall have an infirmary where prisoners may receive medical attention. Isolation wards shall be set aside for cases of contagious disease. Prisoners shall have the attention, preferably of medical personnel of their own nationality.[90] Medical inspections shall be made at least once a month; their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases.[91] Prisoners may not be prevented from presenting themselves to the medical authorities for examination.[92]

f. Medical Personnel and Chaplains

Members of the medical personnel and chaplains, while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war, but shall receive the benefits of the Convention, They shall be granted all facilities necessary for the performance of their functions which they shall exercise with the agreement of and in liaison with the detaining authorities.[93] For example, they shall be granted a significant amount of liberty and shall have at their disposal the necessary means of transport for visiting prisoners,[94] they shall be allowed special facilities for correspondence[95] and shall not be compelled to carry out work.[96]

g. Religious Duties

Prisoners shall enjoy complete latitude in the exercise of their religious duties, on condition that they comply with the disciplinary routine prescribed by the detaining authorities. Premises shall be provided for religious services.[97] Chaplains who are retained with a view to assisting prisoners, and prisoners of war who are ministers of religion shall be at liberty to minister freely to the members of their community, and shall receive all necessary facilities to do so.[98] When no chaplains are retained and no minister of a particular faith is to be found among the prisoners, a minister of religion belonging to the Detaining Power, of the same faith as that of the prisoners or, if none is available, of a similar faith, shall be provided.[99]

h. Recreation, Study, Sports and Games

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational and recreative pursuits and sports and games amongst prisoners. Adequate premises and equipment shall be provided (library, sports equipment, reading rooms, playing fields, etc.).[100]

This provision does not authorize the Detaining Power to organize, for the purpose of imparting political or ideological instruction, lectures or meetings which prisoners would be compelled to attend to obtain or retain certain privileges.

i. Administration

Every camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces. Such officer shall have in his possession a copy of the Convention and of the Protocol and shall ensure that their provisions are applied. In every camp the text of the Convention and of the Additional Protocol shall be posted in the prisoners' own language. Similarly, regulations, orders, notices and publications of every kind concerning the prisoners shall be posted and issued to them in a language which they understand.[101] Prisoners must show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying to their own forces. Officer prisoners of war are bound to salute only officers of a higher rank. All prisoners must salute the camp commander regardless of his rank.[102]

j. Transfers

The transfer of prisoners from one camp to another shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. The prisoners shall be allowed to take with them their personal effects. The transfer shall not be prejudicial to their health, nor shall it be such as to increase the difficulty of their repatriation.[103] If the fighting draws closer to a camp, its prisoners shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or if they are exposed to greater risks by remaining on the spot than by being transferred.[104]

k. Labour

The Detaining Power may utilize the labour of prisoners, taking into account their age, sex, physical aptitude and professional qualifications.[105] Non-commissioned officers shall only be required to do supervisory work, i.e. to be charge of administrative and other tasks performed by other ranks; they shall in no way be made to do any manuallabour.[106] Officers shall not be compelled to work, but they may ask for suitable work to be given them.[107]

l. Unauthorized Work

Labour imposed upon prisoners shall not be directly related to military operations. Furthermore, no prisoner may be employed on tasks which he is physically incapable of carrying out, or on humiliating labour or, unless he be a volunteer, on labour which is of an unhealthy or dangerous nature.[108]

m. Working Conditions

Prisoners must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; they shall be given all the advantages granted to the workers of the Detaining Power and shall receive adequate working pay.[109] The duration of the daily labour of prisoners shall never be excessive. Conditions of labour shall not be rendered more arduous by disciplinary measures. National legislation concerning the protection of labour and safety of workers shall be applied.[110] Prisoners who sustain accidents in connection with work shall receive all necessary care and a medical certificate shall be issued to them.[111] If any prisoner considers himself incapable of working he shall be permitted to appear before the medical authorities of his camp, who may recommend that the prisoner be exempted from work.[112]

n. Financial Resources

Prisoners may be authorized to have in their possession a sum of money in cash but the authorities may set a limit to the maximum amount each one may hold. Any amount in excess may be taken from a prisoner against delivery of a receipt but must be returned to him in the same currency at the end of captivity monthly advance of pay shall be paid to the prisoners.[113] These various amounts are often paid to prisoners as camp money, with which they can make purchases at the canteen.

o. Relations with the Exterior

Prisoners shall be allowed to send and receive mail. Correspondence may be limited to two letters and four cards monthly sent by each prisoner, should such a restriction be required by circumstances (e.g. if the means of transport or censorship services cannot cope with a big volume of correspondence).[114] Prisoners may be permitted to send telegrams should they be for a long time without news, or should they be unable to receive or to give news because they are at a great distance from their homes.[115] As a general rule, correspondence of prisoners shall be in their native language.[116] Facilities shall be provided to prisoners, such as permission to consult a lawyer, for the preparation, execution and transmission of legal documents, for example, powers of attorney and wills.[117] The censoring of correspondence and documents shall be done as quickly as possible, once only by each of the despatching State and the receiving State.[118]

p. Relief

Prisoners shall be permitted to receive individual and collective relief parcels. Relief consignments, which have at times been very substantial, in no way relieve the Detaining Power of its obligation to provide for prisoner maintenance free of charge.[119] Relief may consist of food, clothing, medical supplies, articles of religious, educational or recreational character, books, musical instruments, sports gear, and so forth.[120] The receipt, distribution or disposal of collective relief consignments shall be assigned to the prisoners' representatives.[121] The amount of relief may be limited only as proposed by the Protecting Power or the International Committee of the Red Cross in the interest of the prisoners themselves on account of exceptional strain on transport or communications.[122]

q. Exemption from Postal and Transport Charges

Mail and parcels to prisoners of war shall be exempt from postal charges. This exemption applies to letters and "declared value" parcels weighing up to 5 kg. It also applies to postal money orders to or from prisoners.[123] All relief shipments shall be exempt from import, customs and other dues.[124]

r. Censorship and Examination

Relief consignments to prisoners of war may be examined, but this shall not expose the goods contained in the parcels to deterioration; the examination shall be done in the presence of the addressee and delivery to him shall not be unduly delayed. [125]

s. Prohibition of Correspondence

Any prohibition of correspondence ordered by parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

t. Complaints and Requests

Prisoners of war shall have the right to make known to the military authorities in whose power they are and to the Protecting Power's representatives their requests and complaints concerning conditions of captivity to which they are subjected. Such complaints and requests may be submitted in writing or by word of mouth to the officer in charge of the camp or to his superiors. They may be entrusted to the prisoners' representative for submission; they may not give rise to any punishment, even if they are unfounded.[126]

u. Prisoner of War Representatives

In all places where there are prisoners of war, the prisoners freely elect by secret ballot, every six months, representatives of their own nationality, language and customs. Every representative elected must be approved by the Detaining Power. In camps for officers, the senior officer among the prisoners shall be recognized as the prisoners' representative.[127]

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war and shall represent the prisoners in dealing with the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization providing them with assistance. In particular they shall deal with administrative questions such as requests for family news, the drawing up and forwarding of official documents, the forwarding of wills, complaints and requests,[128] management of the canteen,[129] taking possession, storage and distribution of collective relief,[130] transport of prisoners' community property in the event of transfer,[131] checking of prisoners' accounts,[132] taking charge of parcels and money remittances intended for prisoners of war undergoing confinement as a disciplinary punishment,[133] receipt of notification of judicial proceedings against prisoners of war,[134] proposal of wounded and sick prisoners of war for examination by mixed medical commissions.[135]

Prisoners' representatives shall be exempt from work if their duties take up all their time,[136] and they shall be granted all material facilities, particularly a certain freedom of movement and correspondence, for the discharge of their duties; they may appoint assistants.[137]

I. End of Captivity

a. Escape

It can happen that captivity is brought to an end by successful escape. Escape is considered as successful if a prisoner has rejoined his own army or that of an allied power, when he has left the territory under control of the Detaining Power or of its allies, or has joined a ship flying the flag of his own country or of an allied power in the territorial waters of the Detaining Power or its allies.[138]

Prisoners who have made good their escape in any of these ways and who are captured again shall not be liable to any punishment for their previous escape.[139] A prisoner of war who attempts to escape and is recaptured before making good his escape shall be liable only to disciplinary punishment. However he may be subjected to special surveillance, provided the guarantees laid down in the Convention are respected.[140]

b. Repatriation During Hostilities

Seriously wounded and sick prisoners shall be repatriated as soon as they are fit to travel. Other wounded and sick prisoners may be hospitalized in a neutral country.[141] Mixed medical commissions shall be set up to examine prisoners whose state of health may justify repatriation or hospitalization in a neutral country. No sick or injured prisoner of war may be repatriated against his will during hostilities, nor may he be employed on active military service after repatriations.[142]

c. Release and Repatriation at the Close of Hostilities

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.[143] Any unwarranted delay in repatriation shall be deemed a grave breach of the Convention and the Protocol.[144] If parties to a conflict omit arrangements for repatriation from the agreement concluded on the cessation of hostilities the Detaining Power shall itself establish and execute without delay a plan of repatriation.[145] Conditions of repatriation shall be identical to those laid down for the transfer of prisoners of war.[146] Articles of value and any cash impounded from prisoners shall be restored to them[147] and they shall be allowed to take with them their personal effects and correspondence.

The plan for repatriation may set an order of priorities, giving preference to wounded and sick, followed by those who have been a long time in captivity, and finally to the older prisoners. Prisoners undergoing punishment or awaiting trial for an indictable offence may be detained until the end of the proceedings or until punishment has been completed; their names shall be communicated to the prisoners' own governments.[148]

d. Deaths

In the event of the death of a prisoner of war, the body shall be medically examined to confirm death and enable a report to be made on the cause of death and, where necessary, establish identity.[149] A death certificate shall be drawn up with all required information for identification of the deceased, and showing the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the grave.[150] Death certificates and wills shall be forwarded without delay to official information offices.

Dead prisoners of war shall be decently buried in individual graves which shall be suitably tended and marked. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased, or in accordance with his expressed wish.[151] Every death or serious injury of a prisoner caused by a sentry, another prisoner or any other person shall be immediately followed by an official inquiry.[152]

NOTES

[1] Additional Protocol I, art. 44, § 2.
[2] Cf. Chapter VIII, p. 104 ff.
[3] IIIrd Geneva Convention, art. 4 A, § 4.
[4] IIIrd Geneva Convention, art. 4 A, § 5.
[5] IIIrd Geneva Convention, art. 4 A, § 6.
[6] IIIrd Geneva Convention, art. 4 B, § 1 and 2.
[7] Addilional Protocol 1, art. 4. § I and 2.
[8] Additional Protocol I, art. 41, § 13
[9] IInd Geneva Convention of 1949, art. 12.
[10] Additional Protocol I, art. 42
[11] IIIrd Geneva Convention, art. 5, § 2; Additional Protocol I, art. 45
[12] . In certain countries the fact of being taken prisoner is or was prejudicial to the person in question : in Japan, for instance, this was the case up to the 2nd World War. Even now military instructions forbid members of the armed forces to give themselves up to the enemy without having exhausted all means in their own defence.
[13] IIIrd Geneva Convention, art. 82, § 1
[14] *Ibid*., art. 87, § 2.
[15] IIIrd Geneva Convention, art. 13, § 1.
[16] IIIrd Geneva Convention, art. 13, § 1; Additional Protocol I, art. II, § 1 and 4.
[17] IIIrd Geneva Convention, art. 13, § 2.
[18] *Ibid*., art. 17, § 4.
[19] *Ibid*., art. 15 and 30.
[20] *Ibid*., art. 29
[21] *Ibid.*, art. 38
[22] *Ibid.*, art. 15 and 26
[23] *Ibid.*, art. 15 and 25
[24] *Ibid.*, art. 15 and 27
[25] *Ibid*., art. 19 § 1.
[26] *Ibid.*, art. 52 and 49
[27] *Ibid.*, art. 14, § 1
[28] *Ibid.*, art. 13 § 2
[29] *Ibid.*, art. 22 § 1
[30] *Ibid.*, art. 50 and 52
[31] *Ibid.*, art. 25, § 4
[32] *Ibid.*, art. 13, § 2
[33] *Ibid.*, art. 13, § 3 and 40
[34] *Ibid.*, art. 29, § 2 and 3
[35] *Ibid.*, art. 13 § 3
[36] Cf. p. 77 ff.
[37] IIIrd Geneva Convention. art. 12. § 1
[38] IIIrd Geneva Convention, art. 129; Additional Protocoll, art. 86-89.
[39] IIIrd Geneva Convention, art. 130; Additional Protocol I. art. 11 and 85.
[40] IIIrd Geneva Convention, art. 12. § 2 and 3.
[41] IIIrd Geneva Convention. art. 15.
[42] IIIrd Geneva Convention. art. 16; Additional Protocol I, art. 75.
[43] IIIrd Geneva Convention, art. 49.
[44] *Ibid.*, art. 60

[45] *Ibid.*, art. 30
[46] *Ibid.*, art. 30
[47] *Ibid.*, art. 109
[48] *Ibid.*, art. 25 and 29
[49] *Ibid.*, art. 16
[50] *Ibid.*, art. 82
[51] *Ibid.*, art. 41
[52] *Ibid.*, art. 42
[53] *Ibid.*, art. 90
[54] *Ibid.*, art. 89
[55] *Ibid.*, art. 90
[56] *Ibid.*, art. 98
[57] *Ibid.*, art. 84 and 99
[58] *Ibid.*, art. 105
[59] *Ibid.*, art. 106
[60] *Ibid.*, art. 101
[61] *Ibid.*, art. 85
[62] *Ibid.*, art. 87, § 1.
[63] *Ibid.*, art. 85, § 2
[64] *Ibid.*, art. 82. Cf. also the chapter XVI: Implementing international humanitarian law
[65] *Ibid.*, art. 6, § 7
[66] *Ibid.*, art. 17
[67] *Ibid.*, art. 85, § 1 and 3
[68] *Ibid.*, art. 85, § 1 and 4
[69] *Ibid.*, art. 19, § 1
[70] *Ibid.*, art. 20
[71] *Ibid.*, art. 70
[72] *Ibid.*, art. 122.
[73] IIIrd Geneva Convention, art. 122; Additional Protocol I. art. 33.
[74] IIIrd Geneva Convention, art. 122, § 3 and 9.
[75] *Ibid.*, art. 122, § 7
[76] *Ibid.*, art. 122, § 1
[77] *Ibid.*, art. 123
[78] *Ibid.*, art. 123
[79] *Ibid.*, art. 125
[80] *Ibid.*, art. 21, 22 and 23
[81] *Ibid.*, art. 23, § 2
[82] *Ibid.*, art. 23, § 4
[83] *Ibid.*, art. 25 § 1
[84] *Ibid.*, art. 25 § 2
[85] *Ibid.*, art. 25 § 3
[86] *Ibid.*, art. 26 § 6
[87] *Ibid.*, art. 28
[88] *Ibid.*, art. 27
[89] *Ibid.*, art. 29
[90] *Ibid.*, art. 30
[91] *Ibid.*, art. 31
[92] *Ibid.*, art. 30, § 4
[93] *Ibid.*, art. 33, § 1
[94] *Ibid.*, art. 33, § 2a
[95] *Ibid.*, art. 35
[96] *Ibid.*, art. 33, § 2 c
[97] *Ibid.*, art. 34
[98] *Ibid.*, art. 35 and 36
[99] *Ibid.*, art. 37
[100] *Ibid.*, art. 38
[101] *Ibid.*, art. 41
[102] *Ibid.*, art. 39, § 2 and 3

[103] *Ibid.*, art. 46 and 48
[104] *Ibid.*, art. 47
[105] *Ibid.*, art. 49
[106] *Ibid.*, art. 49, § 2
[107] *Ibid.*, art. 49, § 3
[108] *Ibid.*, art. 50, 52 and 55
[109] *Ibid.*, art. 51, 53 and 54
[110] *Ibid.*, art. 51 and 53
[111] *Ibid.*, art. 54
[112] *Ibid.*, art. 55
[113] *Ibid.*, art. 60
[114] *Ibid.*, art. 71, § 1
[115] *Ibid.*, art. 71, § 2
[116] *Ibid.*, art. 71, § 3
[117] *Ibid.*, art. 77
[118] *Ibid.*, art. 76
[119] *Ibid.*, art. 72, § 2
[120] *Ibid.*, art. 72
[121] *Ibid.*, art. 73
[122] *Ibid.*, art. 72, § 3
[123] *Ibid.*, art. 74, § 2
[124] *Ibid.*, art. 74, § 1
[125] *Ibid.*, art. 76, § 2
[126] *Ibid.*, art. 78
[127] *Ibid.*, art. 79
[128] *Ibid.*, art. 78, § 2 and 4
[129] *Ibid.*, art. 28, § 2
[130] *Ibid.*, art. 73, § 2
[131] *Ibid.*, art. 48, § 3
[132] *Ibid.*, art. 65, § 1
[133] *Ibid.*, art. 98, § 5
[134] *Ibid.*, art. 104, § 2
[135] *Ibid.*, art. 113, § 2 and 3
[136] *Ibid.*, art. 81, § 1
[137] *Ibid.*, art. 81, § 2
[138] *Ibid.*, art. 91, § 1
[139] *Ibid.*, art. 91, § 2
[140] *Ibid.*, art. 92
[141] *Ibid.*, art. 109 and 110
[142] *Ibid.*, art. 109 and 117
[143] *Ibid.*, art. 118
[144] Additional Protocol I, art 85 § 4 b.
[145] IIIrd Geneva Convention, art. 118, § 2
[146] *Ibid.*, art. 119, § 1
[147] *Ibid.*, art. 119, § 2
[148] *Ibid.*, art. 119, § 5 and 6
[149] *Ibid.*, art. 120, § 3
[150] *Ibid.*, art. 120, § 2
[151] *Ibid.*, art. 120, § 4 and 5
[152] *Ibid.*, art. 121

PROTECTION OF PRISONERS OF WAR

J.N. Saxena.*

Contents

INTRODUCTON

Since time immemorial, there have been wars and wars, and in spite of the provisions of the United Nations Organisation, wars are taking place even now, and they will continue to take place in future also. And if there are wars, natural corollary is that there must be Prisoners of War (POW). 'It is a different story how they were treated, in the past and how they are being treated today.

During antiquity, prisoners of war could be killed, and they were very often at once butchered or offered as sacrifices to the gods, though "*Mahabharata* epic and the rules embodied in the legends of *Manu*, the first man, lay down principles for warriors that seem far in advance of their time: warriors are forbidden to kill enemies who are disabled and those who surrender..."[1]

In the medieval period starting from enslavement, the practice of releasing a POW on payment of ransom was introduced. Enslavement of enemy soldiers in Europe later on declined.

In the 16th and early 17th centuries some European political and legal philosophers expressed their thoughts about the war prisoners. As stated by Hugo Grotius in his *De jure belli ac pacis* (1625) victors had the right to enslave their enemies, but he advocated exchange and ransom instead. The Treaty of Westphalia (1648) which released prisoners without ransom, is generally ,taken as marking the end of the era of widespread enslavement of prisoners of war.

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* .Professor of Law (Retd.) Universly of Delhi. Delhi

1 . Jean Pictet. *Development and Principle of Intenational Humanitarian Law, p. 9 (Martinus Nijhoff* Publishers. 1985).

In the 18(h century, Montesquieu in his book, *The Spirit of Laws* (1750), wrote that the only right in war that the captor had over a prisoner of war was to prevent him from doing harm. Later on Rousseau and Vattel expanded on the same theme and developed what might be called the quarantine theory for the disposition of prisoners of war. From this point on, the treatment of prisoners generally improved as the idea developed that soldiers who *are hors de combat* must be relieved of their suffering and their lives must be preserved.

The "Treaty of Friendship and Peace" between Fredrick the Great and Benjamin Franklin in 1785 stipulated that prisoners of war would be fed and lodged in the same manner as the soldiers of the detaining power and a man of confidence would be allowed to visit them and provide them with relief.[2]

The efforts of President Abraham Lincoln in the form of' Lieber Code',[3] the Brussels Conference of 1874, and the Institute of International Law, London[4] led to. the famous Regulations concerning the laws and customs of war on land which were annexed to the Fourth Hague Convention of 1899, revised in 1907. In this Regulation seventeen articles were devoted to the prisoners of war.

These provisions of the Regulation played an important part in improving the lot of the prisoners of war during World War I. The International Committee of the Red Cross (ICRC), though with no legal basis, created a Central Agency for prisoners of war, which relieved the uncertainty and anxiety of an enormous number of families of the prisoners of war.[5] But the regulation provisions were insufficient and so the belligerents were compelled to sign temporary agreements on disputed points.

This and other experiences supplied material for the Convention Relative to the Treatment of Prisoners of War concluded at Geneva in 1929 to cover all aspects of activity. On the whole, this 1929 Convention stood well during, World War II. But there was a demand to have revised Geneva Conventions. Four Conventions came into being in 1949. The Third Geneva Convention relative to the Treatment of Prisoners of War thus emerged and one of the main objects of the revision was to increase the categories of persons who would be entitled to the Prisoner of War status.

CONDITIONS GOVERNING ENTITLEMENT TO PRISONER OF WAR STATUS

A. Under the Convention

Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (herein after referred to as the Convention) is, in a sense, key to the ,Convention as it specifies the categories of protected persons and defines the people who are entitled to the prisoner of war status in case of their captivity.

It is now supplemented by Articles 43 and 44 of Protocol I Additional to the Geneva Conventions of 12 August 1949 (herein after referred to as Protocol I).

[2] *Id*, p. 21.
[3] An American Political philosopher Francis Lieber on the direction of President Abrabam Lincoln drafted this code
[4] The Institute published in 1880 the "Oxford Manual'.
[5] *Supra* n. 1, p. 36.

The recognition as a prisoner of war under Article 4 depends on two factors:

(a) To belong to one of the categories under Art.4 (A) or those who shall likewise be treated as prisoners of war under Art. 4(8);
(b) To have fallen into the power of the enemy.

The words "fallen into the power of the enemy" obviously indicate that those soldiers who surrender without fighting, are covered under the provision thus removing one. of the doubts which arose in World War II, about the “surrendered enemy personnel" following a mass capitulation.[6]

It must also be understood that the list given in Art. 4 is not necessarily exhaustive, and so there is no reason to conclude that persons not in any of the categories in the Article, cannot be considered to be prisoners of war; they may be outside the provisions of the Convention, but are not to be excluded from the Law on Nations in general, as is clearly substantiated by Art. 142 of the Convention and Art. 1(2) of Protocol I.

Article 4 A (1) covers 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.

Article 4 A (2) covers persons who, without being enrolled in the regular army, are nevertheless entitled to the prisoners of war status, being in this respect assimilated to the combatants of that army. This category comprises, in particular, 'members of organised resistance movements' placed on the same footing as militias and volunteer corps, who are required to fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognisable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

It must be noted, however, that the organised resistance groups have to fulfil two more conditions, in addition to the four mentioned above, viz., belonging to a Party to the conflict, and operating in or outside their own territory, even if this territory is occupied.

Also included in this category are members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.[7] This clause was inserted in the light of General de Gaulle's Free French Forces, and that of Italian troops who fought against the German forces in Southern Italy from September 1943 onwards in World War 11.[8] In the Korean War in 1950, both regimes, North Korea and South Korea were not recognised by each other but their personnel were treated as prisoners of , war; also the State of Israel and PLO do not recognise each other and most Arab states do not recognise the

[6] Commentary on the *Third Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, ed., Jean S. Pictet (Geneva, ICRC 1960), p. 50.
[7] Article 4A (3).
[8] *Supra*, n. 6, pp. 61-62.

State of Israel, but while Israel's members of armed forces are treated as prisoners of war, members of PLO are treated as terrorists by Israel.[9]

Article 4 A(5) covers the crew of mercantile marine vessels and civil aircraft, while persons arrested in occupied territory solely because they had belonged to the armed forces of the occupied country fall under Article 4 B (1).

Other categories are also defined such as military internees in a neutral country,[10] or persons who accompany .the armed forces without actually being enro1led in them, provided they have received authorisation to this effect and be the bearers of an identity card.[11]

Article 4 A(6) covers the case of 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.

B. Under Additional Protocol I

Soon after the Geneva Conventions of 1949, an increasing number of states became aware of the obsolescence of the Laws of War, specially because quite a number of wars after 1950 were wars of National Liberation and the Conventions very inadequately covered the protection of the civilian population from the direct effects of hostilities. One of the problems was which categories of combatants may be treated. as prisoners of war, as a large number of member states 'of the United Nations were insisting on Wars, of National Liberation to be treated as International Wars, and the guerri1la fighters in such wars to be accorded prisoner of war status. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, adopted the two Protocols additional to the Geneva Conventions of June 8, 1977.[12]

The list of persons given the criteria for POW status and the mechanism for asserting such status in Art.4 of the Convention, have now been broadened by Protocol I of 1977 so as to encompass more combatants.

The two key articles in Protocol I which list the new requirements for combatant and POW status and which have a bearing on guerrilla warfare are Arts. 43 and 44.[13]None of them mentions 'guerrilla' specifically.

> Art. 43 entitled " Armed Forces", provides:
>
> “The armed forces of a party to conflict of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that party is represented by government or an authority not

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[9] R.C. Hingorani, "Who are the Prisoners of War?", 9 *Australian Y.B. of International Law*, 276 at p. 281 (1985).
[10] Article 4 8(2).
[11] Article 4 A(4).
[12] Hans-Peter Gasser, "International Humanitarian Law- An Introduction", p. 13 (Henry Dunant Institute, Haupt, 1993).
[13] Saxena. J.N., “Gueri1la Warfare and International Humanitarian Law”, 25 1.J.I.L. (1985) 621 at p. 628

recognized I by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict".

Art. 44, entitled "Combatants and prisoners of war", provides for the grant of prisoner-of-war status, and lays down :

1. Any combatant, as defined in Art. 43 who falls into the power of an adverse party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such conditions, he carries his arms openly:

   (a) during each military engagement and

   (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

4. A combatant who falls into the power of an adverse party while failing to meet the requirements set forth in paragraph 3 shall forfeit his right to be a prisoner of war, but he shall nevertheless, be given protection equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.

Reading these two articles together it is apparent that guerrilla forces must fulfil five conditions, four collectively and one individually, to enable them to claim prisoner of war status. They must collectively:

(1) be a party to a conflict;
(2) be organised;
(3) be under command responsible to the party for the conduct of its subordinates;
(4) be subject to an internal disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict,[14] and a combatant must, as an individual
(5) carry arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military

[14] Article 43, para. 1, Protocol I.

> deployment preceding the launching of an attack in which he is to participate.[15]

It is thus clear that even for guerrilla warfare, belonging to a party to the conflict is indispensable, since the law of warfare ought to exclude a' private war'. Thus during armed conflict between the State -of Israel and Popular Front for Liberation of Palestine (PFLP), a case came before the Israeli Military Tribunal.[16] The question was put to the court whether informed members of the organisation of PFLP are entitled to prisoner of war treatment. The court found that PFLP did not belong to any party to the conflict, in as much as no government with which the State of Israel was at war, accepted responsibility for the acts of PFLP and so its members were not entitled to prisoner of war status.

PRESUMPTION OF PRISONER OF WAR STATUS

Should any doubt arise as to whether persons, having committed belligerent acts and who have been captured by the enemy, are "lawful" combatants in the sense of existing conventions, i.e. whether they belong to any of the categories enumerated in Art. 4 of the POW Convention, they shall enjoy POW protection pending the determination of their status by a 'competent tribunal'.[17]

Art. 5, paragraph 2 of the Convention,[18] and Art. 45 (1) of Protocol I[19] deal with those persons whose prisoner of war status is in doubt. This would apply to, for example, deserters and to persons who accompany the armed forces under Art. 4 (4) of the Convention and have lost their identity cards. What is a 'competent tribunal' and what are the limits of its competence has nowhere been defined. It can only be said that the tribunal must examine each case on its merits.

For this reason, the conclusion drawn in the case of the *Public Prosecutor v. Oie Hee Koi by* the Federal Court of Malaysia and supported by the Privy Council[20] has been greatly criticised.[21]

During the 'confrontation' between Indonesia and Malaysia of 1963 to 1966, members of the Indonesian armed forces were sent to Singapore and elsewhere in Malaysia to engage in guerrilla warfare and to carry out acts of sabotage. This case concerned 12 Chinese Malays, born or settled in Malaysia, who had been captured as Members of a Force of Indonesian para-troopers in Malaysia while engaged in guerrilla warfare and carrying out acts of sabotage. The court held that the Convention did not extend the protection given to prisoners of war to nationals of the detaining power nor to persons who, although not nationals, owed a duty of allegiance to that power. The court further held that all but two of the accused were

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[15] Article 44, para. 3, Protocol I

[16] Military Prosecutor *". Omar Mahmud Kassen and others*, (1971) 421 ILR 470

[17] Rosenblad, E., "International Humanitarian Law of Armed Conflict", p. 80 (Henry Dunant Institute, Geneva, 1979).

[18] “Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Art. 4, each persons. enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal”.

[19] This provision is nearly the same as stated in footnote

[20] (1968) 2 W.L.R. 715 P.C.

[21] See Baxter, R.B., "The Privy Council on the Qualifications of Belligerents", 63 A.J.I.L. 290 (1969).

citizens of Malaysia and in consequence owed a duty of allegiance to that country. It follows that they were not entitled to prisoner of war status.

In the other two cases, the Federal Court held that the prosecution had on the facts, not sustained the burden of proving that the accused owed allegiance to Malaysia and so they were to be treated as Indonesian members o f their unit and are entitled to prisoner of war status.

THE PROTECTION OF PRISONERS OF WAR DURING INTERROGATION

Having gone through the conditions governing entitlement to the prisoner of war status, one can turn to the subject of the protection of the prisoners of war.

While Part II of the Convention deals with general protection of prisoners of war indicating that the responsibility for the treatment of prisoners lies on the enemy state and not on the individual or military units who capture them, and they have the right to be treated humanely like respect for their persons and their honour, some duties are also incumbent on them. These are dictated in general under the rules of war and military discipline.

But one duty formally defined in Part II of the Convention in Art. 17, paragraph one, relates to the questioning of the prisoners: "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. "

In fact these details are required to be giver. on an identity card to be issued by each party to a conflict to the person under its jurisdiction, and on demand, the identity card should be shown by the prisoner of war.[22]

If the prisoner of war wilfully infringes this rule, or makes inaccurate statement, he may render himself liable to a restriction of the privileges accorded to his rank or status[23] but in no case should it involve loss of all or part of their benefits under the Convention. The only advantages which may be withdrawn are those incorporated in the provisions concerning special privileges to be accorded to officers, non-commissioned officer or persons with similar status.[24]

The first concern and, indeed, the first duty of a belligerent power which has prisoners of war in its hands is to establish their identity to determine the rank and status of those whom it has captured for the purpose of according them the treatment to which they are entitled.[25] This is thus in the interest of the prisoner of war himself, but not only that, this information has to be conveyed by the detaining power to the national information bureau for forwarding to the powers concerned and to the central POW agency in terms of Arts. 122 and 123 of the Convention, through which the family members of the prisoner of war come to know about him.

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[22] Art. 17 para. 3.
[23] Art. 17 para. 2.
[24] Some of tbese are contained in Arts. 16, 39(3), 40, 41, 45, 49 (1), (2), (3) etc
[25] *Supra* n. 6, p. 156.

It is, however, quite natural that the detaining power may try to procure some additional information from the prisoner which may be of some military significance to them. The prisoner of war may and indeed must refrain from , giving any such information. He must, therefore, be protected against any inquisitorial practices on the part of the detaining power.

Due to the experiences gained during World War II, when some prisoners of war were stationed in special camps known as "interrogation camps " before being sent to a normal POW camp, in an attempt to secure information and great hardships were inflicted on them, or even in ordinary camps they were coerced to give information about their personal circumstances or that of their relatives, Art. 17 paragraph four of the Convention categorically prohibits not only 'coercion' but also 'physical or mental torture'. It lays down: "No physical or mental torture, nor any other form of -coercion may be inflicted" on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to may unpleasant or disadvantageous treatment of any kind ".

CONDITIONS OF INTERNMENT OF PRISONERS OF WAR-RESTRICTIONS OF LIBERTY OF MOVEMENT

Once the prisoners of war are sent to their respective camps, there are placed restrictions on their movement. Article 21 of the Convention deals with restriction of liberty of movement.

The first paragraph of Art. 21 provides that the Detaining Power may subject POWS to internment and may impose on them the obligations of not leaving, beyond certain limits, the camp where they are interned.

It is obvious that- the Detaining Power which has captured the prisoners of war, will try to keep them in captivity by resisting any escape or attempted escape by them. The usual method is internment, which means, to put them in a certain area or place and to forbid them to leave its limits. Internment also involves the obligation not to leave the town, village or piece of land, whether or not fenced in, on which the camp installations are situated.[26] But as this Article provides, internment does not necessarily mean confinement to a cellar room, which can onJy be imposed in execution of penal or disciplinary sanctions, or on health considerations e.g. if a POW is suffering from a contagious disease, or when it is in the interest of the POW himself.

In terms of Art. 41 of the Convention, POWs must be clearly informed about the regulations regarding internment, specially the precise limits imposed on their freedom of movement. In case of any breach of such limits, the Detaining Power, under Art. 42, is entitled to take action, if need be, by the use of weapons.

The Convention in Art. 21, paragraph two lays down that prisoners of war may be partially or wholly released on parole or promise. But this is subject to one reservation as provided in paragraph three- the laws and regulations of the Power on which the prisoner depends must be respected, and they may allow or forbid the prisoner to accept liberty on parole or promise. This reservation is imperative for the Detaining Power.

[26] *Id*., p. 178.

In principle, a prisoner of war who is offered the possibility of liberty on parole is supposed to know the corresponding laws and regulations of the Power on which he depends.[27] But it may be that the POW is not acquainted with them. The Detaining Power has no such excuse, in terms of paragraph three of the article: "Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise."

Thus the Detaining Power is, in a way, responsible for the application of these laws and not permitted to make any proposals to POW that may be inconsistent with such laws and regulations. Art. 21, paragraph two further provides that such release on parole may be permitted for health reasons, e.g. to permit a POW to take a walk outside the camp limits, or to authorise him to live outside a camp. But there is no prohibition of coercion in this paragraph too: "No prisoner of war shall be compelled to accept liberty on parole or promise".

Once the Detaining Power offers a POW some liberty of movement in exchange for a promise that he will not run away, and this is accepted, it is only the word of honour of the prisoner and no other guarantee with the Detaining Power. If such prisoner breaks that promise and escapes, there is nothing in the Convention that would oblige the Power on which he depends to return him to the Detaining Power except that, as provided in paragraph three, in such cases, the Power on which he depends is bound neither to require nor to accept from him any service incompatible with the parole or promise given.

Literally, parole means word of mouth or honour to fulfil ones promise. If it is broken, it was laid down in Art. 12 of the Hague Regulations, that he forfeited the right to be treated as a prisoner of war and therefore, if recaptured, was treated as an outlaw. This 1949 Convention, however, does not go so far, and still gives him the benefit for an impartial and equitable trial in terms of Art. 85.

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THE TRANSMISSION OF INFORMATION REGARDING PRISONERS OF WAR

The anxiety of the family member of a combatant to know about his welfare during a war is quite natural, and specially when he becomes a prisoner of war So there must be some agency for this purpose. During World War I, enquiry offices were set up in terms of Article 14 of the Hague Regulations by the belligerent states as well as neutral countries, to answer inquiries addressed to them concerning prisoners of war as to their internment, release on parole transfer etc.

Also worth remembering are the services rendered by the central prisoner of war agency to prisoners of war and their families during the two World War that was set up under the auspices of the ICRC, now known as the Central Tracing Agency. Even today, this Agency still holds about 40 million index cards, which sometimes constitute the sole data available for establishing the right of prisoners or their families.

Under Article 122 of the Convention, upon the outbreak of a conflict, each party to the conflict shall institute an official information bureau for prisoners of war who are in its power.[28] Even neutral powers or non-belligerent powers who may have received prisoners of

[27] *Id*., p. 179
[28] Article 122, para. I.

war shall take a similar action.[29] Within the shortest possible period, each of the parties to the conflict shall give in its bureau such information in respect of each prisoner of war as his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence or the prisoner may be sent.[30] The information bureau shall also receive from the various departments concerned information regarding transfers. releases, repatriations, escapes, admissions to hospitals, state of health of the prisoners of war and deaths.[31] The bureau shall immediately forward such information to the powers concerned, through the protecting powers, and likewise of the Central Agency provided for in Art. 123.

The information bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who diet in captivity and it will make necessary enquiries to obtain the information which is asked for if this is not in its possession.[32]

A Central Prisoners of War Information Agency shall be created in a neutral country as provided in Article 123 of the Convention. The International Committee of the Red Cross shall, if it deems necessary, propose to the powers concerned the organisation of such an agency.

The existence of the Central Agency can be traced back to 1870, when the ICRC, for the first time, took the initiative of establishing an official agency at Basle during the Franco Gefn1an war. Though in its initial stage, the agency was concerned with wounded and sick soldiers only, soon after it extended its function for collecting and forwarding all available information regarding prisoners of war.

Article 79 of the 1929 Geneva Convention gave legal basis to the International Committee which in 1939 enabled it to open in Geneva the Central Prisoners of War Agency. This institution did a commendable work during World War II. The same continues in the 1949 Convention in Art. 123.

The function of the Agency, as stated in Art. 123, paragraph two, is to collect all the infofn1ation it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend.

RELEASE AND REPATRIATON OF PRISONERS OF WAR

Article 118 of the Convention, dealing with the release and repatriation of prisoners of war, is one of the most important provisions of the 1949 Convention Relative to the Treatment of Prisoners of War, the basis of which is the experience gained during World War II. The issue existed even earlier and there were provisions to deal with it. However, substantial changes have been incorporated under the Convention.

[29] *Ibid*
[30] *Id*. para 4.
[31] *Id*. para. 5
[32] *Id*. para. 7

Article 20 of the Regulation respecting the laws and customs of war on land annexed to the Fourth Hague Convention 1907, laid down that after the conclusion of peace, the repatriation of prisoners of war should be carried out as quickly as possible. Art. 214 of the Treaty of Versailles stated: "The repatriation of prisoners of war shall take place as soon as possible after the coming into force of the present Treaty and shall be carried out with the greatest rapidity". The Treaty, though signed on June 28, 1919, entered into force only on January 15, 1920. So many combatants did not come home until two and a half years after the last shot was fired. Art. 75 of the 1929 Geneva Convention laid down: "When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war... In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace". For many powers, the World War II ended without either armistice or peace treaty, as in the case of German prisoners of war, the elimination of the German state prevented the normal operation of the Convention.[33]

Thus we see that the belligerents had on these two occasions, and without expressly violating the provisions of the then existing Regulation or Convention, been able to keep millions of prisoners of war in captivity, and some as long as four years, for no good reason.

So at the Conference of Government Experts leading to the Third Geneva Convention of 1949, due to these inadequacies in the 1929 Convention and the resultant difficulties, after the World War II, it was pleaded that repatriation should take place. as soon as possible after the end of active hostilities[34] and to make this requirement unilateral so that its implementation would not be hampered by the difficulty of obtaining consent of both parties.[35]

It is, however, interesting to note that at the 1949 Diplomatic Conference, before it finalised Art. 118, its attention was drawn to cases of prisoners of war repatriated against their will, which led to many suicides after World War II. It was also brought to its notice that quite a number of prisoners of war had asked to be sent to a country other than their country of origin. In view of these factual happenings, the Austrian delegation suggested to the Diplomatic Conference that the Convention should specify the country to which prisoners of war should be repatriated (and naturally it will be the country whose nationals they were, at the time of repatriation), and suggested two' exceptions:

(i) where the territories of the country of origin have come under the jurisdiction of a foreign government,
(ii) where conditions of life have so changed that the prisoners of war no longer wish to return to his home country if he is able to settle in another state.

However, the experts refused to make exceptions to special cases and decided to maintain the general principle of repatriation of all prisoners of war who were nationals of a given country. But to think that the matter was settled for good by this provision in Art. 118, would

[33] *Supra* n. 6, p. 541.
[34] Incorporated in Art, 118, para 1. which reads : "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".
[35] This forms the essence of Art. 118, para 2 which reads: “In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph” .

be wrong, as clearly depicted by the Korean experience. The problem raised by the unwillingess *en masse* of the North Korean and Chinese prisoners of war to be repatriated in accord with the rights given to them under the 1949 Geneva Convention, present, in a revealing perspective, the test to which the Korean conflict has put positive international law.[36]
At the time of the Korean War (1950), none of the Parties to the conflict had ratified the Convention, and it was not therefore legally applicable, but since at the beginning of the hostilities the Parties had stated their intention of respecting the "principles" of the Geneva Convention, .it partially applied.[37] A large number of prisoners of war, specially from ,North Korea at the cessation of hostilities were unwilling to be repatriated. In the lengthy Armistice negotiations in Korea, the communist case, put briefly, was that under Art. 118(1), a Detaining Power was under an absolute obligation to repatriate all prisoners of war on the conclusion of hostilities, regardless of circumstances, and in particular, of the prisoners' own wishes and every form of coercion must be used to repatriate all prisoners of war without exception.[38] This was supported by some others on the ground that the Detaining Power was responsible towards the Power of origin of the prisoners of war and not towards the prisoners themselves. Reliance was also placed on Art. 7 of the Convention which provides that prisoners of war may, in no circumstances, renounce in part or in entirety, the rights secured to them by the Convention and so they were to be unconditionally repatriated regardless of their desires.

Originally, the United Nations command claimed that the principle of "voluntary repatriation" should govern the exchange of prisoners and that only those who 'elected repatriation' should be sent home, but later on they withdrew this formula and substituted for it the principle of "no forced repatriation" and stated that all prisoners of war must be released but only those should be repatriated or turned over to the other side who can be delivered without the application of force.[39]

The matter was taken to the General Assembly of the United Nations where on December 3, 1952 a resolution was adopted which gave an interpretation diametrically opposed to that of the Democratic People's Republic of Korea.[40] It stated:

The General Assembly...

1. affirms that the release and repatriation of prisoners of war shall be effected in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War, dated 12 August 1949, the well established principles and practice of international law and the relevant provisions of the draft armistice agreements.

2. affirms that force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention. The United Nations thus decided that no prisoners of war were to be forced to return to their country of origin if they did not wish. It must,

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[36] Jaro Mayda, "The Korean Repatriation Problem and International Law", 47, AJ.I.L 414 (1953).
[37] *Supra*, n. 6, p. 543.
[38] Gutteridge, J.A.C., "The Repatriation of Prisoners of War". 2 I C.LQ. 207 (1953).
[39] Charmatz, J.P. and Wit, H.M., "Repatriation of Prisoners of War and the 1949 Geneva Convention", 62 Y .LJ. 391 (1953)
[40] *Supra* n. 6, p. 544.

> however, be kept in mind that while individual cases may be humanely dealt with, the fundamental principle of repatriation should not be twisted in such a way that .eventually on one pretext or the other, no one may be repatriated.

Gutteridge,[41] in interpreting Art. 118(1) of the Convention applying the age-old "Mischief Rule" of Interpretation of Statutes, laid down by Sir Edward Coke, has stated that two principles- no detention by force and no repatriation by force- be inserted in the Convention when it is next revised.

Jaro Mayda[42] suggested the following construction for the article: .

(a) the prisoners of war have a right of option in specific cases,

(b) the extension *per analogiam* of this right to the situation under Art. 118 is not explicitly excluded and therefore permissible.

Pictet, J.S.,[43] states "without passing judgement on the decisions taken by the United Nations or by the Armistice Commission, it should be pointed out that the Korean war must not in any way be considered as a precedent for the application of Art. 118". He has also laid down some valuable rules for the interpretation of Art. 118, paragraph one which are worth consideration.[44]

In the end, one may agree with the statement:[45] "That international law should govern the Korean repatriation issue is the common ground on which the communists and the United Nations stand. Disagreement results from conflicting views of what the 1949 Geneva Convention provides for the Korean situation. Claiming that its position is 'wholly consistent with' the Convention and required by its general humanitarian principles, the United Nations holds that no prisoner will be forcibly repatriated. The Communists insist that Art. 118, read in conjunction with Articles 6 & 7, embodies "the law" and required that all captive without exception be repatriated In many disputes the re-examination of the factual premises on which seemingly irreconcilable positions are based, has opened new avenues to honourable agreements. Yet even if the United Nations and the communists should re-examine their positions, any agreement which might result must preserve and promote the humanitarian purposes of the 1949 Geneva Convention "

THE RIGHT OF THE PROTECTING POWER AND THE ICRC TO VISIT PRISONERS OF WAR I

Laws themselves are not of much use if they have no implementation machinery. But in spite of that machinery, how far they can be implemented is a different matter.

Today the primary mechanism relied on by the States to ensure the implementation of the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949 and

[41] *Supra*, n. 38, p. 216.
[42] *Supra*, n. 36, p. 434.
[43] *Supra*, n. 6, p. 546
[44] *Id.* Pp. 546-549
[45] *Supra*, n. 39. 415

Additional Protocol I of 1977 is the system of Protecting Power and of the International Committee of the Red Cross.
The term 'Protecting Power' was, for the first time, defined in Art. 2(C) of Protocol I as follows:

"Protecting Power" means a neutral or other state not a party to the conflict which has been designated by a party to the conflict and accepted by the adverse party and has agreed to carry out the functions assigned to a Protecting Power under the Convention and this Protocol.

The institution of the protecting power- a neutral state representing the interests of a second state in the territory of a third- has its origin in international customs, not as an enforcement mechanism developing within the law of war, but rather as the outgrowth of informal peacetime diplomatic efforts aimed at the protection of individual foreigners in territories where their own governments were not diplomatically represented.[46]

During the Franco Prussian War of 1870- 71, the institution of Protecting Power appears to have been used for the first time when at the request of Germany, United States extended Protection to German interest in France through its ambassador. This has been ca1led as marking the beginning of formal designation in wartime of a Protecting Power at the request of a belligerent. Another instance is provided when during the Russo-Japanese war of 1904-06, Russia appointed France and Japan appointed United States as their protecting powers, and these protecting powers did a commendable work.

During the French and Sardinian campaign against Austria in 1859, nearly 38000 officers and men were killed or wounded within 15 hours at the Battle of Solferino, which moved Henry Dunant, a resident of Geneva and he published a book called “Un souvenir de Solferino”, and his efforts ultimately resulted in 1880 in the establishment of the International Committee of the Red Cross.[47]

In the first World War, the system of Protecting Power, though mentioned neither in the Hague nor in the Geneva Convention, matured," and in spite of some restrictive practices by Germany and the USA, belligerents designated a substitute neutral state if the original Protecting Power ceased to function or became a belligerent, and belligerent arrangements were made during the war setting out in some detail the agreed activities of the Protecting Power.[48] The Protecting Powers along with the relief societies like ICRC, succeeded during the first World War, in ameliorating conditions of a large number of prisoners of war as the latter established a Central Information Agency or prisoners of war and sent numerous relief missions to prisoners of war camps.

The role of Protecting Power as well as of the ICRC were given a formal recognition by the 1929 Geneva Convention Relative to the Treatment of Prisoners of War in Articles 86 and 88 respectively. By recognising the role of the protecting power (and of the ICRC), the 1929 Prisoner of War Convention provided the legal basis for its humanitarian work and implied

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[46] Captain George A.B. Peirce, “Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC”, 90 *Military Law Review* 92 (1980).
[47] *Id.*, pp. 96-97.
[48] Draper, G.I.A.D., .The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1977", *164 Recuil des Cours del Academic de droit lnternational de law Hague,* 14, (1979).

an initiative which the protecting power was expected to assume by the High Contracting Parties and thus distinguishing between its customary political function and the new humanitarian concern.

The institution of 'protecting power was widely utilised during World War II, but it also indicated some intricacies involved in the situation, e.g.,

(a) few neutral states were left when that war became global, and sometimes the same protecting power represented a large number of belligerents (at one time Switzerland was the protecting power for 35 belligerents), some of whom were adversaries, and the protecting power thus assumed the role of an umpire rather than being an agent of one of the belligerents.

(b) as the activity of the protecting power was subject to the consent of the detaining power, and both belligerents must recognise each others legal existence as states, difficulty arose in cases where, e.g. the Soviet Union maintained that Poland did not exist, and refused to consent to protection of Polish interests in the Soviet Union by any neutral state.[49]

Under these drawbacks, the ICRC came forward, and having a legal basis under Article 88 of the 1929 Convention, as stated earlier, it undertook a prodigious humanitarian effort to help the prisoners of war by establishing a central Prisoner of War Agency with 40 million index cards, the conduct of 11,000 visits to prisoner of war camps, and the distribution of 450,000 tons of relief items.[50] These extremely useful deeds of the ICRC clearly indicated that in future conflicts, where protecting power system might be handicapped and may not be able to function satisfactorily, non-state substitutes like ICRC's assistance might be invaluable.

Article 126 of the 1949 Convention permits representations of the Protecting Powers to go to all places where prisoners of war may be interned, imprisoned or acting as labourers, and interview them. At the same time, it also permits delegates of the ICRC to enjoy the same prerogatives, subject to the approval of the detaining power.

While visits to prisoners of war are not the only method to safeguard all the interests of the parties to the conflict, it cannot be denied that the inspection of places of internment, imprisonment and labour where prisoners of war are kept, and interviews with them are the best means available to the protecting power for really effective supervision. There are three types of places in which convention will find its widest application, and where, as a result, wider supervision must be exercised.

The ICRC's main function being humanitarian, to ensure that victims of war are treated humanely, it has never exercised and does not exercise real supervision in the legal sense of the term. It being a private organisation, keeps itself aloof from matters of a political nature which fall under the purview of the protecting power and this is very necessary for the ICRC to maintain its reputation for independence, impartiality and neutrality.

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[49] *Supra*, n. 46 pp. 103-104.
[50] *Id*., p. 105.

It will be clear from the following details of functioning of the ICRC and the Protecting Power, as stated by Pictet,[51] that the ICRC will retain the advantage over the protecting power in connection with their visits to prisoner of war camps.

The Protecting Power worked under the mandates given by the powers of origin, and reports of their delegates were communicated only to those powers. It was then for the powers of origin to ask the protecting power to request the enemy to stop any mal-practices which had been indicated. Supervision by protecting powers was exercised only on behalf of powers which had appointed them as their agents.

The position of ICRC was different. Its camp visits apply to all the –occupants without regard to nationality,' solely on the basis that they were war prisoners. The committee carried out these inspections, not on behalf of a particular power, but in the name of humanity. So the reports made by the delegates of ICRC, after each of their visits immediately transmitted to the Power responsible for the place of detention visited, with. comments drawing attention to any improvements which might be desirable.

Moreover, the ICRC was the only institution able to visit in the same way and at the same time prisoner of war camps in almost all the belligerent countries. The protecting power could usually visit the prisoners and internees of only one nationality and in only one country. The Committee thus obtained full information which enabled it to compare the situation of those detained in the various camps, and to make representations where necessary, with a view to reciprocal treatment.

Thus Article 126 gives both the protecting power and the ICRC the right to send representations to all places where prisoners of war may be held, and visits of ICRC are subject to approval of its delegates by the detaining power: but the presence of ICRC in principle is as of 'right'.[52]

The post World War II era indicates a decline of the protecting power system and expansion of the role of ICRC. One of the reasons given for this is that under the 1949 Convention and now also under Protocol I Additional, the functions of protecting powers have been greatly extended, and so the eligable states are afraid to assume such a change. For the same reasons, even the ICRC was hesitant to accept the role of the substitute of the protecting power.

After 1949, there have been a large number of armed conflicts, both interview and international, but only in three instances have protecting powers been utilize before Protocol I of 1977, and in one instance after the Protocol, and even in these instances, ICRC's assistance was offered and utilised in some cases:[53]

(a) The first use of protecting powers under the 1949 Convention too place in Suez crisis in 1956. France and Egypt agreed on the appointment of Switzerland as their protecting power, and Switzerland also served in that capacity between Egypt and United Kingdom. Israel sought to appoint Netherlands as its Protecting Power, but since Egyt did not recognise Israel, Egypt withheld consent. At this point ICRC offered its services to Israel and

[51] *Supra*, no 6, pp- 605-606
[52] *Supra*, n. 46, p. 115
[53] . These cases have been discussed by Captain Georlc Peirce,", *Supra* n. 46 pp. 123-126

Egypt. Israel accepted ICRC assistance subject to reciprocity by Egypt, but the latter did not respond.

(b) In 1961, in the conflict between India and Portugal on the issue Goa, India appointed Egypt as its Protecting Power under. custom, international law, and Portugal designated Brazil. The parties consented to each others appointees. The ICRC invoked common article 9 of the Convention and its specifications as the legal basis for its relief work. It was also asked by Portugal to assist the protecting power in the protection of the citizens of the power of origin.

(c) The birth of Bangladesh in 1971 was preceded by the outbreak of violence in East Pakistan (as it then was). In July 1971, Pakistan consented to the ICRC's establishment of a Central Tracing Agency in Dacca for missing persons. Then the hostilities between India and Pakistan broke in December 1971. The parties (including Bangladesh) assured ICRC to apply Geneva Conventions and the ICRC expanded its activities on the basis of Article 9 of the Convention to its specific tasks.

Both India and Pakistan agreed to the appointment of Switzerland as their. protecting power. However, a dispute arose as to the proper scope of the activities of the protecting power. To avoid an impasse, Switzerland and the ICRC persuaded the belligerents to agree to a division of functions. Under this plan, Switzerland was to carry its representative tasks of the protecting power in the light of the Vienna Convention, while ICRC would provide all possible humanitarian Assistance to the prisoners of war. ICRC made regular visits to prisoners held by Pakistan, India and Bangladesh.

From these events in the three situations noted above, the emphasis of ICRC's contribution to the humanitarian protection is quite apparent, and at the same time they illustrate the limitations of the protecting power in its effective operation in modem conflicts.

Protocol I expands the protecting power provisions of the Convention but it falls short of establishing an automatic, fully mandatory protecting power system.[54] ICRC is obliged (in terms of paragraph 3 of Article 5 of the Protocol) to offer its good offices to facilitate the appointment of a protecting power by mandatory submission by each party, of a list of acceptable nominees for the protecting power role from which a mutually agreeable protecting power is to be chosen. But the designation of a protecting power remains subject to the discretion of each party to the conflict, and Protocol I, therefore, is only partially successful in making the protecting power system of the Convention more effective by adding a new method of designating a protecting power and by requiring the acceptance of a substitute by the parties if such services are offered by a qualifying international organisation.[55]

After the 1977 Protocol I, only in one instance the protecting power system was used and that was the conflict between Argentina and United Kingdom on Falkland Island issue in 1982.

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[54] Major Thomas J. Murphy, Sanction and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977", 103 *Military Law Review* 67 (1984).
[55] *Ibid*

From the Hague Regulations, 1899 and 1907, devoting seventeen articles to the prisoners of war, to the Geneva Convention Relative to the Treatment

of Prisoners of War, 1929, incorporating 97 articles on the subject, and from tbesc to the Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949 containing 143 articles, relating to the prisoners of war, and Protocol Additional I to the Geneva Convention, the law of prisoners of war has taken great strides. "It is no exaggeration to say that prisoners of war in present or future conflicts are covered by a veritable humanitarian and administrative statute which not only protects them from the dangers of war, but also ensures that the conditions in which they are interned are as satisfactory as possible."[56]

[56] 56. *Supra*, n. 6, p. 10.

INTERNATIONAL HUMANITARIAN LAW,
THE REGULATION OF ARMED CONFLICTS

Humanitarianism in the Laws of Armed Conflict

Contents

International humanitarian law and the laws of armed conflict

International humanitarian law is that branch of the laws of armed conflict which is concerned with the protection of the victims of armed conflict, meaning those rendered *hors de combat* by injury, sickness or capture, and also civilians. It is founded upon the ideas that the legitimate scope of military action is not unlimited and that those who are or have been rendered non-combatant are entitled to impartial humanitarian concern and that both they and those charged with their care and welfare in the rendering of humanitarian aid are not legitimate targets in hostilities. These principles are deceptively easy to state but much less so to express as legal norms which are reasonably capable of practical application in the extreme circumstance of armed conflict and herein lies one of the most urgent problems in the development of this "area of law. International humanitarian law,[1] or 'Geneva' law, as such is now found primarily in the four 1949 Geneva Conventions, the two 1977 Additional Protocols and associated materials. It is a sub-part of one of two major divisions of the modern law of armed conflict, which are the *jus ad bellum* and the *jus in bello*. The first of these is concerned with the legitimacy of resort to armed force, which is now permissible only in pursuit of the 'inherent right of self-defence', as variously defined, preserved by article 51 of the United Nations Charter as an exception to the general ban upon resort to armed force contained in article 2(4). The second makes provision for the legal regime applicable during an armed conflict in progress and, it must be stressed, these provisions are generally applicable irrespective of the lawfulness or otherwise of the original resort to armed force by any of the parties to the conflict.

The *jus in bello* itself has two principal subdivisions which are conventionally, although not strictly accurately, categorized as 'Geneva', i.e. international humanitarian, and 'Hague' law. 'Hague' law is primarily concerned with means, methods and weaponry of warfare, in contrast with the overtly 'humanitarian' concerns of 'Geneva' law. These formal divisions are useful for purposes of exposition and study and are broadly descriptive but are not to be taken as absolutes. It would be a grave misapprehension to imagine that humanitarian norms in the regulation of armed conflict are found only in 'Geneva' provisions. The division between the 'Geneva' and 'Hague' limbs of the *jus in bello* is in many ways artificial and has been so since the genesis of both these modern categories in the second half of the nineteenth century. Quite apart from the semantic point that there have been a number of Hague Conventions which fall into the 'Geneva' category in whole or in part, and vice versa, there is anyway a wide measure of overlap between the two. Many, if not all, 'Hague' limitations are broadly humanitarian in inspiration and effect and, equally, many 'Geneva' provisions have clear impacts upon the legitimacy of means and methods of warfare, including upon weapons usage. Even the *jus ad bellum*, which is genuinely distinct from the *jus in bello*, may have humanitarian effects in some circumstances in so far as it might render illegitimate certain military objectives and actions which might otherwise be permissible in 'Geneva' terms. Thus, although one may legitimately concentrate upon 'Geneva' law in the study of humanitarian norms in the regulation of armed conflict, it is important to remember that there is a broader pattern of humanitarian concern which informs the general laws of armed conflict. For this reason, the present study will include within its remit provisions of both 'Hague' and 'Geneva' law as well as the *jus ad bellum* in so far as they impinge upon 'humanitarian' concerns

The paradox of humanitarianism in armed conflict

Beyond the questions of appropriate categorization of the laws of armed conflict there is a seeming paradox which must be considered in there being laws, and certainly 'humanitarian' laws, of armed conflict at all. If public international law represents the outer edge of 'legal' orders, then the laws of armed conflict must represent the most tenuous upper reaches of the 'legal' atmosphere. Armed conflict is the ultimate breakdown of the international 'social' and legal order, much as is interpersonal violence in a municipal context, and one which public international law is largely concerned to avert. It is therefore prima facie curious to find a structure of legal norms which is designed to regulate the conduct of a state of international relations which is in essence a descent into extra-legal violence. Certainly, there is no modern municipal legal equivalent in rules and principles designed to regulate the 'proper' conduct of interpersonal violence. There is also a related argument that armed conflict, as a series of acts of violence, is inherently incapable of moderating definition and even that efforts in this direction actually, encourage' resort to armed force by making it seem more' acceptable'.Both of these apparently strong arguments against 'humanitarian' laws of armed conflict may, however, readily be countered.

The basic paradox was, not surprisingly, well stated by Karl von Clausewitz in his comment that,

> If the wars of civilized people are less cruel and destructive than those of savages, the difference arises from the social condition both of states in themselves and in their relations to each other....But these things do not belong to War itself; they are only given conditions; and to introduce into the philosophy of War itself a principle of moderation would be an absurdity.[2]

This is also. a point made by the novelist Leo Tolstoy,[3] The initial assumption made by Clausewitz must, in the light of twentieth-century experience of 'total war', be regarded as deeply questionable, but the basic paradox remains real enough. That the paradox may be resolved is however implicit in Clausewitz's own statement. Even though the violence of armed conflict may not in itself be logically capable of moderating definition, such conflicts take place in reality in cultural and political contexts which set limits both prospectively and immediately to what may be tolerated even in the heat of combat. Such influences are, as Clausewitz remarked, 'given conditions' but they do in fact set parameters within which limits to the permissible employment of armed force in conflict may be set.

There are obvious questions to be asked about the pragmatic effectiveness of such limitations upon the conduct of warfare, not least because the logic of violence appears to suggest, as

Clausewitz indicated, an escalation of extremities in the conduct of operations. Such simple reasoning is, however, misleading and principles of moderation in warfare have in practice considerable moral and pragmatic force. The moral claim of moderation in armed conflict is obvious and relates ultimately to the nature of human beings as social animals, in the sense understood by Aristotle,[4] to whom a relationship of violence is not 'natural' but a divergence from a more co-operative norm. The pragmatic considerations are, if anything, more powerful. In the medium to long term armed conflicts are, if only by reason of exhaustion, essentially temporary phenomena after which some semblance of normal relations must be resumed by the parties. The greater the degree of barbarity manifested in the conduct of military operations, the more difficult the, inevitably problematic, process of normalization of relations is likely to be. During the armed conflict itself there is also a strong element of self-interest in the implementation of humanitarian norms. Although, as Clausewitz argued, the logic of conflict seems to imply the adoption of increasingly extreme measures until one party is destroyed, there is in practice a moral and political economy of scale to be considered which sets limits to the price which may reasonably be contemplated for military advantage, at least in the majority of conflicts. At an immediate level a commitment to the humane treatment of captured enemies is likely to enhance the prospect of similar behaviour by opposing forces, to obvious mutual advantage. One may take as an example the treatment of prisoners of war in the Second World War.In most cases prisoners of war received relatively proper treatment as between *(*eg) Britain, France, Germany, Italy and the USA, which considered themselves mutually bound by humanitarian treaties, and barbarous treatment as between Germany and the USSR which did not. A further practical pressure is provided by the varying levels of information available to home populations. In combination these factors give a far greater practical force to humanitarian norms in armed conflicts than the logic of violence might seem to suggest, even if it must be admitted that the quality of their observation varies widely according to the place and nature of the conflict concerned.

The argument that the imposition of moderating norms upon armed conflict actually renders-such conflict more likely by making it seem more' acceptable' may readily be countered. Even in such 'textbook' armed conflict as that between the United Kingdom and Argentina in 1982 in the Falkland Islands, in which both sides adhered closely to humanitarian norms,[5] there was a great deal of death, suffering and injury.This can of course be multiplied many times in wider-scale, longer and more bitter conflicts such as the Iran-Iraq war in the Gulf. Armed conflict is, returning to Clausewitz's point, by definition not 'humane' and attempts to protect its victims and to mitigate some of its effects through humanitarian norms do not pose any 'threat' of rendering armed conflict an 'acceptable' or inviting prospect. Peace with justice is properly the ultimate aspiration of public international law, but whilst armed conflicts in fact occur it seems a somewhat callously self-indulgent and absolutist argument to denigrate such palliative measures as are immediately possible.

A more academic dimension of this same argument can be seen in the debate upon the relationship between international humanitarian law and the international law of human rights as such. Geza Herczeg has argued,[6] with others, that although the provisions of 'Geneva' law are clearly connected with human rights concepts, they cannot actually be equated with them because such provisions necessarily suppose the possibility of armed conflict, which can be seen as a breach of human rights in itself. The alternative argument can be found put by another Eastern bloc writer, Igor P. Blishchenko,[7] who contends that the humanitarian provisions of the laws of armed conflict are simply a specific subset of human rights norms applicable in extreme circumstances. The latter argument seems in principle to be the stronger. In his 'rights thesis' Ronald Dworkin[8] argues in passing that the concept of 'rights' is to some extent a response to a perception of threat to some normally assumed entitlement. One does not commonly speak of a 'right' to do something upon which no restraint is anticipated. As a matter of jurisprudence this may be open to some argument but in the present context it is a compelling hypothesis. Whether or not there is a 'human right to peace', and any such contention immediately raises questions about the quality of that peace, armed conflicts do as a matter of fact take place and basic human expectations are thereby gravely imperilled. It seems reasonable therefore to conclude that humanitarian provisions in the laws of armed conflict are best regarded as a specialist application of human rights principles in peculiarly extreme circumstances. It must however be admitted that the nature of the relevant circumstances entails so distinctive a set of characteristics in the applicable provisions as to make their assignment to a distinct academic and practical subcategory inevitable.

The American Realist thinker Karl N. Llewellyn[9] argued that one of the more significant functions of a 'legal' system is the obviation, or at least safe-channelling, of potentially damaging disputes. This seems at least as true of the public international legal system as of any municipal system but, granted the enormously greater power of states *vis-a-vis* the international ''legal system, resort to violent 'self-help' retains a place in the former which it has, for the most part, long lost in the latter. In this light, attempts to ameliorate some of the calamities of armed conflict through formal humanitarian norms seems not only not to be an absurd or contemptible enterprise, but one which remains vitally necessary. This is the basic function of international humanitarian law which makes no judgment upon armed conflict in general or upon the cause of any particular conflict but seeks simply to protect to the greatest possible extent the victims of the armed conflicts which actually occur, for whatever reason.

The origin of modern international humanitarian law is conventionally dated to June 1859 and the battle of solferino, during which an Austro-Hungarian army was defeated by its French opponents not far from the Swiss frontier. A Swiss businessman, Henri Dunant, who happened to be in the vicinity, was appalled by the large numbers of wounded left to die on the battlefield for want of medical attention. He organized such medical relief as was possible -at some personal risk, being actually fired upon by French troops who mistakenly took him for an Austrian sympathizer. In 1862 Dunant published an account of his experiences under the title Souvenirs de Solferino[10] and made two practical proposals: for voluntary relief agencies for the aid of battlefield wounded and for an international agreement upon the humane treatment of the sick and injured in warfare. Dunant's booklet proved an immediately effective polemic and attracted widespread attention which led with remarkable speed to the setting up of the International Red Cross and the conclusion of the first Geneva Convention, concerned solely with the sick and wounded in land warfare. These were seminally important events in the development of international humanitarian law but they cannot properly be viewed as an unprecedented development arising from a vacuum. Dunant in fact published at exactly the right time to crystallize a growing body of European opinion which accorded precisely with the philanthropic instincts of the middle to later nineteenth century.His great contribution lay not so much in the actual concepts of humanitarianism but. in the practical stress which he laid upon the necessity for organization and settled international principles.

Ideas of humanitarianism in armed conflict have, contrary to popular perceptions, an ancient history which reflects the basic tension between the innate savagery of combat and the humanitarian inclinations of general human relations. In the Old Testament there can be found two. contrasting accounts of the treatment of prisoners taken in armed conflict which neatly illustrate this dichotomy. In the Book of Numbers there is an account of the Israelite victory over the Midianites, which includes the following:

> They warred against Midian...and slew every male...and took captive the women...and their little ones....And Moses was angry with the officers of the army [saying]...to them, 'Have you let all the women live? Behold these caused the people of Israel... to act treacherously against the Lord...Now therefore, kill every i male among the little ones and...every woman who has known ! man...but all the young women who have not...keep alive for yourselves. [11]

This stark savagery, committed, supposedly, in the name of God, may be contrasted with the treatment of the captured Syrian army described in the second Book of Kings,

> ...the King of Israel...said to Eli'sha, 'My Father shall I slay them?' He answered, 'You shall not slay them. Would you slay those whom you have taken captive with your sword and bow? Set bread and water before them, that they may eat and drink and go to their master.[12]

For present purposes, however, the relevant conceptual framework is developed from the fusion of Judaeo-Christian and Hellenistic traditions in the period from the late Roman Empire to the high Middle Ages.

The process of fusion commenced with the Edict of Milan in 313 AD by which Constantine the Great declared Christianity the official religion of the Roman Empire. It reached a mature stage with the systematizing work of St Thomas Aquinas in the thirteenth century, long after the Roman Empire in the west had disappeared. In this development two figures were of especial importance, St Augustine of Hippo (354-430) and St Thomas Aquinas (1225-1274). These theorists were closely associated with what Jean Pictet pejoratively terms the 'well known and malignant'[13] doctrine of the *bellum justum* or 'just war'. It can hardly be denied that the doctrine was politically abused, not least through the practice of obtaining papal sanctions for resort to armed force which, if not exactly for sale, certainly became closely allied to the temporal political interests of the Holy See. There is here a somewhat uncomfortable analogy to be drawn with certain aspects of the developing modem United Nations jurisprudence upon 'Wars of National Liberation'.[14] However Pictet's stricture is unfair so far as those who formulated the 'just war' doctrine were cpncemed. Far from being a convenient 'war mongers' charter' the idea of *bellum justum* was intended as an exception to a general principle that warfare by Christian sovereigns was 'unjust' and contrary to religion, much as now the article 51 provision for self-defence in the UN Charter is intended as an exception to article 2(4).

St Augustine stated that war in itself is an evil but one to which a just ruler might none the less be driven by the necessity to remedy gross breaches of the, divinely appointed, 'natural' comity amongst states which proved not to be amenable to other forms of resolution. In such a case the calamities of the ensuing conflict would be the consequence not of the 'just' resort to armed force but of the original injustice which engendered it.[15] A similar view was stated in more recent times by General Sherman in relation to the burning of Atlanta during the American Civil War.[16] St Augustine carefully added, however, that even an originally 'just' resort to armed force may become 'unjust' if pursued to a vindictive excess beyond what is necessary to remedy the original wrong.[17] There is a clear parallel here with modern ideas of proportionality.

From this base there developed the elaborate medieval scholastic concept of a 'just war'. In the early thirteenth century Laurentius Hispanus set out the criteria for 'just warfare' under the headings of persona, persons properly entitled to resort to force, res, the objectives of conflict, *causa*, causes of conflict, animus, spirit ie not one of vindictiveness, and *auctoritas*, the limitations to sovereign rulers of authority to make war.[18] Upon the latter question there was some debate as to whether *auctoritas* under the doctrine of the *Two Powers* (ie the division of Spiritual and Temporal supremacy) approved by Pope Gelasius I (492-496) was limited to the Pope and the Holy Roman Emperor, but the general opinion was that such authority was vested in all sovereign rulers subject to the papal 'licensing' mentioned above. The mature scholastic view was well stated by St Thomas Aquinas, who set out three criteria for a 'just war', being (i) authorization by a legitimate ruler in defence of the interests of the state, (ii) a just cause, having the same meaning as that advanced by St Augustine, and (iii) limitation of action to the satisfaction of the original cause without pursuit to excess. Aquinas also emphasized to a much greater extent than St Augustine the importance of *intention* in a wrongdoing state in the generation of a *causus belli*, not least because therein lay the clue to the possibility or otherwise of a peaceful resolution of the dispute in question. Like St Augustine, however, he considered that a resort to armed force in relations between states could only be 'legitimate' if arising from a 'just cause' which proved incapable of satisfaction by any other means and also that such 'legitimacy' was limited to the 'necessary' cure of the original wrong.[19]

These ideas would in modern terms clearly be classified under the heading *jus ad bellum* rather than *jus in bello* and they carry no necessary implication for the actual conduct of hostilities once they have commenced. It is true that St Augustine claimed a moderating in effect for Christian doctrine even upon 'fierce barbarians',[20] but this perhaps belonged more to the world of pious aspiration than to that of objective description. Unfortunately in practice 'just war' doctrines had a lamentable, if unintended, tendency to imply that the opposing side in a 'just war' were not merely opponents but 'sinners' undeserving of humanitarian consideration, a profoundly unChristian but still very prevalent attitude. None the less, the practice of medieval warfare was informed in theory by certain rules and standards of a moderating nature. These tended however to have more in common with the rules of an elaborate 'game' than with systematic humanitarian provision. The emphasis was more upon 'chivalry' amongst the nobility than upon concern for the condition of the common soldiery and still less to do with concern for' civilian' peasants who had the misfortune to get in the way.[21] In general the degree of humanitarianism in medieval warfare was not great, the nadir being perhaps reached with the atrocious sack of Constantinople, then the capital of the East Roman -or Byzantine -Empire, in 1204 during the Fourth Crusade. It is worth pointing out in this context that there were of course also humanitarian instincts of a genuine form to be found in early warfare and that these were by no means necessarily a 'Christian' phenomenon. The behaviour of the Caliph Abu Bakar and Sal-ud-din (Saladin) was notable in this respect in the Islamic world. There is also evidence of rules moderating some of the grosser excesses of warfare in both ancient Chinese and ancient Hindu legal and political texts.

The doctrine of the 'just war' in its original form waned with the medieval European order upon the assumptions of which it so largely depended. The rise of the renaissance nation state and the sundering of western denominational uniformity during the Reformation shattered the system of the scholastic theorists and from the carnage of the Thirty Years War there arose the early modern order of international legal relations symbolized by the 1648 Peace of

Westphalia.[22] In this new era, characterized by the systematizing work of Grotius, the formal emphasis in the *jus ad bellum* moved from the 'justice' of a claimed *causus belli* to the definition of a state of 'war' and the formal consequences flowing from it. The result of this was. the eighteenth and nineteenth-century view of warfare as a pursuit of policy objectives by other means even if, for what would now be called 'public relations' purposes, strenuous efforts continued to be made upon a political level to represent the opposing side as being 'in the wrong'.

Curiously, this relatively amoral approach to the idea of armed conflict produced a climate of opinion which, at least in the eighteenth century I proved somewhat more conducive to a certain level of humanitarianism than had been the era of 'just war' thinking. There were a number of reasons for this. For one thing the feudal.levies and in-disciplined mercenary forces of earlier times were in the seventeenth and eighteenth centuries replaced by disciplined armies under such military figures as Louis XIV, the Duke of Marlborough, Frederick II and others of the same type. In such an era of 'professional' warfare regulatory norms are *exhypothesi* easier to devise and apply, especially when the opponent is seen simply as such and not as innately 'evil' or an enemy of God. There were a number of instances in the eighteenth century of opposing commanders entering into special local agreements upon such matters as the collection and care of wounded and even the protection of civilians, some of which clearly prefigured later 'Geneva' provisions. Pictet cites an interesting statement made by King Louis XV before the battle of Fontenoy in 1747 to the effect that enemy wounded should be treated' exactly like our own men, because when they are wounded they are no longer our enemies'.[23] The ultimate death rate amongst wounded in the field hospitals after Fontenoy was approximately 9V2 per cent and this compares very well with the Napoleonic Wars, the Crimea and, certainly, Solferino. On the other side of the coin it should also be said that if the attitude of the eighteenth-century 'Enlightenment' to armed conflict was conducive to a relative degree of humanitarianism in the treatment of battlefield injured, it also rendered the occurrence of armed conflict relatively more likely. The rather sporadic humanitarianism of the eighteenth century did not give rise to settled and uniform principles, even thought Pictet does claim that there may have been a developing customary humanitarian law at the time.[24] However that may have been, there was a serious regression from the developing humanitarian standards of the eighteenth century in the first half of the nineteenth century. This may be variously explained. One problem was the increasing scale of warfare in the Napoleonic era and afterwards which simply overwhelmed the existing organization of military medical services and the capacity for adequate accommodation of prisoners. Another was the strong ideological content of the French Revolutionary Wars which, as with earlier 'religious' and later 'ideological' and 'religious' conflicts, much reduced mutual tolerances. Certainly the armed conflicts of the period were characterized by an appalling mixture of callousness, incompetence and simple inadequacy in the aftermath of hostilities which placed battles such as Austerlitz, Borodino, Inkerman and, of course, Solferino in shocking contrast with such battles as Fontenoy.

It was thus to an era in which standards had markedly deteriorated that Henri Dunant addressed his proposals, but also to one which has for some time been awakening to the fact. Efforts had been in progress for a while to effect some improvement in army medical services as such and the work of Florence Nightingale at the base hospital at Scutari during the Crimean War was notable. This was paralleled on the Russian side by the work of Dr Pirogev and the nursing sisters organized by the Grand Duchess Helena Pavlovna and in the medical aspects of the post-Crimean reforms of the Russian army organisation under A.D. Miliutin.

The fate of prisoners of war was also becoming a focus of concern in the mid-nineteenth century, with the notably humane provisions of the Instructions for the Government of the Armies of the United States in the Field, known for its author as the *Lieber Code*, which was promulgated in 1863 during the American Civil War. The great contribution of Dunant in the development of this humanitarian consciousness was not so much conceptual as institutional and organizational.

Following the publication of Dunant's booklet upon the experience of Solferino, the President of the Geneva Public Welfare Society, Gustave Moynier, called a meeting to consider his proposals and a committee of five, all Swiss, consisting of Dunant, Moynier, General Dufour, Dr Appia and Dr Maunoir was set up to study the practical possibilities for action. This committee 'was the precursor of the International Committee of the Red Cross, a title formally adopted in the year 1880. Following its recommendations sixteen nations accepted an invitation to an international conference at Geneva which, in October 1863, agreed upon the foundation of the Red Cross organization, bringing to fruition the first of Dunant's proposals. The second began to take concrete form on 22 August 1864 when representatives of interested states at an international conference for the neutralization of military medical services in the field, again held at Geneva, concluded the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This was the ancestor of the current, 1949, Geneva Conventions and in strict terms August 1864 might, properly be taken as the starting point for modern international humanitarian law rather than the date of Solferino.

The formal chronology of international humanitarian law

The first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the field of 1864 was relatively limited in scope, being focused upon the immediate issues arising from the aftermath of Solferino. It did however establish some of the fundamental principles which continue to underlie international humanitarian norms. The neutrality and impartiality of humanitarian aid to the sick and injured and also the protection of those charged with the provision of such aid was established. Indeed in the latter respect the 1864 Convention went further than current practice in prohibiting the detention of military medical personnel rather than merely prescribing non-interference with the performance of their medical duties. The 1864 Convention also established the red cross as an international protective symbol,[25] later to be followed by the red crescent, the red lion and sun (effectively obsolete since the Iranian Revolution) and, *de facto* but not *de jure*, the red star of David.

Most of the major powers became party to the Convention within five years, the last, the United States, waiting until 1882. The 1864 Convention was a momentous step forward but it proved by no means perfect in practice. One reason for this lay outside the Convention itself in differences in the levels of dissemination and understanding of its principles as between the various powers. During the Franco-Prussian war of 1870-71 the Prussians and their allies generally understood and applied the Convention well, whereas the French for the most part did not. This led' the Prussian, or after 1871 the Imperial German, General Staff to demand a better organized system and other powers, including France, rapidly came to concur. There were also problems with the substance of the Convention itself which tended to be strong on principle but weak on organizational detail. Geoffrey Best argues that these difficulties represented a perennial tension between military necessity and humanitarian endeavour.[26]

This is no doubt true, but it was then, and remains now, vitally important that humanitarian provision in armed conflict should be a practically operable prescription for relief and not an idealistic but unworkable aspiration. Thus, for example, a need was felt for official organization and recognition of humanitarian relief rather than for general protection of all who claimed to be acting under 'humanitarian' auspices -many of whom in the Franco-Prussian war were decidedly not doing so.. A full-scale revision of the 1864 convention was undertaken in 1906 to 1907 and it was applied in that form during the 1914-1918 War. Despite propaganda claims on both sides, the 1907 Geneva Convention was fairly well observed during the First World War, the major difficulties arising over supply of information and powers of inspection rather than actual treatment.

The general history of humanitarian provision from 1864 has been one of steady expansion of categories of persons protected. The rather.limited provision originally made for sick and injured on land left open the obviously similar issue of sick and injured in naval warfare. Draft proposals were made for the extension of 'Geneva' provision to war at sea in 1868, largely in the light of experience during the Austro-Hungarian naval victory over the Italians at Lissa in 1868: nothing, however, came of this. The 1868 proposals finally saw the light of day in 1899, following the debacles of the 1898 spanish-American War,' in the Third Hague Convention of that year. Also in 1899 the Regulations Concerning the Laws and Customs of War on Land were adopted and annexed to the Fourth Hague Convention of that year. These Hague provisions, as revised in 1907, together with the 1909 London Declaration on the Rules of Naval Warfare, were applied in the First World War. Naval warfare in the First World War raised a number of controversial issues, especially in the context of 'unrestricted submarine warfare'. The sinking of the Cunard liner Lusitania in 1915 by the U20 and the question of her cargo manifest remains at present an issue of debate,[27] as also does the sinking in the Aegean in 1916 of the hospital ship *Britannic*, the third sister of the White Star liners *Olympic* and *Titanic*. In the case of the Britannic it is now thought that the ship struck a mine,[28] which raises the continuing problem of the use of' automatic' weapons.

In the Second World War some similar problems arose, with the additional problem of accepted markings for hospital ships when seen from the air. The humanitarian provisions for naval warfare were revised in the light of the 1939-1945 experience in 1949 and are now contained in the second Geneva Convention of that year.

The provisions for prisoners of war in the 1907 Hague Rules worked reasonably well in 1914-1918, although some gaps were discovered in the provisions and a revision was undertaken in 1929 at the same time as that of the Convention upon sick and injured on land. The 1929 Geneva Conventions applied through the Second World War and amply demonstrated their value as between states parties to them in contrast with the treatment meted out as between states not parties to them in most cases.

There remained the question of civilian protection during armed conflict. The idea was not a new one, indeed it had some *ad hoc* eighteenth century precedents as noted above, but in the 1920s and 1930s it met with extraordinary resistance. On an official level a specious and rather hypocritical argument was advanced that to expand the laws of armed conflict in the new era of the League of Nations would be wrong in principle, but the real objection was clearly an unwillingness to admit any further restraint upon freedom of military action. Ultimately an international conference was called in 1940 to consider the issue on the basis of proposals from the 1934 International Red Cross Conference in Tokyo. Unfortunately this conference was aborted by the outbreak of the Second World War and formal provision for the protection of civilians was not made until the conclusion of the fourth Geneva Convention of 1949, which is currently in force.

The 1949 revision of 'Geneva' provision which produced the four current conventions was undertaken in the light of the experience of the Second World War.The pattern of observance and non-observance of 'Geneva' requirements between 1939 and 1945 reflected the value of some existing provisions but also shocking derogations and appalling new dimensions of abuse. The horrifying issues of genocide are largely within the general sphere of human rights *per se*, but even within the narrower sphere of international humanitarian law the horrors of medical experimentation upon prisoners and the very clear need for some protection of civilians rendered the need for revision of 'Geneva' law very urgent. The present Geneva Conventions dealing with (i) sick and injured on land, (ii) sick and injured at sea, (iii) prisoners of war and (iv) civilians are now believed to have reached a reasonably satisfactory state so far as 'textbook' conventional warfare is concerned, except in the case of civilian protection under 1949 Geneva Convention IV, which remains very limited. The question of civilian protection remains problematic and new issues have arisen since 1949 with changing patterns of armed conflict, particularly the postwar significance of' guerrilla warfare', which does not easily fit into the pattern of 1949 prescription. An attempt has been made to deal with some of these problems through Additional Protocols I and II to the 1949 Geneva Conventions concluded in 1977. Of these, Additional Protocol I in particular has proved highly controversial in its attempts to take account of' guerrilla warfare' and neither Protocol has yet (1988) been ratified by either the United States or the United Kingdom, although the governments of both have indicated their willingness in practice to observe many of their provisions.

In parallel with the chronology of international humanitarian law there must also be considered the related but distinct sequence of 'Hague' provisions, quite apart from those which in. fact fall into the 'Geneva' category.Attempts to restrict weapons types and usage also have a long history: one may for example consider the attempt of the Lateran Council in 1139 to ban the use of crossbows which, it need hardly be added, was largely unsuccessful. In more recent times the mid-nineteenth century was for 'Hague' Law *strictu sensu,* as for 'Geneva' law, a watershed. In 1868 the Declaration of St Petersburg outlawed certain calibres of fragmenting bullet and in doing so made the basic humanitarian declaration of principle referred to above, highlighting at this early stage the essential artificiality of the formal division between 'Hague' and 'Geneva' law. Further significant steps were taken with the Hague Conventions of 1899 and 1907, the former resulting from a diplomatic initiative from the Imperial Russian Government in the form of a circular which, in its references to the perils of arms races, makes rather depressing reading nearly 90 years on.[29]

Again, the First World War, the first modern technological war, raised new problems and new horrors which were reflected in the attempted 1923 Hague Draft Rules for Aerial Warfare and the 1929 Geneva Convention upon Gaseous, Poisonous and Asphyxiating Weapons, the latter being actually observed in the Second World War, with the exception just before of the Italian campaign in Ethiopia.

Since the Second World War the primary public emphasis has been upon the issue of nuclear weapons, sometimes to the rather unwise exclusion of the general issue of weapons proliferation. Some local agreements, such as the South American Treaty of Tlatilolco, have been reached upon this issue but more general agreements have proved elusive.[30] In another example of convergence between 'Hague' and 'Geneva' law, 1977 Additional Protocol I includes in its expanded regime for civilian protection provisions which have clear implications for certain types and usages of weaponry which might be considered 'indiscriminate' in nature. Protocol I was in fact intended to have contained much more specific 'Hague' provisions but the lengthy debates upon other contentious matters precluded their inclusion. These later emerged in the 1981 United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which, inter alia, bans certain fragmentation weapons reliant upon materials which are undetectable to X-rays when lodged in the body -returning in a more modern guise to the principal concern of the 1868 Declaration of St Petersburg. These problems continue, the most recent being the instances of gas and chemical attacks in the catastrophic Gulf War between Iran and Iraq. The close relationship between 'Hague' and 'Geneva' law should in the light of the above be obvious, as should the necessity for discussion of the one in the context of the other.

International humanitarian law and the changing laws of war

Although the post-1945 settlement of the four 1949 Geneva Conventions represents the current primary statement of international humanitarian law, the law, naturally, continues to develop in the light of changing circumstances, as the perceived need for the 1977 Additional Protocols demonstrated. It is perhaps therefore proper for an introductory chapter to conclude with a forward view of future potential and difficulties.

It has been remarked above that the development of modern international humanitarian law in the 1860s did not entail any significant changes in the *jus ad bellum*, which remained essentially in an early modern 'Westphalia' condition. Subsequently, however, considerable changes have come about with significant implications for the modern development of the *jus in bello.*

The *jus ad bellum* which was the legacy of the 1648 Peace of Westphalia underwent great changes as a result of the First World War arid the subsequent Peace Settlement, which may thus be regarded as the period of transition into the modern era. The 1914-18 War was the first experience of technological 'total war' and this, coupled with the rather specious mantle of 'just warfare' in which it was retrospectively clothed, contributed much to the ill-judged vindictiveness of the Treaty of Brest-Litovsk which Germany dictated to post-revolutionary Russia and the Treaty of Versailles which the allies finally dictated to Germany and Austria-Hungary.3) In the short term this had disastrous results in so far as it did much to fuel the grievances which Adolf Hitler was able to exploit in his creation of the Nazi regime whose aggression brought about the Second World War. This aspect of the post-1918 settlement was aptly symbolized by article 2[31] of the Treaty of Versailles, the 'war guilt' clause, which laid the whole blame for the war upon Germany and her allies in a clear context of resurgent 'just war' thinking. At the same time a significant shift occurred in the *jus ad bellum* which began to treat resort to armed force as a 'wrong' in itself, even in most cases of 'just cause'. The Covenant of the League of Nations, set up in the light of the war, required that international disputes be submitted to adjudication or arbitration and that even if no peaceful solution was thereby produced there should be no resort to armed force for a further three months,[32] in effect a 'cooling off' period. It was also provided that resort to armed force in circumstances amounting to a breach of the Covenant would be an act of war' against the League collectively, inviting collective sanctions[33] and 'aggression' as such was specifically outlawed.[34]

The 1928 Pact of Paris, also known as the Kellogg-Briand Pact, which was ratified by sixty-three states, went further in actually requiring the renunciation of war as an 'instrument of national policy' and, being now accepted as *jus cogens*[35] -however dubiously interpreted, may be taken as marking the definitive end of the 'Westphalia' period of the *jus ad bellum*.

In fact the Covenant of the League of Nations and the Pact of Paris together represented a return, in a much changed and secular form, to the same mainstream of thought upon armed conflict which had earlier informed the work of the scholastic thinkers. This was well expressed by Geoffrey Best in the comment that:

> The European law of war...had its origins in a religious-based philosophy which exalted peace as the highest and most 'natural' condition of humankind and reluctantly accepted war as no more than an occasional, unwelcome and discreditable incident of mortal frail ty and wickedness. [36]

To this view the modern *jus ad bellum* has eventually returned. The post-1945 settlement and the Charter of the United Nations have taken the process further. The League Covenant failed in the face of determined aggression by the various totalitarian regimes of the period coupled with the naive irresolution of the interwar leaders of the democratic powers. Returning to the basic problem in 1945 the UN Charter adopts a more robust approach and seeks simply to outlaw aggressive use of force by providing that' All members shall refrain in their international relations from the threat or use of force against the territorial integrity of any state....[37] This is then made subject to an exception of necessity contained in article 51 which provides for the retention of an 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. Originally intended as a provision for emergency action pending United Nations intervention, article 51 has, partly as a result of the political inability of the United Nations to form a 'permanent' peacekeeping force, [38] assumed a much greater importance than was at first intended and this has tended to emphasize the ambiguities of the nature of the 'inherent' right of 'self-defence'.

The development of a complex canon of interpretation centred upon article 51 has important implications for the development of the *jus in bello* and of international humanitarian law in particular. It is here that the uncomfortable parallel with medieval European experience of 'just war' thinking arises. In a system which bans armed force subject to the inevitable exigencies of defensive necessity invocations of the exception necessarily involve some form of plea of 'justification'. It does not follow that 'just war' doctrines with their undesirable connotations must result from this, but the possibility is clearly there, and a few somewhat disconcerting straws may be seen in the wind. There is however a more urgent problem to be addressed which also centres upon the 'just war' implications of the article 51 exception to article 2(4).

One of the minimum requirements for an effective international humanitarian law in the realities of armed conflict is clarity in the status of the various 'situations of application and of parties to conflicts. For reasons which are in themselves understandable an undesirable level of ambiguity is beginning to appear in this area. This is a consequence of certain changes in the typical patterns of warfare since the Second World War and in particular the prominence of postcolonial liberation struggles and 'guerrilla' conflicts. There is in *jus in bello* theory a clear distinction between international armed conflicts, to which a full 'Geneva' regime applies, and internal armed conflicts to which a more basic system of minimum guarantees is applicable. However, through an interpretation of the 'inherent right of self-defence' under article 51, some apparently 'internal' armed conflicts have been 'internationalized'.[39] It was established at the time of the Algerian War of Independence (1954-61) that some internal conflicts might be treated as acts of, self-defence' against historical colonial aggression and indeed the FLN, the independence movement, established a claim to be treated as a provisional government. Having as such declared its willingness to abide by the Geneva Conventions it then obliged the French government also to do so during the conflict. This was essentially a fruit of the doctrine of self-determination which took firm shape after 1918. The idea is now endorsed, somewhat ambiguously, by the United Nations General Assembly through the so-called Consensus Definition on Aggression adopted in 1974. These developments have now impinged upon international humanitarian law through the revision of circumstances of application by 1977 Additional Protocol I. The Protocol makes provision for the 'internationalization' of some prima-facie internal armed conflicts and also extends the categories of those entitled to be treated as members of 'armed forces' and to 'prisoner of war' status in the event of capture. The argument which arises here is not founded upon any antipathy to the clearly desirable expansion of the scope of humanitarian norms, but upon the dangerous ambiguities in both the determination of applicable legal regime and the status of individuals concerned in certain conflicts. Ambiguity is always a fault in legal norms and in international humanitarian law it is potentially a source of disaster.

Assuming that satisfactory definitions of 'international' and 'non-international' armed conflicts may in time be worked out, there yet remains a serious long term potential impact of 'just war' thinking upon the development of humanitarian norms. In past eras there have arisen variously expressed ideas that 'unjustified' parties to armed conflicts are not deserving of humanitarian consideration.,.. Modern ideas of' defensive' national liberation could carry some of : the same implication. Fortunately Protocol I does not go very far ; down this road and indeed states expressly that 'forces' entitled to its protection must themselves be willing and able to observe 'Geneva' norms.[40] The only actual hint of such thinking to be found in Protocol I lies in article 47 which excludes 'mercenaries' from 'Geneva' protection. A compendious definition of 'mercenary' status is given which in fact excludes all but those clear 'soldiers of fortune' who are simply contract killers in themselves deserving no sympathy. A considerable difficulty, however, arises from the form of article 47. 'Mercenaries' are by the terms of the article excluded from 'Geneva' protection ab initio and there is here an alarming leeway for 'mistakes' to be made. It would be preferable to treat 'mercenaries' like pirates or aerial hijackers as *hostes humani generis*, especially since there is no legal bar upon the trial and punishment by due process of recognized prisoners of war for offences committed prior to capture[41] -whatever the practical difficulties of such action might be. It is to be hoped that article 47 has not set a precedent for what might be wider and much more sinister developments. In fact certain minimum guarantees would apply even to mercenaries but these are not necessarily extensive in effect.

A more immediately serious development has been a resurgence of evidence of 'just war' thinking in a religious and ideological context. The Gulf War between Iran and Iraq was claimed as an Islamic *jihad* [42] and at one point newspaper accounts suggested that Iran might denounce the Geneva Conventions as inapplicable to an 'Islamic' war. This was not, however, done and indeed Iran later formally objected to claimed Iraqi contraventions of 'Geneva' provisions during the conflict. None the less the resurgence of ideological and religious 'just war' thinking undoubtedly presents the most significant problem for the immediate future in the continuing evolution of neutral and impartial norms of international humanitarian law.

Conclusions

The broad jurisprudential and historical perspectives addressed in this introductory chapter are a necessary preliminary to the discussion of the present substance of international humanitarian law. Much as lawyers would like to believe it so, law is not an autonomous phenomonon existing independently of the social, political and moral context in which it is generated and current rules and standards can in most cases only be fully understood when viewed in their proper general setting. If this is so in general terms it is all the more so in case of a subject like international humanitarian law which lies at the extremities of legality. Although cultural and technological forms vary widely according to both time and place, the fundamental issues raised by attempts to impose moderating norms upon the conduct of armed conflicts do not much change in their essential nature. In understanding the difficulties of the present time and in anticipating the continuing development of inter-national humanitarian law in the context of modern armed conflicts the past development of the *jus in bello* and its relationship with the *jus ad bellum* is vitally important. It can be said that past patterns of development afford useful evidence of both a cautionary and an exemplary nature, and this may be of especial use in an area of law in which the permissable latitude for ill-judged experimentation is even less than is commonly the case. Experience from 1864 onwards demonstrates that clearly stated provision is far more valuable than worthy aspiration and if this is forgotten the very difficult role of international humanitarian law could become impossible to perform, at a great price in human suffering. If this is remembered then one may hope that progress may continue to be made and the calamities of armed conflict, while it occurs, may be reduced so far as may be possible.

NOTES

1 'International humanitarian law' as a term of art is of relatively recent date, having gained recognition largely through the work of lean Pictet.
2 Karl von Clausewitz, *Vom Kriege* (On War). (1832).
3 Leo Tolstoy, War and Peace (Moscow 1865-69), Book XIV, Ch. I
4 Aristotle, *The Politics*, 1253a 7 using the term *Politikon Zoon* meaning, in a general sense, 'political animal'
5 See the ICRC report by Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands* (1982, 2 ed. ICRC 1985).
6 Geza Herczeg, *Development of International Humanitarian Law*, trans. Sandas Simon and Lajos Czante (Akademiai Kiado, Budapest, 1984).
7 Igor P. Blishchenko, *Humanitarian Norms and Human Rights, in War, The Humanitarian Challenge* (ed. Bedjaoui, Zed Books, 1986) p. 142
8 See R.M. Dworkin, *Taking Rights Seriously* (Duckworth 1972), passim.
9 See Karl N. Llewellyn, *The Normative, the Legal and the Law Jobs, the Problem of Juristic Method* (1939-40)', 49 Yale Law Journal, 1355
10 *A Memory of Solferino*, published in translation by the British Red Cross Society.
11 Numbers, 31:7, 10, 15-19
12 2 Kings, 6:21,22.
13 J. Pictet, Development and Principles of International Humanitarian Law (Martinus Nijhoff, 1985), p. 13.
14 See Chapter 2.
15 St Augustine, *De Civitate Dei*, Books V:22 and XIX
16 See Michael Walzer, *Just and Unjust Wars.*
17 17 St Augustine, *Contra Faustem.*

[18] See Philippe Contamine, *War in the Middle Ages*, transl. M. Jones, (Basil Blackwell, 1984) p. 282
[19] 19 St Thomas Aquinas, *Summa Theologica*, 2a2ae, 40
[20] St Augustine, *De Civitate Dei*
[21] For an excellent general account of warfare in the Middle Ages see Contamine, op. cit. There was however occasional unease over particular incidents such as the slaughter of prisoners by Henry Vat Agincourt in 1415 which was felt, at least in retrospect, to demand some special justification (see Walzer, op.cit., pp. 17-19).
[22] 22 For an interesting account of the legal effects of the Peace of Westphalia see Leo Gross, 'The Peace of Westphalia, 1648-1948', (1948) 42 (AJIL) *American Journal of International Law*, p. 20.
[23] J. Pictet, op. cit., p. 22.
[24] *Ibid*, pp. 21-22
[25] Exactly how the reversed arms of Switzerland came to be adopted as the protective symbol and whether it really was, as is always claimed, unconnected with Christian symbolism is unclear. Pictet (op. cit., p. 30) suggests that the actual device of the equal armed red cross on white was proposed by the Prussian delegate, Leoffler, at the 1863 Geneva Conference. Apparently this was settled during a recess and the details of the discussion are lost. The notion of the symbol as a reversal of the Swiss arms appears to have been an ex post facto rationalization which appeared in the 1906 revision of the Convention.
[26] 26 See G. Best, *Humanity in Warfare* (Methuen, University Paperbacks, 1983) pp. 47-49
[27] See for example C. Simpson, *The Lusitania Affair* (BCA 1972).
[28] A view seemingly confirmed by a dive upon the wreck made by Commander Jacques Cousteau and his team in 1977: see *The Titanic Commutator*, Winter 1977 and Winter 1978.
[29] Diplomatic note circulated in 1898 by Count Muraviev in the name of Tsar Nicholas II
[30] For a discussion of this issue see Chapter 7.
[31] Peace with the Ottoman Empire was concluded subsequently on much more lenient terms, largely through the diplomatic skills of Kemal Ataturk.
[32] Covenant of the League of Nations, art. 12.
[33] Ibid., art. 16(1)
[34] Ibid., art. 10.
[35] It was so treated by the International Military Tribunal at Nuremberg
[36] G. Best, op. cit.; p. 129.
[37] UN Charter, art, 2(4).
[38] Provision was made for such a force under the United Nations Charter but mutual distrust between the member states frustrated the plan with the resulting present reliance upon the rather unsatisfactory expedient of ad hoc forces raised from time to time in emergency under UN aegis.
[39] See Chapter 2.
[40] 1977 P I, art. 1(2).
[41] 41 See M.A. Meyer, 'Liability of Prisoners of War for Offences Committed prior to Capture: The Astiz Affair', (1983) (ICLQ) International and Comparative Law Quarterly, p. 948
[42] This term is often mistakenly translated as 'Holy War' whereas, although the implication clearly exists, the reference is more to a war of 'duty'.

ASSISTANCE TO THE CIVILIAN, POPULATION: THE DEVELOPMENT AND PRESENT STATE OF INTERNATIONAL HUMANITARIAN LAW.[*]

Denise Plattner[**]

Contents

INTRODUCTION

Bearing in mind the plethora of rules applicable in time of war, jurists define international law rather elaborately as follows:

> "International humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict".[1]

International humanitarian law is contained mainly in six international treaties-the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The Geneva Conventions are binding on nearly all States (169 States are party to them). Protocol I regulates international armed conflicts, with 110 States party, and Protocol II regulates non-international armed conflicts, with 100 States party.[2]

International humanitarian law is often styled "jus in bello " as opposed to "jus ad bellum " or "jus contra bellum II (the rules of international law that prohibit the use of armed force). There is thus a sharp divide between *"jus contra bellu"* and *" jus in bello"*; this distinction preserves humanitarian law from any influence by "*jus contra bellum*". In other words,

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[**] Legal Adviser, ICRC.

[1] *Commentary on the Additional Protocols of 8June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoy, Christophe Swinarski and Bruno Zimmermann, eds., Internatinal Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, p. xxvii.

[2] As on 15 May 1992. The latest figures are 187, 146 and 138 respectively (as on 31 August 1996)

humanitarian law has to be observed by all belligerents-both by the aggressor and by the victim of aggression; similarly, humanitarian law is applicable whatever the cause or the grounds for the war.

Contrary to widespread belief, the prohibition of war has tended to encourage the development of humanitarian law-the four Geneva Conventions. Were adopted just four years after the Charter of the United Nations. It seems therefore that progress in humanitarian law and progress in "*jus contra bellum*" go together.

With regard to international humanitarian law, the International Committee of the Red Cross (ICRC), as distinct from the National Red Cross and Red Crescent Societies and their Federation, fulfils various functions. States request the ICRC to prepare developments in international humanitarian law; this it did as soon as it was founded by proposing that they adopt the original Geneva Convention, that of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field.[3] The ICRC also has to ensure, in particular by visiting prisoners of war and monitoring conditions in occupied territory,[4] that humanitarian rules are being observed. Lastly, it has a right of initiative whereby, with the agreement of the authorities concerned, it takes any action it considers necessary to further the interests of victims of armed conflict and the aims of humanitarian law.[5]

PROTECTION OF THE CIVILIAN POPULATION UNTIL 1949

Humanitarian law recognizes that the civilian population of a belligerent State is entitled to receive assistance. Accordingly it takes into account the almost inevitable effects of war on standards of living, and the fact that the consequent suffering serves no purpose because the sufferers take 'no direct part in hostilities. It may be as well to remind the reader at this point that humanitarian law is founded on the principle codified in 1868 by the Declaration of St. Petersburg, which states that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[6] As will be seen later, both in theory and in practice assistance to the civilian population is only one of the ways of protecting it from the rigours of armed conflict. This means that development of the rules governing assistance is linked to development of the humanitarian law protecting the civilian population.

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[3] See on this subject Article S, paragraph 2(g), of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross in Geneva in October 1986. The text of these Statutes was published in the International Review of the Red Cross. No.256, Jan.-Feb., 1987, p. 25 ff.

[4] See Article 126 of the Third Geneva Convention and Article 143 of the Fourth Geneva Convention, which relate to supervision of the provisions made for the protection of prisoners of war and of civilian persons respectively. Article paragraph 2(c), of the Statutes of the International Red Cross and Red Crescent Movement defines in general terms the various duties involved in supervising the application of international humanitarian law, when il states that '.the role of the International Committee is to work for the faithful application of international humanitarian law applicable in armed conflicts" (see Note 3 above).

[5] The ICRC's right of initiative is recognized, as regards international armed conflicts, in Article 9 of the First, Second and Third Geneva Conventions, and in the second sentence of Article 81, paragraph 1, of Additional Protocol I; and as regards non-international armed conflicts in the second paragraph of Article 3 common 10 the four Geneva conventions. Article 5, paragraph 2(d), of the Statutes of the International Red Cross and Red Crescent Movement sanctions it as regards internal armed conflicts and strife (see Note 3 above).

[6] Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime. This text appears in *The Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*, Dietrich Schindler and Jiri Toman, eds., Martinus Nijhoff Publishers. Dordrecht, Henry Dunant Institute Geneva, 1988, pp. 285-288.

Before 1949 there were no humanitarian rules relating specifically to the civilian population as such. The Regulations annexed to The Hague Convention IV envisaged only some of the acts that could be committed by an army of occupation.[7] Unlike the provisions made as early as 1899 for prisoners of war, the annexed Regulations of 1907 did not mention aid to civilians. Curiously enough, the governments of that time were so sure that it was impossible to intern nationals of a belligerent State who were resident in the territory of the adverse party that they refused to include any such prohibition in those Regulations.[8]

The First World War gave the lie to such optimistic beliefs, and in 1921 the ICRC began to put forward preliminary drafts to deal with the humanitarian problems thrown up by the war. The most important of these proposals forbade deportations and the execution of hostages in occupied territory, and guaranteed civilians the right to correspond and receive relief.[9]

In 1929, however, governments would not commit themselves except in regard to members of the armed forces, and only the Convention on Prisoners of War was adopted. In 1934 the lnternational Conference of the Red Cross in Tokyo adopted another draft for submission to a Diplomatic Conference planned for 1940,[10] but it came too late, for the Second World War broke out in 1939. Had that draft been adopted, the legal and political context of the fate of the Jews and the civilian populations of Nazi-occupied territory would have been different, but there is no certainty that it could have prevented the barbarous cruelties that took place.

By the end of the Second World War nobody questioned the need for an instrument designed especially for the protection of civilians in time of war. The protection of wounded, sick and shipwrecked members of armed forces, and of prisoners of war, had been much improved by the adoption of the First, Second and Third Geneva Conventions of 1949, and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War was a great advance on previous regulations. No wonder, then, that the first roles pertaining to assistance for civilians appeared in 1949.

It has however been said that already at the time of the First World War the ICRC had seen the need for new rules to protect civilians, for its Commentary on the Fourth Geneva Convention remarks that the first signs of total war exposing civilians and soldiers to the same dangers and extending beyond the front line, had already appeared in the 1914-1918 war.[11]

REGULATIONS GOVERNING ASSISTANCE IN TIME OF BLOCKADE AND ENEMY OCCUPATION

The principal provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons stem from the ICRC's work to bring assistance to distressed civilian populations from 1939 onwards and all the attendant difficulties.

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[7] See Articles 42-56 of the Regulations annexed to The Hague Convention IV, 1899 and 1907 versions, Schindler/Toman, op. cit., pp. 75-93.

[8] Commentary on the Fourth Geneva Convention relative to the protection of civilian persons in time of war, published under the general editorship of Jean s. Pictet, ICRC, Geneva, 1958, p. 3.

[9] *Id*., p. 4

[10] *Id*., p. 4

[11] *Id*., p. 3.

Three economic factors dominated the Second World War. The first was destruction on an unprecedented scale by mechanized units, artillery and aircraft, devastating roral areas and towns alike and destroying equipment, livestock at means of transport. The second was the requisitioning of labour, raw material and food by the Axis powers. The third was the blockade whereby each coalition of warring powers attempted to isolate its adversary and cut it off from its sources of supply; neutral trade too was subject to quotas and kept under supervision. These three factors together caused production to plummet allover Europe. The situation was particularly disastrous in countries like Belgium and Greece, which even in peacetime had to import much of their food. Deficiency diseases appeared and soon led to a sharp rise in mortality.[12]

Relying solely on its own Statutes -the Fourth Geneva Convention did not yet exist -the ICRC carried out relief operations under the aegis of the Joint Relief Commission set up by itself and the League of Red Cross Societies (now the International Federation of Red Cross and Red Crescent Societies) for assistance to civilian populations.[13] It also acted independently, as, for example, in Greece. The following figures will give some idea of the scale of these operations:

- the Joint Commission bought, transported and distributed 165,000 tonnes of relief supplies, worth 314 million Swiss francs, to 16 European countries including Belgium, France, the Netherlands, Yugoslavia and Poland, and later, in the immediate post-war period, to defeated Germany, Austria, Italy and Hungary; [14]

- to supply Greece, Swedish vessels made 94 voyages between Canada (or Argentina) and Greece, delivering 17,000 tonnes of food monthly from September 1942 to March 1944, and even more thereafter.[15]

These relief operations necessarily required the agreement of the principal belligerents. The ICRC had therefore to conduct two separate sets of negotiations, respectively with Germany and with the Allies. On 11 January 1941, the Ministry of Foreign Affairs of the German Reich agreed in principle to relief operations for the benefit of the civilian population of the occupied territories, on the following conditions: consignments were to be collective, not individual; the German Red Cross was to organize and supervise the distribution of gifts, but they were to be distributed by local charitable organizations; representatives of donors might be allowed to visit occupied territories to see that aid was being properly distributed; and for its part Germany undertook that no part of the relief would be diverted to German troops or civilian administrators.[16]

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[12] See Francois Bugnion, *Le Comite international de la Croix-Rouge et la protection des victimes de la guerre*, p. 263.

[13] *Report of the International Committee of the Red Cross on its activities during the Second World (September I, 1939-June 30, 1947).* Vol. Ill, Relief activities, Geneva, 1948, p. 363 ff. 14.

[14] *Report of the Joint Relief Commission ollhe International Red Cross*, 1941-1946, Geneva, ICRC League of Red Cross Societies, 1948, p. 441. See also Bugnion, *op. cit*., p. 267.

[15] *Ravitaillement de la Grece pendant l' occupation 1941-1944 et pendant les premiers cinq mois après la liberation. Rapport final de la Commission de Gestion pour les secours en Grece sous les auspices du Comite international de la Croix-Rouge,* ICRC, Athens, 1949, PP. 17-19 AND PP. 168-171. See also bugnion, *op. cit.,* p. 271

[16] *Report of the Joint Relief Commission, op. cit.,* pp. 436-437. See also Bugnion, *op. cit.,*p. 265

The British government's reaction of 14 September 1940 was much less favourable to relief operations. It argued that it was the duty of the Occupying Power to provide food 'for occupied territory; that relief consignments might enable the Occupying Power to increase its requisitions of locally-produced foodstuffs; that occupied territory would not have been at risk from famine had the invader not seized all available reserves; and lastly that humanitarian considerations should not stand in the way of a blockade, because only rigorous blockade would bring hostilities to a speedy close. It did, however, make an exception for consignments of medicines for the sole use of the sick and wounded[17] and in practice a few other exceptions to the blockade were negotiated, for example for the operation in Greece.

The British government's last argument would, at any rate nowadays, be considered absolutely incompatible with international humanitarian law; it is in fact an attempt to justify total war, which is exactly what international humanitarian law seeks to prevent.

The contrast between the British and German attitudes is particularly striking, It may be asked whether the German response was made for humanitarian reasons, and whether it would have been the same had the British government's reply welcomed relief operations. Perhaps, as the British feared, Germany agreed to relief operations in the hope of using them for its own benefit. No answer can be given to all these questions, but the precedent is instructive for several reasons.

First, the German reply shows that a relief operation should not be regarded as contrary to a belligerent's military interests. Secondly, a totalitarian. State waging a war of aggression welcomed the ICRC's proposal, whereas a country regarded as one of the oldest democracies in the world refused it-for reasons one of which would now be regarded as unacceptable, to say the least. Admittedly Britain was a victim of aggression, and this tends to show that a country that goes to war for a just cause, or for a cause it believes to be just, will not necessarily behave in a humanitarian way. It would be wrong to jump to conclusions; but neither is it safe to assume that a country that respects human rights will always or in all circumstances respect humanitarian law.

The ICRC's negotiations on this matter led in particular to two highly important provisions of the Fourth Geneva Convention. Its Article 23, drafted with blockade in view, makes mandatory the free passage of certain goods neccessary to the survival of the civilian population. The British government's reservations have not been overlooked, for an exception may be made to the obligation to allow the free passage of relief supplies where they would confer a definite advantage on the enemy. Now that the economic weapon has become particularly effective because States are dependent on each other in commercial relations, this provision is still of the greatest importance.

The duty of the Occupying Power to ensure that the population of occupied .territory is properly supplied and the limits to its powers of requisition are set out in Article 55 of the Fourth Geneva Convention. If in spite of this the population of an occupied territory is still inadequately supplied, the Occupying Power is obliged by Article 59 of the Fourth Geneva Convention to agree to relief schemes, in which supervision of distribution of supplies is compulsory.

[17] *Report of the Joint Relief Commission, op. cit.,* p. 13 See also bugnion, *op. cit.,* p. 265

REGULATIONS GOVERNING ASSISTANCE TO THE CIVILIAN POPULATION ON NATIONAL TERRITORY

The obligation imposed by Articles 23 and 55 ff. of the Fourth Geneva Convention apply only to the relations existing, by reason of war, between one State and another, as in Article 23, or between a State and a population other than its own, as in the provisions regulating relief operations on occupied territory.
The obligations of a State concerning assistance to its own nationals were elaborated at the Diplomatic Conference of 1974-1977, which adopted the two Protocols additional to the Geneva Conventions. Their appearance in the form of written rules coincided with a new approach to the humanitarian problems raised by armed conflicts.

The Diplomatic Conference of 1949 confined itself to alleviating the plight of, a civilian population "in enemy hands" and therefore liable to suffer from arbitrary action by a foreign belligerent State. With few exceptions,[18] the Fourth Geneva Convention does not deal with protection of the population from hostilities, that is, from military operations, although in the Second World War the civilian population probably suffered about as much from indiscriminate bombing as from abuses of power by the occupying forces, As stated above, during the 1914-1918 war the ICRC realized the danger to, victims of armed conflict represented by more powerful weapons and military aircraft. In all probability the situation immediately after the Second World War hardly lent itself to consideration of such matters, for the Conduct of military operations in that war could reflect unfavourably on the Allies as well as on Nazi Germany.

In 1956, only ten years after the Second World War, the ICRC drew up a set of, “Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in time of War”, which was not adopted by governments.[19] Another attempt was made in 1965 at the 20th International Conference of the Red Cross, and this time a resolution was adopted.[20] Some years later, in 1968, the United Nations, which had hitherto been reluctant to consider matters relating to armed conflict, adopted a resolution of similar content.[21] Some of the many resolutions on respect for the civilian population in time of war which subsequently emanated from the United Nations [22] or International Conferences of the Red Cross covered the conduct of military operations as well as the provision of supplies.[23]

When the Diplomatic Conference opened in 1974, the time was therefore ripe for the drafting of new rules to cover both subjects-the protection of civilian persons from hostilities, and assistance to the civilian population.

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[18] See especially Part II of the Fourth Geneva Convention
[19] *Commentary on the Additional Protocols, op. cit.*, p. 587, paragraphs 1831 and 1832.
[20] Resolution XXVIII, on the protection of civilian populations against the dangers of indiscriminate warfare, published in the International Review of the Red Cross, No 56, November 1965, pp. 588-590. This resolution also appears in Schindler/Toman, op.cit., pp. 259-260.
[21] Resolution 2444 (XXIII) of 19 December 1968, on respect for human rights in armed conflicts. See Schindler/Toman, op.cit., pp. 263-264.
[22] See the list of these resolutions in the *Commentary on the Additional Protocols*, op,cit, p. 588, Note 16.
[23] See especially Resolution 2675 (XXV) resuming the basic principles for the protection of civilian populations in armed conflicts, of 9 December 1970, in Scbindler/Toman, op.cit., pp. 167-268. See also, on relief actions, Resolution XXVI adopted by the 211& International Conference of the Red Cross, Istanbul, 1969, in International Review of the Red Crau, No.104, November 1969, pp. 632-633.

For several reasons these two subjects were, in a way, connected with each other. To begin with, it was probably realized throughout the blockade enforced in the Second World War, and in subsequent Third World armed conflicts, that the belligerents were using starvation as a weapon. It should be emphasized that both instruments adopted in 1977 strictly forbid attempts to strave the civilian population as a means of weakening the enemy.[24] The precedent of Biafra, although the armed conflict there was a non-international one, was certainly one of the underlying reasons for these provisions, and for those relating to assistance.[25] The strategy of total war, which abolishes the fundamental distinction between combatants and civilians, made it urgently necessary to devise rules to counter it and uphold the principle established in 1868 by the Declaration of St. Petersburg. The civilian population thus became an entity to be protected from any belligerent whatsoever, even if that belligerent was its own State.

Paragraph 5, Article 54 of Additional Protocol I is revealing in that respect. It reads:

> "In recognition of the vital requirements of any Party to the conflict in the defence of its <u>national territory</u> against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity" (our underlining).

While these rules may have been made necessary by events, States were probably more prepared to accept them because of the international development of human rights.

Article 70 of Additional Protocol I, then, obliges a State at war to agree to a relief action which is humanitarian and impartial and conducted without any adverse distinction, and if the civilian population in its territory is , insufficiently supplied with goods essential to its survival. The agreement of the State is needed, but this is in no way a matter of discretion and such agreement must be given as soon as the necessary conditions are fulfilled.[26] Nevertheless, the wording of Article 70 is less imperative then that of Article 59 of the Fourth Geneva Convention. The fact that the population is "national" and not foreign partly explains this difference.

THE REGUlATION OF A SSISTANCE IN A NON-INTER NATIONAL ARMED CONFLICT

So far, this paper has confined itself to examining the humanitarian rules applicable in an international armed conflict, that is, a conflict which except for wars of national liberation is between States. However, humanitarian law also contains rules applicable to non-international armed conflicts, which have been by far the more frequent since the end of decolonization.

In 1949, States adopted for the first time a provision applicable to internal armed conflicts. It appears in each of the four Geneva Conventions, and is known as "Article 3 common to the Geneva Conventions". Just as the Second World War led to codification and developments of

[24] Articles 54 of Prolocol I and 14 of Protocol II.
[25] On the relief activities undertaken during this cont1ict, see Thierry Hentsch, *Face au blocus: La Croix-Rouge internationale dans le Nigiria en guerre* (1967-1970), Graduate Institute of International Studies, Geneva, 1973.
[26] See the *Commentary on the Additional Protocols*, op. cit., p. 819, paragraph 2805.

international humanitarian law in respect of international armed conflicts, the Spanish Civil War prompted the codification and development of international humanitarian law in respect of non-international armed conflicts.[27]

Although Article 3 common to the Geneva Conventions fell far short of the ICRC drafts[28] its adoption was a great step forward for international humanitarian law, for it removes the *a priori* internal situation of a non-international armed conflict from the exclusive jurisdiction of the State concerned. Its injunctions are admittedly so basic that they seem very modest, but if they were duly respected in all internal armed conflicts, the plight of victims would be greatly alleviated.

Humanitarian law confers no legal status under international law on the parties to an internal armed conflict,[29] but it does impose the same obligations on each of them. These are basically the duty of treating humanely persons who take no direct part in hostilities or who have ceased to fight, the prohibition of summary executions, and the granting of the judicial guarantees necessary to a fair trial. Lastly, by authorizing the ICRC to offer its services to the parties to the conflict, common Article 3 gives a basis, laid down by the Conventions, for ICRC intervention in non-international armed conflicts.

Considerable though it is, the protection afforded by Article 3 common to the Conventions cannot be compared with that given by the imposing body of rules applicable to international armed conflicts. Understandably, therefore, the work done from the 1970s onwards for the adoption of new humanitarian rules intended these to cover internal as well as international armed conflicts. Accordingly, the ICRC submitted a draft Protocol on non-international armed conflicts[30] to the Diplomatic Conference of 1974-1977.

Discussion of this text was arduous and protracted.[31] New States particularly wanted wars of national liberation to be upgraded to the status of international arDled conflicts. This was done by Article I, paragraph 4 of Additional Protocol I. The draft concerning internal armed conflicts met with difficulties similar to those encountered in 1949. The rules finally adopted, which form Additional Protocol II, nevertheless develop the principles contained in Article 3 common to the Geneva Conventions. Above all, they cover various aspects of protection of the civilian population from hostilities.[32]

The ICRC draft contained an Article on actions for the relief of the civilian population whose wording was identical with that proposed for international conflicts.[33] It was not accepted,

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[27] On the legal aspects of the Spanish Civil War see Antonio Cassese, "'The Spanish Civil War and Customary Law", in *Current problems of International Law, Antonio Cassese,* ed., Milan, 1975, pp. 281.317.

[28] See *the Commentary on the Fourth Geneva Convention, op.cit*., p. 34

[29] This was the decision of the States that adopted Article 3 common to the Geneva Conventions, since the last paragraph of that article reads: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

[30] See the *Draft Additional Protocols to the Geneva Conventions of 12 August 1949, Commentary*, ICRC, Geneva., October 1973, p. 130.

[31] On the historical background 10 Protocol II, see the Commentary on the Additional Protocols, paragraph 4360 ff.,pp. 1325ff. For an analytical account of the discussions, see *The Law of Non-international Armed Conflict*, Protocol II to the 1949 Geneva Conventions, Howard S. Levie, ed., Martinus Nijhoff Publishers, Dordrecht, 1987. For the history of the law see Rosemary Abi-Saab, *Droit humanitaire et conflits internes. Origines et evolution de la reglementation internationale,* Henry Dunant Institute, Geneva, 1986

[32] See Protocol II, Part IV

[33] See *Draft Additional Protocols,* op.cit., p. 165.

but Additional Protocol II does contain a provision on international relief actions, Article 18, paragraph 2, which reads:

> "If the civilian population is suffering undue hardships owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned".

This Article was strongly criticized because it makes a relief action subject to the agreement of the legal government. Article 18 should be considered as the equivalent of Article 70, Protocol I, in that, when correctly interpreted, it means that such agreement must be given if the necessary conditions are fulfilled,[34] and for as long as the relief operation is taking place on the territory controlled by the legal government. However, Protocol II does give the legal government an advantage over the rebel party by requiring the agreement of the legal government but not that of the rebel party, even if the relief operation takes place on territory under the latter's control. The legal government may then be tempted to refuse, since the relief will go to the "enemy", who is, to make matters worse, an "internal" enemy. Any such refusal by the legal government would however be a violation of humanitarian law under Article .18, paragraph 2, of Protocol II, as correctly interpreted; and where its refusal, is intended to starve the civilian population as a means of weakening the enemy, that violation is aggravated because it infringes Article 14 of Protocol II.

Professor Bothe has investigated the legal basis of all the relief actions possible in such circumstances, and concludes that a unilateral ICRC relief action would be in accordance with international law.[35] The ICRC, however, does its best to win the confidence of all parties to the conflict and to persuade them to observe the basic tenets of humanitarian law. Although the relevant text entitles it only to offer its services, the principle that the ICRC may operate in a country ravaged lIy internal armed conflict is now generally accepted.

THE PRESENT POSITION AS TO HUMANITARIAN ASSISTANCE

A party to an armed conflict cannot, however, be obliged to agree unconditionally to a relief action. The Fourth Geneva Convention provides that permission for the free passage of relief consignments may be conditional on their distribution being supervised by the bodies responsible for monitoring the application of humanitarian law, namely the Protecting Power or the ICRC. Relief consignments for the inhabitants of occupied territory must be distributed "with the co-operation and under the supervision of the Protecting Power". The duty may be by agreement between the Occupying Power and the Protecting Power, "to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body" (Art. 61).

The 1977 texts reaffirmed the obligations laid down in 1949, but in more general wording. Thus, both Article 70 of Protocol I and Article 18 of Protocol II specify that relief actions must be conducted in a humanitarian and impartial fashion and without any adverse

[34] See *Commentary on the Additional Protocols*, p. 1479, paragraph 4885.
[35] Michael Bothe, "Relief Actions: The Position of the Recipient State", in *Assisting the Victims of Armed Conflicts and other Disasters,* Fritz Kalshoven, ed., Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 92-97, p. 96.

distinction.[36] Article 170, paragraph I, of Protocol I states that offers of such relief that conform to these conditions shall not be regarded as interference in the armed conflict or as unfriendly acts. These provisos were repeated in Article 5 of the resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States which was adopted on 13 September 1989 by the Institute of International Law.[37] The Internatioaal Court of Justice had already accepted them in its judgment in the case of military and paramilitary activities in and against Nicaragua.[38]

It is of course extremely difficult to say what are the conditions required by each of these principles separately. Can, for example, discriminatory behaviour be in accordance with. the principle of humanity? Such criteria serve primarily to preserve the neutral character of aid to victims of armed conflicts, so that such aid shall not pervert the aims of humanitarian law. Know-how and experience are probably essential, and are important in winning the confidence of the belligerents. The agreement of all the parties concerned is also an indication (not necessarily the only one or an absolute one) that assistance does not interfere with military operations in the armed conflict. Article 71 of Protocol I, which deals with personnel participating in relief actions, clearly shows the inevitably precarious balance struck between humanitarian considerations and military necessity. For example, "Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted, " but such personnel "shall take account of the security requirements of the Party in whose territory they are carrying out their duties."

CONCLUSION

The aims of international humanitarian law are too important to admit of ineffective regulations. Its history shows that it was not developed from pre-established concepts, but by full and accurate consideration of the realities of war, on which its texts throw a tragic light for anyone who takes the trouble to look. Obligations must be imposed on leaders of. an armed struggle, whether they are national authorities or combatants in an internal armed struggle. The balance between rights and obligations must be acceptable to the whole of the international community, for unless the constraints of humanitarian law are accepted by all it will not be applied. Only where humanitarian duties apply equally to both sides will law take its due place in war.

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[36] See also "The Right to Humanitarian Assistance" in *Implementation of international humanitarian law, protection of the civilian population and persons hors de combat*, International Committee of the Red Cross, Doc. C. 174, 2/1, Geneva, 1991, pp. 6-12; and Resolution 12 adopted by the Council of Delegates of the International Red Cross and Red Crescent Movement, at its meeting of 28-30 November 1991 in Budapest, on humanitarian assistance in situations of armed conflict, in International Review of the Red Cross, No.286, Jan.-Feb. 1992, pp" 56-57.

[37] Yearbook of *the Institute of International Law*, vol. 63- II, p.34S. Article 5 reads:
"An offer by a State, a group of States, an international organization or an impartial humanitarian body such as 1he International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other manner of intimidation; assistance shall be granted and distributed without discrimination.
States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance. "

[38] ICJ, *Reports of Judgements, Advisory Opinions and Orders*, The Hague, 1986, p. 125, paragraph 243.

PROTECTION AND ASSISTANCE FOR REFUGEES IN ARMED CONFLICTS AND INTERNAL DISTURBANCES :

Reflections on the Mandates of the International Red Cross and Red Crescent Movement and the Office of the United Nations High Commissioner for Refugees

by Vitit Muntarbhorn

Contents

This article examines the mandate to protect and assist refugees in armed conflicts and internal disturbances.[1] It is a modest attempt to clarify the web of overlapping roles and mandates of humanitarian bodies, in particular the International Red Cross and Red Crescent Movement ("the Movement") and the Office of the United Nations High Commissioner for Refugees (UNHCR). It purports to re-assess the evolution of their mandate and its extension. On the one hand, there is a need to define concrete principles, based on past and present practice, for humanitarian action. On the other, there must be sufficient leeway for flexibility and pragmatism in situations for which there is no comprehensive prognosis. The article concludes by demonstrating the interdependence and complementarity of humanitarian organizations which have to proffer protection and assistance where no other body can act.

Protection and assistance

At the international level, there has so far been no formal attempt to define the terms "protection" and "assistance" in relation to refugees in armed conflicts and internal disturbances. To a layman, the notions of protection and assistance are self-evident. A description of what lies behind the term "protection" may be found in this observation from the Movement :

> "In Red Cross action, "to protect" implies preserving victims of conflicts who are in the hands of an adverse authority from the dangers, sufferings and abuses of power to which they may be exposed, defending them and giving them support."[2]

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[1] For general reading, see G. J. L. Coles, *"The Protection of Refugees in Armed Conflict and Internal Disturbance,* paper submitted to the *VIIIth Round Table on Current Problems of International Humanitarian Law and Red Cross Symposium*, San Remo, September 1982; J. Pictet, *Humanitarian Law and Protection of War Victims*, Geneva: Henry Dunant Institute, 1975, especially pp. 115-38; J.-L. Blondel, " Assistance to protected persons", International Review of the Red Cross, No.260, September-October 1987, pp. 451-468.

[2] "The ICRC, the League and the Report on the Re-Appraisal of the Role of the Red Cross", *International Review of the Red Cross*, from March-April1978 to January-February 1979, pp. 1-72; 19. Footnote 1 on the

At the very least, protection should comprise physical protection-protection from dangers to the person. In a wider perspective, protection may also be legal, in the sense that a person's welfare derives from a range of legal principles which have to be safeguarded whether by judicial, administrative or other institutional means.

The term "assistance" is, arguably, even more a matter of common knowledge and needs no explanation. At the very least, it should comprise material relief in the form of food and medical aid.

One is tempted to leave the terms "protection" and "assistance" undefined because doing so gives them an inherent flexibility with a "catch-all" quality which can be adapted to new situations. As will be seen, the two notions are closely interlinked whether one talks of the Movement or the UNHCR: Indeed, in various instances where these bodies were initially requested to provide merely material assistance, they eventually became involved in the wider dimension of protection, both physical and legal.[3]

The Movement and refugees: the issue of mandate

The Movement's mandate in relation to refugees can be found in various instruments ranging from the Statutes of the Movement[4] to the 1949 Geneva Conventions[5] and their 1977 Protocols[6]. These instruments have been supplemented by various International Conferences of the Red Cross, the latest of which was convened in Geneva in 1986.[7]

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same page develops the observation as follows: "In a broader context, one might say that 'protection' also includes developing, publicising and ensuring application and respect for international humanitarian law."

[3] An example of how the role of the UNHCR may be extended from providing material assistance to cover legal protection can be seen in the case of Thailand. In various agreements between Thailand and the UNHCR in 1975, the term "assistance" was used in relation to the role of the UNHCR in Thailand. There was no express mention of the protection aspects in these agreements. However, from the outset, there has been a section of the UNHCR dealing with protection issues in Thailand. Protection furnished by the UNHCR has encompassed a wide range of matters, including protection against forced return, protection against physical abuses in camps, provision of legal aid where displaced persons are prosecuted for illegal entry , and arrest of those who perpetrate crimes against asylum-seekers, e.g. , pirates.

[4] See *Compendium of Basic Reference Texts on the International Red Cross, the International Committee of the Red Cross and the League of Red Cross Societies*, Geneva : ICRC, 1982, as amended by "Statutes and Rules of Procedure of the International Red Cross and Red Crescent Movement", *International Review of the Red Cross*, No.256, January-February 1987, pp. 1-39.

[5] There are four 1949 Geneva Conventions :

- - - - - the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
- - - - - the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
- - - - - the Third Geneva Convention Relative to the Treatment of Prisoners of War .
- - - - - the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

For text, see The Geneva Conventions of 1949, August 12, reprint, Geneva: ICRC,1983.

[6] For text, see Protocols additional to the Geneva Conventions of 12 August 1949, Geneva: ICRC, 1977.

[7] See further *Twenty-fifth International Conference of the Red Cross*, Geneva, 1986: "Resolutions of the International Conference and of the Council of Delegates", *International Review of the Red Cross*, No.255, November-December 1986, pp. 1-58.

The *locus classicus* is Article 5 of the Statutes of the International Red Cross and Red Crescent Movement. Article 5 (1) (d) effectively establishes the role of the International Committee of the Red Cross (ICRC) in protecting and assisting military and civilian victims of international and other armed conflicts or internal strife or of their direct results. Article 5 (3) adds to this by defining the ICRC's "right of initiative", which has so often served as a fall-back clause for its action, as follows:

> "The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and may consider any question requiring examination by such an institution."[8]

As a corollary, the ICRC is designated as responsible for action to provide protection and assistance in case of war, civil war or internal strife, to military and civilian victims of such conflicts,[9] and also for the operation of Tracing Agencies as defined in the 1949 Geneva Conventions.[10] As a complement to this, Article 6 (4) of the Statutes of the Movement gives the League of Red Cross and Red Crescent Societies (LRCS) the task of, *inter alia*, bringing relief to all disaster victims and helping victims of armed conflicts in cooperation with the ICRC.[11] It is for the latter reason that the ICRC and the LRCS came to an agreement in 1969[12] (interpreted in 1974 for the purpose of specifying certain of their respective functions in relief operations) whereby the primary responsibility for protection and assistance was conferred upon the ICRC in cases of international war, civil war, blockade or military occupation, while the IRCS would act in natural disasters, in co-ordination with the ICRC and National Societies. The role of the Movement was further reinforced by various resolutions on natural and man-made disasters adopted by the 1986 International Conference of the Red Cross.[13]

However, experience has shown that the Movement cannot operate without co-ordinating with other organizations. In particular, it has co-operated with the UNHCR. The importance of this practice was reiterated in Resolution XXI of the Twenty-fourth International Conference of the Red Cross (1981), entitled "International Red Cross Aid to Refugees",[14] whereby the Movement pledged support for the UNHCR in favour of refugees and displaced persons.

The Statement of Policy attached to the resolution is of special significance and reaffirms the role of the International Red Cross (as the Movement, used to be known) as the residual institution where no other organizations are available, competent or willing to provide protection and assistance. Indeed, the Movement has declared its readiness to project and assist not only "refugees" but also "displaced persons and returnees", including internally displaced persons –a domain, *stricto iure*, outside the original mandate of the UNHCR.[15]

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[8] "Statutes and Rules of Procedure of the International Red Cross and Red Crescent Movement", *op. cit.*, note 4, p. 11.

[9] *Ibid*

[10] *Ibid.*

[11] *Ibid.,* p. 13

[12] *Compendium of Basic Reference Texts on the International Red Cross, the International Committee of the Red Cross and the League of Red Cross Societies, op. cit.,* note 4, pp. 29-36.

[13] *Op. cit.*, note 8, pp. 31-3; 39-40. (Resolutions XXI and XXVI).

[14] See further "Twenty-fourth International Conference of the Red Cross, Manila, 1981: Resolutions and Decisions of the International Conference and the Council of Delegates", *International Review of the Red Cross,* No.225, November-December 1981, pp. 318-357.

[15] *Ibid*. Point 1 of the Statement of Policy provides that:

Moreover, it has undertaken to take due account of the comparable needs of the local population in the areas where refugees, displaced persons and returnees are accommodated.[16] This, therefore, covers an immense range of persons eligible for relief. Nevertheless, Red Cross relief programmes are of an emergency character, consonant with the need to provide rapid physical protection and material assistance.[17] In consequence, in theory at least, they are of shorter duration than those of other relief organizations, such as the UNHCR.

Beyond the Statutes and the Resolution mentioned above, the role of the ICRC in relation to refugees is also set down in the Fourth 1949 Geneva Convention[18] and its Additional Protocol I of 1977.[19] Of interest are the provisions on refugees (Articles 44 and 70 of the Fourth Geneva Convention and Article 73 of Protocol I) .Article 44 deals with the situation of refugees in the hands of a party to a conflict who are not nationals of the latter party and confers a measure of protection (such as through a Protecting Power) by stipulating that :

> "In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government. "

Article 70 (2) tackles the dilemma of refugees who subsequently fall into the hands of their State(s) of origin when the latter becomes the Occupying Power by stating that :

> "Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace."

Article 73 of Protocol I goes even further by elevating the status of these refugees to that of "protected persons". This implies that they enjoy the protection provided by more than 120 articles of Parts I and III of the Fourth Geneva Convention, although the article itself is limited to those considered as refugees before the outbreak of the hostilities.

It can be seen that the term "refugees" has been left undefined by the body of international humanitarian law discussed above. Hence, the Movement's mandate is nothing akin to that of the UNHCR, which originally covered only those who had left their home country for "well-founded fear of persecution", as will be seen later. It is evident that the term "refugees", as concerns the Movement, should be broad and unrestricted in meaning. This is not the case for

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"The Red Cross should at all times be ready to assist and to protect refugees, displaced persons and returnees, when such victims are considered as protected persons under the Fourth Geneva Convention of 1949, or when they are considered as refugees under article 73 of the 1977 Protocol I additional to the Geneva Conventions of 1949, or in conformity with the Statutes of the International Red Cross, especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of internally displaced persons."

[16] *Ibid.* Point 3 provides that:

"Assistance from the Red Cross should at all times take due account of the comparable needs of the local population in the areas in which refugees, displaced persons and returnees are accommodated."

[17] *Ibid.* Point 3 states further that:

"Since Red Cross relief programmes are essentially of an emergency character, they should be phased out as soon as other organizations are in a position to provide the aid required."

[18] *Op. cit*., note 5.

[19] *Op. cit*., note 6.

the UNHCR. For this reason J. Pictet stated in his Commentary on the Fourth Geneva Convention that the definitions of the term "refugees" inherent in the Constitution of the International Refugee Organization (now defunct), the Statute of the UNHCR and the Convention relating to the Status of Refugees of 1951" are valid for the particular purposes of law for which they were formulated, but are too technical and too limited in scope to meet the requirements of the Geneva Conventions."[20]

Turning more specifically to the position of the International Red Cross within the framework of the 1949 Geneva Conventions and their Protocols, the role of the ICRC is provided for in Article 10 of the Fourth Geneva Convention and is reinforced by Article 81 of Protocol I, as follows :

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the ICRC or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief." (Article 10 of the Fourth Geneva Convention),[21] and

> "1. The parties to the conflict shall grant to the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the ICRC may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned." (Article 81 of Protocol I).

Article 81 of Protocol I also bolsters the actions of the LRCS and National Societies by stipulating that:

> "2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red' Cross as formulated by the International Conference of the Red Cross.
>
> 3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross."

In relation to armed conflicts not of an international character, it is worth noting Article 3 common to the four Geneva Conventions, which enlarges the field of humanitarian services as follows :

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

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[20] J. Pictet, *Commentary on the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: ICRC, 1958, p. 264.

[21] The English version of the text uses the term "may". The French version uses the term "entreprendra". The latter seems more forceful than the former, but the difference may be unintentional.

As a corollary, the role of the Movement is extended to displaced persons where there is no movement across borders.[22]

However, it is apparent that the Movement has preferred to base its actions on the 'right of initiative' under its own Statutes and subject to the consent of the parties concerned rather than having recourse to the Geneva Conventions and Protocol I as the basis for providing protection and assistance to refugees.[23] This is because the 'right of initiative' is of broader scope than the mandate stipulated by the Conventions. In effect, the fomler enables the Movement to provide protection and assistance in cases of internal tension and disturbances which are beyond the confines of traditional international humanitarian law as embodied in the Geneva Conventions and their Protocols.

On analysis, what emerges from the above discussion is the ambivalent nature of the ICRC mandate for refugees: it is comprehensive in scope, but ephemeral in principle. Its comprehensiveness lies in the fact that it can provide relief to a wider range of persons than the UNHCR can, due to the intrinsically flexible quality of the term "refugees", left undefined, and pursuant to its “right of initiative”. On the other hand, in providing what it sees as emergency relief, it purports to give short-term protection-cum-assistance in keeping with the immediacy of the situation, unlike the UNHCR, whose goals are legally conditioned by long-term criteria.

The UNHCR and refugees: The issue of mandate

The Statute of the UNHCR (1950)[24] is the basis for its mandate to provide protection and assistance to refugees. This mandate is stated categorically in relation to "refugees", who are defined in Article 6 (B) of the Statute as :

> " Any (other) person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race; religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."

By this very wording, the UNHCR is given the mandate to deal with those who have left their country of origin for "well-founded fear of persecution". In essence, to fulfil the definition concerned, there must be a transfrontier movement: a person still in his home country is, *stricto jure*, not as yet a refugee. Moreover, he must have left with or without physical detriment, which has to be analysed subjectively and objectively. This definition of the term "refugee" is indeed a far cry from the opaque nature of the same term when used in the context of the Red Cross.

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[22] See further V. Muntarbhorn, "Transfrontier and Internal Displacement of People", *Amity International: Bulletin of the International Law Association of Thailand, Vol. 2* (1) (1986), pp. 28-48.

[23] G. Abi Saab, "The Implementation of Humanitarian Law" in A. Cassesse (ed.), The *New Humanitarian Law of Armed Conflict*, Napoli: Editoriale Scientifica, pp. 331-46.

[24] *Collection of International Instruments concerning Refugees*, Geneva: UNHCR, 1979, pp. 3-9.

The definition above was, to a great extent, adopted by the Convention relating to the Status of Refugees of 1951[25] in Article 1 (A) (2), as follows: a refugee is someone who

> "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The difference between the definitions under the UNHCR Statute and the 1951 Refugee Convention lies in the time limit inherent in the latter, i.e. , refugees as defined by the 1951 Convention being the product of events occurring before 1 January 1951, and in the optional geographical limitation clause attached to the definition by Article 1 (B) (1), whereby a contracting State may limit its responsibility to the European context and exclude other regions. The limitations mentioned were, however, subsequently discarded in the Protocol relating to the Status of Refugees of 1967.[26]

An important point to bear in mind is that the UNHCR has the mandate to deal with refugee situations in all countries if requested to do so, irrespective of whether they are parties to the 1951 Refugee Convention and its 1967 Protocol or not. By Articles 8 and 9 of the UNHCR Statute, guidelines are laid down for the protection and assistance of refugees, including, *inter alia* :

- promoting the conclusion and ratification of international conventions for the protection of refugeys and supervising their application ;
- promoting special agreements with governments conducive to measures improving the situation of refugees; .
- assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities ;
- promoting the admission of refugees to the territories of States ;
- providing its resources in such additional activities, including repatriation and resettlement, as the General Assembly may determine .

In the 1951 Refugee Convention, the role of the UNHCR is expressly stipulated by Article 35, reinforced by an array of long-term considerations establishing rights for refugees. Five categories of rights are given.[27] The first is that the refugee has the right to be treated in the same manner as other aliens generally, except where the Convention contains more favourable provisions. The second comprises a series of rights concerning which the contracting States are to accord to refugees within their territories the same treatment as that accorded to their own nationals, such as in matters of artistic rights and industrial property, access to courts, rationing, public relief, labour legislation and social security, fiscal charges, and conditional wage-earning employment. The third consists of a right to be treated at least as favourably as local nationals in relation to religion. The fourth relates to rights for which

[25] *Ibid*., pp. 10-39.
[26] *Ibid*., pp. 40-4.
[27] See further L. W. Holborn, *Refugees: A Problem of Our Time. The Work of the UNHCR 1951-1972* (2 Vols.), Metuchen, NJ: Scarecrow, 1975, Vol. 1; G. Jaeger, *Status of International Protection of Refugees*, HCR/120/24/80 (1980), p. 18.

the contracting States are to accord to refugees the most favourable treatment accorded to nationals of a foreign country in the same circumstances, such as the right of association and general wage-earning employment. The fifth relates to rights for which the contracting States are to accord to refugees treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances, such as rights to movable and immovable property, self-employment, to have a liberal profession, to housing, and to education other than elementary education.

Complementary to the above are certain principles established by the 1951 Refugee Convention which are of primary importance. The most obvious is the principle of non-refoulement stated in Article 33 (1), whereby "no Contracting State shall expel or return (in French "re-fouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." In addition, Article 31 stipulates that the contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization, while Article 32 directs the contracting States not to expel refugees save on grounds of national security.

Ostensibly, the UNHCR has two roles :

- it is the guardian of refugees who fall within the purview of the 1951 Refugee Convention and its related Protocol, and
- it is the guardian of refugees who do not fall within the purview of the instruments concerned.

Yet, the fact that its mandate is explicitly set down in terms of a definite concept with a distinct definition -"refugees" who have left their country of origin for "well-founded fear of persecution"- also, if one were to take a literal approach of definitional interpretation, limits that mandate. That definition was espoused in the context - eurocentric by nature- of people seeking political asylum in the wake of the Cold War. Present day circumstances are different.[28] Currently it is more often than not the victims of armed conflicts and internal disturbances who need protection and assistance, even though they do not flee because of "well-founded fear of persecution."

Perforce, the role and competence of the UNHCR have had to be extended beyond the scope of the original mandate embodied in the UNHCR Statute and the refugee instruments.[29] In 1959, the General Assembly requested the High Commissioner to use his "good offices" to aid "refugees not within the competence of the United Nations", although no indication was given of who these people were in legal terms. The use of "good offices" for this extended category continued in the 1960s, and culminated in the importation of another term in respect of UNHCR activities -"displaced persons"- in 1975.[30] Although the term 'displaced persons' had been used by the International Refugee Organization, comprising those fleeing from

[28] See further v. Muntarbhom, Shadowplay: *The Legal Status of Refugees in Eight Asian Countries*, Chapters 2-4, forthcoming.

[29] D. McNamara, "Determination of the Status of Refugees -Evolution of Definition", *Proceedings of the Symposium on the Promotion, Dissemination and Teaching of Fundamental Human Rights of Refugees*, Tokyo, December 1981, Geneva: UNHCR, 1982, p. 76-8.

[30] *Ibid*., p.77.

forced labour and Nazi persecution, the new use of this term is wider in conception. In particular, it has been applied to the situation of Indo-Chinese persons seeking refuge in other countries. It was with this category in mind that the General Assembly endorsed ECOSOC Resolution 2011 in 1976, in which assistance to displaced persons was explicitly approved, such persons being identified as 'victims of man-made disasters requiring urgent humanitarian assistance.' This extension is thus concrete recognition of the repercussions of armed conflicts and internal disturbances which have superseded the context in which the UNHCR Statute and the refugee instruments were drafted.

Certain developments at the regional level have provided additional impetus for re-assessing the definition of the term 'refugees' and related institutional competence. Most notable is the definition stated in the Organization of African Unity (OAU) Convention governing specific aspects of refugee problems in Africa, adopted in 1969.[31] It incorporates the definition given in the 1951 Refugee Convention, but extends the term "refugees" to cover "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"[32] To all intents and purposes, this definition comprises situations giving rise to man-made disasters, and is, arguably, synonymous with the term "displaced persons" used in the extended mandate mentioned above.

Support for enlarging the scope of the term "refugees" from the original definition to that of man-made disasters, as exemplified in the OAU Convention, can be gauged from reactions in other quarters. The OAU definition was approved by the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia of 1981[33] and by the Executive Committee of the UNHCR in its Conclusion 22 (XXXIII) of 1981 concerning the protection of asylum-seekers in situations of large-scale influx.[34] It was reiterated in the Conclusions of the Eighth Round Table on Current Problems of International Humanitarian Law and the Red Cross Symposium of 1982. More recently, the definition has been broadened even further to cover not only victims of man-made disasters but also victims of human rights violations. In the Cartagena Declaration of 1984,[35] some South American groups proposed the extension of the term "refugees" to cover "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order" Arguably, the extension to encompass victims of human rights violations suggests a norm *de lege ferenda* rather than a widely accepted norm.

There is another development of the UNHCR mandate which deserves attention. In spite of the traditional view, whereby it would only act in countries receiving refugees rather than in countries of origin, the UNHCR has become increasingly involved in humanitarian activities in the countries from which the refugees originally fled.

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[31] *Op. cit.,* note 24, pp. 193-200.
[32] *Ibid*., Article I (2).
[33] *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia*, San Remo: International Institute of Humanitarian Law, 1981.
[34] *Conclusions on the International Protection of Refugees*, Geneva: UNHCR, 1980.
[35] *Declaracion de Cartagena* 1984, Geneva: UNHCR, 1985..

Numerous examples can be given of how UNHCR work has been extended to those countries. In Burma, it has been involved in the rehabilitation of returnees who had previously fled into Bangladesh.[36] It has provided help to Laotian returnees from Thailand and internally displaced persons in Laos.[37] It has also been an important catalyst in the Orderly Departure Programme in Vietnam, under which Vietnamese who wish to leave Vietnam for other countries may do so in an orderly fashion.[38] Whether or not one agrees with this extended competence, it is clear that pragmatism and flexibility are part and parcel of the UNHCR approach. When requested to provide relief, if no other organization is in a position to take charge, necessity *de facto* calls for action by the UNHCR even if its competence *de jure* in such situations is not clearly stipulated. In this respect, practice indicates that the UNHCR also embodies "fall-back" attributes parallel to those of the Red Cross, albeit in a more equivocal field of competence.

Reflections

In general, it may be said that the mandates of the Movement and the UNHCR differ, at least in principle. More particularly, the ICRC enjoys a flexible mechanism within the existing framework of humanitarian law treaties and the Movement's Statutes to offer protection and assistance not only to persons who have crossed frontiers to seek refuge, but also to others where no cross-border movement is apparent. Moreover, it can provide services on its own initiative, and it works in close co-operation with the LRCS and National Societies, the latter providing a key infrastructure at the local level.

By contrast, the UNHCR's mandate is more circumscribed. Although it has been extended beyond refugees to encompass 'displaced persons' in transfrontier flows, it still does not cover, *stricto jure*, internally displaced persons, the local population affected by an in flux of refugees, and situations in countries of origin -instances where the ICRC is competent to furnish relief. Moreover, at least in relation to assistance aspects, the UNHCR does not claim an inherent right of initiative; it is in the more passive position of having to wait to be asked to act .

Nevertheless, Red Cross protection-cum-assistance is more transitory by nature, since it is conceived in terms of emergency relief, usually in the form of material assistance and immediate physical relief. On the other hand, the UNHCR not only provides material assistance but is also oriented towards a greater range of long-term protection services, as is demonstrated by the list of rights mentioned earlier in relation to the 1951 Refugee Convention.

In reality, their mandates do overlap on a number of points, especially in the case of massive transfrontier flows of persons seeking refuge as a result of armed conflicts and internal disturbances, which are very much contemporary tragedies. Both bodies are involved in furnishing material assistance, including food, welfare and medical aid. They are both involved in certain forms of legal protection, linked with or detached from physical protection. They both say that refugee camps should be in safe locations. They both visit

[36] *Report of the UNHCR, Official Records of the General Assembly, Thirty-fourth Session, Supplement No.12 (A/34/12)*, New York: UN, 1979, paras. 197-200.
[37] *UNHCR Activities financed by Voluntary Funds: Report for 1985-6 and Proposed Programmes and Budget for 1987*, UN Doc. A/AC.96/677 (1986), Part III, pp. 11-12.
[38] *Ibid*., pp. 29-31.

refugees to ascertain their welfare and protest against abuses. They both trace refugee families and are concerned with family reunification as a lasting solution to the refugee problem. They both pay special attention to the plight of unaccompanied minors. They have both made provisions for issuing travel documents to refugees. Moreover, they have both been contributing to efforts to tackle the piracy problem affecting asylum-seekers.[39]

Their complementarity is enhanced by the fact that in certain situations which concern those who have left their country of origin for well-founded fear of persecution, the UNHCR has not been called upon to furnish protection and assistance, even though, *stricto jure*, these persons fall well within its institutional competence. Such is the situation of many Kampucheans and Vietnamese who are now living on Thai soil near the Thai-Kampuchean border. Although they have sought asylum in Thailand, the UNHCR has not been requested to take charge of them for various reasons, and it was therefore at the outset left to the ICRC to provide relief.[40] De facto, therefore, their roles have become complementary, and are recognised as such by Point 10 of the International Red Cross Aid to Refugees: Statement of Policy, which states that :

> "The international institutions of the Red Cross will have regular consultations with the office of the UNHCR on matters of common interest and whenever considered useful, will coordinate their humanitarian assistance in favour of refugees and displaced persons in order to ensure complementarity between their actions. "[41]

Despite this complementarity, there is still no statement on the principles to be followed as basic standards for protection and assistance. Should there be common guidelines, explicitly stated? Can these be ascertained inductively from existing sources of law and practice ? In this author's view, there is room for humanitarian organizations to agree on certain principles for the purpose of protection and assistance. This is all the more necessary because, even if there is some disagreement over the precise meaning of such terms as "refugees", "displaced persons", etc., these victims of circumstances beyond their control still need protection and assistance, however they are classified and whatever the terminology used for describing them.

Tentatively, a set of principles for humanitarian protection and assistance may be proposed as guidelines for the operations of humanitarian organizations. They would be derived from sources of law and practice, in particular concerning the ICRC and UNHCR, notably the four Geneva Conventions of 1949, their two Protocols of 1977, the 1951 Refugee Convention and the Conclusions of the Executive Committee of the UNHCR, such as Conclusion 22 (XXX111).[42] Under the heading **"Principles for Human itarian Protection and Assistance"**, they should, at least, comprise the following:

- the principle of humane treatment, i.e. , victims of armed conflicts and internal disturbances have .a right to life and to be treated humanely;

[39] V. Muntarbhorn, "Asylum-seekers at Sea and Piracy in the Gulf of Thailand", *Revue Beige de Droit International*, Vol. 2 (1981-2), pp. 481-508, and Resolution V of the Twenty-fourth International Conference of the Red Cross, *op. cit*., note 14, p. 7.

[40] *Annual Report 1986*, Geneva: ICRC, 1987, pp. 53-7.

[41] *Op. cit*., note 14, p. 25.

[42] *Op. cit*., note 34.

- the principle of necessary assistance, i.e. , these victims should receive all necessary assistance and should be able to satisfy their basic needs, such as food, shelter, medical aid and sanitary facilities ;
- the principle of judicial protection, i.e. , these victims should have access to courts of law or other competent bodies to protect their interests ;
- the principle of family unity, i.e. , these victims should be helped to re-establish family ties and rejoin their families ;
- the principle of tracing, i.e. , all possible aid should be given to trace relatives of these persons ;
- the principle of special protection, i.e. , vulnerable groups, such as women, children (especially unaccompanied minors) , the aged and handicapped, need special measures to protect them;
- the principle of correspondence, i.e. , these victims should have the ways and means of communicating with the outside world ;
- the principle of family assistance, i.e. , these victims should be able to receive material assistance from friends and relatives ;
- the principle of personalty, i.e. , these victims should be able to own personal effects, and measures should not be taken to deprive them thereof unless there are reasons of public security;
- the principle of personal arrangements, i.e. , these victims should be able to make personal arrangements in relation to their births,deaths, marriages and testaments;
- the principle of safe location, i.e. , these victims should be cared for and lodged in areas where they are safe ;
- the principle of non-discrimination, i.e. , these victims should enjoy the rights derived from the above without any adverse distinction.

These principles are not exhaustive, but are drawn from a variety of instruments and practices where the work of the Movement and the UNHCR overlap. They are particularly important where the victims themselves are detained in camps, as is the case in many countries which have adopted a closed door policy towards asylum-seekers. Indeed, they are but a manifestation of the most basic human rights which the Movement and the UNHCR can and should espouse for the sake of humanity in the face of growing compassion fatigue.

Vitit Muntarbhorn

Vitit Muntarbhorn is Associate Professor at the Faculty of Law, Chulalongkorn University, Bangkok. He has written extensively in Thai and English on a wide range of topics, such as human rights, humanitarian law, international law and development, and refugees in Asia. At the grass roots, he runs projects to disseminate human rights to local people, especially children, in collaboration with UNESCO and UNICEF. He is currently translating the 1977 Protocols into Thai for the ICRC. His latest work is *Shadowplay: The Legal Status of Refugees in Eight Asian Countries*, to be published by the Refugee Studies Programme of Oxford University.

Displaced persons

The protection of displaced persons in non-international armed conflicts

by Denise Plattner

Contents

I. INTRODUCTION

In recent years a number of institutions, in particular non-governmental organizations, have brought their attention to bear on the plight of people displaced within national borders.[1] Prompted by their interest in the protection of human rights, and in keeping with the charitable nature of their work, they have focused the international spotlight on the situation of those who leave their homes in a context marked by political violence. The international community has thus been made aware of two things simultaneously: first, that countries affected by internal armed conflicts have a large number of displaced persons, and second, that armed clashes often result in large-scale population movements. The displacement of minority communities can even become a deliberate policy.

This sometimes neglected aspect of the suffering engendered by war has now been put on the agenda of multilateral diplomacy.[2] This gives us the opportunity -which it would be remiss of us to pass by -to review the existing law and to promote its implementation.

II. BACKGROUND

I. The sources of the rules applicable in non-international armed conflicts

As soon as the situation in a country is characterized by continued and organized armed clashes between the legal government and a group of insurgents, or between parties none of which constitute the legal government, the authorities concerned become subject to a number of obligations which are binding under international law. The general purpose of these

[1] For example, the Commission of the Churches on International Affairs and the Friends World Committee for Consultation (Quakers) submitted to the Commission on Human Rights a communication on internally displaced persons (document , E/CN.4/1991/N60 1 of 15 December 1990).

[2] Pursuant to the initiative mentioned in footnote 1 above, the 47th session of the Commission on Human Rights adopted resolution 1991/25 on internally displaced persons. At its 48th session the Commission adopted resolution 1992n3, requesting the Secretary-General to collect the views of the governments and the intergovernmental and non-governmental organizations concerned and to report to the 49th session.

obligations is to limit the violence and to protect people from any abuse of power by the belligerents.. The relevant rules are contained in the branch of international law commonly known as international humanitarian law,[3] which is comprised of one very comprehensive series of rules governing international armed conflicts, and another more summary set of provisions which is applicable in non-international armed conflicts and therefore concerns us here.

The treaty-based rules making up humanitarian law applicable in internal armed conflicts are set forth in two places: Article 3 common to the 1949 Geneva Conventions (GC I-IV Art. 3),[4] which applies in this kind of conflict, and Additional Protocol II (P II)[5], which develops and supplements Article 3.[6]

Finally, the victims of internal armed conflicts also benefit from the protection of a series of international customary rules, in particular those relating to the methods and means of combat.

2. Differences between international human rights law and international humanitarian law

International humanitarian law is a system of legal rules specially conceived for implementation in the event of prolonged and organized armed clashes, but it in no way supersedes other systems of International rules protecting the individual. Thus, in situations of armed conflict international human rights law and international humanitarian law are applied concurrently. We can nevertheless assert, for a number of reasons, that the provisions of humanitarian law are tailored more specifically to deal with the special problems that arise during armed conflict than are those of human rights law.[7] Indeed, the applicability of international human rights instruments is often suspended during armed confrontations.[8] Of course, the inalienable human rights remain applicable, but the protection they offer would

[3] The Commentary on the Additional Protocols of 8 June 1977 defines humanitarian law as follows: "the expression **international humanitarian law** applicable in armed conflicts means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression “international humanitarian law applicable in armed conflict. is often abbreviated to **international humanitarian law or humanitarian law”**. (*Commentary on the Additional Protocols of 8 June 19*77 to the Geneva Conventions, of 12 August 1949, Yves Sandoz, Christophe Swinarski. Bruno Zimmermann. eds., ICRC/Martinus Nijhoff Publishers, Geneva, 1987, p. xxvii).

[4] At 30 September 1992, 174 States were party to the four 1949 Geneva Conventions.

[5] At 30 September 1992, 106 States were party to Additional Protocol II (116 were party to Additional Protocol I).

[6] It is generally considered that the level of strife required for common Article 3 to apply is lower than that required for the application of Protocol II (*see Commentary on the Additional Protocols. op. cit.*, p. 1350, para. 4457). Moreover, the definition of armed conflict as set forth in Protocol II requires that one of the parties concerned be made up of government armed forces (Art. I, para. 1). Thus. if several factions clash without the involvement of the government armed forces, only common Article 3 is applicable (ibid., p. 1351, para. 4461).

[7] See *inter alia* Marco Sassoli. "Mise en reuvre du droit international humanitaire et du droit international des droits de l'homme: une comparaison". in *Annuaire Suisse du droit international*, Vol. XLIII, 1987, p. 51

[8] For an up-to-date list of the States having declared. extended or cancelled a state of emergency (about 70 since 1 January 1985), see Mr. Leandro Despouy's 5th annual report to the Commission on Human Rights, E/CN.4/Sub.2/1992/23, 6 July 1992.

seem to be inferior to that afforded by international humanitarian law.[9] International human rights law contains no rules on the methods and means of combat, meaning that most problems relating to the conduct of hostilities are outside its purview.[10] Humanitarian law contains obligations which are binding on all the belligerents, whereas in principle only States can be held responsible for human rights violations.[11]

Finally, the mechanisms for monitoring compliance with humanitarian rules require the appropriate organizations to have access to -protected persons on a regular basis, essentially for the purpose of preventing violations.[12] The mechanisms for monitoring respect for human rights on the other hand, are set in motion only when individuals or third States approach the UN or any other agency having jurisdiction in the matter under the human rights treaties. This point constitutes a significant difference between the two branches of law.[13]

III. CONTENT OF THE PROTECTION OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN NON-INTERNA TIONAL ARMED CONFLICTS

The rules applicable in non-international armed conflicts may be divided into three categories: those that protect the victims from the effects of hostilities; those that protect them from any abuse of power by the belligerents; and those that require certain activities to be undertaken in favour of non-combatants or persons *hors de combat.*

I. Protection from the effects of hostilities

The rules affording protection from the effects of hostilities are those that govern the means and methods of combat. As concerns non-international armed conflicts, it is worth refreshing our memory on a number of points.

Article 3 common to the Geneva Conventions contains no rules specifically governing the conduct of hostilities.[14] Consequently, when the State involved is not a party to Protocol II, the belligerents must rely essentially on the rules of customary law for the definition of their duties during military operations. The same holds true if the conflict has not yet reached the level of intensity required for the application of Protocol II.[15]

The rules in Protocol II relating to military operations (Part IV) may be few in number, but their importance should not be underestimated as Protocol II,[16] for example, bans attacks on

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[9] See *inter alia* Mohamed El Kouhene. *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme*, Martinus Nijhoff Publishers. Dordrecht, 1986, p. 145

[10] See Absjorn Eide, "The laws of war and human rights. Differences and convergences", in *Studies and essays of international humanitarian law and Red Cross principles, in honour of Jean Pictet*, Christophe Swinarski ed.. ICRC/Martinus Nijhoff Publishers, Geneva, 1984, p. 690.

[11] See note 6 above

[12] See Sassoli, *op. Cit.,* p. .53

[13] See Eide. *op. cit*., p. 697.

[14] Common Article 3 is nevertheless applicable to military operations, even though the solutions it offers are very limited. See Robert Kogod Goldmann, "International humanitarian law and the armed conflicts in El Salvador and Nicaragua", *The American University Journal of International Law and Policy*. Vol. 2, No.2, Fall 1987, p. 547

[15] See note 6 above.

[16] P II. part iv.

the civilian population,[17] prohibits the starvation of the civilian population[18] and attacks on objects indispensable to its survival,[19] and Article 17 prohibits the displacement of the civilian population unless the security of the civilians involved or imperative military reasons so demand.[20] However, international law in no way leaves the belligerents free to launch attacks causing disproportionate losses among the civilian population,[21] to use weapons causing superfluous injury[22] or having indiscriminate effects, such as chemical or bacteriological weapons,[23] or to lay mines indiscriminately.[24] All these practices are prohibited by rules which have not yet been formally codified in respect of internal armed conflicts. Since such practices are at the root of most of the population displacements occurring today,[25] there can be no doubt that the relevant rules should be promoted as a matter of urgency.

2. Protection against abuse of power

The provisions affording protection against abuse of power cover the conditions of internment or detention of persons deprived of their freedom for reasons connected with the armed conflict,[26] the legal guarantees applicable to the prosecution of offenders and the repression of offences committed in connection with the armed conflict,[27] and the rules of conduct to be observed in all circumstances by -civilian officials and members of the armed forces with regard to non-combatants or persons *hors de combat* under their authority.[28] All these rules are very similar to the norms of international human rights law in terms of both content and the problems they deal with. They cannot, however, be fully implemented as complementary branches of international law if the State concerned has invoked the derogation clause contained in human rights treaties.[29]

The injunctions imposed by international humanitarian law on the civilian and military authorities are numerous and specific.[30] Common Article 3 and Additional Protocol II expressly prohibit twenty-three different acts, ranging from murder and torture to the threat

[17] P II. Art. 13, par. 2.

[18] P II, Art. 14, first sentence.

[19] Ibid., second sentence.

[20] P .II. Art. 17

[21] See "Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts". *International Review of the Red Cross*, No.278, September-October 1990, p. 388.

[22] lbid., p. 389. See also Denise Plattner. "The 1980 Convention on Conventional Weapons and the applicability of the rules governing means of combat in a non-international armed conflict".*IRRC*. No.279. November-December 1990, p. 554.

[23] "Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts", (Note 21), p. 395.

[24] *Ibid*., p. 395 ff.

[25] See Alain Mourey, "Famine and war", *IRRC*, No.284, September-October 1991, p. 552; see also the resolution adopted by the Council of Delegates of the International Red Cross and Red Crescent Movement in Budapest on the protection of the civilian population against famine in situations of armed conflict, *IRRC*, No.286, January-February 1992, p. 57.

[26] P II, Art. 5.

[27] GC I-IV. Art. 3 (l.d). and p II. Art. 6.

[28] *Inter alia* GC I-IV, Art. 3 (1), and p II, Art. 4.

[29] See note 8 above.

[30] These are injunctions with which the civilian and militay authorities must comply no matter what the circumstances with regard to any person under their authority (see footnote 28 above).

of indecent assault.[31] Types of behaviour other than those expressly prohibited can also be considered to be implicitly forbidden by the general obligation of humane treatment set forth in both instruments.[32]

In respect of displaced persons, these rules are as important as those governing the means and methods of combat. Indeed, the harassment of civilians is another frequent cause of population movements.[33]

Moreover, such harassment does not necessarily end with displacement; only the toffi1entors' faces change. Here again, the existing rules must be well known and widely disseminated.

3. Norms concerning care and relief activities

The international rules applicable in internal armed conflicts provide for and govern the provision of services for those who are not or are no longer participating in the hostilities.

As concerns the sick and wounded, both civilian and military, the rules stipulate in particular that they must be collected and cared for,[34] that medical personnel [35] and facilities[36] are to be protected against military operations, and that medical personnel and facilities regarded as such under the law[37] are to be identified by means of the red cross or red crescent emblem.[38]

As concerns the civilian population in general, a category which includes civilian sick and wounded, the rules provide that if essential supplies are lacking, the State concerned must agree to the mounting of relief operations which are humanitarian, impartial and conducted without distinction.[39] From the legal point of view, this means that the State would be violating international law were it to prevent people whose lives and health were seriously

[31] The following are expressly prohibited: killing (GC I-IV Art. 3.1(a), p II, Art. 4.2(a): summary executions (GC I-IV Art. 3.1(a) and (d)), P II, Arts. 4.2(a) and 6.2); physical and mental torture, mutilation and corporal punishment (GC I-IV Art. 3.1 (a), P II, Art. 4.2(a)): rape. enforced prostitution and indecent assault (GC I-IV Art. 3.I(c), P II, Art. 4.2(e)): pillage (GC I-IV Art. 3.1. P II. Art. 4.2(g)); collective punishment (GC I-IV Art. 3.1, P II, Art. 4.2(b)); the taking of hostages (GC I-IV Art. 3.1(b), P II, Art. 4.2(c): acts of terrorism (GC I-IV Art. 3.1. P II, Art. 4.2(d)). It is also prohibited to threaten protected persons with any of the above acts(GC I-IVArt. 3.1,P II. Art. 4.2(h)).

[32] The obligation to respect person. honour and convictions and religious practices (GC I-IV Art. 3.1, P II, Art. 4.1), and the prohibition on inflicting or threatening to inflict any form of humiliating or degrading treatment other than that expressly prohibited (GC I-IV Art. 3.1(c), p II. Art. 4.2(e) and (h)) constitute the principal aspects of the general obligation to treat non-combatants or persons hors de combat humanely (GC I-IV Art. 3.1. P II. Art. 4.1). Moreover. by virtue of the prohibition of adverse distinction set forth in p ll, Art. 4.1 and defined in detail in common Article 3 ("adverse distinction founded on race. colour. religion or faith. sex. birth or wealth, or any other similar criteria"). discriminatory treatment is also contrary' to the obligation of humane treatment.

[33] See "Respect for international humanitarian law-ICRC review of five years of activity (1987-1991)", in *IRRC*, No.286. January-February 1992. p. 83.

[34] GC I-IV Art. 3,2, P II, Arts. 7 and 8.

[35] P II. Art. 9: see also “Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts” (Note 21), p. 391.

[36] P II, Art. II: see also Note 21. p. 391.

[37] For the definition of medical personnel. see *ibid*.. p. 392. Medical facilities comprise medical units and medical means of transport: for their definition. See *Commentary on the Additional Protocols*, *op. cit.* p. 1433. paras. 4711 and 4712.

[38] P II, Art. 12.

[39] P II, Art. 18.2.

threatened from receiving assistance from an international organization, in so far as such assistance is provided in a manner in keeping with the aim of humanitarian law.[40]

IV. IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICT

I. The agents of implementation and their specific roles

(a) Humanitarian organizations

At present, international organizations are supplying vast quantities of aid to persons displaced in situations governed by international humanitarian law. These are usually specialized institutions or agencies set up by the United Nations General Assembly, such as UNICEF,[41] UNHCR,[42] UNDP[43] and the WFP,[44] or non-governmental organizations such as *Medecins sans frontieres, Oxfam and the Save the Children Fund*.[45]

The ICRC, for its part, has 52 delegations working in 80 countries. In 1991, more than 80% of its field budget (610 million Swiss francs) was allocated to protection and assistance activities for civilians, in particular displaced persons and refugees.[46]

The question which springs to mind is whether or not all this aid is provided within the legal framework established by the humanitarian rules.

The answer is in the affirmative, if the assistance is supplied in response to the humanitarian problems that the rules are intended to solve.[47] In this sense, assistance furnished by the

[40] On this subject. see the series of articles on humanitarian assistance which appeared in IRRC. No, 288. May-June 1992. in particular: Yves Sandoz. '"*Droit' or .devoir d'ingerence* and the right to assistance: the issues involved'.. p. 220: Maurice Torrelli, "From humanitarian assistance to 'intervention on humanitarian grounds'?" p. 246: Denise Plattner. " Assistance to the civilian population: the development and present situation of international humanitarian law". p. 262. See also Cornelio Sommaruga. "Assistance to victims of war: international humanitarian law and humanitarian practice", p. 376. and Frederic Maurice, "Humanitarian ambition", p, 369, in IRRC, No.298, July-August 1992.

[41] The United Nations Children's Emergency Fund, whose mandate is to assist children, has been particularly active in Sudan.

[42] Among the assistance activities undertaken by the office of the United Nations High Commissioner for Refugees are those carried out in Iraqi Kurdistan and in the former Yugoslav republics.

[43] The United Nations Development Programme's operation in Mozambique, undertaken in cooperation with the government, is an example of this agency's work in war-torn countries.

[44] In September 1992, for example, the World Food Programme and the ICRC embarked on a joint 100-day relief operation in Somalia.

[45] MSF and the Save the Children Fund are active in Somalia, for example; they are also present in Mozambique, as are Oxfam and many other non-governmental organizations.

[46] Frederic Maurice, *The ICRC's work to assist civilian refugees and displaced persons -an operation-by-operation description 1991*, January 1992, p. 2 (paper available from the ICRC).

ICRC or by any other' operational organization respecting the principles of humanitarian aid distributed impartially and without discrimination must be considered as having been provided in compliance with humanitarian law.[48] The ICRC has a specific role in that it focuses on the most urgent needs, operates in conflict zones, and conducts medical activities for the victims of war.[49] Assistance intended to promote the country's development is not, of course, within the scope of humanitarian law. The same question may be asked about. assistance provided by non-operational intergovernmental organizations, since the use to which it is put is monitored in a way which is incompatible with an armed conflict situation.

(b) United Nations organs

The United Nations evinces its concern regarding armed conflicts not only by providing assistance. but also in resolutions adopted by UN organs and calling for compliance with international humanitarian law.[50] These resolutions reflect the different mandates set forth in the United Nations Charter, i.e. for the Security Council, to safeguard international peace and security, and for the other bodies, their mandates with respect to human rights. While the Security Council resolutions on Iraqi civilians[51] and Somalia[52] do not mention humanitarian law, some of the resolutions adopted by the Commission on Human Rights are more explicit in that regard.[53]

The United Nations organs and the ICRC do not, however, work for compliance with humanitarian law in the same way. The ICRC's mandate stems from humanitarian law itself. and only humanitarian law can define the criteria that govern the ICRC's endeavours to promote compliance with its provisions.[54]

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[47] See Jovica Patrnogic, "The evolution of the right to assistance –concluding statement". in the Institute of International Humanitarian Law's report on the XVIIth Round Table on problems of humanitarian law (San Remo. 2-4 September 1992). See *infra*, pp. 592.

[48] See letter (a) of the General Conclusion on International Protection adopted by the 43rd session of the Executive Committee of the High Commissioner's Programme (5-9 September 1992). according to which the UNHCR assumes its responsibilities "within the framework of international refugee law and applicable regional instruments, with due regard for human rights and humanitarian law" (see the Report on the 43rd Session of the UNHCR Executive Committee, A/AC.96/8041, of 15 October 1992).

[49] Frederic Maurice and Jean de Courten, "ICRC activities for refugees and displaced civilians", *IRRC*, No.256, January-February 1991, pp. 14 and 18.

[50] During the Gulf war, international humanitarian law was mentioned in Security Council resolution 666 of 13 September 1990, and subsequently in resolutions 670 and 674, to mention only the first 12 resolutions. In connection with the former Yugoslavia, at 31 October 1992 humanitarian law had been referred to in resolution 764 of 13 July 1992, resolution 771 of 13 August 1992, and resolution 780 of 6 October 1992.

[51] Security Council resolution 688 of 5 April 1991 condemned the repression of the Iraqi civilian population and insisted that Iraq "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations".

[52] See resolutions 733 of 23 January 1992, 746 of 17 March 1992, 751 of 24 April 1992 and 767 of 24 July 1992 (at 31 October 1992).

[53] See, for example, resolutions 1987/51, 1988/65, 1989/68. 1990/77 and 1991/75 adopted by the Human Rights Commission on the human rights situation in El Salvador, which referred to common Article 3 and to Protocol II.

[54] The Statutes of the International Red Cross and Red Crescent Movement. adopted by the States and the Movements components as members of the International Conference of the Red Cross and Red Crescent require the ICRC to work for the faithful application of international humanitarian law and to ensure the protection of and assistance to militay' and civilian victims of armed conflicts. In so doing, the ICRC must honour the principle of impartiality (Art. 5. paras. 2(c) and 2(d) of the Movement's Statutes: for the complete text. see *IRRC*. No.256. January-February 1987, p. 25 ff.).

(c) The States

A non-international armed conflict is an internal affair of the State concerned, so that State can invoke the principle of non-interference to oppose third-party interventions intended to promote implementation of the relevant international rules. Article 1 common to the Geneva Conventions nevertheless provides that States have the duty to ensure respect for humanitarian law and the International Court of Justice considers that this duty obtains with respect to non-international armed conflicts as well.[55] Only an obligation to refrain from certain acts - such as those which would encourage violations of humanitarian law -has been inferred from this but Article 1 should also be construed as imposing active obligations.[56] In any case, it entitles third-party States to take steps to promote respect for humanitarian law on the part of authorities faced with a non-international armed conflict. They must exercise this right. however in accordance with international law and must not do anything incompatible with the objective pursued.[57]

In principle, humanitarian law does not discourage States from undertaking relief operations on the territory of another State.[58] The possibility is even explicitly provided for in the case of territory occupied by a foreign power.[59] In this event. however, the distribution of relief consignments must be supervised by a neutral entity.[60] This is probably the only way a government can make sure that the relief operation serves only humanitarian ends and will therefore not weaken its military and political position.

(d) The ICRC

In the light of the above, it is clear that the ICRC is both an operational organization and one which safeguards respect for the international rules applicable in non-international armed conflicts. This dual role was conferred on it many years ago by the States. and confirmed by the 1949 Geneva Conventions in the event of international armed conflicts.[61]

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[55] Judgement of the International Court of Justice in the case of military and para-military activities in and against Nicaragua. ICJ. Reports *Reports of Judgements, Advisory Opinions and Orders,* The Hague, 1986, p. 104, para. 220

[56] See Luigi Condorelli and Laurence Boisson de Chazournes. "Quelques remarques a propos de robligation des Etats de 'respecter et faire respecter. le droit international humanitaire .en toutes circonstances"', *in Studies and essays on international humanitarian la"' and Red Cross principles*. (Note 10). p. 26 ff.

[57] As concerns in particular the fact that Article 1 common to the Geneva Conventions cannot serve as grounds for an armed intervention. see Yves Sandoz. “L 'intervention humanitaire. le droit international humanitaire et le Comite international de la Croix-Rouge”.. in Annales du droit international medical, No.33. 1986. p. 35. and, by the same author. ‘“Droit. or 'devoir d’ingerence. and the right to assistance: the issues involved” (Note 40), p. 230: see also Kamen Sachariew. “States entitlement to take action to enforce international humanitarian law”. *IRRC*. No.270. May-June 1989, p. 192. and Nicolas Levrat, "Les consequences de l’engagement pris par les Halites Parties contractantes de 'faire respecter' les conventions humanitaires” in *Implementation of international humanitarian law*. Frits Kalshoven and Yves Sandoz, eds., Martinus Nijhoff Publishers, 1989, pp. 263-296 and 289.

[58] In this regard, Article 5 of the resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States, adopted on 13 September 1989 by the Institute of International Law. refers to "an offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross (ICRC), of food or medical supplies..." (*Yearbook of the Institute of International Law*, 1990. Vol. 63, Part II, pp. 344-345).

[59] GC IV, Art. 59.2

[60] GC IV, Art. 61.1.

[61] The ICRC is entitled to visit prisoners of war (GC III. Art. 126) and civilian persons protected by the Fourth Geneva Convention (GC IV. Art. 143). It can act as a substitute for the Protecting Power (GC I-IV, Arts. 10, 10, 10 and 11 resp.. and P 11, Art. 5). As concerns its role in relief operations, see GC IV, Arts. 23. 59 and

The situation as concerns non-international armed conflicts is as follows. The Statutes of the International Red Cross and Red Crescent Movement require the ICRC to assist the victims of armed conflicts, no matter who they are, and to work for the faithful application of humanitarian law.[62] Article 3 common to the Geneva Conventions authorizes the ICRC to negotiate with the governments concerned to that end.[63] In fact, the ICRC is present on the scene of almost every internal conflict worldwide, although the terms and conditions of its activities naturally vary with the circumstances.[64]

2. The difficulties of implementing international humanitarian law

(a) Monitoring the implementation of international humanitarian law

Studies conducted on the situation of persons displaced within national borders have often revealed the absence of any mechanism to ensure compliance with existing rules of law. Indeed, in situations of non-international armed conflict what the written law confers on the ICRC is essentially the power to negotiate. Fortunately, in practice States have gone much further and allowed the ICRC to operate in conflict zones, not least because they have an interest in seeing that people not taking part in the hostilities are treated humanely.

It must be borne in mind that the mechanisms for the implementation of international humanitarian law, which for the time being are codified for international armed conflicts only, are mainly preventive in purpose.[65] This also explains the confidential nature of the ICRC's findings. While the mechanisms provided for in the Geneva Conventions cannot be applied as they stand to situations of internal armed conflict, their main features can be preserved. Indeed, the ICRC has increasingly tended to submit to the authorities concerned, with their agreement, reports on the protection of the civilian population.[66] This practice should be extended, since it has often led to tangible improvements.

(b) The difficulties involved in providing assistance

Public opinion, alerted by the media, is very much aware of the difficulties encountered in providing assistance in certain situations.[67] From the legal point of view, any refusal to allow

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61, and P I, Art. 70. Finally, GC I-IV, Arts. 9,9,9 and 10 respectively and P L Art. 81 give the ICRC a right of humanitarian initiative in international armed conflicts.

[62] See note 54 above.

[63] Paragraph 2 of common Article 3 in fact provides that the ICRC 'may offer its services to the Parties to the conflict". thus expressing a right of humanitarian initiative applicable in non-international armed conflicts. See Yves Sandoz, "Le droit d.initiative du Comite international de la Croix-Rouge", German *Yearbook of International Law*, Vol. 22, 1979, pp. 364 ff.

[64] See "Respect for international humanitarian law: ICRC review of five years of activity (1987-1991), op. cit. In the section on humanitarian law in internal conflicts, the ICRC refers to its activities in the following countries: Sri Lanka. Afghanistan, Mozambique, Uganda, Rwanda, El Salvador, Nicaragua. Yugoslavia. Angola. Ethiopia, Sudan, Somalia. Liberia, Lebanon, Cambodia and Myanmar. For a relatively recent and detailed description of ICRC activities for refugees and displaced persons, see Frederic Maurice, *The ICRC's work to assist civilian refugees and displaced persons. op. cit.*

[65] See note 12 above.

[66] See the ICRC's 1991 Annual Report, the sections on El Salvador (p. 52) and the Philippines (p. 73). In the same publication, see ICRC activities for the protection of civilians in Liberia (p. 25), Uganda (p. 33). Rwanda (p. 34), Sudan (p. 38), Peru (p. 55) and Colombia (p. 57).

[67] These difficulties notwithstanding we should remember the following assistance operations for civilians conducted by the ICRC in 1991 (see 1991 *Annual Report*): on both sides of the front lines in Angola (p. 17) and

or hamper an external aid operation must be regarded as a violation on a par with other acts which are contrary to the law and which are often committed concurrently.[68] Assistance and protection are therefore two sides of the same coin. On the other hand, no matter what the legal provisions, governments will always require serious guarantees before they agree to allow relief supplies to be distributed to the enemy side.[69] Moreover, a party which is not the internationally recognized government may well have just as much difficulty in agreeing to relief operations over which it has no control. Military protection for humanitarian aid would in itself give rise to problems of image only, if the parties concerned were truly willing to respect it. The question must be put above all in terms of effectiveness.

V. CONCLUSION

To conclude we have seen that there is a whole series of rules and mechanisms which should playa decisive role in preventing population movements in situations of non-international armed conflict. The implementation of these mechanisms depends first and foremost on the political will of the parties to the conflict. All the bodies we have mentioned can playa role in accordance with their respective mandates.

Denise Plattner

Denise Plattner has been a legal adviser at the ICRC Legal Division since 1991. She has published the following articles in the International Review of the Red Cross: "Protection of children in international humanitarian law". No.240, May-June 1984; "The penal repression of violations of international humanitarian law applicable in non-international armed conflicts", No.278, Sept.-Oct.1990; "The 1980 Convention on Conventional Weapons and the applicability of rules governing means of combat in a non-international conflict", No.279, Nov -Dec. 1990; and " Assistance to the civilian population: the development and present state of international humanitarian law". No.288, May-June 1992

Mozambique (p. 20); in Liberia including NPLF zones (p. 25): in conflict zones in Uganda {p. 33); in Rwanda where it intervened to prevent the grouping of displaced people in overcrowded camps (p. 34); in both government and SPLA-controlled areas in southern Sudan, where it brought in and distributed thousands of tonnes of food {p. 39); in Sri Lanka, where it brought in 79.000 tonnes of food by sea and land {p. 76); and in Yugoslavia, where from November to December 1991 ICRC ships plied the coast to help civilians cut off by the fighting (p. 90).

[68] See Cornelio Sommaruga. ..Assistance to victims of war". (Note 40). p. 374.

[69] See Article 70, para. 3, of Additional Protocol I. applicable to. International armed conflicts. For the definition of “the parties concerned” mentioned in the first paragraph of the same article who can have recourse to the facilities provided for in paragraph 3. see *Commentary on the Additional Protocols. op. cit*.. p. 819. para. 2806. It is hardly likely that the party to benefit from an offer to provide relief would be opposed to it.

The Protection of Women in International Humanitarian Law

by Françoise Krill

Contents

Introduction

Since the number of women who actually participated in war was insignificant until the outbreak of World War 1, the need for special protection for them was not felt prior to that time. This does not imply however that women had previously lacked any protection. From the birth of international humanitarian law, they had had the same general legal protection as men. If they were wounded, women were protected by the provisions of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field; if they became prisoners of war, they benefited from the Regulations annexed to the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land.[1]

From 1929 onward, women have enjoyed special protection under international humanitarian law. In that year, the Powers which adopted the Geneva Convention relative to the Treatment of Prisoners of War[2] sought to take into account a new phenomenon: the participation of a relatively large number of women in the war of 1914-1918. This international legal instrument contained two provisions of particular interest: *"Women shall be treated with all consideration due to their sex" (Art. 3). "Differences of treatment between prisoners are permissible only if such differences* *are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them"* (Art. 4).

In World War II, women participated in hostilities in greater numbers, although they did not commonly bear arms. In addition, there were many more civilian victims than in the earlier conflict. Of the 50 million persons killed, it was estimated that 26 million were in the armed forces while 24 million were civilians, including many women. The adoption of new legal instruments taking such factors into account was essential. The "Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War", convoked by the Swiss Federal Council, depository of the Geneva Conventions, met from April to August 1949 in Geneva and drew up four Conventions which were adopted on 12 August of that year.[3] The Third Convention, relative to the treatment of prisoners of war, and the Fourth Convention, relative to the protection of civilian persons in time of war, contain some thirty articles of special concern to women. These will be studied in detail in the next chapter.

In armed conflicts which have taken place since the adoption of the four Geneva Conventions of 1949, statistics indicate, more men and more women died than during World War II. The proportion of civilians among the dead, in some instances, was as high as 90%. These terrible totals were primarily a result of new means and methods of warfare with indiscriminate effects. In addition, new types of conflict developed between regular armies and guerrilla forces. In such conflicts, it is difficult to distinguish combatants from civilians, which renders civilians more vulnerable. In view of this new situation, the Conventions had to be supplemented. The ICRC took the initiative and at the conclusion of the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law" (1974-1977), the Additional Protocols were adopted in 1977. These supplemented the Conventions and thus offered better legal protection, primarily to the civilian population and thus to women. In addition, the rules governing non-international armed conflicts, contained in Article 3 common to all four Conventions, were developed and expanded in Protocol II, applicable in these situations. The provisions in these two instruments which give particular protection to women are examined in the following pages of this paper.

PART I: THE PROTECTION OF WOMEN IN THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

The Conventions and Protocols protect women both as members of the civilian population not taking part in hostilities and also as combatants, fallen into the hands of the enemy. We shall examine the various aspects of this protection in the following paragraphs, giving particular emphasis to differentiated treatment accorded to women in the light of the following principles.

I. Principles

International humanitarian law gives expression in law to the fundamental principle of the equality of men and women, specifying this principle in clauses forbidding discrimination. Articles 12 of the First and Second Conventions, 16 of the Third Convention, 27 of the Fourth Convention and Article 75 of Additional Protocol I and Article 4 of Additional Protocol II (referred to below as C.I, C.II, C.III, C.IV, P.I and P.II) provide for treatment *"without any adverse distinction founded on sex... "* It is also specified that women *"shall in all cases benefit by treatment as favorable as that granted to men"* (Article 14, C. III). This means that women are entitled to all the rights and freedoms specified by the Conventions. Accordingly, any discriminatory measure which does not result from the application of the Conventions is prohibited. However, the prohibition of discrimination is not a prohibition of differentiation. It is for this reason that distinctions are prohibited only to the extent that they are unfavourable. Equality could easily be transformed into injustice if it were to be applied to situations which are inherently unequal and without taking into account circumstances relating to the state of health, the age and the sex of protected persons.

The principle of equal treatment is extended by the further principle that *"women shall be treated with all the regard due to their sex"* (Article 12, C.I and C.II, Article 14, C.III). This particular regard is not legally defined, but regardless of the status accorded to women, it covers certain concepts such as physiological specificity, honour and modesty, pregnancy and childbirth.[4]

International humanitarian law makes particular reservations concerning the female sex in various cases, either in general terms ("without prejudice to the provisions relating to their sex...") or in more specific terms (separate dormitories, separate places of detention). One should not deduce from this that the principle of differentiated treatment is not applicable in cases where it is not specifically mentioned (protection against insults and public curiosity, questioning, searches, food, clothing, intellectual, educational and recreational pursuits, sports and games, labour, conditions for transfer, prisoners' representatives, identification). An express reference tends to strengthen the scope of the principle, rather than to limit its application, and differentiated treatment is accorded to women even if it is not explicitly mentioned.[5]

It would also be wrong to draw conclusions about a lack of special protection through the following examples. With respect to the labour of prisoners of war, the principle of special treatment for women is referred to (Article 49, C. III), while it is not in the case of women internees (Article 95, C. IV). As to the searching of prisoners of war, differentiated treatment is not specifically mentioned (Article 18, C. III), whereas it is in the case of a woman internee (Article 96, C. IV). At the time of capture, a prisoner of war must be searched immediately, for obvious reasons of security. It is not always possible under these conditions to have a woman available to make the search, whereas in the slower procedure of civilian internment this can be arranged. With respect to work by civilian internees, this is optional and there is thus no need to refer to the principle of differentiated treatment.

II. Protection of women as members of the civilian population

Like all civilians, women are protected both against abusive treatment by the Party to the conflict in whose power she finds herself and against effects of hostilities: *"A civilian is any person who does not belong to the armed forces"* (Article 50, P. 1).

A. Protection against abuses by the Party to the conflict into whose power women have fallen

In an *international armed conflict*, women are among the persons protected by the Fourth Geneva Convention relative to the protection of civilian persons in time of war. Under these conditions, they benefit from all the provisions which state the basic principle of humane treatment, including respect of life and physical and moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages. Furthermore, in the event of infractions committed in relation to the conflict, women have the right to trial by an independent and impartial court established by law respecting the generally recognized principles of judicial procedure.

In addition to the general protection from which all civilians benefit, *"women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault"* (Art. 27, para 2, C. IV; Art. 75 and 76, P.I). This provision was introduced to denounce certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations, etc. In areas where troops were stationed or through which they passed, thousands of women were made to enter brothels against their will... Acts against which women are protected by Art. 27, para 2, C. IV are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religions beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.[6]

The origin of Art. 76, P. 1, entitled "Protection of women", is the resolution of the United Nations Economic and Social Council of April 1970 on "the protection of women and children in time of emergency, war, struggle for peace, national liberation and independence" which invites the U.N. Secretary-General to give special attention to this problem.[7]

This provision represents an advance for international humanitarian law as compared to Art. 27, para 2, C. IV, since it widens the circle of beneficiaries and also constitutes a substantial extension of the International Covenant on Civil and Political Rights which does not contain particular provisions protecting women.[8] In other words, the new rule refers to all women in the territories of the Parties to the conflict. While protection covers nationals of States which are not Parties to the Conventions and those of neutral and co-belligerent States, it does not extend to nationals of a Party to the conflict who are victims of offences against their honour committed on the territory of that Party under circumstances which have no relation to the armed conflict.[9]

In a *non-international armed conflict*, women are protected by the fundamental guarantees governing the treatment of persons not taking part in hostilities which are contained in Article 3, common to all four Conventions. However, this article does not provide special protection for women. Protocol II completes and develops this provision. Its Article 4 expressly forbids *"outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault ".*

1. Respect for preferential treatment of women

In an *international armed conflict,* the situation of aliens in the territory of a Party to the conflict continues to be regulated, in principle, by provisions concerning aliens in time of peace. However, the state of war creates a situation which will inevitably have repercussions on the standing of aliens and does not always permit their previous status to be wholly maintained. Protected persons are compelled to submit to various restrictions which, under these conditions, affect the population as a whole. Even in case of war, however, the special benefits accorded to pregnant women and mothers of children under the age of 7 years by national laws should be respected.

Countries at war generally take some measures for the benefit of persons whose weakness in one respect or another warrants special care. These measures are varied in scope and application: they may cover the granting of supplementary ration cards, facilities for medical and hospital treatment, special welfare treatment, exemption from certain forms of work, protective measures against the effects of war, evacuation, transfer to a neutral country, etc.[10] *"Pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned"* (Art. 38, C. IV). *Likewise, "The*

Occupying Power shall not hinder the application of any preferential measures... which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years" (Art. 50, C. IV).

2. Interned women

General

A Party to an *international armed conflict* is authorized by international law to take strict control measures over protected persons, on the condition that its security renders these measures absolutely necessary. A belligerent, for example, may intern people if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage.[11] In addition, an Occupying Power may charge protected persons with infractions of penal laws which it has promulgated for its own protection. Like other protected persons, women may be interned or charged for carrying out acts endangering the security of the Occupying Power. Special provisions are made in international humanitarian law [12] for the benefit of women in such situations.

Under the terms of Protocol I, *"Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units"* (Art. 75, para 5).

The Fourth Convention states, *"Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory"* (Art. 85). This paragraph is a case of a particular application of the general principle laid down in Article 27, paragraph 2, concerning the respect due to women's honour.[14] For the same reasons, *"A woman internee shall not be searched except by a woman"* (Art. 97, para 4).

Protocol I provides a further guarantee for the benefit of interned women: *"They shall be under the immediate supervision of women"* (Art. 75, para 5).

With respect to disciplinary penalties, the Fourth Convention also refers to the principle of differentiated treatment, in general terms. *"Account shall be taken of the internees age, sex and state of health"* (Art. 119). Women accused of offences and those serving sentences *"shall be confined in separate quarters and shall be under the direct supervision of women"* (Arts. 76 and 124, C. IV and Art. 75, para 5, P.I).

There is nothing to prevent the Detaining Power arranging for women a system of disciplinary detention less harsh than that for men and in less uncomfortable premises.[14] Such a distinction between the sexes is not regarded as contrary to the general principle of international humanitarian law forbidding all discrimination.

In non-international armed conflicts, Protocol II provides similar rules. It specifies that women who are arrested, detained or interned *"shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when members of a family are accommodated together"* (Art. 5, para 2a). In the event that it is not possible to provide separate quarters it is essential in any event to provide separate sleeping places and conveniences. It should be noted that the foregoing provisions refer both to civilians deprived of their freedom and to captured combatants.[15]

Pregnant women and maternity cases

In an international armed conflict, these women benefit from supplementary protection. Protocol I specifies that *"pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority"* (Art. 76, para 2). This is intended to make sure that pregnant women are released as rapidly as possible.

In 1949, a similar provision was included in the Fourth Convention urging the Parties *"to conclude agreements during the course of hostilities for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of interned pregnant women"* (Art. 132, C. IV). This Article does not specify an obligation to reach such agreements but it does constitute an urgent recommendation based on experience. During World War II, numerous repatriations of internees took place by the belligerents. In this connections emphasis should be laid on the role which can be played by the Protecting Power or by the ICRC in suggesting and inspiring such agreements. The Protecting Power is well placed, especially when it acts simultaneously on behalf of both parties, to understand the deplorable seriousness of certain situations. The argument of reciprocity can be invoked to further, and sometimes even almost to compel, the conclusion of special agreements concerning, for instance, exchanges of internees. Naturally, the International Committee of the Red Cross can also play a role in this. It goes without saying that the ICRC can and does on occasion play a similar role.[16]

This category of women also benefits from other forms of differentiated treatment.

The Fourth Convention provides that *"expectant and nursing mothers in occupied territories shall be given additional food, in proportion to their physiological needs"* (Art. 89). This clause was designed to avoid deficiency diseases which would be particularly regrettable among these women, as they would affect future generations.[17] Since internment is not a punishment but a precautionary measure adopted in the interest of the Detaining Power, it cannot be allowed to cause serious prejudice to the persons subjected to it. " Thus, *"maternity cases must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population"* (Art. 91).

"Maternity cases must not be transferred if the journey might be seriously detrimental to them, unless their safety imperatively so demands" (Art. 127). As we see, it is the safety of the internee which is decisive, not the military situation. The latter concept, which existed in the 1929 Convention with respect to sick and wounded prisoners of war, was too often interpreted as granting permission to the Detaining State to transfer them when it appeared that military operations might enable them to escape from its power.[19]

Mothers of young children

Protocol I, as in the case of expectant or nursing mothers, asserts that *"mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict shall have their cases considered with the utmost priority"* (Art. 76, para 2). The term "mothers having dependent infants" has a wider meaning than "nursing mothers", the wording which had been previously proposed.[20] The authors of the Protocols were unable to agree on the age when children cease to be dependent on their mothers. Since various provisions in the Fourth Convention refer to mothers of children under the age of 7 years (preferential treatment in Art. 50 and safety zones in Art. 14), we can consider 7 years to be the age below which the application of Art. 76, para 2 of Protocol I is imperative.

As in the case of pregnant women and maternity cases, the Fourth Convention provides that *the Parties to the conflict shall endeavour during the course of hostilities to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of interned mothers of young children* (Art. 132).

3. Women and the death penalty

Nothing is said about this subject in the Conventions. Protocol I makes up for this deficiency, drawing inspiration from the International Covenant on Civil and Political Rights which entered into effect on 23 March 1976. Its Art. 6, para 5, provides that a death penalty must not be executed on pregnant women. It was not possible however for the authors of the Protocols to prohibit absolutely in the event of an *international armed conflict,* the pronouncement of the death penalty on pregnant women and the mothers of young children. Such a prohibition would run counter to specific provisions in the national legislation of a number of countries. Nevertheless, international humanitarian law recommends that such pronouncements be avoided to the utmost possible extent. With regard to the actual execution of the sentence, it was relatively easy for the authors to agree to forbid the execution of pregnant women. The fact is that many national legal codes which still provide for the death penalty also recognize this restriction. The barbarous practice of postponing an execution until the birth of the child has been abandoned almost universally, both in law and in fact.[21] *"To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the Pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women"* (Art. 76, para 3, P.I).

In non-international armed conflicts, Protocol II also makes up for the previous absence of such a protective clause. The Protocol goes even farther than the International Covenant on Civil and Political Rights. It specifies that *"the death penalty shall not be carried out on mothers of young children "* (Art. 6, para 4, P. II).

B. Protection of women against the effects of hostilities

In an *international armed conflict*, women as members of the civilian population benefit from rules in international humanitarian law which impose limits on the conduct of hostilities. These rules, whose sources go back to the Hague Conventions of 1899 and 1907 and which have to a great extent become a part of customary law, are specifically reaffirmed and developed in Protocol I. They provide notably that the Parties to a conflict *"shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives"* (Art. 48, P. 1).

In relation to non-international armed conflict, the essential elements of these provisions are also set forth, in simplified form. Article 13 of Protocol II stipulates that *"the civilian population as such, as well as individual civilians, shall not be the object of attack."*

1. Pregnant women or maternity cases

In an *international armed conflict,* this category of women benefits from special protection. Protocol I stipulates that *"maternity cases and pregnant women, who refrain from any act of hostility, shall enjoy the same general protection as that accorded to the sick and wounded"* (Art. 8).

Such women are not necessarily in need of medical care but their condition is such that they may need such care rapidly.

The principle of assimilating pregnant women or maternity cases to the sick and wounded was already implicit in the Fourth Convention, which states, *"The wounded and sick, as well as the infirm and expectant mothers, shall be the object of particular protection and respect"* (Art. 16). *It adds, "The parties to the conflict shall endeavour to conclude local agreements for removal from besieged or encircled areas of wounded, sick, infirm, and aged persons, children and maternity cases... "* (Art. 17).

Maternity cases, along with the wounded, sick, and infirm, are among those whose transport by land, sea or air must be respected and protected (Arts. 21 and 22).

2. Pregnant women or maternity cases, nursing mothers and mothers of young children

In certain circumstances, nursing mothers and mothers of young children, in the event of an *international armed conflict*, benefit from other forms of differentiated treatment. Like other categories of the civilian population whose relative weakness renders them incapable of strengthening the military potential of their country, *"expectant mothers and mothers of children under seven may be placed in hospital and safety zones"* (Art. 14, C. IV), provided, of course, that they do not contribute directly to the war effort.

With regard to the shipment of relief for the civilian population, the Fourth Convention provides for *"the free passage of medical and hospital stores and objects necessary for religions worship, along with special consignments of essential foodstuffs, clothing and tonics for expectant mothers and maternity cases"* (Art. 23). That should be understood to mean basic foodstuffs, necessary to the health and normal physical and mental development of the persons for whom they are intended e.g. milk, flour, sugar, fats, salt.[22]

Additional Protocol I constituted an undeniable advance in international humanitarian law in comparison with Article 23 of the Fourth Convention, by enlarging the circle of beneficiaries. The civilian population as a whole now has the right to receive essential foodstuffs, clothing and tonics. This widening of the circle was attended by a reminder that certain persons should have priority in the distribution of relief. To pregnant women and maternity cases, a new category was added, that of nursing mothers. These groups have the right at all times to priority in receiving relief, in particular foodstuffs, clothing and tonics, and to benefit from special treatment (Art. 70).

III. Women taking part in hostilities

A. Historical note

Participation by women in hostilities is not a new development, for many of them have taken a more or less active part in war throughout the centuries.[23] A great many female canteen-keepers followed armies from the 17th to the 19th centuries to sell food and drink to the soldiers. Other women, behind the front, devoted themselves to the care of wounded soldiers. The image of the young English nurse Florence Nightingale, bringing aid and comfort to soldiers in the Crimean War (1854-1855), is unforgettable. Participation by women in hostilities remained exceptional however until the 20th century.

It was only in World War 1 that women began to take part in hostilities more systematically. In Germany for example, though not directly incorporated into combat units, women contributed to the war effort in World War 1. In addition to their work in arms factories, they carried out numerous tasks close to the front, in supply services and munitions depots. In March 1917, 67,877 women were replacing men sent to the front.[24]

In England, women also took part in that war, either as paid or unpaid civilians or auxiliaries, 80,000 in female military units, the WAAC, WRNS and WRAF[25] while others worked as nurses.

Russian women, though in smaller numbers, took part in combat.[26]

In World War II, women took a more active part in the hostilities. In Germany, from 1943 onward, more than a million women worked in arms factories, while 300,000 served as army reservists, with 20,000 in the navy and 130,000 in the air force.[27]

In England, at the end of 1943, female military units (ATS, WAAF and WRNS)[28] had a total of 450,000 women, 9.37% of the country's armed forces. During the war, their units had 624 dead, 98 disappeared, 744 wounded and 20 captured.[29]

Soviet women participated directly in the fighting in World War II, in all services and units, as snipers, riflewomen, air pilots, bombardiers, artillerists, etc. It is estimated that about a million Soviet women took part in the fighting, 800,000 in the armed forces and 200,000 in resistance movements, constituting 8% of the total armed forces.[30]

French women in World War II did not commonly fight in the maquis, but performed many services essential to the existence and survival of the resistance, providing supplies, carrying out liaison missions, producing and distributing newspapers and tracts, hiding and transporting arms, etc.[31]

B. Status of women prisoners of war

Like men, women who take part in hostilities are protected by international humanitarian law from the moment they fall into the power of the enemy. It is essential for them to be members of the armed forces of a Party to the conflict if they are to be considered as combatants entitled to the status of prisoners of war, once captured.

The armed forces of a Party to a conflict are recognized as such if they are organized and placed under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. In addition, these armed forces must be subject to an internal disciplinary system which, *inter alia*, enforces compliance with the rules of international law applicable in armed conflicts. In particular, this compliance requires combatants to distinguish themselves from civilians, by a uniform or other distinctive sign, visible and recognizable at a distance, or, at least, they must carry their arms openly while taking part in an attack. Violation by a combatant of the rules applicable in armed conflict is punishable but he is not deprived of his right to the status of prisoner of war in case of capture. In case of doubt, this status must be presumed, until the question has been decided by a competent authority.[32]

The drafting of women into the armed forces, as combatants, has generally been marginal up to the present, with the Soviet Union as an exception. As we saw earlier, many Soviet women took part in fighting during World War II. With recognition of the principle of equality of the sexes, at least in the western and socialist countries, it is not excluded that women will participate in combat to a greater extent in the event of new conflicts. We may note nevertheless that Israel, the only country with compulsory military service for women, does not oblige them to take part directly in combat. In case of war, women staff officers at the battalion and brigade levels are withdrawn to the rear.[33]

On the other hand, participation by women as non-combatant auxiliaries is relatively high. In England and the Soviet Union, in World War II, they constituted about one tenth of the total of the armed forces. They perform administrative functions, serve as liaison agents and work in such branches as supplies, motor transport, communications and air control.[34]

International humanitarian law also extends the right to the status of prisoner of war to those taking part in a *levée en masse* - the inhabitants of a non-occupied territory which spontaneously take up arms at the approach of the enemy to resist the invasion, without having had time to organize themselves - if they carry their arm openly and respect the laws and customs of war. The same right is accorded to various categories of persons who are not
combatants, such as:
- persons authorized to follow the armed forces without being directly part of them,
- crews of the merchant marine and civil aviation;
- members of military personnel serving in civil defence organizations.[35]

Women may obviously be included in any of these categories.

There are other persons who, although they are not given the status of prisoner of war in the event of capture, nevertheless have the right to corresponding treatment. They include:
- persons arrested in occupied territory because they belong to the armed forces of the occupied country;
- military internees in a neutral country;
- members of the non-combatant medical and religions personnel who are part of the armed forces.[36]

The medical personnel of the armed forces includes many women, nurses in particular.

C. Treatment of women combatants and prisoners of war

1. General protection

Inasmuch as women *"shall in all cases benefit by treatment as favourable as that granted to men"* (Art. 14, C. III), they have the right to the same protection. Among the numerous provisions in the Third Convention and the two Additional Protocols, we shall refer only to the most important and note the principles involved.

In an *international armed conflict*, it is forbidden to declare that no quarter shall be given, to threaten the adversary therewith and conduct hostilities on such a way that there are no survivors. Furthermore, the enemy who is *hors de combat,* who has surrendered or who shows his intention to surrender, as well as one who has parachuted from an aircraft in distress, shall not be the object of attack.

In addition, the Third Convention provides in general that prisoners of war must be treated humanely at all times and it is forbidden to subject them to physical mutilation or to medical or scientific experiments which are not justified by the medical treatment of the prisoner concerned and which are not in his interest.

It is specified that prisoners of war shall not be unnecessarily exposed to danger while awaiting their evacuation from a fighting zone.

Finally, anyone who has taken part in the hostilities but has not been granted the status of prisoner of war must in principle benefit from the provisions of the Fourth Convention unless he is detained as a spy or saboteur (Art. 5,C.IV). In the latter cases, such persons must nevertheless be treated humanely and must benefit from the fundamental guarantees provided in Art. 75, P. I.[37]

In a *non-international armed conflict,* captured combatants do not have the status of prisoners of war but must benefit from the fundamental guarantees of Article 3 common to the four Geneva Conventions and of Art. 4, P. II.

2. Special protection

Apart from the general protection from which women benefit on the same basis as men, they enjoy special protection resulting from the principles previously stated.

In an international armed conflict, Protocol I specifies that *"pregnant women and mothers having dependent infants who are arrested, detained or internedfor reasons related to the armed conflict, shall have their cases considered with the utmost priority "* (Art. 76, para 2). This is the principle we considered earlier with respect to the protection of women as members of the civilian population. The authors of the Protocol thus sought to assure that pregnant women and mothers of young children would be released as rapidly as possible.

A comparable concern was the basis of a Model Agreement on direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war, annexed to the Third Convention. This proposed agreement has two clauses of particular interest to us:

1. Paragraph 7 of Section B provides for accommodation in neutral countries of women prisoners of war who are pregnant or mothers with infants and small children.

2. Paragraph 3 f of Section A provides for repatriation in cases of normal pregnancy and of prisoners suffering from chronic and serious gynaecological and obstetrical disorders, when it is not possible to accommodate them in neutral countries.

The Third Convention contains various provisions based on the principle in Article 14, para 2, stipulating that *"women shall be treated with all the regard due to their sex"*. Article 25, para 4 states that *"in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them ".*

The introduction of this paragraph was due to the presence of a number of women in the armies of belligerents in World War II. The interpretation that has been given to this provision is that the separation must be effective, in other words that male prisoners must not have access to the dormitories of women prisoners whether or not the women consent. The Detaining Power is responsible for the effective application of this provision. Strictly speaking, this paragraph refers only to dormitories and the quarters as a whole need not necessarily be separated; the Detaining Power is, however, at liberty to provide separate quarters if it deems fit and in order more easily to fulfil the other requirements of the Convention with regard to women prisoners.[38]

Furthermore, under the terms of Article 29, para 2, *"in any camps in which women prisoners of war are accommodated, separate conveniences must be provided for them ".* The question of sanitary conveniences is of the utmost importance for the maintenance of cleanliness and hygiene in camps. These conveniences should be so constructed as to preserve decency and cleanliness and must be sufficiently numerous. It goes without saying that the most elementary rules of decency require that separate conveniences should be provided for women prisoners of war.[39]

Art. 49, para 1, specifies that the Detaining Power *"may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health ".* This is an instance of the application of Art. 16 (See First Part, 1: Principles).

With regard to penal and disciplinary penalties, the Third Convention is consistent with the principle of equality of treatment.

The Convention states that *"a woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.*

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence " (Art. 88, paras 2 and 3).

Other provisions result from the principle of differentiated treatment. Articles 97 and 108 provide in particular that *"women prisoners of war, undergoing disciplinary or penal punishments, respectively, shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women".*

Protocol I has a rule analogous to that in Articles 25, 97 and 108 of the Third Convention: *"Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women"* (Art. 75, para 5).

In a non-international armed conflict, Protocol I also specifies that women arrested, detained or interned *"shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when families are united"* (Art. 5, para 2, a). However, persons captured do not have prisoner of war status.

PART II: ICRC ACTION IN FAVOUR OF WOMAN VICTIMS OF ARMED CONFLICTS

1. Activity during World War II

It must not be forgotten that at the outbreak of this war only the prisoners of war were under legal protection with respect to internment, thanks to the Geneva Convention of 27 July 1929 relative to the treatment of prisoners of war. Civilians had no legal protection in that respect, which did not facilitate matters for the ICRC.

At the beginning of the conflict, the ICRC had no occasion to intervene on behalf of women prisoners of war, either because their treatment was in conformity with the provisions of the Convention or because intervention was impossible.

On 2 October 1944, the Polish army of General Bor-Komorowski[40] laid down its arms. The terms of the capitulation recognized the status of prisoners of war of all the combatants who surrendered to the German forces, including the army's female auxiliary personnel. Unfortunately, the German authorities did not respect these clauses of the capitulation, and the ICRC delegates who visited the camps where the women were held could do nothing but corroborate the complaints of these prisoners: the overcrowding and discomfort of the quarters, the lack of heat, clothing and food, the imposition of heavy work, etc. Upon making representations to the German authorities, the ICRC received assurances that there would be no more forced labour for the women auxiliaries and that they would be interned in separate camps where they would receive treatment appropriate to their sex and state of health. Despite these assurances, the ICRC delegates did not observe any particular improvements in subsquent visits.

In view of the importance of the problem, the ICRC on 9 January 1945 addressed a general appeal to the German, British, French and American governments drawing attention to Articles 3 and 4 of the Convention (see Introduction) and laying stress on the appropriate differentiated treatment which should be accorded to women prisoners of war.

The replies of the American and French governments disclosed that only very few women belonging to the German Army were in the hands of these Powers, and that such prisoners were accommodated in special camps or in compounds set apart for them in ordinary PW camps. These two governments further stated their intention to repatriate women PWs without delay, beginning with expectant mothers and the sick, and without making it a condition that the German Government should take similar action. The repatriation of German women PWs was effected in part by way of Switzerland; the Committee approached the Swiss authorities to allow their passage through Swiss territory.

In February 1945, acting on a request from the Polish Red Cross in London, the ICRC began negotiations to secure the accommodation in Switzerland of women prisoners from General Bor-Komorowski's army. The German and Swiss governments had signified their agreement in principle to the transfer when, with the fall of the Reich, it became unnecessary.[41]

2. ICRC activity after World War II

Since 1949, with the adoption of the Fourth Geneva Convention relative to the protection of civilian persons in time of war, the ICRC has had legal grounds to act for them as well as for prisoners of war. The activity of the ICRC in protecting and assisting civilian populations has steadily increased in recent years as conflicts have multiplied. Among the many tasks of protection carried out, some repatriations deserve attention, to the extent that they shed light on the special protection which benefits women victims of armed conflicts.

In Cyprus in November 1974, the ICRC was active in transferring from the north to the south, and vice-versa, various categories of especially vulnerable persons: the wounded, sick, elderly, pregnant women and their children.

In June 1977, after capturing the Bardai Oasis in northern Chad, the Frolinat movement requested the intervention of the ICRC to evacuate various families of prisoners of war from the combat zone. Due to numerous technical problems, and a resumption of hostilities in the region, the operation was delayed and could not take place until 5 December 1978. The wives of 15 prisoners and 22 children were returned to the capital of Chad by the ICRC.

In Uganda in 1980, the ICRC made several approaches to the authorities asking them to investigate the situation of civilian detainees and to release various categories among them: minors, old and sick persons and women. This request was granted by the authorities.

With respect to assistance, women were among those who received priority in relief actions undertaken by the ICRC for the benefit of civilian populations. Among these actions were the following:

In Bangladesh in 1972, many totally destitute Pakistani civilians, mostly women and children, were refugees in a camp at Dacca. The ICRC gave them articles of most urgent necessity, such as clothing, blankets, soap, cooking pots and powdered milk.

Following disorders which broke out in February 1979 in the frontier zone between the Yemen Arab Republic and the People's Democratic Republic of Yemen, many civilians sought refuge in the central area of the Yemen Arab Republic. About 45,000 persons, among them a high proportion of women and children, benefited from ICRC assistance.

The ICRC has very often had occasion to act for the benefit of women deprived of their freedom. Intervening at all levels, it has insisted upon differentiated treatment for women, such as separate quarters and supervision by women, and has drawn the attention of authorities to the cases of pregnant women and the mothers of young children. To cite a few recent examples:

ICRC delegates made visits twice a month to a number of women arrested in Lebanon, until their release on 24 November 1983. Originally detained in Israel following their capture in 1982, these women were transferred to southern Lebanon in March 1983.[42]

At the request of the ICRC, four young Iranian women, captured in October 1980, were transferred by the Iraqi authorities to a prisoner-of-war camp, and were subsequently released on 29 January 1984.

Both in connection with conflicts and with internal disorders or tensions, ICRC delegates continue to visit the following places of detention:

Union of South Africa: Sections reserved for women in prisons in Pretoria and Kroonstad.
Israel: Women's prison at Neve Tirza.
Argentina: Women's prison at Ezeiza.
Chile: Several centres reserved for women, known as "Centro de orientacin feminino", in different parts of the country.
C*olombia*: "Carceles de mujeres del Buen Pastor" at Cali, Medellin and Popayn.
Paraguay: "Casa del Buen Pastor" at Asuncin.
Peru: Penal establishments for women at Arequipa, Cuzco and Lambayeque.
El Salvador: Rehabilitation centre for women at Ilopango.
Uruguay: "Punta rieles (EMR 2)" at Montevideo.

Conclusion

International humanitarian law undoubtedly gives extensive protection to women. They benefit not only from all the provisions which protect the victims of armed conflicts in general. In addition, among the approximately 560 articles in the Geneva Conventions of 1949 and the Additional Protocols of 1977, about 40 are of specific concern to women.

If women in real life are not always protected as they should be, it is not due to the lack of a legal basis. Despite adoption of the Fourth Geneva Convention and the two Additional Protocols, women as members of the civilian population continue to be the first victims of indiscriminate attacks against civilians, since the men are usually engaged in the fighting. Article 27 of the Fourth Convention, which provides special protection for women against any attacks on their honour and in particular against rape, enforced prostitution or any form of indecent assault, did not prevent the rape of countless women in the conflict in Bangladesh in 1971, for example .43 This was one of the reasons why the authors of Protocol I considered it necessary to repeat in

Article 76, para 1, the contents of the earlier article. The same rule is found again in Protocol II. Although these new provisions have been adopted, crimes against honour continue to be committed, with women as the principal victims. We need only think of the tragedy of the "boat people", even though this is outside the specific framework of armed conflicts. With particular regard to women deprived of their freedom, the ICRC has found that women are in the greatest danger of such assaults at the time of their arrest or capture and during the interrogation which follows, assaults ranging from the threat of rape to obtain "confessions" to the act itself.

The international community will not succeed in remedying this situation merely by adopting new rules. Most of all, it must see that the rules already in force are respected. The responsibility to apply the provisions giving special protection to women, and for that matter all the rules of international humanitarian law, is a collective one. It rests first and foremost with the States party to the Geneva Conventions of 1949 and the Additional Protocols of 1977, which have undertaken to respect and ensure respect for these rules. The ICRC can certainly also help to render the protection accorded to women more effective through its own activities, whether by visiting women held as prisoners of war or in civilian detention or internment, by providing material assistance or by making enquiries into the whereabouts of missing persons. Finally, the dissemination of knowledge of these rules by the National Red Cross and Red Crescent Societies, or by organizations such as the World Veterans Federation, can strengthen the existing law. Every effort made in this respect undoubtedly facilities the task of those who bear the prime responsibility for the implementation of international humanitarian law, and encourages them in their endeavours.

Provisions of international humanitarian law according special protection to women

Geneva Convention of 1929: Articles 3, 4

Geneva Conventions of 1949*
Convention 1: Articles 3, 12
Convention II: Articles 3, 12
Convention III: Articles 3, 14, 16, 25/4, 29, 49, 88/2, 3, 97/4, 108/2
Convention IV: Articles 3, 14/1, 16, 17, 21, 22/1, 23/1, 27/2, 38/5, 5015, 76/4, 85/4, 89/5, 91/2, 97/4,
119/2, 124/3, 127/3, 132/2

Additional Protocols of 1977
Protocol I: 8,a; 70/1; 75/1 and 5; 76
Protocol II: 4/2,e; 5/2,a; 6/4

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10. MARWICK Arthur: The Home Front - The British and the Second World War, Great Britain, 1976.

11. KHUSHALANI Yougindra: Dignity and Honour of Women as Basic and Fundamental Human Rights, The Hague/Boston/London, 1982.

12. MARWICK Arthur: Women at War - 1914-1918, Glasgow, 1977.

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15. "Rapport en vue d'une consultation concernant la participation de la femme à la défense générale", Office Central de la Défense, Berne, 1982.

16. WEITZEL Andrée: La participation de la femme à la défense générale, Berne, 1979.

Notes

1. These Regulations, for the first time, granted prisoners of war a legal status which removed them from the arbitrary control of the Detaining Power.

2. Taking advantage of the possibility provided by the Hague Regulations (Art.15) for properly constituted relief societies to exercise their charitable efforts, the ICRC during World War I (1914-1918) sent delegates to visit internment camps. In the light of its experience in this conflict, the ICRC suggested two things: a revision of the Geneva Convention of 1864 and the drafting of a new Convention to clarify and supplement the Hague Regulations.

3. The Fist Geneva Convention of 1864 has undergone three revisions, 1906, 1929 and 1949. The Second Geneva Convention took the place of the Tenth Hague Convention. The Third Convention replaced the 1929 Geneva Convention on the same subject and supplemented the Hague Regulations of 1899 and 1907. The Fourth Convention was new and supplemented Sections II and III of the Hague Regulations.

4. *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, Article 14, p. 147.

5. *Ibid.*, Article 14, p. 147.

6. *Commentary on the Fourth Geneva Convention, ICRC*, Geneva 1958, Art. 27, pp. 205-206.

7. *International Review of the Red Cross*, November-December 1980: "New code for the protection of civilian population and property during armed conflict" by Ionel Closca.

8. Article 10 (2) of the International Covenant on Economic, Social and Cultural Rights, which affords families protection, provides for special measures for the benefit of mothers.

9. *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, K.J. Partsch, W. A. Solf, The Hague/Boston/London, 1982, Art. 76, p. 470.

10. *Commentary Fourth Convention*, Art. 38, p. 248

11. *Ibid.*, Art. 42, pp. 257-258.

12. Other instruments (human rights, national legislation etc.) also provide for special treatment for the benefit of detained women.

13. *Commentary Fourth Convention*, Art. 85, p. 388.

14. *Ibid.*, Art. 124, p. 494.

15. *Commentary on the Two Protocols...,* Art. 5, p. 645.

16. *Commentary Fourth Convention*, Art. 132, pp. 510-514.

17. *Ibid.*, Art. 89, p. 395.

18. *Ibid*, Art. 91, P. 399-400.
19. *Ibid,* Art. 127, p. 500.

20. Vol. XV, p. 464, CDDH/407/Rev. 1.

21. *Commentary on the Two 1977 Protocols...*, Art. 76, pp. 472-473.

22. *Commentary Fourth Convention*, Art. 23, p. 180.

23. Along with such well-known historical characters as Queen Christina of Sweden, Empress Catherine II of Russia and Queen Elizabeth 1 of England, who were both rulers and military commands, many other women distinguished themselves in combat. A well-known example of a woman-warrior is Joan of Arc.

24. *Frauen ans Gewehr,* by Renate Janssen, Köln, 1980, pp. 11-19.

25. WAAC: Women's Auxiliary Army Corps, 1917. WRNS: Women's Royal Navy Service, 1917. WRAF: Women's Royal Air Force, 1918.

26. *Great Britain and the World Wars*, by Nancy Loring Goldman and Richard Stites, Greenwood Press, 1982, pp. 24-29.

27. *Frauen ans Gewehr,* pp. 19-27.

28. ATS: Auxiliary Territorial Services, 1938. WAAF: Women's Auxiliary Air Force.

29. *Great Britain and the World Wars*, pp. 30-35.

30. *Ibid.*, pp. 35-36.

31. *Les femmes dans la résistance*, l'Union des Femmes Françaises, éditions du Rocher, 1977, p. 15.

32. *Basic rules of the Geneva Conventions and their additional Protocols*, ICRC, Geneva, pp. 21-22.

33. *La participation de la femme à la défense générale*, by A. Weitzel, Département militaire fédéral, Berne, 1979, p. 148.

34. *Ibid.*, pp. 67 and 129.

35. *Basic rules of the Geneva Conventions and their additional Protocols*, ICRC, Geneva, 1983, pp. 21-22.

36. *Ibid.,* p. 22.

37. *Ibid.*, p. 23 and 26.

38. *Commentary Third Convention*, Art. 25, p. 195.

39. *Ibid.*, Art. 29, p. 207.

40. The underground Polish army loyal to the Polish Government in exile in London, which was uselessly sacrificed in the Warsaw insurrection.

41. ICRC records and *Report of the ICRC on its Activities during the Second World War (1 September 1939 - 30 June 1947),* ICRC, Geneva, 1948, 3 Vol. - See Vol. 1, pp. 295-297.

42. ICRC *Annual Reports*, from 1965 to 1983.

43. *Dignity and Honour of Women as Basic and Fundamental Human Rights,* by Yougindra Khushalani, The Hague, Boston, London, 1982.

CHRISTINE CHINKIN

Women: The Forgotten Victims of Armed Conflict?*

Contents

1. INTRODUCTION

Events from 1991 onwards surrounding the disintegration of the former Yugoslavia served to demonstrate to the world that women have been among the 'forgotten' victims of the laws of both international and non-international armed conflict. Reports of the massive, widespread and systematic rapes, enforced prostitution and sexual enslavement of women as part of policies of ethnic cleansing led to demands for an effective response from the international community. As the first proposals for a war crimes tribunal were being made in 1992-3 two interlocking observations were possible. First, despite the long history of rape and sexual assault against women during armed conflicts, these offences had not figured significantly in war crimes prosecutions. Second, it was even possible to argue that their scant treatment in the Four Geneva Conventions and the 1977 Protocols meant that these offences did not legally amount to grave breaches of the Geneva Conventions, or even as war crimes. This paper will outline the legal responses to the catastrophe in the former Yugoslavia, and subsequently Rwanda, from the perspective of the inclusion of women. It will then consider whether these responses have been sufficient to redress the situation, or whether women in fact remain forgotten by international humanitarian law.

2. SEXUAL ASSAULT IN THE TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

* This chapter draws closely upon Chapter 10 of H Charlesworth and C Chinkin, The Boundaries of International Law: a Feminist Analysis (forthcoming). Since it was written the decision of the ICTY in Prosecutor v Anto Furundzija, 10 December 1998, has added significantly to the substantive jurisprudence on rape as a war crime. Procedural challenges throughout the case have also highlighted the obstacles found in bringing a successful prosecution for such offences

Helen Durham and Timothy LH. McCormack (eds.), The Changing Face of Conflict and the Efficacy of International Humanitarian Law, 23-44.

2.1 *Jurisdiction*

In late 1991 and 1992 the Security Council was faced with having to respond to allegations of war crimes in the territory of the former Yugoslavia. It condemned violations of the laws of war , requested information on the commission of war crimes and established a Commission of Experts to undertake an independent investigation.[1] After receiving the conclusions of the Commission, the Security Council, by Resolution 808 dated 22 February 1993, requested the Secretary-General of the United Nations to submit proposals for the establishment under Chapter VII of the United Nations Charter of an ad hoc tribunal for the prosecution of war crimes in the former Yugoslavia.[2] The Secretary-General's Report[3] was adopted on 2 May 1993 by Resolution 827, and the Tribunal for the Former Yugoslavia was created.[4] In 1994, events in Rwanda led the Security Council to establish a second International Tribunal 'to prosecute persons for genocide and other serious violations of international humanitarian law'.[5]

The report of the Secretary-General emphasised that the proposed international tribunal should apply rules of international humanitarian law 'which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.'[6] The report concluded that the Geneva Conventions of 12 August 1949,[7] the Hague Convention (IV) 1907,[8] the Genocide Convention 1948[9] .and

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[1] *Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992)* 47 UN SCOR (3119th mtg), UN Doc S/Res/780 (1992); 31 ILM 1476, ON Doc S/674/1994 Annex (1994) ('*Final Report*').

[2] SC Res 808,48 UN SCOR (3175th mtg), UN Doc S/Res/780 (1992); 31 ILM 1476, UN Doc S/674/1994 Annex (1994) ('*Final Report*').

[3] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 (1993); 32 ILM 1159 ('Secretary-General's Report').

[4] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993); 32 ILM 1203 ('*Statute of the ICTY*').

[5] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994*, UN Doc S/RES/955 (1994), 49 UN SCOR (3453rd mtg); 33 ILM 1598 ('*Statute of the ICTR*').

[6] Paragraph 34 of the Secretary-General's Report, above n 3.

[7] See *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, 75 UNTS 31 ('First Geneva Convention'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members ofArmed Forces at Sea*, 75 UNTS 85 ('Second Geneva Convention'); Geneva *Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 ('Third Geneva Convention'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 ('Fourth Geneva Convention'). All these Conventions entered into force on 21 October 1950, and as at 24 March 1999, there were 188 States Parties.

[8] *Convention Concerning The Laws and Customs of War on Land (Hague IV)*, signed at The Hague, 18 October 1907, 205 CTS 277. The Regulations are annexed to the Convention.

[9] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948,78 UNTS 277, (entered into force 12 January 1951) ('Genocide Convention'), art 2. As at 24 March 1999, there were 129 States Parties.

the Nuremberg Charter[10] were without doubt customary international law. The Statute of the Tribunal for the Former Yugoslavia accordingly bestows jurisdiction over grave breaches of the Geneva Conventions, violations of the laws or customs of war , genocide and crimes against humanity.[11] The internal nature of the events in Rwanda meant that the ICTR also had jurisdiction based on Common Article 3 of the Geneva Conventions and Additional ProtocoII to the Geneva Conventions[12] that provides a minimum code of conduct for non-international conflicts.[13]

Acknowledgment that the Tribunal's jurisdiction needed to be founded upon pre-existing law and pressure to ensure that rape and sexual abuse of women were included within that jurisdiction necessitated consideration of the extent to which these offences were already incorporated within international humanitarian law. Humanitarian attention was first paid to those who became *hors de combat* through injury or capture -that is members of the fighting forces -who were invariably men. Despite long formal understanding of the prohibition of attacks on non-combatant women, it was not until 1949 that the Fourth Geneva Convention on Civilians was introduced. Even under this Convention attention to rape and sexual assault is minimal. Article 27 provides that States parties are under an obligation to protect women in international armed conflict 'against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. ' This provision does not constitute a forceful prohibition of rape but rather presents women as in need of protection. This draws upon two separate ideas. First, are the concepts of protector and protected that are used both to justify recourse to armed force and to lessen the civil status of those deemed to need protection. Second, the designation of rape as a crime against honour embodies a masculine notion of women as property rather than as victims of violence, humiliation and degradation. The Additional Protocols, while updating and extending the Conventions, make no reference to the honour of women but retain the objective of protection of women. Thus Article 76 of Additional Protocol I, states that 'women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault.'[14] Other references to women in the Geneva Conventions tend to emphasise their roles as child bearers and carers rather than as individuals with their own rights. For example, Article 76(2) of Additional Protocol I states, 'pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.' Judith Gardam has concluded from an analysis of 34 provisions within the Geneva Conventions that

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[10] *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, (London Agreement),* 8 August 1945,82 UNTS 279. The Charter of the International Military Tribunal is appended to the Agreement ('Charter of the IMT).
[11] Statute of the ICTY , arts 2-5.
[12] *Protocol Additional to the Geneva Convention of 12 August 1949,and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609; 16 ILM 1442 (‘Additional Protocol II’)* (entered into force on 7 December 1978). As of 24 March 1999, there were 145 State Parties.
[13] Statute of the ICTR, art 4.
[14] *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict,* 1125 UNTS 3; 16 ILM 1391 ('Additional Protocol I'). As at 17 March 1999, there were 153 States Parties

purportedly provide safeguards for women, 19 in fact primarily protect children.[15] This makes the position of women without children problematic, arid also obscures the fact that female children are especially vulnerable to various forms of sexual attack. Armed attackers are not generally particular about the age of their female victims.

The ICTY has jurisdiction over grave breaches of the Geneva Conventions.[16] Rape was not explicitly designated a grave breach of the Geneva Conventions, although grave breaches include acts wilfully committed and causing great suffering or causing injuries to body or health. Sexual violence can be easily read into this definition, but a specific reference to these offences would have closed the possibility of contrary argument. Additional Protocol I among its list of grave breaches, *inter alia* included, 'degrading practices involving outrages on personal dignity based on racial. discrimination', but makes no reference to gender-based discrimination.[17] Although non-grave breaches are nevertheless violations of the Conventions, the distinction between grave and other breaches may lead to the latter being perceived of as unimportant and as not meriting enforcement. Certainly rape and other forms of sexual violence against women, 'are not rigorously punished in international humanitarian law partially because they are not sufficiently protected or punished by either domestic law or international human rights law.'[18] The consequences of this somewhat equivocal language is that the Geneva Conventions create what Judith Gardam has termed a 'gender hierarchy' in that the provisions concerning women are not regarded as seriously as those concerning other protected persons.[19]

Common Article 3 to the Geneva Conventions provides a minimum standard of behaviour that applies to both government and non-government forces in non-international (internal) armed conflict, although the threshold of applicability is quite high. Prohibited actions include violence to life and the person, cruel treatment and torture, and humiliating and degrading treatment. Sexual violence can be understood within these terms. However Article 4(e) of the Statute of the ICTR makes this explicit in that it expressly includes: 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.' [20]

The Geneva Conventions and Protocols are not the only legal regime applicable to sexual violence in armed conflicts. A second category is that of crimes against humanity. Crimes against humanity were defined in the Nuremberg Charter as:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in

[15] Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International and Comparative Law Quarterly* 55, 57
[16] Additional Protocol I, art 2.
[17] Additional Protocol I, art 85(4)(c).
[18] Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997) 257.
[19] Gardam, above n 15,56.
[20] Statute of the ICTR, art 4(e).

> connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.[21]

The omission of rape from the list of acts constituting crimes against humanity was rectified in the Allied Control Council Law No 10 that was adopted by the four occupying powers in Germany .[22] The inclusion of 'other inhumane acts' meant that the Nuremberg Charter did not provide an exhaustive definition of the elements for a crime against humanity and so the Tribunal for the former Yugoslavia needed to give careful consideration to the elements of the offence in the first case involving charges of crimes against humanity. This was the trial of Dusko Tadic.[23] According to the Tribunal there must be evidence of systematic government planning for the commission of crimes against a civilian population, not just against individual civilians, but the acts need not occur during an armed conflict.[24] Where rape is used as a deliberate instrument of war intended to cause physical harm, to spread terror and to degrade women and children, it is appropriately categorised as a crime against humanity. Women are dehumanised by this treatment, as indeed are all members of the community andperpetrators of the crimes. As such, the crime is perceived as destructive of humanity, not just of individual victims.

At first sight rape does not appear to fall within the legal definition of genocide contained in the Genocide Convention and replicated verbatim in the Statutes of both war crimes tribunals. Genocide requires:

> An intention to destroy, in whole or .in part, a national, ethnical, racial or religious group through the commission of such acts as killing or causing serious bodily or mental harm to members of the group; deliberatelyinflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent births within the group; forcibly transferring children of the group to another group.[25]

It has been forcefully asserted by the United Nation's General Assembly that where rape has been carried out on a massive and systematic basis for the purposes of destroying the

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[21] Charter of the IMT, art 6.

[22] *Allied Control Council Law No 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity*, 20 December 1945, Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, art VI.c *('Control Council Law No 10').* The prohibition of crimes against humanity was subsequently affirmed by the General Assembly in its resolution entitled *United Nations General Assembly Resolution in Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, 11 December 1946, UN GA Res 95, I UN GAOR (Part II) at 188; UN; Doc A/64/Add.l (1946), and thereafter confirmed in the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, adopted at Geneva, 29 July 1950*; 5 UN GAOR Supp (No 12), 11; UN Doc A/1316 { 1950); (1950) 4 *American Journal of International Law* 126 (Supp). Principle VI.c provides that a crime against humanity is punishable as a crime under international law

[23] *23 Prosecutor v Dusko Tadic (Decision of Trial Chamber II, 7 May 1997) IT -94-1- T; 36* ILM 908. It has also recognised that a single act of the perpetrator, when committed within a context of widespread or systematic attack against a civilian population, entails individual criminal responsibility (at [649]) ('Tadic').

[24] *Ibid* [618]-[657].

[25] Genocide Convention, art 2.

family and community life of the victims and of 'cleansing' the vicinity of all other ethnicities by causing mass flight, and births of a tainted bloodline, it becomes genocidal.[26] In reviewing the indictments against Karadzic and Mladic, a Trial Chamber of the ICTY invited the prosecution 'to consider broadening the scope of the characterization of genocide to include other criminal acts listed ...'[27] It suggested that 'the systematic rape of women ...is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group.'[28] It considered this characterisation to be supported by the forced detention of women for impregnation and subsequently to prevent abortion.[29]

Finally the Statute of the International Criminal Court (ICC),[30] agreed in Rome in July 1998, also includes 'other serious violations of the laws and customs applicable in international armed conflict ...'[31] which includes 'intentionally directing attacks against the civilian population ...'[32] Outrages on personal dignity are in a separate paragraph[33] from rape, sexual slavery , enforced prostitution and forced pregnancy.[34] This explicitly includes rape within the Hague provisions, again eliminating the need to show that it is contrary to the' customs of war'.

Thus the jurisdictional provisions, of the Statutes establishing war crimes tribunals for the former Yugoslavia and Rwanda have at least clarified that rape constitutes a crime against humanity when committed in a widespread systematic fashion. However these diverse legal regimes for grave breaches, crimes against humanity and genocide, allow a shifting perception of rape and other violent crimes against women. The emphasis in both crimes against humanity and genocide is on the group and the violence committed against members of the group for its destruction, not upon rape as a gender crime against individual women. Crimes against humanity and genocide take other forms when

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[26] *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, GA Res 49/205 (Sess XLIX), UN GAOR, UN Doc A/Res/49/205 (1995). See also Catharine A MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 Harvard Women's Law Journal 5, 12-13; Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326,333; Koenig, 'Women and Rape in Ethnic Conflict and War' (1994) 5 *Hastings Women's Law Journal* 129. On sexual violence against women in the conflict in the Former Yugoslavia see Todd A Salzman, 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical esponses to Rape Victims in the Former Yugoslavia' (1998) 20 *Human Rights Quarterly* 348; Catherine N Niarchos, 'Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 651; Cleansing and Tissen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues' (1995) 5 *Criminal Law Forum* 471. See also Human Rights Watch, *War Crimes in Bosnia-Herzegovina* (1992). On sexual violence against women in the Rwanda genocide see Africa Human Rights Watch Women’s Rights Project, *Shattered Lives, Sexual Violence During the Rwandan Genocide and its Aftermath* (1996).

[27] *Prosecutor v Radovan Karadzic and Ratko Mladic*, 108 ILR 85,136.

[28] *Ibid*, 135

[29] *Ibid*, 118

[30] *Rome Statute of the International Criminal Court*, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998; 37 ILM 1002. The whole of the Statute can be accessed at <http://www.un.org/icc/romestat.htm> ('*Statute of the ICC*').

[31] Statute of the ICC, art 8(b).

[32] Statute of the ICC, art 8(b) (i)

[33] Statute of the ICC, art 8(b).(xxi)

[34] Statute of the ICC, art 8(b).(xxii)

committed against men, while women are subject to other forms of the offences, as well as to sexual violence. The omission of rapes from the definition of grave breaches allows the perception that it is only where they reach the systematic and widespread level of crimes against humanity that they are punishable as war crimes. Just as a single illegal act towards a prisoner of war violates the Third Geneva Convention (and, depending upon content of the act, potentially a grave breach of that Convention) so too a single act of rape in armed conflict must be regarded as illegal under the laws of war .

2.2 *Prosecution Policy*

Jurisdictional provisions are of no account if they are not acted upon. In determining when to bring indictments for rape and sexual assault in armed conflicts, the prosecution has had to take account of the Rules of Evidence and Procedure and the adequacy and reliability of available evidence. Investigations of crimes against women in the Former Yugoslavia and Rwanda have raised numerous practical and legal problems: the dispersal of victims and witnesses across all regions of the world; the unwillingness of women to speak of crimes committed against them through humiliation, shame, fear of public or family ostracism or fear of reprisal; the intervention of too many people wanting accounts of their experiences, including media, NGOs, support agencies etc, and, eventually, official investigators; the passage of time and the desire not to relive such atrocities; and the feeling that rape and sexual assault were not in fact of major concern compared with the loss of community, home and possessions and the death or disappearance of family members.[35]

With respect to indictments, the prosecution has had to determine what charges to bring. The lack of any international definition of rape in Article 27 of the Fourth Geneva Convention perhaps assumed a common understanding of the elements of the offence, but perhaps also assumed that it would not be subject to international criminal prosecution. In determining what legally constitutes rape, the ICTY could have relied upon the criminal law applicable in that country to which all those involved were subject. It is however undesirable that the formulation of any international crime should depend upon the happenstance of the location of the first prosecuted offences, especially given the likely precedential impact of any rulings. Further, the criminal law of many States defines rape from the viewpoint of the male perpetrator rather than of the usually female victim.[36] The prosecution has circumvented these problems by first issuing indictments for the crime of forcible sexual intercourse.[37] This formulation allows fresh consideration of the elements of the offence, without importing understandings of rape from any particular legal system, for example, that rape must be penile and is only committed against women. It also emphasises the elements of violence and force.

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[35] Christine Chinkin, , Amicus Curiae Brief on Protective Measures for Victims and Witnesses' (1996) 7 *Criminal Law Forum* 179, 185.
[36] See especially, Jocelynne A Scutt, *Women and the Law* (1990) 444-501. See also Catharine A MacKinnon, *Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence* (1983) 636.
[37] *Tadic*, above n 23

The prosecution for the Tribunal for the Former Yugoslavia has indicted alleged accused for the offence of rape under Articles 2 and 5 of the statute of the Tribunal. It has, however, gone further and investigated sexual assaults for the specific purpose of prosecution under the rubrics of torture and enslavement as a crime against humanity.[38] In indictments issued in June 1996 against Dragan Gagaovic and others in the *Foca Case* the prosecution alleged 62 counts of crimes committed against women, including crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war relating especially to rape, torture, outrages upon personal dignity, persecution, wilfully causing great suffering, enslavement and inhuman treatment.[39] The prosecution has also included charges of rape in indictments against all sides in the various conflicts in the former Yugoslavia, thereby emphasising that such actions are not the preserve of anyone faction but have been common to all.[40]

2.3 *Rules of Procedure and Evidence*

The Secretary-General of the Untied Nations proposed that protective measures be 'provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault.'[41] Protective measures have been implemented through a number of provisions for the protection of victims and witnesses in proceedings before Trial Chambers, and the establishment of the Victims and Witnesses Unit in the Registry.

The understanding of the dilemma faced in court by victims of rape and sexual assault is shown in Article 96 of the Rules of Procedure that warrants citation in full:

> In Cases of sexual assault:
>
> (i) ...no corroboration of the victim's testimony shall be required;
>
> (ii) Consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected
>
> (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in *camera* that the evidence is relevant and credible;

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[38] See the Indictment in *Prosecutor v Dragan Gagovic and others* [1996] (the Foca Case) IT-96-23-1. The most significant aspect of this case is Judge Vohrah's confinnation of the Prosecutor's allegations of the crime of enslavement, based on the evidence of sexual violence.
[39] *Ibid*. No arrests have been made to date in this case.
[40] *Prosecutor v Zejnil Delalic and others* [1996] IT-96-21-1.
[41] Secretary-General's Report, para 108.

(iv) (iv)Prior sexual conduct of the victim shall not be admitted in evidence.[42]

Dispensing with the need for corroboration shows sensitivity towards both the facts of rape during armed conflict, and its psychological impact. The Special Rapporteur on Violence against Women has explained in her first report some of the reasons why survivors may be reluctant to testify in public criminal proceedings. These include 'severe traumatization, feelings of shame, lack of trust, fear of awakening bad memories as well as fear of reprisals against themselves and their families.'[43] Evidentiary difficulties are accentuated where there is no medical corroboration because victims did not, or could not, seek medical advice through fear, shame or because of its unavailability. Victims may not have discussed what occurred with anyone out of fear of retribution or rejection.

Many domestic rape trials turn on whether or not there was consent to intercourse, especially where the victim knows the alleged attacker.[44] In the fear and horror of armed conflict, the concept of consent is meaningless. Closely connected with the issue of consent is the retraumatisation experienced by women alleging rape through humiliating and rough questioning by defence counsel on their prior sexual conduct in order to present them as 'bad' women and therefore as unreliable witnesses. Rule 96 approaches the question of consent from the viewpoint of the victim. It is her reasonable belief of the consequences if she does not submit that is determinative, not that of the accused as to her consent as is so often the case in domestic law. It is to be hoped that 'reasonableness' will be interpreted in light of the history of sexual violence in armed conflict, from the standpoint of a woman as a victim, and not on the relevance of her sexual history .

2.4 *Trial Process*

Many of the concerns about the trial of rape cases were addressed by the Trial Chamber in pre-trial motions in the first case brought before it, that of Dusko Tadic. The prosecution sought confidentiality for certain witnesses from press and media, protection from the potential retraumatisation of confronting the accused in open court and anonymity, including from the accused for as long as possible, for particular witnesses.[45] This application raised important questions about the content of a fair trial in accordance with the European Convention on Human Rights,[46] the International Covenant on Civil

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[42] *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 'Rules of Procedure and Evidence'*, as amended, UN Doc IT/32 Rev 11 (1997).

[43] *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, Submitted in Accordance with Comm'n on Hum Rts Res 45 (Sess XLV),* UN ESCOR, UN Doc E/CN.4/1995/42 (1995) (*'Preliminary Report on Violence Against Women'), [13]. See also Rape and Abuse of Women in the Territory of the Former Yugoslavia: Report of the Secretary-General, Comm'n on Hum Rts (L),* UN ESCOR, UN Doc E/CN.4/1994/5 (1993) (*'Rape and Abuse Report*').

[44] MacKinnon, above n 36, 636.

[45] Prosecutor v Dusko Tadic (Decision of the Trial Chamber, 10 August 1995 on Protective Measures for Victims and Witnesses) 105 ILR 599.

[46] *[European] Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, (entered into force 3 September 1953), as amended by

and Political Rights (ICCPR) [47] and the Tribunal's own Statute. Article 21 (e) of the Statute of the Tribunal provides that:

> the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (e) To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses ...under the same conditions against him;

This right of the accused must however be balanced against other interests, notably those of victims and witnesses in their security and privacy, and those of the international community in seeing guilty persons brought to justice. In considering these applications, the Trial Chamber emphasized its over-riding preference for a public trial, especially in light of a trial's important educative function.[48] However the Chamber was also mindful of the unique mandate to protect witnesses and victims, that distinguishes its Statute from human rights treaties that contain no such affirmative obligation.[49] The fact that the Tribunal had been established during a continuing conflict that had caused 'terror and anguish' to the civilian population had to be taken into account. The Chamber was also aware that, unlike at Nuremberg, it would be largely dependent upon eyewitness testimony .[50]

The Chamber drew upon national jurisprudence[51] and case law under the European Convention on Human Rights[52] to provide guide-lines for the factors that must be taken into account in determining whether to accord anonymity to witnesses.

First there must be a real fear for the safety of victims and witnesses. Although this requirement was phrased objectively, the Chamber stated that the ruthless character of the alleged crimes justified witnesses fearing the accused and his accomplices. Second, the evidence of the witness must constitute an important part of the prosecution case. Thus, there must be no evidence that the witness is unreliable or untrustworthy, for example, through having a criminal background. Fourth, the Tribunal must be unable to supply adequate protection, and fifth, the measures must be strictly necessary to justify the unavoidable prejudice to the accused of not knowing the identity of witnesses against him.[53]

Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990, respectively. As at 28 October 1998, there were 40 States Parties.

[47] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966,999 UNTS 171,6 ILM 368 (entered into force 23 March 1976) ('ICCPR'). As at 17 March 1999, there were 144 States Parties.

[48] Prosecutor v Tadic, above n 45,629

[49] Ibid, 611-12.

[50] Ibid, 609-10.

[51] 51 Ibid, 615-17. The Tribunal made extensive references to United States, Australian and New Zealand case law on confidentiality and to the *Evidence Act (Amendment Act)* 1989 (Old) that allow additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court.

[52] Ibid, 614-15.

[53] Ibid, 622-3.

These guidelines do not provide a blanket expectation of privacy for witnesses but rather a flexibility that allows all the relevant factors in the particular claim to be assessed. In some cases identity will be more important than in others. For example, in a chain of command case where there is no accusation that the defendant was present at the commission of the offences, identity of those testifying is less important than in trials where the accused is the alleged perpetrator. It might be further argued that in many instances the identity of the victims was irrelevant at the time of the commission of the offences. Women have spoken of being taken in turn, or arbitrarily 'selected' for sexual abuse.[54] In these circumstances, it seems somewhat strained to argue that their identity is now crucial to the prosecution case. Nor do the guidelines suggest that anonymity will be permanent but will only last for as long as the decision making.

In *Kostovski v The Netherlands*,[55] the European Court of Human Rights recognised the disadvantages that an accused person faces when answering the allegations of an anonymous witness and suggested that the trial court should ensure that certain safeguards are put into place to provide some counter-balance. The Appeals Chamber of the ICTY in referring to the decision in *Kostovski*, similarly indicated procedural measures to minimize the accused's handicap.[56] The judges must verify the true identity of each witness and must be able to observe the demeanour of all witnesses to assess the reliability of their testimony. In the absence of a trial by jury , the judges are the decision-makers both as to fact and law and confidence in their ability to weigh all aspects of the evidence is crucial to the credibility of the Tribunal. The defence must be given ample opportunity to question all witnesses on issues unrelated to their identity and current whereabouts. This principle conforms to the requirements of Article 21 (4)(e) of the Tribunal's Statute that the accused is entitled 'to examine, or have examined, the witnesses against him. ' Finally any anonymity accorded is not permanent, but will last only as long as there is reason to fear for the witness's security .[57]

The ruling of the Tribunal in *Tadic* on witness anonymity has provoked an extremely hostile response on the grounds that it will deny accused persons a fair trial and may lead to the conviction of accused persons on the basis of tainted evidence. Monroe Leigh has argued, for example, that the well-established rights of the accused should not be undermined by the more recent conception of victims' rights.[58] However focus on the rights of the accused deflects attention from the broader interests of the international community in achieving the three objectives for which the war crimes tribunals were established: to do justice, to deter further crimes and to contribute to the restoration and maintenance of international peace. It also ignores the fact that in national courts too security and policing interests have at times justified the receipt of testimony from anonymous witnesses.

[54] Askin, above n 18, 261-379
[55] (1989) 166 ECHR (ser A).
[56] *Prosecutor v Tadic,*. above n 45.620-1.
[57] Ibid, 624.
[58] Monroe Leigh, 'Witness Anonymity is Inconsistent with Due Process' (1997) 91 *American Journal Of International Law* 50, 51. See also, in reply, Christine Chinkin, 'Due Process and Witness Anonymity' (1997) 91 *American Journal of International Law* 75.

Most importantly, this refusal to see beyond the rights of the accused illustrates precisely the claim made by feminist analysis of human rights law that its principles have been predicated upon the concerns of men and have failed to take account of the life experiences of women.[59] Women typically feature in criminal trials as victims and witnesses, while more men than women feature as accused persons.[60] It is not surprising that the guarantee of a fair trial -that is, to fair treatment by the agents of the State -is seen by many as more fundamental than the right of the victim to equality before the law and of the victim and potential victims to be free from fear of further abuse. It has been asserted that, 'sex crimes against women cannot be effectively controlled or punished by domestic laws . during times of armed conflict.'[61] The subsequent refusal of one of the witnesses accorded anonymity by the Chamber to testify in the *Tadic* trial highlights the reality of the fears of witnesses that the Dayton Peace Accords have done little to relieve.

Inclusion of rape and sexual assault within the jurisdiction of war crimes tribunals is an overdue signal to the international community of the unacceptability under international law of atrocities committed against women during armed conflict. If the tribunals are unable to prosecute successfully those who have been indicted of such offences because of the reasonable fears of witnesses who are offered no protective guarantees, that message becomes blurred and its seriousness open to question. For women it means that yet again their suffering is denied and their stories discounted.

3. DO WOMEN REMAIN THE FORGOTTEN VICTIMS OF WAR?

The Judges and prosecution staff of the War Crimes Tribunals for the Former Yugoslavia and Rwanda have done much to ensure that women are no longer the forgotten victims of war .In particular the long silence about the suffering of women in armed conflict has been broken. Crimes against women have been widely investigated and the inclusion of rape and sexual assault within the jurisdiction of the Tribunals may have conclusively determined that such offences are war crimes that must be subjected to enforcement measures.

The second judgement handed down on 2 September 1998 by the Rwanda Tribunal has resulted in the conviction of the defendant Jean-Paul Akayesu for crimes of sexual violence.[62] The trial chamber in that case made a number of important findings. It defined rape and sexual violence as acts of a sexual nature not limited to domestic definitions of the crime. The Chamber found that sexual violence might constitute a crime against humanity or a breach of article 3 common to the Geneva Conventions and Additional Protocol n as an outrage on personal dignity. It also held that sexual violence constituted serious bodily or mental harm and could constitute genocide. Finally, the judges found

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[59] MacKinnon, above n 26, 15.
[60] Scutt, above n 36.
[61] Askin, above n 18,295.
[62] Prosecutor v Jean-Paul Akayesu [1996] ICTR-96-4- T .The decision can be accessed at <http:/ /www .un.org/ictr/eng1ish/judgements/akayesu.html>

that the participation of the accused in the sexual violence need not be restricted to the role of the main offender but could include ordering, instigating, aiding and abetting the commission of such acts by allowing them to take place.[63] These significant findings assist in the creation of jurisprudence that views sexual violence from different perspectives, including that of genocide.

Other recent developments in international law also indicate that the issue of sexual violence against women remains on the agenda. The Statute of the ICC identifies sexual assault and other similar violence as crimes against humanity and under war crimes provision for acts committed during international and internal armed conflict. Article 7 (1)(g) states that the following acts are a crime against humanity, when the other constitutive elements are present: 'rape, sexual slavery , enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' .

Article 7(2) assists in the interpretation of the list of crimes under article 7(1). It defines the crime of 'forced pregnancy' as:

> the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law .This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

The intent required to prosecute the crime of forced pregnancy is very high, the crime is limited by the purpose of the perpetrator and there is no doubt that it will be extremely difficult for prosecutors to provide such evidence.

Article 8(2)(b) (xxii) of the Statute of the ICC lists war crimes committed during international armed conflict and includes:

> Committing rape, sexual slavery , enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

It is interesting to note that whilst rape and other such crimes are not articulated under article 8(2)(a) dealing with grave breaches, the statement 'also constituting a grave breach ...' indicates that crimes of sexual assault may be starting to be recognised as a grave breach as well as a' serious violation. The same listing of sexual violence crimes can be found in article 8(2)(e)(vi) pursuant to cases of armed conflict not of an international character. The final part of the sub-paragraph states, '...and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.'

The Statute of the ICC contains the most comprehensive coverage to date of sexual crimes regularly suffered by women during times of armed conflict. The practical

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[63] *Ibid*

elements required to prosecute some of these crimes will create difficulties and no assumptions can be made in relation to the potential prosecution policies with respect to indictments for such crimes.

Steps taken in other arenas have reinforced this progress. For example, the truth about sexual slavery for the benefit of the Japanese military during World Warn has at last been revealed, and to some limited extent addressed.[64] Rape in armed conflict was denoted a violation of human rights law by both the World Conference on Human Rights in Vienna in 1993[65] and the Fourth United Nations World Conference on Women in Beijing in 1995.[66] The UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, has given special attention to the subject.[67] The civil jurisdiction of the US courts has been asserted in a class action against Radovan Karadzic brought by women victims of sexual violence in Bosnia and Herzegovina.[68] Perhaps the most significant advance has been at the regional level in the decisions of the Inter-American Commission of Human Rights *in Raquel Marti de Mejia v Peru*[69] and the European Court of Human Rights in *Aydin v Turkey*.[70] The salient facts of the former case for the purposes of this discussion are that soldiers in Peru raped Raquel Mejia after they had abducted her husband, a known political activist. When she learned of her husband's

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[64] Askin, above n 18,73-85.

[65] On 25 June 1993, representatives of 171 States adopted by consensus the *Vienna Declaration and Programme of Action of the World Conference on Human Rights*. The final paragraph of the Vienna Declaration and Programme of Action was adopted by all the States attending the World Conference. The full text of the Vienna Declaration is located at <http://www.unhchr.ch/html/menu5/d/vienna.htm>. On 20 December 1993 the General Assembly of the United Nations endorsed the Declaration: see GA Res 48/121, UN GAOR (85th plen mtg), UN Doc A/Res/48 (1993).

[66] The official documents of the Conference are located at <gopher://gopher.undp. org:70/00/unconfs/women/ off/a--20.en>, UN Doc A/CONF.177/20 (1995); 35 ILM 401. See especially, Annex II: Platform for Action -Women in Armed Conflict [131]-[149]. The role of the United Nations in making the document available 'on-line' is hereby greatly acknowledged.

[67] Preliminary Report on Violence Against Women, above n 43. See also, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44 Sess LIV)* UN ESCOR, E/CN.4/1998/54 (1998) ('1998 Report on Violence Against Women').

[68] *Kadic v Radovan Karadzic and Jane Doe v Radovan Karadzic*, 866 F Supp 734-35 (SD NY 1994), rev'd, 70 F 3d 232 (2d Cir 1995), cert denied, 116 S Ct 2524 (1996) (*'Karadzic Actions'*). See also in this regard, the remarks by Catharine MacKinnon made during the Fourth Hague Joint Conference held in The Hague, 2-5 July 1997, in 'International Human Rights and Humanitarian Law', Wybo P Heere (ed), *Contemporary International Law Issues: New Forms, New Applications* (1998) 150-3, in her capacity as lead council in the case of *Kadic v Karadzic*. The plaintiffs sought compensatory and punitive damages, as well as injunctive relief as a redress for torts including: genocide; summary execution; wrongful death; torture; cruel, inhuman or degrading treatment; rape; assault and battery; war crimes; intentional infliction of emotional distress; forced pregnancy and prostitution; and forced childbirth, the Karadzic Actions, 735- 7. The actions were instituted pursuant to the *Alien Torts Claims Act*, 28 USC § 1350 (1994). The Supreme Court denied the defendant's writ of certiorari and allowed the plaintiffs to proceed with the case. For a detailed analysis of these cases see Beth Ann Isenberg, 'Comment: Genocide, Rape, And Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Actions' in (1997) 60 *Albany Law Review* 1051 ; Theodore R Posner, Alien Tort Claims Act-genocide-war crimes-violations of international law by non State actors' in (1996) 90 *American Journal of International Law*. 658.

[69] (1996) Report No 5/96, Inter-Am CHR, OEA/Ser L/V/II.91 Doc 7,157.

[70] (1998) ECHR (ser A), (1998)3 Butterworths Human Rights Cases 300.

death, Raquel Mejia filed criminal charges in Peru but fearing reprisal, did not mention rape. Some years later when she had received political asylum in Sweden, Raquel Mejia lodged a petition with the Inter-American Commission on Human Rights alleging violations of the American Convention on Human Rights,[71] including, *inter alia*, of Article 5 (the right to be free from torture and other inhumane treatment), Article 11 (the right to private life) and Article 1 (the duty of the State to respect and guarantee the exercise of the rights and freedoms within the Convention).

It might be first noted that what had happened to the complainant is not unusual. Her association with a known activist targeted her for violence. Women who themselves have played no political role are singled out in this way and a Human Rights Watch Report with respect to Peru has found that women may well become subject to abuse from both government and anti-government forces.[72] The inter-American Commission made a number of groundbreaking statements with respect to her allegations of rape. First, they presumed the facts as alleged by Raquel Mejia to be true, although she had not reported it at the time and there was no corroborating evidence. There was strong circumstantial evidence to presume the responsibility of Peruvian army troops in a complaint of violation of human rights, which does not demand the same high standard of proof as a criminal trial. The Commission accepted that the rapist was wearing Peruvian army fatigues and was in the company of soldiers. She was living in an area under emergency legislation where the military 'commonly perpetrate numerous human rights violations. ' The Commission found support for her allegations in the abundant information contained in reports of inter-governmental organisations and NGOs of rapes by security forces in Peru as part of their campaign to intimidate, humiliate and punish civilians suspected of collaborating with insurgents.[73] Such rapes were committed with impunity and the Commission noted that there were no effective domestic remedies within Peru for the impartial investigation and prosecution of allegations of sexual abuse by members of the security forces. Accordingly, although the sexual abuse had not been reported in Peru, there was also no failure to seek domestic remedies. In terms of substance, the Commission unequivocally affirmed that:

> Current international law establishes that sexual assault committed by members of security forces, whether as a result of a deliberate practice promoted by the state or as a result of failure by the state to prevent the occurrence of this crime, constitutes a violation of the victim's human rights, especially the right to physical and mental integrity.[74]

The Commission cited Article 27 of the Fourth Geneva Convention and Article 76 of Protocol I to support its pronouncement that 'any act of rape committed individually constitutes a war crime.' It referred to the declaration of the International Committee of the Red Cross that the' serious offence' of deliberately causing great suffering includes

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[71] *American Convention on Human Rights*, opened for signature 7 January 1970, OAS Treaty Series No 36; 1144 UNTS 123; 9 ILM 673, OEA/Ser.K/XVI/l.l Doc 65, Rev 1, Corr 2 (entered into force 18 July 1978).
[72] Human Rights Watch, *Untold Terror. Violence against Women in Peru's Armed Conflict* (1992).
[73] *Marti de Mejia v Peru*, above n 69.
[74] Ibid

sexual abuse. In the context of non-international armed conflict, Common Article 3 of the Geneva Conventions and paragraph 2 of Article 49 of Additional Protocol II include the prohibition of rape and other sexual abuse 'in so far as they are the outcome of harm deliberately influenced (sic) on a person.'[75]

Although its holdings were under the American Convention on Human Rights, the Commission accepted the applicability of both international humanitarian law and human rights law to such events. Rape can therefore constitute the offence of torture under the Geneva Conventions as well as falling within Article 5 of the American Convention. The Commission emphasised that 'rape is a physical and mental abuse that is perpetrated as a result of an act of violence. ' It is also a method of psychological torture through the humiliation, victimisation and fear of. public ostracism. The purposive element of torture is satisfied by the use of rape for personal punishment and intimidation. In addition, the deliberate outrage to dignity that is caused by rape makes it a violation of the concept of. private life within Article 11 of the American Convention on Human Rights. The Commission recommended to the government that it conduct a full investigation into the sexual abuse of Raquel Mejia in order to identify and punish the perpetrators in accordance with national law, and to pay her fair compensation.[76]

This strong statement that rape by security forces constitutes torture that is attributable to the State parallels the indictments by the ICTY in the *Foca Case*. Together they provide strong evidence of a changed understanding of human rights violations that incorporate the violence experienced by women. In Aydin the European Court made important statements about the duty of States to investigate effectively and substantially allegations of rape by government officials:[77]

Despite these important steps forward, I would still argue that women are not yet sufficiently taken account of by international humanitarian law and remain largely forgotten. Indeed there is a risk that these very advances will create the false illusion that the problem of war crimes against women has now been adequately addressed. This remains far from the true position. First, the ad hoc tribunals are limited to the conflicts in the former Yugoslavia and Rwanda and there has to date been limited prosecution of rape, despite a number of indictments issued by both Tribunals. There is no general recognition of the reality that violent sexual abuse of women continues with impunity in other internal and international conflicts across the globe. Second, even after the establishment of the ICC, it is unlikely that it will have many cases of violations of international humanitarian law brought before it, at least for several years:[78] As has always been the case, internalised respect for the laws of war must be the first goal and their enforcement through domestic courts enhanced. On one approach, the problems with the incorporation of women's interests are no different from enforcement of international humanitarian law generally. However, similar harms to those suffered by

[75] ICRC -Update on Aide-Memoire of 3 December 1992.
[76] *Marti de Mejia v Peru*, above n 69.
[77] *Aydin v Turkey*, above n 70.
[78] Article 126 of the Statute of the ICC provides that the Court will come into existence when 60 States ratify the Statute. The Court will only have prospective jurisdiction after that date and given the limitations of the court's jurisdiction, it is unlikely that the court will be inundated with cases from its inception.

women in armed conflict are committed against women by men from within their own families, communities and States. In many instances these acts are committed with impunity and, even where prosecuted, convictions are hard to secure.[79] Violence against women in armed conflicts, and during peacetime, is not a distinct phenomenon but forms part of the same spectrum of behaviour and each occurs along a continuum of seriousness. The widespread, systematic and brutal nature of the offences committed in the Former Yugoslavia and Rwanda place these offences at the far end of the spectrum, as is recognised by their inclusion as crimes against humanity in the Statute of the two Tribunals. It cannot be assumed that other bodies, including the ICC, will adopt the approach of the Inter-American Commission that all rapes committed individually by all persons in armed conflict constitute war crimes. Further, the legal distinction between these offences emphasises the falsity from the perspective of the lives of women of such dichotomies as war and peace, protector and protected, security and insecurity, human rights law and international humanitarian law. The reaffirmation of the illegality of violence against women in armed conflict by the Statute of the ICC should reinforce recognition that such violence outside armed conflict is a violation of human rights law that incurs State responsibility for failure to take due diligence for its elimination and punishment. The crucial question that needs to be asked in the light of these historic developments is: would future prosecutions be willing to include rape and sexual abuse within indictments, especially where there have been other offences, perceived as more serious, or where witnesses are unwilling to testify?

Third, the adequacy of international legal remedies for victims of rape in armed conflict can be questioned. The focus of the enforcement measures through the Tribunals is on punishing the wrongdoers, not on providing compensation and support to those who have suffered. Admittedly this is a defect shared by municipal criminal legal systems, but these may be backed up by other domestic support services. A war crimes tribunal must be supplemented by long-term financial and practical assistance from governments such as medical care, shelter, support, counselling, resettlement and retraining. It cannot be assumed that all women will share the same needs. Some may feel empowered by the establishment of war crimes tribunals and the opportunity they offer to testify. Others may consider investigation and requests for evidence as further intrusions into their lives and as peripheral to their efforts to rebuild their lives. A vailable responses under international law must be sensitive to individual needs and choices.

Emphasis must remain upon dissemination, prevention and changing the mindset that sees offences against women civilians as less serious than those, for example, against prisoners of war .For this reason it is important that the provisions with respect to remedies for, and participation by, victims in the ICC statute are given full effect.

The fourth concern comes from quite the other direction. The Geneva Conventions recognise the plethora of offences that might be committed against those subject to their protection and provide a comprehensive code of behaviour during international armed conflict. While the developments discussed above recognise that women are subject to specific abuses in armed conflict, the emphasis remains on their sexual and reproductive

[79] Askin, above n 18, 223.

identities. Rape, sexual assault, sexual enslavement, enforced prostitution and forced pregnancy have been recognised as gender-specific, violent abuses of the laws protecting civilians. As has been seen, women are also accorded special protection as mothers and carers. But the numerous other ways in which women suffer harms during armed conflict in ways different from men are still not accommodated. Lack of data about the differentiated effects of conflict lays this claim open to challenge. It is unarguable that both men and women non-combatants suffer many diverse forms of hurt during and after armed conflict. The priority accorded by the legal regime to military necessity adversely impacts upon the protection accorded to non-combatants. The construct of societal gender roles combined with the generally subordinate social and economic position of women means that they suffer in particular ways during conflict. Thus, as Judith Gardam expresses, 'women suffer under a double disability in comparison with combatants: their status and treatment are not only inferior as civilians but doubly so as women civilians.'[80]

Many illustrations could be given of this. The struggle for daily survival in the face of price increases for essential foods and health supplies, shortages and the dislocation of services falls most heavily upon those with responsibility for the care of others, including of physically and psychologically injured fighters, the elderly, and traumatised children. Food and health supplies are typically allocated with priority according to military needs. Within a combat zone hardship is exacerbated by the physical danger from sniper or other attack involved in leaving home for routine, but essential, activities such as shopping or finding fuel. Continuation of professional life (and therefore receiving income) might become impossible. Collapse of governmental agencies, including those for maintaining law and order and the concentration of armed men within an area all undermine the usual community restraints on human rights abuses.[81] The use of UN or regional peacekeeping forces does not guarantee security for women. Research suggests that women also suffer from a higher incidence of violence at home during a period of armed conflict, whether or not they are living within the combat zone.[82] The laws of war do not take account of any of these consequences of armed conflict. Their focus is upon the military operations, not upon the inevitable, but largely ignored repercussions, that fall unequally on different sections of the population. Nor is the role of women in restructuring society and peace building after conflict acknowledged. Women are not routinely included within peace negotiations and plans for the reorganising of society do not take account of the burden upon women. For example, the Special Rapporteur for the human rights situation in the Former Yugoslavia, Elisabeth Rehn, has emphasized in her report the urgency of rehabilitative measures for children traumatised and physically injured by the war and who require expert psychological, educational and medical care.[83] Much of this social burden is likely to fall heavily on women. The potential charge on women of addressing

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[80] Judith Gardam, 'Women and International Humanitarian Law' in William Maley (ed), *Shelters From the Storm: Developments in International Humanitarian Law* (1995) 209.
[81] Jeanne Vickers, *Women and War* (1993) 23-6.
[82] ICRC Special Brochure, 'Women and War' No 8/95.
[83] *Report of the UN Special Rapporteur of the Commission on Human rights in the Territory of the Former Yugoslavia. Elisabeth Rehn, Submitted in Accordance with Commission on Human Rights Resolution 1995/89 (Sess LII)*, UN ESCOR, UN Doc E/CN.4/1996/63 (1996) ('Report on the Situation'). See further, Christine Chinkin, 'strategies to Combat Discrimination Against Women' in M O'Flaherty and G Grisvold (eds), *Post-war Protection of Human Rights in Bosnia-Herzegovina* (1998) 173.

the needs of children could become empowering if the function is respected as a national priority, with provision for appropriate training, and allocation of resources, but could otherwise force women into further domestic roles that are unrecognised as an essential part of reinvesting for the future. Women are an essential human resource in the redevelopment program and in the search for peace. Their leadership, political, organisational and management skills should be harnessed in the identification of priorities and strategies for their achievement. Neither the law nor practices relating to armed conflict include women as agents for the survival of the community or of change, but instead continue to view them as passive victims of international affairs. In this sense the recent developments described earlier have not transformed the position of women within the legal structures of the laws of war .

A suggestion that should receive full deliberation is for a further Protocol to the Geneva Conventions directed to the needs of women in armed conflict comparable with the current proposal for a protocol to the Rights of the Child Convention[84] to increase protection for children in armed conflicts. Such a Protocol would be based upon women's own encounters with armed conflict, not upon assumptions that they experience it in the same ways as men. Gender statistics and data would therefore be an important requirement. There has been much national debate about the inclusion of women in the military, in particular in combat roles. This would increase the likelihood of women becoming prisoners of war But many, many more women experience armed conflicts as civilians. A rethinking of international humanitarian law that takes seriously the position of women civilians would be a major contribution to that law.

[84] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989,28 ILM 1448 (entered into force 2 September 1990). As of 28 October 1998, there were 191 States Parties.

Protection of Children in International Humanitarian Law

by Denise Plattner

Contents

I. Introduction [1]

The legal protection of children was introduced into international humanitarian law after the Second World War. Experience during that conflict had, in fact, pointed to the urgent need to draw up an instrument of public international law for protecting civilian population in wartime. The results of the ICRC's efforts in this field led to the adoption of the 1949 Fourth Geneva Convention relative to the protection of civilian persons in time of war. From that time on, children, as members of the civilian population, were entitled to benefit from the application of that Convention. Moreover, the first international humanitarian law regulations concerning armed conflicts not of an international character, contained in article 3, common to the four 1949 Geneva Conventions, were drawn up at the 1949 Diplomatic Conference. Here again, children were protected, in the same way as all "persons taking no active part in the hostilities".

Since the Second World War, the international community has witnessed the appearance of new kinds of conflicts. Methods and means of warfare have become increasingly sophisticated. Conflicts opposing regular armed forces and irregular combatants are more frequent. In modern warfare, losses are much more severe among civilians, including children. A Diplomatic Conference was held from 1974 to 1977, whose aim was to supplement and develop international humanitarian law by taking into account this evolution. At the close of this Conference in 1977, the two Protocols additional to the Geneva Conventions were adopted. These instruments considerably improve the protection of civilian population and, consequently, that of children. The new provisions of both Protocol I, applicable during international armed conflicts, and Protocol II, relating to non-international armed conflicts, reaffirm and develop those of the Fourth Geneva Convention."

The International Committee of the Red Cross (ICRC), which works on behalf of the victims of armed conflicts, has always been particularly sensitive to the plight of children during wartime. Since the Second World War especially, it has endeavoured to alleviate their sufferings by helping in the drafting of laws for their protection, and by undertaking operations in countries affected by conflicts.

II. The protection of children in the Geneva Conventions and their Additional Protocols

International humanitarian law provides general protection for children as persons taking no part in hostilities, and special protection as persons who are particularly vulnerable. Moreover, children taking part in hostilities are also protected. The various aspects of the legal protection of children will be examined one after the other in the following paragraphs.

A. General protection of children, as members of the civilian population

During international armed conflicts, children come into the category of those protected by the Fourth Geneva Convention relative to the protection of civilian persons in time of war. By virtue of this, they benefit in particular from all the provisions relative to the treatment of protected persons, which state the basic principle of humane treatment, including respect of life and physical and moral integrity, and for- bidding, inter alia, coercion, corporal punishments, torture, collective penalties and reprisals.

As members of the civilian population, children benefit from the rules of international humanitarian law relative to the conduct of hostilities. These rules, developing the principles for distinguishing between civilians and combatants and forbidding attacks directed against civilian population, are expressed, inasmuch as they refer to international armed conflicts, in Protocol I of 1977.

In non-international armed conflicts, children are protected by the fundamental guarantees relating to the treatment of persons taking no active part in the hostilities, set forth in article 3 common to the four Geneva Conventions. Under this article, children have at least the right, during these conflicts which are often very cruel, to be treated humanely. There should not be any violence to their lives and persons or their dignity.

Protocol II of 1977 also codifies the principles according to which the civilian population as such, as well as individual civilians, shall not be the object of attack.

B. Special protection of children, as members of the civilian population

1. The principle

The Fourth Geneva Convention comprises a great many provisions in favour of children. They show that, already in 1949, it was felt that children should be especially protected against warfare. However, the principle on which the rules relating to children is based is not stated explicitly anywhere in that Convention.

Protocol I fills this gap, by providing, under article 77, that: "Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason". The principle of the special protection of children during international armed conflicts is thus explicitly laid down.

Protocol II made similar provision for non-international armed conflicts. Article 4, entitled "Fundamental guarantees", comprises a paragraph devoted exclusively to children. It stipulates that: "Children shall be provided with the care and aid they require". This article then enumerates special measures relative to children, giving substance to the general rule stated above. The structure of article 4 shows how important the authors of Protocol II considered the protection of children during non-international armed conflicts, and it enables us to maintain that the principle of special protection of children during these conflicts is thereby affirmed.

2. Special provisions for protection against the effects of hostilities

New-born babies are assimilated to the "wounded" for the purposes of Protocol I (article 8 (a)).

Children who have not attained the age of fifteen years and mothers of children under seven come into the categories of the civilian population who can be received into the hospital or safety zones established by the parties to an international armed conflict in accordance with article 41 of the Fourth Geneva Convention. Likewise, children and maternity cases come into the category of civilian persons who, according to the Fourth Convention, should be evacuated from besieged or encircled areas (article 17).

Protocol I provides, yet only on the strictest of conditions, for the temporary evacuation of children, should this become necessary for compelling reasons for their safety (article 78).

In the case of non-international armed conflicts, Protocol II encourages the temporary evacuation of children, on certain conditions, from an area in which hostilities are taking place to a safer area within the country (article 4, 3, e).

3. Right to care and aid

As already mentioned, Protocol I lays down that the parties to an international armed conflict should provide children with care and aid.

Many of the provisions of the Fourth Geneva Convention take into account the particular needs of children.

Thus, each High Contracting Party must allow the free passage of relief intended for children under fifteen and maternity cases (article 23). An Occupying Power must facilitate the proper working of institutions devoted to the care of children in occupied territory (article 50). Parties to a conflict are bound to provide for the dependents of internees, if such dependents are without adequate means of support or are unable to earn a living (article 8 1). Nursing mothers and children under fifteen, interned for reasons of security by parties to a conflict, shall be given additional food, in proportion to their physiological needs (article 89).

Under Protocol I, in the distribution of relief consignments, priority shall be given to children and maternity cases, among others (article 70, 1).

Lastly, according to article 78 of this same Protocol, the temporary evacuation of children is also provided for in cases where the health or medical treatment of the children require it (article 78, 1).

As already mentioned, where non-international armed conflicts are concerned, Protocol II lays down the right of children to care and aid (article 4, 3).

4. The child and his family

In the light of the conclusions of a UNESCO study on children and warfare, the provisions of international humanitarian law which aim at preserving family unity during armed conflicts take on a special significance. Thus, according to that study:

" When we study the nature of the psychological suffering of the child who is a victim of the war, we discover that it is not the facts of war itself - such as bombings, military operations - which have affected him emotionally; his sense of adventure, his interest for destruction and movement can accommodate itself to the worst dangers, and he is not conscious of his peril if he keeps near him his protector who, in his child's heart, incarnates security, and if, at the same time, he can clasp in his arms some familiar object.

It is the repercussion of events on the family affective ties and the separation with his customary framework of life which affect the child, and more than anything the abrupt separation from his mother. [2]

Protocol I states the general duty of High Contracting Parties and parties to a conflict to facilitate the reuniting of families dispersed as a result of an international armed conflict (article 74).

Unity of the family is taken into consideration in the various provisions relative to persons deprived of their freedom. The Fourth Geneva Convention states that, wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life (article 82). Internees may request that their children who are left at liberty without parental care shall be interned with them (article 82). According to Protocol I, families arrested, detained or interned shall, whenever possible, be accommodated as family units (article 75, 5).

The rules of Protocol I on arrested, detained or interned mothers having dependent infants also stem from a concern to keep mothers and children together. Their cases must be considered with the utmost priority (article 76, 2). Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on these women; if they are sentenced to death, the penalty shall not be executed (article 76, 3).

The protection of family ties was taken into consideration for the temporary evacuation of children pursuant to article 78 of Protocol I. Such evacuation is subject to very strict conditions. The consent of the parents, legal guardians or persons who by law or custom are primarily responsible for the care of the children is required (article 78, 1). In addition, all the necessary steps must be taken to keep track of children who are evacuated (article 78, 3).

In keeping with the principle of the inviolability of the child's personal status, as expressed in the Fourth Geneva Convention, it is forbidden to an Occupying Power to change the family or personal status of children (article 50).

Another aspect of the protection of the family is taken into account in article 51 of the Fourth Geneva Convention, which forbids an Occupying Power to compel protected persons under eighteen to work.

An account of all the measures provided for by international humanitarian law to preserve the ties between children and their families would be incomplete if no mention were made of either the provisions for keeping track of protected persons or of those enabling the members of their families to learn of their fate.

According to the Fourth Geneva Convention, the parties to a conflict shall endeavour to arrange for all children under twelve to be identified, in particular by the wearing of identity discs (article 24). An Occupying Power shall facilitate the identification of children and the registration of their parentage, and set up, within its Information Bureau for protected persons, a special section responsible for identifying children whose identity is in doubt (article 50). The extreme importance of having a system for identifying children, especially infants, must be emphasized. That is the only way of preventing thousands of them from being abandoned as a result of the events of war: exodus of the population, bombings, the destruction of towns, deportations, etc.

Moreover, the Fourth Geneva Convention recognizes that all persons in the territory of a party to a conflict, or in a territory occupied by it, have the right to give news to members of their families, wherever they may be (article 25). The system set up by the Geneva Conventions and the functions assigned to the Central Tracing Agency by the Geneva Conventions [4]permit parents to receive information on their children who are in the power of a party to a conflict and vice versa (article 136 and ff).

With regard to non-international armed conflicts' Protocol II lays down that all appropriate steps shall be taken to facilitate the reuniting of families temporarily separated (article 4, 3, b). The evacuation of children is subject to "the consent of their parents or persons who by law or custom are primarily responsible for their care" (article 4,3, e). The death penalty shall not be carried out on mothers of young children (article 6, 4).

5. The cultural environment of the child

While a child remains with his family, he continues to benefit from the cultural environment to which he is accustomed. By protecting a child's family, international humanitarian law is also protecting the moral values, religion, culture and traditions in which he has been brought up. If a child is orphaned or separated from his parents, his cultural environment can be affected by the conflict. It appears from the provisions of international humanitarian law relating to this category of children that the authors of the Fourth Geneva Convention and those of Protocol I subscribed to the principle that, in international armed conflicts, children should benefit from an environment as close as possible to that to which they are accustomed.

Thus, in the Fourth Geneva Convention, the parties to a conflict shall ensure in all circumstances that children under fifteen who are orphaned or separated from their families may continue "the exercise of their religion and their education"; as far as possible, their education shall "be entrusted to persons of a similar cultural tradition" (article 24). The reception of such children in a neutral country should comply with the same principles (article 24). The Occupying Power shall make arrangements for the maintenance and education of children who are orphaned or separated from their parents, "if possible by persons of their own nationality, language and religion" if they "cannot be adequately cared for by a near relative or friend" (article 50). In Protocol I, article 78, 2, relating to the evacuation of children, lays down that "each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity".

6. The education of children

In addition to the provisions mentioned above on the education of children who are orphaned or separated from their families, the Fourth Geneva Convention imposes certain duties of a general nature concerning the education of children on parties to an international armed conflict. The Occupying Power must facilitate the proper working of all institutions devoted to the education of children (article 50). The Detaining Power shall ensure the education of interned children and young people, who shall be allowed to attend schools (article 94).

In the case of non-international armed conflicts, Protocol II provides that children "shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care" (article 4, 3, a).

7. The personal rights of the child

The Fourth Geneva Convention prohibits an Occupying Power from changing a child's personal status (article 50). Therefore, neither his nationality nor civil status should be changed if his country is occupied during an international armed conflict. This provision supplements, with regard to children, the essential principles concerning respect for the human person and for family rights set down in article 27 of the same Convention. In addition, an Occupying Power must not enlist children in formations or organizations subordinate to it (article 50). This prohibition is meant to prevent a renewal of the compulsory mass enrolments which took place during the Second World War, where a great many children were automatically made members of organizations and movements devoted primarily to political ends.

8. Respect of preferential treatment for children

Although the Fourth Geneva Convention does not state as a principle that special protection should be given to children, two of its provisions do stipulate that preferential treatment granted to children by national legislations shall continue during international armed conflict. Indeed, countries at war very often issue decrees for the benefit of those who are particularly- vulnerable and who require special treatment: additional food ration cards, facilities for medical and hospital care, social assistance, protection against the effects of war, etc. Children under fifteen years and mothers of children under seven years who are nationals of the enemy are entitled to any preferential treatment which is granted to the same categories of nationals of the State concerned (article 38). Likewise, the Occupying Power shall not hinder the continued application in favour of these persons of any preferential measures adopted prior to the occupation (article 50).

9. Arrested, detained or interned children

International law authorizes a party to an international armed conflict to take measures, with regard to protected persons, aimed at ensuring its own security. One of these measures is internment. Moreover, the Occupying Power can indict protected persons for breach of the national laws in force in the occupied territory, or for breach of its own decrees, issued to ensure its own security. A child can be interned like any other protected person. He can also be indicted, as in peacetime, for having committed a breach of the penal law in the occupied territory, or for having committed acts prejudicial to the security of the Occupying Power. Contrary to international humanitarian law (see 3 above), he may, in fact, have been enrolled in the armed forces and captured as a fighting member of those forces. In taking into account these situations, international humanitarian law provides special provisions for children who are thus deprived of their freedom.

Under Protocol I, children who are arrested, detained or interned, must be held in quarters separate from the quarters of adults, except where families are accommodated as family units (article 77, 4).

The Fourth Convention provides for the lodging of children with their interned parents (article 82), whereas Protocol I extends such accommodation to all those who are in the power of a Party to the conflict (article 75, 5) (see 4 above).

The Fourth Geneva Convention provides for the education of the children and young people who have been interned (see 6), as well as special playgrounds for sports and outdoor games (article 94). Provision is made (article 89) for additional food (see 3). The Convention also encourages the release, repatriation, return to places of residence or accommodation in a neutral country of children and mothers with infants and young children (article 132).

According to the Fourth Geneva Convention, proper regard shall be paid to the special treatment due to minors accused of offences under legislation in force before the occupation (article 76).

According to Protocol I, children under fifteen who take a direct part in hostilities and fall into the power of an adverse party shall continue to benefit from the special protection accorded by article 77 (article 77, 3) (see 3).

Protocol II contains an identical stipulation for non-international armed conflicts (article 4, 3, d) (see 3).

10. Children and the death penalty

The authors of the Fourth Geneva Convention and those of the Additional Protocols fixed the minimum age limit for the execution of the death penalty at eighteen years. According to the Commentary on the Fourth Convention:

"It (article 68 (4) of the Convention) makes eighteen years the absolute age limit below which the death penalty may not be inflicted, even if all the other conditions which make that penalty applicable are present. The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgement, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint."[5]

With regard to international armed conflicts, Protocol I forbids the execution of the death penalty for an offence related to the armed conflict on persons who had not attained the age of eighteen years at the time the offence was committed (article 77, 5). The Fourth Geneva Convention prohibits the death penalty to be pronounced on a protected person of an occupied territory who was under eighteen years of age at the time of the offence (article 68).

In non-international armed conflicts, Protocol II forbids the death penalty to be pronounced on persons who were under the age of eighteen years at the time of the offence (article 6, 4).

11. Orphaned or separated children

The arrangements which parties to an international armed conflict must make for children who are orphaned or separated from their families owing to a war have already been mentioned in the paragraphs devoted to the child and his family (see 4) and the cultural environment of the child (see 5).

The Fourth Geneva Convention attaches special importance to the cases of children who are orphaned or separated from their families. The parties to the conflict have the duty to take the necessary measures to ensure the maintenance and education of children under fifteen who are orphaned or separated from their families as a result of the war, and to see that they are not left to their own resources (article 24). Provision is made (article 24) for the reception of such children in a neutral country. The authors of the Convention chose fifteen as the age limit because they considered that, after that age, the development of the faculties no longer required special measures to such an extent.[6] Likewise, the Occupying Power should make arrangements for the maintenance and education of children who are orphaned or separated from their parents (article 50).

C. Children taking part in hostilities

Both Protocols include provisions relating to a new problem, that of children taking part in hostilities. This is one of the consequences of the evolution in the nature of conflicts, namely the fact that civilians and combatants are often mixed. Children's involvement in hostilities, which can extend from indirectly helping combatants to actually taking part in fighting, or even being enlisted in the armed forces, should be considered within this context. To categorically prevent children from taking part in hostilities would have been neither realistic, nor even possible. However, the Protocols aim at excluding their doing so as far as possible, especially by forbidding the recruitment of young people under fifteen (article 77, 2 of Protocol I and article 4, 3, c of Protocol II). Moreover, Protocol I encourages the parties to a conflict, if they recruit persons between the ages of fifteen and eighteen years, to enlist the oldest first (article 77, 2).

If, despite the provisions of the Protocols, children who have not attained the age of fifteen years take a direct part in hostilities and are captured, they shall continue to benefit from the special protection afforded by the Protocols (article 77, 3 of Protocol I and article 4, 3, d of Protocol II).

III. ICRC action in favour of child victims of armed conflicts

The ICRC has always been active in promoting the legal protection of children. As long ago as 1939, the ICRC and the International Union for Child Welfare prepared a draft Convention for the protection of the child. It did not materialize owing to the outbreak of the Second World War. During the Diplomatic Conferences in 1949 and from 1974 to 1977, the ICRC initiated and developed the legal protection of children.

In accordance with its tradition as a humanitarian organization, and with its mandate, the ICRC did not await the legal provisions for protecting children in armed conflicts before undertaking operations for the protection of children. Throughout conflicts the ICRC's initiatives preceded the legal protection of children and endeavoured to complete or compensate for it, when the machinery for applying international law was wanting.

During the Second World War, amongst so much horror and in spite of the difficulties it encountered in its work for civilians, due especially to a lack of legal grounds, the ICRC was able to organize certain actions such as the placing of young people under eighteen in special camps, the organization of radio broadcasts to facilitate the reuniting of children and parents and the creation of children's homes in countries ravaged by the war.

There is one sphere in which the ICRC has made and continues to make a vitally important contribution on behalf of children: the tracing of missing persons, the exchanging of family messages and the reuniting of families separated by the fighting. For over a century, the ICRC's Central Tracing Agency has been gathering and transmitting information on missing persons, captives, refugees, persons released from detention or repatriated, and informing their families. When normal channels of communication are disrupted, it forwards family messages. In the discharge of these tasks, ICRC delegates give priority to the tracing of missing children, putting them in touch, and reuniting them with their families. A task accomplished in recent years by the ICRC's Central Tracing Agency on behalf of children separated from their parents through war was the identifying of unaccompanied Khmer children placed in refugee camps in Thailand as a result of the Kampuchea conflict. In this way, in 1980, about 3,500 cases of unaccompanied minors were registered by the ICRC, in co-operation with the Office of the United Nations High Commissioner for Refugees and various voluntary agencies, with the aim of reuniting them with their families.

With regard to assistance, children benefit by the relief actions which the ICRC undertakes on behalf of civilian populations affected by conflicts. In some cases the main beneficiaries of ICRC assistance programmes are children and adolescents. Such was the case, for example, in Zambia, during the Rhodesia/Zimbabwe conflict, where 18,000 of the 29,000 refugees from Rhodesia/Zimbabwe, were young people under sixteen, and 300 were young mothers with babies. Until the end of the conflict in 1980, the ICRC supplied these persons with a considerable amount of medical and material aid.

It also happens that the ICRC carries out a special operation for children. The assistance programme for orphanages, which the ICRC undertook in Kampuchea in 1981, is a case in point.

The ICRC endeavours to protect all the victims of armed conflicts, and, by virtue of this, children are included in the actions which the ICRC undertakes during these conflicts. This means that children will be visited by the ICRC if they are being held by a party to a conflict and be included in the ICRC's actions or interventions on behalf of the victims of armed conflicts. The ICRC can also take special measures of protection for children. For example, on the day following the ICRC's first visit to Al Ansar Camp in south Lebanon, where mainly Palestinian prisoners were detained, 212 children under sixteen were released under the auspices of the ICRC. ICRC delegates took charge of the children and ensured their return to their families in the various regions of the Lebanon (September - October 1982).

IV. Conclusion

Numerous provisions of international humanitarian law establish and develop the principle of special protection for children in time of armed conflict. Whether for victims of armed conflict, or specifically for children as such; whether it involves promotion of respect for international humanitarian law or the daily tasks of its delegates, the ICRC's work undoubtedly gives effect to the principle that child victims of war must be protected. Indeed such protection is part and parcel of the protection of civilians against the effects of hostilities. It is within this scope that the protection of children should first be situated.

Notes

1. Paper read at the International Symposium "Children and War", at Siuntio Baths, Finland, 24-27 March 1983.

2. As of 31 December 1983, thirty-eight States had become parties to Protocol I and thirty-one to Protocol II.

3. Translation of: L'Enfance, Victime de la Guerre: Une itude de la situation europdenne, par le docteur Thérèse Brosse, UNESCO 1949, Paris, pp. 11-12,

quoted in the "Report on the Work of the Conference of Government Experts", Vol. ii, ICRC 1972, p. 89.

4. The origin of the provisions on the Central Information Agency in the Geneva Conventions goes back to the very first actions of the ICRC on behalf of the victims of conflicts. But it was in 1914 that the ICRC first established an international Prisoners of War Agency which was responsible for collecting and forwarding information on prisoners (wounded, sick or deceased) and also on civilians. The Geneva Convention relative to the treatment of prisoners of war of 1929 gave legal sanction to the existence and operation of this Agency. During the Second World War, the ICRC opened the Central Prisoners of War Agency in Geneva, which, dealing also with civilians, handled a considerable work load. The 1949 Diplomatic Conference confirmed the legal basis of the Central Information Agency in the Third Geneva Convention relative to prisoners of war, and, in identical terms, in the Fourth Geneva Convention relative to civilian persons. According to the Geneva Conventions, the main tasks of the Central Information Agency are the collecting and transmitting of information on protected persons. The ICRC's Central Tracing Agency continues the work of the Central Prisoners of War Agency and, since 1960, has been run, under this name, as a permanent department of the ICRC.

5. Commentary of the Fourth Geneva Convention, International Committee of the Red Cross, Geneva 1958, re article 68, p. 347.

6. Ibid., re article 24, p. 186.

Development of the protection of the wounded, sick and shipwrecked under the Protocols Additional to the 1949 Geneva Conventions

WALDEMAR A. SOLF
Senior Fellow and Adjunct Professor of Law, Washington College of Law Institute, Washington D.C.

The committees of the Conference of Government Experts and of the Diplomatic Conference charged with the development of new rules for the protection of the wounded, sick and shipwrecked were fortunate to have Jean PICTET as their ICRC adviser. Throughout the long and difficult negotiations, J. PICTET inspired the members with his own dedication to the essence of humanitarian law as that branch of international law which owes its inspiration to a feeling for humanity and which is centered on the protection of the individual victim of war against the abuse of authority.[1] In addition to his invaluable personal guidance, these committees derived their appreciation of the legal problems inherent in their work from the monumental four volume ICRC Commentary on the *Geneva Conventions* prepared under his general editorship. [2]

Contents

I. Overview

With over 100 years of experience in the protection of the wounded and sick in armed forces, the implementation of the *First Geneva Convention* had achieved a remarkable measure of success. There were, however, several important lacunae which were believed to need correction and which were addressed by the 1974-77 Diplomatic Conference.

Part II of *Protocol I* (International Armed Conflicts) was intended to remedy deficiencies in the *Geneva Conventions* relevant to the protection of wounded, sick and shipwrecked persons, medical and religious personnel, medical units and transports, and missing and dead persons. It thus supplements the relevant provisions of the four 1949 *Geneva Conventions*, which must be considered together with the new provisions.

The major deficiencies of the present *Geneva Conventions* in relation to international armed conflicts which Part II is designed to remedy are :

a) The *First* and *Second Conventions* provide detailed protection only for wounded, sick and shipwrecked members of the armed forces and for limited categories of civilians associated with the armed forces. Only very general provisions concerning other persons who are wounded and sick appear in the *Fourth Convention*. These provisions urgently required more detailed

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[1] *J. S. Pictet*, Humanitarian Law and the Protection of War Victims 11, 1975.
[2] 2 *J. S. Pictet*, ed. Commentary, The Geneva Conventions of 12 August 1949, ICRC, Vol. I, 1952; Vol. II, 1960. Vol. III, 1960, Vol. IV, 1958 (Hereinafter cited as Pictet, Commentary 1,11, III or IV).

development. Many of the new provisions of Part II now assure that the legal protection of wounded, sick and shipwrecked civilians is equal to that provided for members of the armed forces. The scope of protection for the shipwrecked, moreover, is enlarged by including internal waters as well the sea.[3]

b) The *First* and *Second Conventions* provide special protection only to medical personnel, units and transports serving the armed forces on land and sea. The *Fourth Convention* provides such protection only for civilian hospitals, their personnel and transports.[4] As many governments tend to establish highly organized civilian medical services to supplement and complement their military medical services in the event of armed conflict, it was considered to be necessary to provide wider protection to civilian medical and religious personnel, units and transports not necessarily associated with civilian hospitals. Part II of the *Protocol* extends to them needed recognition and special protection against improper interference.[5]

c) Another major deficiency of the *1949 Conventions* is that medical aircraft are denied protection unless they are flying under a flight plan agreed to by the Parties to the conflict.[6] Part II, Section II, replaces these unsatisfactory provisions by a new and well balanced system. The provisions provide for improved rules and procedures for the identification of both military and civilians medical aircraft and for their protection. This section also establishes a new set of rules which eliminates the requirement for an agreed flight plan except for flights over areas physically controlled by ~n adverse Party, flights over neutral territory and for search flights in the forward parts of the battle area.[7]

d) The. fourth major deficiency consists of the absence of an explicit duty to search for missing persons other than missing prisoners of war and civilian internees, and the absence of rules relating to access to war graves. There are also gaps in the obligations to maintain the graves of foreign war victims other than prisoners of war and civilian internees, and gaps in the regulations concerning the exhumation and repatriation of their remains. These deficiencies have been corrected by Section III of Part II, which recognizes the human right of families to know the fate of their relatives.[8]

Additionally, the normative rules of the *Conventions* relative to the protection of the physical or mental health of persons in the power of an adverse Party and those deprived of liberty in any way by any Party have been developed by providing additional precision and by severely restricting the removal of organs and tissues for transplant or transfusion.[9] The protection of

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[3] Protocol I, Arts. 8 (a) and (b), 9, 10, 11, 22 and 23.
[4] Fourth Convention Articles 18-21.
[5] Protocol I, Arts. 8 (c)-(g), 12-15, 18, 21-31.
[6] First Convention Arts. 36-37; Second Convention Arts. 39-40; Fourth Convention Art. 22. On the general status of medical aircraft, *see Cummings*, The Juridical Status of Medical Aircraft Under the Conventional Laws of War, 66 Military Law Review, p. 105, 1974
[7] Protocol I, Arts. 8 (f)-(g), 0), 18, 24-31; Annex I, Arts. 5-8, 12, 13.
[8] *Ibid*., Arts. 32-34.
[9] *Ibid*., Art. 11, Protocol II, Art. 5 (2) (e).

the medical profession generally has been enhanced, in particular with respect to compliance with medical ethics.[10]

Part III of *Protocol II* (non-international armed conflicts) elaborates comparable normative rules relative to the protection of the wounded, sick and shipwrecked victims of non-international armed conflicts.

The only provision of present conventional international law which is relevant to this subject is Article 3 Common to the *Four 1949 Geneva Conventions*. In part it provides :

> "The wounded, sick and shipwrecked shall be collected and cared for."

Implicit in this cryptic statement are the principles set forth in greater detail in the *Conventions* and *Protocol I* dealing with the protection of the wounded, sick and shipwrecked in international armed conflicts. These principles include the respect and protection due to medical personnel, units, and transports in order to make it possible to search for, collect and care for the wounded, sick and shipwrecked victims of armed conflict. The purpose of this Part is to make explicit, and to provide concrete guidance for the implementation of principles which were only implicit in Common , ArtIcle 3.

The Committee of the Diplomatic Conference which negotiated this Part patterned its adopted text closely to that of the General Protection provided in *Protocol I*, Part II. Insofar as its scope deals only with the humanitarian obligations to provide protection to the wounded, sick and shipwrecked, the Committee believed that this Part does not involve the political problems of status and sovereignty which may have been involved in other Parts. In the process of simplifications, however, the Plenary deleted the Committee's draft article on definitions, believing it to be too complicated for *Protocol II*. As the definitions were integral to the substance of the Articles adopted by the Committee, their deletion removes the frame of reference for the terms used in Part III. Accordingly, in signing Protocol II, the United States expressed the following understanding:

> "It is the understanding of the United States of America that the terms used in Part III of this Protocol which are the same as the terms defined in Article 8 of Protocol I shall so far as relevant be construed in the same sense as those definitions. "

Space does not permit a detailed analysis of all the normative rules developed in the two *Protocols* relating to the protection of the wounded, sick and shipwrecked. Accordingly, the solution of three particularly difficult problem areas will be discussed in the remainder of this article :

- The protection of persons against abusive medical procedure (Art. 11 of *Protocol I* and Art. 5 (2) (e) of *Protocol II*).
- General protection of medical duties (Art. 16 of *Protocol I* and Art. 10 of *Protocol II*).
- The protection of medical aircraft (Arts. 18, 24-31 of Protocol]).

2. Protection of persons against abusive medical procedures [11]

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[10] *Ibid*., Art. 16, Protocol II, Art. 10.
[11] *Supra*, note 9.

Concern over improper medical and pseudo scientific experiments conducted during World War II [12] motivated the 1949 Diplomatic Conference to prohibit the subjecting of protected persons to biological or scientific experiments which are not justified by the medical treatment of the protected person and carried out in his interest.[13] Violations of this norm were denounced as grave breaches of the *Conventions*.[14]

Dramatic advances in the art of organ and tissue transplants generated fears that prisoners of war and other persons in the power of an enemy might be exploited as the sources of organs or tissue for transplant or transfusion. These concerns motivated proposals in the 1971- 72 Conferences of Government Experts for a comprehensive prohibition of injustified procedures endangering the physical or mental health of broad classes of persons in the power of Party to the Conflict.[15]

After extensive debate, Committee II of the Diplomatic Conference accepted a proposal for Article 11 of *Protocol I* co-sponsored by Australia, Austria, Netherlands, Poland, Sweden, Switzerland, United Kingdom, U.S. and U.S.S.R.[16]

The first two paragraphs of Article 11 prohibit any injustified act or omission which endangers the physical or mental health and integrity of persons who are in the hands of an adverse Party, or of any other person deprived of liberty as a result of hostilities or occupation. This includes prisoners of war, the civilian population of occupied territories and a Party's own detained nationals. "The provisions precludes the employment of any medical procedure (including the administration of mind altering drugs) on individuals protected by the article which is not intended for the therapeutic or prophylactic benefit of the individual concerned and which is not consistent with accepted community medical standards. These standards are those which would be applied under similar medical circumstances to nationals of the Party conducting the medical procedures who are not in any way deprived of their liberty.

Paragraph 2 implements and provides emphasis to the general prohibitions of paragraph 1 against medical procedures which are not indicated by state of health of the person concerned. Thus, the prohibition against mutilation would not preclude a surgical procedure, including amputation, which is judged by responsible doctors to be essential to the health of the patient, and which are consistent with accepted medical standards. Similarly, an attempt to save the life of a patient with an experimental procedure or medication would not violate the prohibition of this paragraph if it conforms to accepted standards.

Within any occupied territory, the prohibition against medical or scientific experiments in paragraph 2b, applies with full force to any such experiment conducted by, or on behalf of, the occupying authorities, but it has no effect on reasonable medical or scientific experiments conducted within the occupied community by its own medical and scientific profession under

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[12] U.S. v. Brandt ("Medical case"), 2 Trials of War Criminals before the Nuremberg Military Tribunal, p. 171, 1947; for an account for Japanese biological experiments on prisoners of war, see *R. Gomer, J. Powell and B. Roling*, Japan's Biological Weapons: 1930-1945,37 Bulletin of the Atomic Scientists, p. 43, 1981.
[13] Third Convention, Art. 13; Fourth Convention, Art. 32; see also Arts. 12 of the First and Second Conventions.
[14] 1949 Geneva Conventions, Common Arts. 50/51/130/147.
[15] ICRC, Conference of Government Experts, 1971 Report, p. 27, p. 33; 1972 Report, p. 35 et seq. 241
[16] Swiss Federal Political Dept., III Official Records of the Diplomatic Conference on Reaffirmation & Development of Int'l Humanitarian Law, pp. 60-61, 1978. (Hereinafter cited as Official Records)

generally accepted research standards for testing on human subjects. This understanding is based on a recognition that full, free and informed consent is a necessary prerequisite to medical and scientific testing on human subjects. Such consent cannot be presumed in any relationship between the occupying authorities and the people of occupied territory , nor with respect to any person who, in connection with hostilities or occupation, is deprived of liberty by internment, detention or any other form of restraint.

Paragraph 3 provides a narrow exception to the prohibition against the removal of tissue for transplantation by permitting voluntary donations, under strict safeguards, of blood for transfusion and skin for grafting. This exception was adopted in recognition of the fact that these two life saving substances are available only from human sources.

During the consideration of this Article by Committee II, the provision for voluntary blood donations met with opposition from Bangladesh and Mali.[17] The Soviet Union and Poland expressed second thoughts. They feared that prisoners of war might become living blood banks for the Detaining or Occupying Power. A counter proposal that voluntary donations should be limited to the benefit of fellow prisoners of war was not accepted because any form of nationality test was considered incompatible with the principle of nondiscrimination and was technically impracticable.[18] A compromise, which ultimately gained a consensus, provided that any wilful act or omission prohibited by paragraphs 1 and 2 of the Article or which fails to meet the safeguards designed for the benefit of donors of blood or skin under paragraph 3, and which seriously endangers the health of persons affected, would be a grave breach of the Protocol.[19]

During the consideration of penal sanctions by Committee I, in the third (1976) session, it was noted that Article II, paragraph 4, like the grave breaches of the *First* and *Second Conventions*, are applicable to serious offenses against a Party's own nationals. Several delegations requested that Committee II reconsider the provision so as to exclude offenses against a Party's own nationals from the scope of paragraph 4.[20]

In the final hours of the Conference, Article II, *Protection of Persons*, was reconsidered by Committee II and amended on a motion of France and The Netherlands in order to align its grave breach provision to that of the general Article on grave breaches (Article 85) by removing offenses against a Party's own nationals from the scope of the grave breaches denounced by Article II.[21]1

Like the fundamental guarantees of Article 75, the substantive provisions of Article II remain applicable to a Party's own nationals, but their denial, although a breach of the Protocol, is not a universal or extraditable crime.

In *Protocol II* the prohibitory norm of the first paragraph of Article 11 of *Protocol I* is restated in Article 5, *Persons whose liberty has been restricted*. The principle thus restated is broad enough to include the prohibitory rules, but omits the exception relative to voluntary donations of blood and skin.[22] Its application is limited to persons deprived of their liberty for

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[17] *Ibid*., XI Official Records 23-41; CDDH/II/SR.23, paras. 24-40.
[18] *Ibid*. at pp. 294-302; CDDH/II/SR.29, paras. 10-46.
[19] *Ibid*. at pp. 419-422 CDDH/II/SR.39, paras. 3-20
[20] *Ibid*., Report of Committee I., Third Session (1976), X Official Records 126; CDDH/234/Rev. 1, para. 70.
[21] *Ibid*., XII Official Records 634 ff, CDDH/II/SR.98, paras. 58,61 ; CDDH/II/SR.99, paras. 2-5.
[22] Protocol II, Art. 5 (2) (e).

reasons related to the armed conflict by internment or detention.[23] Persons whose liberty has been restricted by other restraints do not benefit from this protection.[24] The norms of Article 5 are classified into two categories those whose application is mandatory , and those which are expected to be respected by those responsible for internment or detention " within the limits of their capabilities. "[25] U nfortunately , this purely prohibitory norm is classified in the latter category .

3. General protection of medical duties [26]

Article 16 of *Protocol I* is intended to protect all " persons engaged in medical activities" from improper coercion to disregard relevant professional ethics and standards. The personal scope of the protection extends to:

a) Military and civilian "medical personnel" as defined in Article 8 of *Protocol I*. There are persons assigned by a Party to the conflict exclusively to medical purposes, generally as members of medical units or transports belonging to, or recognized and authorized by, the competent authority of a Party to the conflict, or the members of the staff of a civilian hospital.[27] Administrative personnel who are not engaged in the treatment, diagnosis, or medical records of patients are not covered by these articles ;

b) Private practitioners, their nurses and medical attendants; and

c) Medical members of aid societies spontaneously, or in response to an appeal from the authorities, assisting in the collection and care of the wounded and sick in accordance with Article 18 of the *First Convention*, Article 17 of *Protocol I* or Article 18 of *Protocol II*.

Additional protection for medical personnel is provided by the normative rules that priority in the treatment of the wounded and sick shall be based only on medical grounds; and that they shall not be required to carry out tasks which are not compatible with their humanitarian mission.[28] Paragraph I of Articles 16 of *Protocol I*, and 10 of *Protocol II* are reaffirmations of the third paragraph of Article 18, *First Convention* which provides that " no one may ever be molested or convicted for having nursed the wounded or sick". See also Article 17, *Protocol I*. These provisions remove medical activities in the collection, transportation, diagnosis or treatment of the wounded and sick from the scope of national legislation prohibiting aiding the enemy. Particularly in respect to the voluntary medical care provided spontaneously by the civilian population and private practitioners this protection is limited to open medical care and does not extend to the activities of escape organizations who conceal wounded enemies combatants and assist them in escaping when cured.[29]

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[23] *Ibid.*, para. 1
[24] *Ibid.*, para 3
[25] *Ibid.*, paras 1 and 2
[26] Protocol I, Art. 16 Protocol II, Art. 10
[27] First Convention, Arts. 24-27; Second Convention, Arts. 36-37; Fourth Convention, Art. 20; Protocol I, Art. 8 (c), (e) and (k), 15, 17; Protocol II, Art. 9
[28] First Convention, Art. 12 (3); Second Convention, Art. 12 (3); Third Convention, Art. 33; Fourth Convention, Art. 56; Protocol I, Arts. 10 (2); 15 (3) Protocol II, Art 9 (2)
[29] United Kingdom, The Law of War on Land, Part III of the Manual of Military Law III (1958); the ICRC Commentary relative to Art. 18 of the First Convention States: The wounded and sick entrusted to the

Paragraph 2 of both Articles prohibits compulsion as to acts or omissions which would be contrary to (a) the rules of medical ethics or other professional rules designed for the benefit of the wounder and sick, or (b) the provisions of the Conventions or the applicable *Protocol*.

The limitation of the scope of this provision to rules designed for the benefit of the patient is in recognition of the fact that some national or local rules of professional conduct prohibit members of the medical profession from cooperating with or training persons who are not licensed physicians, in the performance of medical procedures. Although such rules may be appropriate in some communities, they would preclude members of the medical profession from training para-medical personnel of the armed forces, who may be required by circumstances, to perform minor surgery or other medical procedures in the absence of a licensed physician. Recognition of the problem occasioned by lack of medical doctors aboard small ships and in isolated military units caused Commission I of the Second Conference of Government Experts to limit the scope of the comparable provision to " professional rules designed for the benefit of the wounded and sick".[30]

It is interesting to note that paragraphs 2 and 3 confer on military' and civilian persons engaged in medical activity the right to refuse to obey an illegal order violative of the *Conventions* or the relevant *Protocol* without subjecting themselves to a prosecution for the military offense of disobedience. The Diplomatic Conference was unable to confer such a right to other military or civilian agents of a Party to the conflict.[31]

Paragraph 3 of Article 16, *Protocol I* and Paragraphs 4 and 5 of Article 10 of *Protocol II* deal with the delicate issue of the extent to which persons covered by these articles may refuse to disclose to the authorities information concerning the wounded and sick in their care. The issue proved to be one of the most controversial and time consuming confronting Committee II. The ultimate solution with respect to Protocol I was a formula under which persons covered by Article 16 may exercise the principle of medical secrecy with two exceptions :

a) In their relation to the authorities of their own Party to the conflict, they have no duty to disclose such information except as required by the national law of such Party. In their relation to the adverse Party, that Party is prohibited from using compulsion to obtain any such disclosure from them.

b) Regulations for the compulsary notification of communicable disease, however, must be respected in all circumstances.

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inhabitants must nevertheless remain under the control of the authorities... The institution of control is equally necessary in the case of enemy wounded. It is the military authorities who are responsible for their condition and medical treatment. It is they... who have to inform the Power of Origin of their identity and capture. Lastly, it is the authorities who must arrange for their protection und~r the Third Convention relative to the treatment of prisoners of war" (Pictet, supra note 2, Commentary I, p. 187).

[30] XI Official Records, pp. 149-150; CDDH/II/SR.16, para. 46-47.

[31] The ICRC Draft for Article 77 (I) which provided that: "No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the. Conventions or of the present Protocol" was rejected by the Diplomatic Conference (VI Official Records 307-309; CDDH/SR.45, paras. 3, p.613).

In regard to *Protocol II* (which contains no reference to Parties to the conflict), both the immunity from compulsion and the prohibition against punishment for failing to make the relevant disclosure are " subject to national law".

The deference to national law has been the subject of severe criticism, both on the ground that international law should not be subordinate to national law, and on the ground that any danger of disclosure would discourage wounded and sick combatants who find themselves in territory controlled by the adverse Party (e.g., occupied territory) from seeking medical help.[32] These criticisms should be reexamined.

Among the resolution of Non-governmental Organizations which urged the ICRC to propose rules for the protection of medical ethics was a *Resolution concerning medical secrecy during armed conflict*, adopted by the International Law Association at its 53d session in Buenos Aires, 1968. In relevant part this resolution states :

" 3. Under national law, a citizen must not serve the interests of a foreign country. Thus all citizens and even the doctors are obliged not to expose their country's combatants to the enemy especially when the combatant is sick and wounded. The doctor is therefore obliged not to denounce his patient, whether a combatant of the regular army or of the resistance movement to the occupying authorities, by virtue of two principles:

a) in the capacity of citizen, he must respect the law of his country , and

b) in his capacity of doctor, he must live up to the standards ofmedi- cal ethics and preserve professional secrecy".

It is to be observed that Article 16 accomplishes precisely what the International Law Association urged. It prohibits the adverse Party from requiring doctors and other persons engaged in medical activities from acting as a collaborator by disclosing facts concerning patients which might result in his capture. On the other hand, if the law of a Party to the conflict requires the disclosure facts which might lead to the identity of fugitive enemy combatants, the medical personnel of that Party to the conflict may be required to respect its national law even if as a personal matter, he entertains sympathy for the ideology of the enemy. There does not seem to be any criticism of the duty to comply with regulations relative to communicable diseases, assigning priority to the interest of public health over the protection of a resistance fighter.[33]

Although the law of most countries recognizes a medical privilege of non-disclosure, national law almost universally requires certain disclosures from doctors. Members of the medical profession recognize that their ethical obligations is not to make disclosures concerning their patients except as required by law. This rule which is applicable in peacetime, must remain equally applicable in time of armed conflict, in respect to the relation of persons engaged in medical activities and the authorities of their own Party to the conflict.

4. The protection of medical aircraft [34]

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[32] XI Official Records 513-514; CDDH/II/SR.46, paras. 1-4; A. *Baccino-Astrada*, Manual of the Rights and Duties of Medical Personnel in Armed Conflicts, pp. 71-72, 1982

[33] *Ibid*

[34] *Supra*, note 7.

The present *Conventions* provide protection for medical aircraft only while they are flying under a flight plan agreed to by the adverse party even when such flights are deep in friendly territory. Flights over territory controlled by an adverse party are prohibited. [35]

This restrictive regime has been based on the assumption that medical aircraft cannot be reliably protected against attack from distances which exceed the capability to recognize the distinctive emblem of the Red Cross. Another factor contributing to the limitation on protection has been concern over the security threat posed by abuses of protected status. [36]

The regime for the protection of medical aircraft adopted by Committee II establishes three categories of protection :

- First, for movement in the rear part of the battle area, and other areas controlled by friendly forces, medical aircraft are protected and no agreement is required, but the Parties are invited to notify the adverse Party when medical aircraft will fly within range of the adversary's surface to air weapons system.[37]

- Second, for movement in the forward part of the battle area under the control of friendly forces (contact zone), and in areas where control is not clear, agreement between the competent military commanders is recognized as the only effective means of providing protection for medical aircraft. Nevertheless, it is also provided that if medical aircraft fly over such areas without an agreement; they shall be protected from attack when they are recognized as medical aircraft. [38]

- Third, for overflight of areas controlled by adverse forces, previous agreement is required with the adverse Party to secure protection I for medical aircraft. Before taking the drastic action of attacking an intruding medical aircraft, the parties are required to order it to land for inspection as provided in article 30 or take other less drastic measures.[39]

In order to make protection more effective, a system of flashing lights radio messages over specified frequencies and electronic radar signals was adopted to make medical aircraft more easily recognizable.[40] In addition, restrictions against the abuse of protected status are clear and unambiguous.[41]

The regime established under the *Convention* was entirely dependent on agreed flight plans but no procedure for effecting such agreement was specified. Article 29 of *Protocol I* cures this deficiency by providing general procedures necessary for the transmission of communications contemplated in other articles regarding notifications and requests for agreement between the adverse Parties.[42] The development of a feasible system for such communications by radio as contemplated in Articles 7 and 9 of Annex I was facilitated by

[35] *Supra*, note 6.
[36] *Cummings*, *supra* note 7, at p. 119.
[37] Protocol I, Arts. 24, 25.
[38] *Ibid*., Art. 26.
[39] *Ibid*., Arts. 27 and 30.
[40] *Ibid*., Art. 18 (5) (6) (8); Annex I, Arts. 5-8.
[41] *Ibid*., Art. 28
[42] *Ibid*., Arts. 25 (notifications), 26, 27, 28 (4), and 31 (requests for agreements).

the 1979 World Administrative Radio Conference of the International Telecommunications Conference which amended the Radio Regulation by establishing procedures authorizing medical transports to use the international "urgency" frequencies for the purpose of identification and to establish communications. Thereafter the communication should be moved to appropriate working frequencies.[43] The net effect of these articles is to provide medical aircraft with legal protection that goes well beyond the protection provided in existing treaties on the law of armed conflict. Thus, the law in this case is catching up with technological change and this should result in more lives saved on the battlefield.

5. Conclusion

The achievement of a consensus based on compromise of the provision discussed above, after long and difficult negotiations, shows that the Diplomatic Conference shared the attitude of the ICRC which stated :

" In drawing up the draft *Protocol*... the ICRC believes that it has remained steadfast to the spirit in which, since 1864, it has demanded for the benefit of individuals guarantees consistent with the dictates of humanity, whilst bearing in mind the realities of national defence and security. "[44]

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[43] ITU, Radio Regulation, Art. 40, Sec. 3209-3220 (1979).
[44] ICRC, Introduction, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 2, 1973.