MODULE 1 – Introduction to IHL

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DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

The development of humanitarian thought And the practice of states throughout the ages[1]

We are aware today that law follows events more often than it precedes them. We may also say that one of the fundamental elements of law is its continuity and permanence, since it is usage, which gives it form. It is for this reason, although we are not always conscious of it, that history holds so large a place in the study of legal disciplines.

Let us then outline the evolution of humanitarian thought through the ages and see what events shaped the law whose study we are undertaking.

To protect man against the evils of war and arbitrary treatment is not a new idea. Springing up long before the dawn of history, it has grown steadily more powerful, and today has become a tidal wave.

The efforts, which it has engendered, keep pace with the rise of civilization, to which it is inseparably bound. Like civilization itself, it has gone through periods of sudden acceleration, of stagnation, and of setbacks, marking like milestones its journey through history.

Let us be clear that all these successes and reverses are no more than episodes in the formidable struggle which has been carried on from the very beginning of human society between those who wish to preserve, unite and liberate mankind and those who seek to dominate, destroy or enslave it -a manifestation of the eternal opposition between 'eros' and 'thanatos', complementary and closely bound as they are to one another.

The review we propose to make will demonstrate that violence can be bridled, suffering attenuated and unnecessary death vanquished. We shall also see how long and arduous is the road leading 'to that universality without which nothing great and lasting can be constructed.

1. Antiquity

[1] The historic elements in this chapter come mainly from the works of Mr. I. Harding, Mr. G. Fehr, Mr. P. Boissier, Mr. H. Coursier and Mr. G. Draper, cited in the bibliography.

The roots of humanitarian law are very much deeper than some European authors with a narrow view of matters had long believed, content as they were to situate its origins in the Middle Ages. In reality, the laws of war are as old as war itself, and war is as old as life on earth.

Modern naturalists, studying the vaguely defined mentalities of the animal world, have even perceived the rough outlines of rules for combat. Among individuals of the same species, for example, the aggressive instinct does not usually reach the point of killing the antagonist. Single combat follows particular patterns: deer fight only with antlers against antlers, and when two wolves or two dogs fight, the one who knows he is losing will give up -and sometimes even offer a form of surrender, exposing his throat to the victor, who abstains from the fatal bite.[2]

In the earliest human societies, what we call the law of the jungle generally prevailed; the triumph of the strongest or most treacherous was followed by monstrous massacres and unspeakable atrocities. The code of honour forbade warriors to surrender; they had to win or die, with no mercy. Yet, even in this period, especially among sedentary peoples, we find traces of a desire to attenuate the horrors of combat. Archeologists have discovered that the wounded in great battles during the Neolithic epoch were cared for; many skeletons give evidence of fracture reductions and even trepanations.

The study of savage tribes existing in our own time gives some insight into the nature of primitive man at the dawn of society. In Papua, where such tribes are constantly at war with one another, an adversary is always warned in advance when active hostilities are planned, and the fighting does not begin until both armies are ready. Arrowheads are not barbed, so as to avoid causing too much injury. A battle stops for 15 days as soon as a man is killed or injured, and this truce is so well respected that sentries on both sides are withdrawn.

Taken as a whole, wrote Quincy Wright, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules defining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether.[3]

We may also cite, more specifically, the equal chances accorded to the participants in single combat -the origin of the laws of chivalry –the immunity offered to a foreign guest, even an enemy, and to those who took refuge in temples. Some authors believe these customs can partly be explained by fear that the gods or the spirits of victims might wreak vengeance or by a desire to restore normal relations with a neighboring tribe.

How were such things in the great civilizations of antiquity, from 3,000 to 1,500 years before our era? Their economies were based largely on slavery, sometimes practiced on a

[2] G. Fehr.
[3] A Study of War, 1942.

large scale, as the only means possible for irrigation of desert lands. Entire peoples were thus subjected to slavery, to work the soil and to erect the huge constructions at whose vestiges we still marvel. This brought about genuine progress, even though we find the institution of slavery detestable, for it meant that the lives of captured enemies were more often spared.[4] So it is, that something good for mankind ray result from a material interest, however sordid it may be.

Examples of humanity, provided by some monarchs and by some nations, were all the more remarkable for being rare. First like solitary flashes of distant lightning in the blackness of night, they were to become a widening glow, enough to bring light to the whole of the world. Finally, the growth of cities, the organization of nations and the development of relations between peoples, about 2,000 B.C., gave rise to the first rules of what was later to be called international law.

Among the Sumerians, war was already an organized institution, characterized by declarations of war, probably possibilities for arbitration, immunity for messengers from the enemy and finally by peace treaties. Hammurabi, king of Babylon, proclaimed the famous code which bears his name, beginning with the words, 'I establish these laws to prevent the strong from oppressing the weak'. It was customary to release hostages against the payment of ransom.

The ancient Egyptian Culture was marked by consideration for one's fellow beings. The 'Seven Works of True Mercy' instruct its readers to 'feed the hungry, give water to the thirsty, clothe the naked, shelter the traveler, free the prisoners, treat the sick, and bury the dead'. A commandment dating from the second millennium declares, 'You should also give food to your enemy'. A guest, even an enemy, must not be harmed.

The civilization of the Hittites, rediscovered by archeologists little more than a century ago, was found to have had a remarkably humane manner of conducting warfare. The Hittites also had a code of laws, based on justice and integrity. They too signed declarations of war and treaties of peace. When enemy cities capitulated, their inhabitants were usually not harmed. Cities which resisted were dealt with more severely, but even then it was exceptional for them to be destroyed and for their people to be massacred or reduced to slavery. This leniency was in sharp contrast to the cruelty of the Assyrians, whose victories were attended by revolting atrocities.

A war between the Egyptian and Hittite empires was ended by a peace treaty in 1269 B.C., notable for its moderation, and respect for justice, which opened an epoch of harmony and friendship between the two powers.

In the first millennium before our era, new civilizations were flowering in Asia. Whereas Hinduism had tended to leave it to each individual to work out his own destiny, Buddhism arrived with a mission of compassion, advocating pity as a spur to mutual assistance. Lao Tzu declared that man had no value except in service to others and Confucius preached a practical kind of altruism based on solidarity and intelligence.

[4] G. Fehr.

Meh-ti arrived at a universal concept of love as a source of mutual advantage.[5] Unhappily, in every land and at every time, people have been unwilling to put these moral precepts into effect.

Among the Persians, Zoroaster taught tolerance and in the same period Cyrus was noted for treating wounded Chaldeans in the same way as he did his own soldiers.

In the historical books of the Old Testament, tales of carnage abound. It was the Lord who ordered the bloodshed and forbade those coming to the Promised Land to have any dealings with their enemies. Even at that time, however, the law of the talion constituted a limitation on violence, as it demanded only an eye or a tooth as punishment, and not death. Other passages in the Bible, in sharp contrast to those referred to above, told the Israelites not to kill enemies who surrendered, to show mercy to the wounded, to women, children and old people. Prisoners of war were enslaved however, in accordance with the customs of the time.

The ancient texts of India are also interesting and significant. Both the 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; they must send the wounded back home after they are healed. Some provisions are amazingly similar to those in the Hague Regulations of 1907 on the laws and customs of war. Thus, for example, not all means of combat were permissible: all barbed or poisoned weapons were forbidden, along with flaming arrows; requisitions of enemy property were regulated, as were the conditions for detention of prisoners; it was forbidden to declare that no quarter would be granted.[6]

Another generous attitude was that of the Indian emperor Asoka, 'the Benevolent', who ordered his soldiers to respect the enemy wounded and the religious sisters who treated them.

Some of the cities of ancient Greece provide admirable examples of organized society. Reason was taking the place of mysticism and we can perceive the beginning of the concept of justice as an aspect of. Natural law -an ancestor of what we know today as human rights.

Even as early as the Iliad, Homer described a war which was not completely lacking in fair play, a war with truces and one marked by respect for the enemy dead. Yet, what horrors there were in the slacking of Troy! Alexander the Great treated the vanquished humanely, spared the family of Darius and ordered that the women be respected. Nevertheless, in ancient Greece, a defeated or captured enemy became the property of the winner, who could kill or enslave him as he chose.

There is nothing more disconcerting to the modern mind than the recognition that the great thinkers of the Hellenic world, whose civilization we admire so much, cheerfully

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[5] Jean-G. Lossier, *Les Civilisations et le service du prochain.*
[6] S.V. Viswanatha, *International Law in Ancient India*, 1925.

accepted the institution of slavery, which angers and disgusts us. Plato for example refused to recognize that slaves, any more than barbarians, possessed any human dignity, and Aristotle regarded servitude as a natural phenomenon. In the same century, however, Alcidamas proclaimed that, 'Divinity has made all men free and nature has made no man a slave'.

In the field which concerns us more directly, Alexander of Isiu made a prophetic statement which was eventually to become the very basis of the law of war: 'To destroy the objects of contention in a war whilst leaving the war itself in existence was the act of a madman'.[7] After the Messenian revolt was put down, however, the Spartans killed the men and made slaves of the women.

The kinship of all the members of the human family burst into daylight, at least for some, when Alexander the Great broadened the horizon of the Greeks to the distant boundaries of his conquests. This made possible the development of a new philosophical approach, Stoicism, opening a new era in which the concept of humanity had to be reckoned with as a major guideline.[8]

The Stoic school, founded by Zeno shortly after 310 B.C., reasoned as follows: Every living being is permeated by love for itself. This love then reaches out to immediate progeny. Then it is expanded by reason, in concentric circles, with the individual as the center, to take in direct relations, fellow citizens and ultimately the whole of humanity, including enemies. Relations with ‘the other’ are assimilated to relations with the self. The equation 'stranger equals barbarian' is abolished.

It was war which founded the power of Rome. For 700 years, from its beginnings to its final conquests, the temple of Janus, opened at the outset of hostilities, was closed only twice. Thereafter however, Roman law spread across the world the benefits of a peace which lasted for several centuries.[9]

The Romans also had a genius for organization. Thus, every cohort of 500 to 600 men had at least one doctor and each legion, composed of 10 cohorts, had a *medicus legionis*, what we might call today a chief medical officer.

Rome reigned by force, organization and law. *Ubi societas, ibi jus.* Among the Romans, law went through an extraordinary development - but the law stopped at the frontiers. *Jus naturale* applied only to Roman citizens. *Jus gentium* covered aliens in Rome and did not have its later meaning of international law.[10] It was a conceded and unilateral law.

Enemy peoples were simply outside the law. The vanquished were at the mercy of the conqueror who was generally perfidious and implacable. At Carthage, nothing and no one

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[7] Polybius, XVIII, Chapter 3. cited by I. Harding.
[8] G. Fehr.
[9] H. Coursier.
[10] In the Institutes of Justinian, *jus gentium* is defined as the totality of the rules established among men by natural reason (*quod naturalis ratio inter homines constituit*).

was spared. Captured soldiers and civilians were treated with ignominy and were often strangled to death after the triumphal procession. Those who were not killed were sold as slaves. There were of course acts of mercy. In the third century B.C. Pyrrus, king of Epirus, after defeating the Romans at Heraclea, ordered the enemy wounded to be cared for. Scipio Aemilianus did likewise.

The fate of slaves continued to be a miserable one. They had no rights and were often treated with cruelty, especially when they worked in groups. In 185 B.C., after an uprising of slaves at Apulia, 7,000 of them were crucified.

At the dawn of the *Pax Romana*, with world conquest completed, the Stoic doctrine gained some eminent advocates, including Seneca and Cicero, and entered what might be called its golden age. Its adherents proclaimed the equality of all men and denounced slavery. They affirmed that war did not break all the bonds imposed by law. They replaced the saying, *homo homini lupus* with the slogan *homo homini res sacra*.[11] For the ancestral *vae victis!* they substituted such heart-warming phrases as *homo sum et humani nihil a me alienum puto*[12] and *hostes dum vulnerati fratres*. More and more people sought security in respect for the law and in mutual tolerance.

Marcus Aurelius, who prolonged this golden age, spoke in terms which were not common in his time: ‘What conforms to the nature of a man is good and useful for him...As an Emperor, Rome is my city and my country, but as a human being, the whole world is my country. Only what is good for both of these societies can be good for me.’

However, as usual, practice fell far short of the counsel of the wise men. Progress was slow, and even after it became Christianized, the Roman world did not completely abandon the harsh treatment of its enemies, before it was itself overrun by the barbarians. Theodosius, for example, in the year 390 of our era, had the throats of 7,000 persons cut at Thessalonica, without distinction of age or sex, after rioting in which a few soldiers had been killed. For this, St. Ambrose, Bishop of Milan ordered him to do penance and to issue an edict providing a lapse of 30 days between the imposition of a death penalty and its execution, 'so that passion would subside and reason take its place'. Theodosius yielded and made his apologies.[13]

We should also mention at this point that we owe to the Romans and to the Stoic philosophers the idea of the 'just war' which was to be revived during the Christian middle ages with terrible consequences. With the best of intentions, the philosophers postulated that one must not make war without *justa causa*, in other words only in defence or seeking to redress a wrong. A college of priests -fetiales -would be called on to certify that a projected campaign would be a *bellum justum et pium*. Conquerors have always sought to justify their conquests and the crushing of their adversaries on religious and moral pretexts. The Romans did so with exceptional hypocrisy.[14]

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[11] Seneca
[12] Terence
[13] H. Coursier
[14] I. Harding.

From this brief survey of antiquity, we see that the ancient civilizations of Asia and Europe, in exerting their influences upon one another, all contributed to the birth and development of humanitarian law.

The Middle Ages

Other factors which subsequently influenced the development of humanitarian law included Christianity, Islam and the age of chivalry.

The Judeo-Christian religion had proclaimed that all men were created in the image of God, that all were children of the same Father and all were offered eternal life. The consequences of this new doctrine were numerous and incalculable, since henceforth the status of the individual was linked to the structure of the cosmos. The human being acquired a hitherto unknown dignity. If all men were brothers, to kill was a crime -and there would be no more slaves. This concept was so revolutionary that it shook the foundations of ancient society and contributed, at least as much as the great invasions" to bring down the tottering structures of the old world. It is understandable why no religion had ever been more bitterly contested.[1]

Christ had preached love for one's neighbor and had raised this to the level of a universal principle. Human love should be a reflection of divine love -absolute and without motive. It should be extended to everyone, even to one's enemies. One should love one's neighbor for himself, without judging his merits and without expecting anything in return.[2]

Unhappily, people deformed this doctrine, seeing altruism above all as a means to assure their personal salvation, as a ticket to heaven, and applying the precept only to their fellow believers. In the Middle Ages, there was a tendency to consider life as no more than a stage on the way to the hereafter. People were more concerned with saving their souls than their bodies -which had been quite arbitrarily separated one from the other.

Life on earth did not appear to be such a precious possession that one should make great sacrifices to preserve or prolong it. There were those who even attached to suffering a mystic value, a kind of educational quality.

Following the examples of some of the noble figures who represented Christianity -such as Saint Francis of Assisi, Saint Charles Borromeo and later Saint Vincent de Paul - monks and hospital orders, such as the Order of the Hospital of Saint John of Jerusalem, known for a time as the Military Order of the Knights of Malta, attempted with great devotion to relieve suffering, especially when the Black Death, as bubonic plague was known, spread terror throughout Europe. The mass- of the peoples, however, remained relatively indifferent to the suffering of others.

Christ himself made no pronouncement on war or how it should be conducted. The question 01: whether the commandment 'Thou shalt not kill' in the Decalogue and the admonition 'love your enemies' in the Gospel applies to war and not only to the private lives of believers has been heatedly debated throughout the centuries.

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[1] G. Fehr.
[2] J.-G Lossier.

If the Christians in the first centuries of our era refused to serve in the Roman army, it was because of the pagan character of that army and the claimed divinity of the emperor. These objections fell by the wayside in 313 A.D. with the proclamation of the edict of Milan in which Constantine, a convert to Christianity, made the Church, from one day to the next, into a great temporal power.

Among its multiple consequences, this alliance of Church and State induced the ecclesiastical authorities to legitimatize war. This attitude, however, was deeply disturbing to some religious thinkers who agreed with Tertullius and Origen that the shedding of blood was a crime condemned by the Scriptures.

In the face of such scruples, Saint Augustine -assuredly a great figure in the history of Christianity -elaborated at the beginning of the Fifth century a theory borrowed from the Romans, which was designed to soothe Christian consciences. This was the well-known and malignant doctrine of the 'just war' I which was later to be embraced by Saint Thomas Aquinas and a host of casuists. It did nothing less than provide believers with a justification for war and all its infamy, by offering a compromise between moral ideals and political necessities. The reasoning was as follows: natural, order is a reflection of divine order. A legitimate sovereign has the power to establish and maintain order. Since the end justifies the means, acts; of war carried out for the cause of the sovereign are exempt from sin. The war is declared to be a just war; it is a war desired by God; the adversary is therefore the enemy of God, and cannot possibly wage any but an unjust war.[3]

Certain conditions must naturally be fulfilled. For a war to be just, its cause must be just - to repel an attack or redress a wrong; Accordingly, Saint Augustine condemned wars of conquest. But, throughout history, has there been a single case in which a sovereign or a state has said that its war was for an unjust cause or was being fought for any purpose other than to redress a wrong perpetrated against it by the adversary?

Anyone who understands human nature knows perfectly well that a just war is a war that we wage and an unjust war one waged by our adversary. It has never been otherwise and never will be otherwise. Accordingly, each side will claim, either in bad faith or in the best of circumstances, naively, that his cause is the only good one.

The introduction into armed conflict of such a highly emotional and esoteric element as the myth of a just war has inevitably hampered humanitarian progress for centuries.[4] Wishing at all costs to prove they are 'right' and searching for pretexts in faith, morality, justice or honour, both belligerents will fight until their forces are totally exhausted.

As we may well imagine, ever since the concept of the just war was introduced, an effort has been made on every occasion to justify aggression. However, it is impossible to be both a judge and a party to a case. Judgement and condemnation can come only from a

[3] G. Draper, The Conception of the Just War.

[4] Evidence for this may be found in the fact that religious wars are those marked by the worst atrocities. Passion and cruelty appear to be inseparable.

high, impartial and competent jurisdictional authority. Furthermore, such an authority would have to be able to make the necessary investigations at the scene of the alleged crime, so as to discover the truth and unravel the tangle, which those concerned have used all their skill to weave.

The most serious consequence of the idea of a just war -from the point of view with which we are now concerned -is the use which men on all sides have made of it, to justify the cruelties which abounded in that sanguinary age, cruelties which they had the effrontery to call the punishment of God. Accordingly, their worst acts were never crimes, but well-deserved penalties they inflicted on the guilty. We need cite only one example, the Crusades, which were perhaps the most perfect examples of 'just wars'.

As Saint Augustine asserted, 'When a just war is waged, it constitutes a struggle between sin and justice, and any victory, even when it is gained by sinners, humbles the vanquished who, by the judgement of God, suffer the punishment and penalty due for their evil deeds.'[5] Later, Thomas Cajetan, master general of the Dominicans, wrote, 'The injuries caused not only to the combatants but even to other members of the state against which one is waging a just war, are free of guilt...One is not obliged to determine if some citizens are unjust and others innocent, because the whole state is presumed to be the enemy and it is for this reason that the whole state is condemned and ravaged'.

The Church acknowledged the right to kill enemy captives, usually characterized as heretics, and hence the right to take them as slaves, including the women and children.

When the Second Lateran Council in 1139 A.D. prohibited the use of crossbows, it specified that they could still be used against infidels, and the same rule applied to poisons. This is far removed from evangelical charity.

Confessors no doubt tried to limit the horrors, by imposing heavy penitence’s on perpetrators of the worst abuses, but what could they do to change the whole tragic situation?

It was not until the twentieth century that the Catholic Church ceased to regard war as a necessary consequence of original sin. More regrettable is the fact that in our own time we see a rebirth of the myth of the just war with all its consequences, openly supported now by political arguments. The spokesmen for major ideologies have taken it over for themselves, and the banning of war by the League of Nations and the United Nations gave it added force. We shall come back to this later.

Let us now consider the part played by chivalry -or knighthood -originally a Germanic institution, which prevailed during the period of feudalism. Chivalry brought together into an elite corps men who had the right to bear arms and fight on horseback, in effect, the nobility. To be conferred this right was an honour which carried with it certain duties. Upon his initiation, a knight swore to serve God, his monarch and the lady of his dreams. To break (this oath was the supreme disgrace. The traditional motives of knighthood were

[5] *De Civitate Dei.* XIX. 15.

therefore faith, loyalty and love, and its virtues, honour, the spirit of service, moderation and mercy.

The precepts of chivalry contributed in some degree to the evolution of international law. Declarations of war, the status of those who carried a flag of truce and the banning of certain weapons are part of the heritage of chivalry. The institution brought with it the recognition that in war as in the game of chess there should be rules and that one does not win by overturning the board.

The impact of these rules was considerably reduced by the fact that they were valid only for Christians and even then only within the closed world of the nobility. It is noteworthy as well that the status of nobleman sometimes took precedence over that of foe. The rules existed indeed only for the benefit of chivalry itself, Only a captured nobleman had to have his life spared and only he could purchase his freedom. Furthermore, how could one Expect a knight in shining armour on his prancing steed to run the risk of being killed from a distance by the disrespectful arrow of a mere serf? Never! The crossbow had to be banned and the villain hanged.

Such examples help explain the curious mixture of compassion and cruelty, delicacy and savagery, good faith and treachery, idealism and depravity, which were the attributes of chivalry,[6]

The Crusades constituted the historic epoch in which Christianity and chivalry converged. What adversary did they face? Islam, a power to be reckoned with, is extending into Europe.

As Professor Massignon said, in referring to one aspect of that power, 'Islam took the lead over Christianity in the legal effort to restore their human personality to the barbarians, slaves included'. Nevertheless, the counsels of moderation in the Koran still applied only to believers. The just war for the Muslims was the 'jihad', a word which has been incorrectly translated as; 'holy war',[7] This also was tempered by a spirit of chivalry, manifested notably by the rights to asylum and hospitality, Prisoners of war could be executed or reduced to slavery, unless they were either converted or ransomed. The Viqayet, written around the year 1280, is a veritable code of the laws of war, as seen at the peak of the Moorish reign in Spain. It forbids the killing of women, children, old people, madmen, the sick and the bearers of flags of truce. It also forbids mutilation of the~ vanquished and the poisoning of arrows and of water sources.

Treaties between the caliphs and the Eastern Empire provided for humane treatment of prisoners and their release in exchange for ransom. Here was a further example of the fortunate effect of greed on a humanitarian matter. The Muslims advocated the inviolability of treaties whereas the prevailing doctrine in Europe was that agreements with infidels could be unilaterally broken -a doctrine, which was consistently followed.

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[6] G. Draper, *The Interaction of Christianity and Chivalry in the Historic Development of the Law of War*.
[7] 'Jihad' means literally 'common effort'.

The Crusades cost the lives of millions of human beings. Both sides perpetrated abominable massacres - from which they finally gained nothing. A Westerner today is compelled to recognize that here, as elsewhere, the Europeans sowed hatred and desolation, on the pretext that they were bringing civilization and the true faith. The Christians, to whom the Church had granted remission of all sins in advance, committed unspeakable crimes. In so doing, they created a breach between East and West that has still not been repaired. We shall limit ourselves to two or three examples.

When the crusaders took Jerusalem in 1099, they massacred its entire population. An eyewitness, Raymond d'Agiles, Canon of Puy, wrote, 'So much blood flowed in the ancient temple of Solomon, where 10,000 Muslims had taken refuge, that bodies were floating in it, drifting this way and that in the court, together with hacked-off hands and arms'. Another witness said the blood was knee-deep.

As a striking contrast, when Salah al-Din - known as Saladin to the crusaders -entered Jerusalem in 1187, his Saracen troops did not kill nor mistreat a single one of its inhabitants. To make sure of this, Saladin had established special patrols to protect the Christians. He then released rich prisoners for ransom and poor prisoners for nothing.

Saladin also allowed doctors from the enemy side to come and treat their wounded compatriots and then return to their own camp. He sent his own doctor to the bedside of Richard Coeur de Lion, who subsequently showed his appreciation by the cold-blooded massacre of the 2, 700 survivors of the siege, of Saint Jean d' Acre, including the women and children.

The worst of all these crimes however was the sacking of Constantinople by the Venetians and the crusaders in 1204. This time, both the butchers and their victims were Christians. For nine centuries, this city had been the heart of the civilization and Christian religion of the Eastern Empire. The papal legate had relieved the knights of their vows and the massacre lasted three days. Nothing and nobody was spared, neither the churches nor the nuns. Such is war when the pretext for violence is faith and justice.[8]

Can we say that the fate of the victims was any better in the West? Certainly not. At that time, wars were often decided by a single battle, after which there was no more memory of the anonymous instruments of victory or defeat, the soldiers who ran the risks of the work for which they were paid -and plunder and rape were part of the pay. When they were wounded, the soldiers found little mercy, and even monastery and convent hospitals were often closed to them.[9] To add to the misery, the Lateran Council in 1213 forbade members of the clergy to practice surgery.

In the armies, there was no such thing as a medical service. Knights! Were often accompanied by their personal physicians, for they had no desire to entrust their noble bodies to the quacks that exploited the troops. The wounded were therefore simply left to suffer, and the enemies wounded were commonly finished off with a club. As late as

[8] p, Boissier.
[9] P. Boissier.

1533, the great surgeon Ambroise Pare was only spared from a massacre of prisoners at the siege of Hesdin because he had cured a Spanish colonel of an ulcer.

Prisoners for 'whom no ransom could be collected were usually killed. The civilian population fared no better. When a besieged town was captured and sacked, its garrison was put to the sword; the fate of the women and children was for the victor to decide.

The Church proposed to the Western world in 1027 what was called the 'Truce of God', which forbade acts of war on Sunday, from Saturday evening to Monday morning. This sort of 'military weekend' was later extended, to begin on Friday evening and eventually as early as Thursday evening.[10] This truce, more or less respected, was not sufficient to eliminate the horrors of war. The Middle Ages, from the point of view with which we are now concerned, was a fanatic and bloody period.

At the end of the 14th century, military history reached a decisive turning point with the arrival of firearms on the battlefield, making a dwarf the equal of a giant. Artillery made profound changes in the art of war and in the social order as well. Cannons were expensive and only kings and emperors could afford them. Accordingly, armies tended to have monarchs as their masters and mercenaries as their soldiers. Chivalry left the battlefields and entered the storybooks. The relatively single-minded power of the State succeeded to the intricate rivalries of princelings. Private wars were out of season. Serfdom was abolished. At the same time, a degree of solicitude developed for prisoners, who were more often released for ransom, and for the wounded, who were more often picked up from the battlefields and cared for by the slowly developing medical services.

Starting in the 16th century, these practices led to the development of a system of 'cartels and capitulations' between the commanders of opposing armies. Between 1581 and 1864 no fewer than 291 such agreements were concluded.[11] One of the first of its kind was arrived at even earlier in the Covenant of Semach in 1393 between the Cantons of Switzerland, with clauses requiring respect for the wounded and for women, for which reason it is commonly known as the 'Frauenbrief'. It specifies that women shall be kept apart from war and that the wounded shall be 'left intact, with respect to their persons and possessions'.

Also in the 16th century the formation of modern states and the decline of papal authority led to al new concept of the law of nations. Accordingly, the *jus gentium* became the *jus inter gentes*, under which political entities took the place of individuals as the subject matter of the law.

The scholastic philosophers in this period exerted a beneficial influence on the laws of war. The Spanish Dominican Francisco de Vitoria, for example, re-examined the ideas of Saint Augustine and Saint Thomas Aquinas and brought them together into a unified doctrine. In his feelings for humanity, Victoria was ahead of his time. Even if he did not

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[10] P. Boissier.

[11] Professor E. Gurit collected these texts in his book, *Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege*, Leipzig. 1873.

escape completely from the baneful concept of the 'just war', he allowed for the possibility that a war could be just for both sides, a thought which his colleague Francisco Suarez considered absurd. Basing his argument on 'natural law', Victoria denounced the needless suffering and massacre of what he dared to call 'the innocents'. Together with *Las Casas*, he denied that the doctrine of the just war legitimatised the slaughter of the Indians in the American colonies. His tolerance did not extend to the Saracens however, and he granted that one might kill those taken prisoner and reduce the women and children to slavery. Suarez declared that even if the law of nations derived from natural law, it differed from it in that it was a 'positive human law'.

Soon after, the Reformation cut Christianity in two and a new basis for universality had to be found for international relations. Such a basis evolved from the law of nations sometimes designated as the law of mankind. The main architects in this development - this time a Protestant undertaking -were! Grotius and his successors.

For Grotius. Law was no longer to be regarded as a product of divine justice but of human reason. It did not precede action, but emerged from action. The law of nations emanated from nations, who created it in the fullness of their sovereignty. Accordingly, if national legislation, on the basis of natural law, proclaimed certain basic rights of the human person, public authorities must assure the exercise of those rights. In time of war, when the law of a country did not protect people from the enemy, only international law could do so.

Grotius did not abandon the idea of the just war, but considered that the inherent competence of the state to wage war was a more important element in war than the justice of its cause and regarded war as one of the means of conserving the state. 'In war', he wrote, 'we must always have peace in mind'. He was the first to assert that the 'just cause' invoked by a state to resort to war did not negate the duty of the belligerents to observe the laws of war. However, like Vitoria, Grotius believed that the population of an adverse country was an enemy, at the mercy of the winner. At the same time, he insisted that violence beyond what was necessary for victory was not justified; that civilians and even combatants should be spared whenever military needs made this possible. 'Since violence is no longer regarded as the administration of punishment, it ceases to be an end in itself. It becomes a means, to be used with increasing and measured moderation'.[12] In his major work, *De jure belli acpacis*, which the Catholic Church kept on the index of forbidden books until 1899, Grotius enumerated the *Temperamenta belli*, which constitute part of the most solid foundations of the law of war.

Unfortunately, there is still a long way to go before practice catches up with theory. In Grotius' time, the Thirty Years War heaped one disgrace upon another. Living by banditry, in allied and enemy territory alike, the soldiers plundered the peasants, who took their revenge when panic-stricken armies fled back through their lands. To cite only one figure, the population of Bohemia fell from 3 million to 750 thousand persons.

[12] P. Boissier.

In 1521, when Cortez men took Tenochtitlan, now Mexico City, they destroyed the entire city, house by house, together with its 400 temples. In 1527, the soldiers of Charles V spent four months ravaging the city of Rome, not neglecting Saint Peter's Basilica. These are among many examples.

Why was there this flagrant contradiction against the spirit of the Renaissance? Human stupidity and vandalism are not sufficient to explain it. The armies of the time were still badly paid mercenary bands. It was only with the reforms of Louis XIV and Frederick II that they were transformed into regular armies, national in nature and composition, regularly paid and strictly disciplined.

Now at last the scientific spirit was awakening. Man was discovering the physical laws governing the universe, including himself. Life was becoming an aim in itself, and not only a training ground for eternity. Henceforth, society took its own affairs in hand and set out to correct the blunders of destiny. The 17th century opened the age of Enlightenment which among other things witnessed the birth of humanitarianism, an advanced and rational form of charity and justice. The philosophers refused to consider suffering as a fatality and no longer accepted the doctrine that every man was responsible for the misery in the world. They held that all men had equal and inalienable rights, which it was the responsibility of the states to guarantee. The first item on the agenda was to gain the greatest possible happiness for the greatest possible number of people.

In the 18th century, war became a struggle between professional armies with smaller numbers of soldiers. Civilians were no longer directly involved because the armies had their own supply services and pillage was forbidden. War had become an art with its own rules, and although these were sometimes violated, the breaches were exceptional. Perfidious and cruel methods were banned, since they would dangerously exasperate the enemy. In short, war was under human control.

The humanization of 'war proceeded rapidly, at least in Europe. The cartels concluded in advance between military commanders to decide how victims would be treated were often models of common sense and moderation. The most remarkable document of this kind was the 'treaty of friendship and peace' arrived at by Frederick the Great and Benjamin Franklin in 1785, containing provisions which rose to the level of principles, in which we find for the first time the ideas that the parties 'commit themselves mutually, and before the Universe' and that the purpose of a convention between states is to protect the individual.

It was stipulated in this document that in case of conflict the parties would abstain from blockades and that enemy civilians would be allowed to leave each country after a certain time. 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.

The recurrence of comparable clauses created a veritable customary law, which may be summed up as follows:

1. Hospitals shall be immunized and be marked by special flags, with identifying colours for each army.
2. The wounded and sick shall not be regarded as prisoners of war; they shall be cared for like the soldiers of the army, which captured them and sent hol'T1e after they are cured.
3. Doctors and their assistants and chaplains shall not be taken as captives and shall be returned to their own side.
4. The lives of prisoners of war shall be protected and they shall be exchanged without ransom.
5. The peaceful civilian population shall not be molested.

These stipulations reached such a degree of perfection that Luder could write in 1876: 'Nearly all the positive provisions of the Geneva Convention...are to able found in earlier treaties where, it must be said, they are in many respects more absolute, more comprehensive and often drafted in a more just and practical manner'.[13] However, these cartels were no more than ad hoc contracts, valid only for specified conflicts.

On the eve of the battle of Fontenoy in 1747, Louis xv was asked how the enemy wounded should be treated. He replied, 'Exactly like our own men, because when they are wounded they are no longer our enemies'. In fact, 4,000 beds were already prepared to receive the wounded. When the battle ended, 1,200 wagons were sent forward to evacuate the victims and take them to hospitals where well-trained personnel and adequate supplies of dressing materials were awaiting them. Within a few hours, 3, 790 French and 2,368 enemy wounded were brought in. Only 583 of them died during the following three weeks. If Henry Dunant had lived in that period, and had come to Fontenoy instead of Solferino, he would have found nothing to write about and no reason to propose the creation of the Red Cross.[14] All these advance however, both material and legal, were still the attributes of only a few countries in Western Europe. Most of the world, we must realize, was still in the stage of the Thirty Years War.

We may well look to social thinkers to derive a social principle from these facts. In 1762, Jean Jacques Rousseau expressed himself as follows in *The Social Contract:*

> 'War is not a relation between man and man, but between State and State, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers; not as members of their country, but as its defenders...
>
> The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms, but as soon as they lay them down and surrender they cease to be enemies or instruments of the enemy, and become once more merely men, whose lives no one has any right to take'.

[13] Luder, *Etude sur la Convention de Geneve*.
[14] P. Boissier.

Rousseau thus gained the signal honour of having stated, clearly and for all time, the fundamental rule of the modern law of war. With a stroke of his pen, he destroyed the! Whole argument of Hobbes that war is natural for mankind and is justified by the sovereign reason of the State, to which individuals are nothing but objects. He wiped out the old sophistry of the just war in contrast to an unjust war, and offered in its place a more significant distinction -the one! Which must be made between combatants and non-combatants. A combat, he told us, has no other purpose than to bring about the submission of the enemy State, and that we may not go beyond that. Soldiers who are hors de combat and peaceful civilians cannot bear the blame for crimes they have not committed; their lives must be preserved and their suffering must be relieved, for suffering is the same on both sides.

This thesis, set forth in the form of a syllogism, is simply an extension, to international affairs, of Rousseau's ideas on the origin of society: the citizen surrenders part of his rights to the state only in order to gain protection in return. Such words were to have a decisive effect upon the science of law and the practice of politics. They have assuredly changed some things across the face of the earth.

These ideas were taken up by the French Revolution which solemnly proclaimed in its Constitution that, 'Every human being possesses inalienable and sacred rights', and adopted the Declaration of the Rights of Man. Furthermore, legislation required 'obligatory and equal treatment of enemy soldiers and national soldiers' and specified that 'prisoners of war shall be under the safe keeping of the nation and the protection of the laws'. As Holzendorff wrote, 'the great principles which the French Revolution has proclaimed and which have become the patrimony of civilized states give this revolution capital importance in the history of the law of nations'.[15] Despite this view, the famous doctor Larrey barely escaped the guillotine for having treated a wounded Austrian officer and later advocated his repatriation. Also, when General Westermann crushed the revolt in La Vendee, he put to death all the 'rebel' men, women and children.

The 'immortal principles' of the 1789 Revolution, in the view of its leaders, should have universal peace as their corollary. Unfortunately, events decided otherwise and the whole nation was mobilized to save the Republic. A new invention at that time had far reaching effects in military history: conscription, or obligatory military service for everyone, which drastically charged the conditions of warfare. Henceforth, there would be mass wars, with vast collisions between entire peoples who had assembled all their material and emotional resources to destroy one another. People no longer fought simply for particular interests but for ideas, for conceptions of the purpose of life itself. Thus began the epoch of wars of 'unbridled ferocity', as Marshal Foch described them. This period was marked by a terrible setback for humanitarian principles. Completely overrun by circumstances, military health services were bogged down.

The wars of the First Empire served only to accelerate the tragic process of decadence. 'Inevitable wars are always just wars', proclaimed Napoleon. The great conqueror had little concern for the wounded; what he needed was new and healthy cannon fodder to

[15] Holzendorff, *Elements de droit international.*

feed his war machine. Mortality was therefore appallingly high in the army and the suffering of the wounded was frightful. One need only recall the horrors of the retreat from Russia, still memorable despite all that has happened since. The great dramas have their sordid aspects, and Austeritz is quite properly described as a 'medical Waterloo'.[16]

What may be even more serious was the fact that humanitarian principles appear to have fallen into the shadows. Cartels were concluded less frequently and had less effect. Again, field hospitals were fired upon. Captured doctors were taken away from the wounded and were kept as prisoners. In his Egyptian campaign, when he was still no more than a general, Napoleon cold-bloodedly ordered the massacre with rifles and bayonets of the 4,000 Turkish soldiers of the garrison at Jaffa who had surrendered on the promise that their lives would be spared.

Such famous doctors as Percy and Larrey in France and Faust and Wasserfuhr in Germany raised their voices in protest against the declining standards. If attention had been paid to them, thousands of lives would have been saved, but the military leaders were deaf to their appeals. These doctors, a half century ahead of their time, had gone so far as to propose the conclusion of an international convention to provide for the 'neutralization' of the wounded. All their efforts were in vain.

[16] Dr. Andre Soubiran, *Napoleon et un million de morts, Paris,* 1969.

The Foundation of the Red Cross

This grievous situation had hardly improved by the beginning of the second half of the 19th century. Following the siege of Messina in 1848, Doctor Palasciano, one of the precursors of the Red Cross, having barely escaped the death penalty, was sentenced to one year in prison for bandaging the wounds of the defeated garrison. When the Crimean War broke out in 1854, the medical service of the Franco-British expeditionary corps was virtually nonexistent. Of the 300,000 men in this army, 83,000 died of diseases in unspeakable conditions of disorder and distress. Mortality among the amputees was 72 per cent. It took the prodigious energy and devotion of Florence Nightingale, a 26-year-old English woman, to bring order out of chaos and reduce the toll of death and misery. After the war, the British government benefited from this lesson and made far-reaching reforms in its medical services. In the course of the conflict, all the customary principles of humanitarian law had fallen by the wayside. Next came the war in Italy, between the Austrians and the Franco-Italian forces. In June 1859, the two powerful armies clashed at Solferino in one of history's bloodiest battles. By nightfall, 6,000 dead and 36,000 wounded lay on the battlefield. No effort was made to gather them up until the following day, and some of the wounded received no help for several days.

A young Swiss, Henry Dunant, arriving in the nearby town of Castiglione shortly after the battle, was 'seized by horror and pity' at the sight of the wounded, piled up in the churches, dying of infection and suffering atrocious pain -needlessly, because if they had been gathered and tended in time, many of them would have recovered. Dunant did everything he could for the wounded and organized a first aid movement with the women of the region, inspiring them to help, by word and example -and finally heard them crying out: 'Sono tutti fratelli!'

Finally, 22,000 Austrian and 17,000 French soldiers lost their lives at Solferino. During the campaign, 60% of the wounded died. Of the 200,000 men in the French army, 120,000 fell sick. In the military campaigns of the time, the number killed outright usually amounted to only one fourth of the total number who died.

Later, haunted by the scenes he had witnessed, and determined to do all in his power to keep them from happening again, Dunant wrote his impassioned little book, ' A Memory of Solferino'. In addition to his personal testimony, he made a two-fold proposal: that in every country a volunteer relief society be constituted which would train and prepare itself in peacetime -this was the inspired innovation -to assist the army's medical service in the event of war; secondly, that the various states meet in a congress and adopt an inviolable international principle, guaranteed and sanctioned by a convention, to provide a legal basis for the protection of military hospitals and medical personnel. The first part of this proposal led to the creation of the Red Cross; the second to the Geneva Convention -which were henceforth to be indissolubly linked.

Dunant's prophetic book had a profound effect on public opinion, which was becoming increasingly receptive to humanitarian considerations. Others, such as Palasciano in Italy and Arrault in France, had formulated similar ideas, but it was Dunant who gained a hearing. 'It is a thousand times finer than Homer -finer than anything', wrote the Goncourt brothers in their Journal, possibly with some exaggeration. One of the most notable readers of' A Memory of Solferino' was Gustave Moynier, President of the Geneva Public Welfare Society, a realist and a doer. He called a meeting of the Society to study Dunant's proposals and try to give them practical effect. A commission was appointed and then a 5-man committee, consisting

of Dunant, Moynier, General Dufour and Doctors Appia and Maunoir. This committee met on 17 February 1863 and immediately established itself as a permanent institution. It thus became the founding body of the Red Cross and promotor of the Geneva Conventions. In 1880, it adopted the name of the International Committee of the Red Cross.

In the same year, this small committee of ordinary private individuals, with no power and no prestige, but moved by an irresistible faith in humanity, invited the states of the world to send representatives to Geneva. Fortune favoured their audacity. Sixteen nations were represented at a preparatory conference in October 1863 which created the basis for what was to become the Red Cross, still viewed only as a means to provide relief to the military wounded.

The conference was not qualified however to deal with legal matters. This was the concern of the Diplomatic Conference convoked for the following year, which adopted the 'Convention of Geneva of 22 August 1864, for the amelioration of the condition of the wounded in armies in the field'. This was the starting point for the whole of humanitarian law.

No indeed! The 19th century cannot be called a stupid age. Some have said it was, because in its first half, basing its society on technique and profit, it deified money and forgot mankind. In its later years however, it made up for that by creating a remedy for some of the evils it had produced. Did not a fresh wind awake in those years, to create a spirit of internationalism, to abolish slavery and to establish the Red Cross?

II

The development of the humanitarian conventions and their application

1. The Geneva Convention for the protection of the war-wounded

The International Conference for the Neutralization of Military Medical Services in the Field, convoked by the Swiss Federal Council at there quest of the Geneva Committee, met in that city on 8 August 1864, with the participation of representatives from sixteen countries. General Dufour, who presided, was an appropriate person to open the meeting. In a brief civil war among the Swiss cantons in 1847 he had given instructions to his troops to exercise great moderation and he himself played the role of a pacifier rather than that of a victor. He was a member of the Red Cross founding committee.

Moynier and Dufour had drafted the proposals, which served as the basis for the work of the conference. This had been so well done that the conference made virtually no changes. Within two weeks, the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted. The great innovation made in international law by this document was the concept of neutrality as originally proposed by Dunant. Doctors and nurses were not to be regarded as combatants and would be exempt from capture. No longer fearing that he would lose his doctors to the enemy, a military commander, in the event of his retreat, would be willing to leave them behind among the wounded that would no longer be abandoned, as they always had been in the past. The Convention went on to assure for all time and in all places respect for the wounded and their treatment in the same manner, regardless of the side to which they belonged.

The 1864 Convention contained only ten articles but they constituted a foundation, which has never been shaken. These articles covered the essential elements: military ambulances and hospitals were recognized as neutral and had to be protected and respected; their personnel, and also chaplains, shared this neutrality while performing their duties; if they fell into the hands of the opposing side they were to be exempt from capture and permitted to return to their own army; civilians coming to the assistance of the wounded were to be respected; the military wounded and sick were to be cared for, regardless of the side to which they belonged; hospitals and medical personnel were to display a red cross on a white ground as an emblem which would assure them this protection.

Here we should say a word about the flag, which was soon to fly over lands throughout the earth, wherever there were victims of war. Dunant had made clear the need for an emblem, which would be universally recognized. His colleague, Dr. Appia, proposed a simple white armband to the Conference of 1863, but he was reminded that this was already recognized as a sign of truce or surrender. Someone -and it appears to have been the German delegate Loeffler[1]-then suggested the addition of a red cross, which was accepted.

'As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, shall be retained as the emblem and distinctive sign of the Army Medical Services'. The foregoing is quoted from the Geneva Convention, as revised in 1906. Contrary to general opinion, the founders of the Red Cross probably did not intend to base the new emblem on the idea of reversing the colours of the Swiss flag. Indeed, the minutes of the two conferences are silent on the matter and there is no document from that period suggesting such a connection. The idea was not expressed before 1870.

It is difficult to imagine today the vast influence exercised by the first Geneva Convention on the evolution of the law of nations. For the first time in history, the states, in a formal and permanent document, accepted a limitation on their own power, for the sake of the individual and an altruistic ideal. For the first time, war had yielded to law.

In less than a century, the principle of the Geneva Convention was gradually extended to other categories of war victims and this movement also brought about the conclusion of the texts of The Hague. It is for this reason that it has been called, 'The Mother of Conventions'. One might even say that modern efforts to resolve conflicts peacefully and to outlaw war have their source, indirectly, in the first Geneva Convention.

Only two years after its conclusion, in the Austro-Prussian war of 1866, the Geneva Convention received its baptism of fire. This was an occasion for it to give dramatic evidence of its value, especially at Sadowa, a battle nearly as murderous as that of Solferino. Prussia had ratified the Convention and proceeded to apply it. It had well-organized hospitals and the Prussian Red Cross was at work wherever it was needed. The situation was quite different in the other camp, for Austria had not signed the Convention and its retreating army left it’s wounded behind. In a forest clearing near Sadowa were found 800 bodies of wounded men who had died for lack of care.

[1] This supposition is based on a recently discovered letter by Henry Dunant. The matter appears to have been settled in a private conversation during a recess.

In 1867, all the major powers had ratified the Convention except the United States, which did so in 1882. Since that time, the Convention has maintained the universal character, which is essential to its authority.

In the war of 1870 the Geneva Convention was still virtually unknown in France, which occasioned serious problems. The first conflict in which both parties applied it in a fully satisfactory manner was the Serbo-Bulgarian war of 1885. The mortality amounted to no more than 2%. This time the states had understood that the Geneva Convention worked for their reciprocal benefit, and henceforth this was uncontested.

The Convention underwent a series of revisions. The law had to be adapted to new realities - which did not mean that it had to yield to passing pressures and to the growing development of the means of destruction. The basic principles necessary for the protection of the human person remained sacrosanct. Provisions for application of these principles developed parallel to other changes in the world, in the interest of realism and effectiveness. The founders of the Red Cross and their successors were constantly aware that this was necessary if humanitarian law was to remain a living reality.

The International Committee of the Red Cross (ICRC) was the instigator and linchpin of these successive developments of humanitarian law. With the assistance of internationally recognized experts, it drafted the proposals, which subsequently served as the basis of the work of Diplomatic Conferences convoked by the Swiss Government.

The first revision was made in 1906, when the number of articles was increased to 33, but without modification of the essence of the Convention. In World War I, it was applied quite fully, except with respect to the repatriation of medical personnel from which the belligerents departed by keeping a considerable number of doctors and nurses in prison camps to care for their wounded compatriots.

A second revision was made in 1929. This took into account the development of medical aviation and eliminated the *si omnes* clause in the preceding version, an absurd provision under which the Convention was not applicable unless both belligerents were parties to it. In addition, the Diplomatic Conference of 1929 recognized the right of Muslim countries to use a red crescent in place of a red cross.[2] We may find in these two symbols a reminder of the Crusades, even though the sign of the Red Cross never had any national or religious connotation, but was intended to be neutral, like the activities it represented.

We cannot help but regret this departure from the universality of the emblem, which has been a source of many difficulties. Up to the present however, it has been impossible to find a solution providing for a return to the unity, which is so essential. We must hope at least that there will be no further breaches in this unity through the creation of new symbols.

The principle of making medical personnel exempt from capture and returning them to their army of origin was maintained but the ban on their retention was to be valid only' in the absence of an agreement to the contrary'.

[2] And also a red lion and sun for Iran, which later rejected that emblem and returned to use a red crescent.

The Geneva Convention was relatively well respected during World War II, but the belligerents took advantage of the clause introduced in 1929 and held doctors and nurses from the opposing side in prisoner-of- war camps to treat their compatriots.

The subject of retaining medical personnel was one of the most controversial questions relating to the Convention after the end of the war and it was decided to revise and augment the Conventions. This was the task of the Diplomatic Conference of 1949.

On this particular point a compromise solution finally prevailed. The arbitrary retention of part of the medical personnel was implicitly legalized to the extent justified by the number of prisoners. The doctors and nurses thus retained were not to be considered as prisoners of war but were to have the same rights as these prisoners, plus certain facilities necessary for the exercise of their professions; those not required to tend their compatriots were to be repatriated. This nebulous hybrid solution did not fully satisfy anyone.

It is to be hoped that future legislators will find a double lesson therein. First of all, if one is compelled to open a breach in the protective wall of the Conventions by permitting derogations by agreement, it is important at the same time to decide how to deal with the consequences of this derogation and the practices to which it leads, instead of leaving the matter to the hazards of the future, following the legendary policy of the ostrich.

Secondly, in conferences of plenipotentiaries it would often be better to impose a solution by a majority vote, which is clearly defined and coherent rather than seek an illusory unanimity by adopting ambiguous and obscure texts.

There was another weak point in the 1949 revision, resulting in the relative paralysis of medical aviation. Before 1949 it was sufficient to protect medical aircraft by painting them white with red crosses. It was immediately recognized in 1949 that such painting war illusory since aircraft could be shot down before they were visible. Any protection for such aircraft was made subordinate to an agreement between the belligerents, concerning the means of identification and the routes to be followed by the planes. Since it is very difficult to arrive at agreements between belligerents in the middle of a war, especially ones designed to cover emergency cases; the new text virtually clipped the wings of wartime medical aviation.

A return was made to a more realistic view in additional Protocol I to the Geneva Conventions, adopted in 1977 and ratified, at the time of writing, by about thirty countries. Science has supplied a remedy for the evil, which it had created because, contrary to what had been supposed, and identification of aircraft in flight is now possible. A highly technical annex to this Protocol provides for a system with three types of signals –a flashing blue light, a radio signal and a secondary radar signal –which have now been integrated into international communication procedures.

Other significant and welcome improvements were made by the Diplomatic Conference of 1974-1977. For example, civilian medical personnel, on the condition that it is working under the control of the state, was accorded protection analogous to that which had been enjoyed since 1864 by military medical personnel. It was therefore granted the right to display the sign of the Red Cross. Immunity was also extended to civilian civil defence organizations

coming to the aid of victims of aerial bombardments. Further provisions protected the exercise of the medical mission and the respect for its independence and its observance of medical ethics.

The latest version of this convention, together, with its additional Protocols, is fully worthy, as we can see, of its long tradition.

2. The Maritime Convention

We have thus far spoken only of the wounded in armies in the field. What is the situation in warfare at sea? Humanitarian progress developed slowly in maritime war due to particularly difficult conditions. In the 18th century however, cartels between enemy leaders began to include some provisions protecting the human person in naval operations, covering such matters as repatriation of the shipwrecked, return of medical personnel and the use of a flag of truce to confer immunity on ships transporting exchanged prisoners.

The founders of the Red Cross were aware of the desirability of extending the principles of the Geneva Convention to warfare at sea. A proposal to this effect was submitted to the Diplomatic Conference of 1864, but was rejected, probably because warships had begun to undergo the most profound transformation in naval history, with the advent of steam power, propellers and armour plating. It was impossible to predict the future of warfare at sea.

There was tragic evidence of the absence of humanitarian law at sea in the battle of Lissa, a kind of 'maritime Solferino', on 20 July 1866 off the Dalmatian coast. After a four-hour engagement, the ships under the command of the Austrian commander, Admiral Tegethoff, defeated the Italian fleet. The flagship 'Re d'ltalia' was rammed and sunk, resulting in the deaths of hundreds of sailors with no ship daring to come to their rescue.

The Geneva Committee prepared a draft convention adapting maritime warfare to the principles of the 1864 Convention. This was approved by a Diplomatic Conference in Geneva in 1868, which granted protection but not exemption from capture to hospital ships. This convention was never ratified.

It took a new maritime disaster off the coast of Cuba during the Spanish-American war of 1898 to remedy the deficiency. The provisions proposed earlier in Geneva entered into effect the following year in the Third Hague Convention. After revision, this became the Tenth Hague Convention in 1907, which was in force during both world wars. The Hague document followed closely the 1906 Geneva Convention, according to shipwrecked persons the same protection previously granted only to the wounded. Hospital ships were inviolable and this time were exempt from capture, including the medical personnel and members of their crews, since their detention would leave the ships as helpless derelicts.

During World War I, however, the application of the Convention was compromised by serious differences between the two sides and by several tragic incidents. The fleet of one of the belligerents attacked and sank hospital ships, charging that they were being used for the transport of troops and munitions; as the attacking fleet consisted mostly of sub-marines, it could not exercise the right of inspection provided by the Convention. The adverse powers therefore began to provide escorts for their hospital ships, and in so doing renounced the benefits of the Convention.

A number of hospital ships were also attacked and sometimes sunk in World War II, especially in the Far East. Most of these tragedies were due to the absence of identification marks visible to attacking aircraft. The 1907 Convention had provided only for protective markings on the sides of ships and not on their decks.

The evolution of methods of warfare thus made it necessary to revise the Convention, which was done in 1949. The new document covering maritime warfare became another Geneva Convention, returning the subject to a legal jurisdiction to which it had always morally belonged. It is much more detailed than its predecessor, but no fundamental modifications were made, nor were any made in 1977.

In our time, hospital ships are auxiliaries of prime importance. In maritime warfare, they follow the fleets and collect the victims after battles; in land warfare, they provide a means for evacuation of the wounded and sick; in amphibious warfare, they serve as permanent floating hospitals.

3. The situation of prisoners of war

From the beginning, Henry Dunant urged that the treatment of prisoners of war should be specified by an international Convention, along with that of the wounded. His colleagues, however, felt it was advisable to proceed more slowly, one step at a time.

In 1863, at the moment of the founding of the Red Cross, the United States, then engaged in its deadly Civil War, adopted a code of 'Instructions for the Government of the Armies of the United States in the Field', a document of a very humane character. President Abraham Lincoln, distressed at the ferocity of the early battles, had asked an American political philosopher, Francis Lieber, to draft the code. The 'Lieber code', as it came to be called, inspired by the thinking of 18th century philosophers, was based on the general concept that war is legitimate only to the extent that it is conducted in accordance with certain rules.

The Lieber code was purely national in character, but had widespread influence elsewhere, as did the monumental codification of modern inter- national law, *Das moderne Volkerrecht*, published in 1868 by Jean-Gaspard Bluntschli, a distinguished Swiss jurist teaching at Heidelberg. These stimulated a demand for the drafting of a code for prisoners of war. The Brussels Conference of 1874 worked on the project, as did the Institute of international law, which published in 1880 the 'Oxford Manual', whose principal author was none other than Gustave Moynier, one of the founders of the Red Cross.

These efforts 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. The Regulations devoted 17 articles to prisoners of war. The first of these asserted that such prisoners are in the power of the enemy government, but not of the soldiers who captured them. The government might intern them to keep them from taking up arms against it again, but had to treat them humanely, on the same footing as their own troops. It could require them to work, but not in connection with war operations.

From 1914 to 1918, the Hague Regulations governed the treatment of seven million prisoners of war. Although they provided important guarantees, the lot of prisoners in World War I was nevertheless often difficult. With no legal basis, the ICRC created for them the Central Agency for Prisoners of War, which relieved the uncertainty and anxiety of an enormous

number of families. This also led to the inspection of internment camps by neutral delegates, one of the essential means available today to limit arbitrary conduct by detaining powers.

The need was very soon felt to supplement the law in force, even though it was difficult to conclude agreements between belligerents in the middle of a war.

Since representatives of the warring powers were not authorized to meet one another, the negotiations had to be carried out through a neutral person who shuttled back and forth between the rooms of the principals. Eventually, the latter met face to face. In 1917 and 1918, mainly under the auspices of the Swiss Government, about a dozen agreements were arrived at. One of them, signed on 26 April 1918, provided for the repatriation of 100,000 elderly prisoners who had been in captivity for long periods.

This experience supplied material for the future Convention relative to the treatment of prisoners of war concluded at Geneva in 1929 to cover all aspects of captivity. While confirming earlier principles, the Convention made substantial advances, such as: forbidding reprisals against protected persons, regulating the conditions of work and of penal sanctions and, most important, setting up a system of control exercised by what were called Protecting Powers, that is, neutral states charged with representing the interests of one belligerent vis a vis the adversary. This control was supplemented by the activity of the ICRC, whose delegates were accorded the same prerogatives as those of the protecting powers.

On the whole, the Geneva Convention of 1929 stood up well to the trial by fire to which it was soon to be subjected by World War II. For many captives it provided real safeguards and a detention regime better than that between 1914 and 1918. For evidence of this, it is sufficient to note that where the Convention was in force, mortality among the prisoners did not exceed normal rates, while in military camps where it was not recognized and in unprotected civilian concentration camps as well, mortality ranged from 30 to 90%. This is enough to show that even when it is not completely applied a humanitarian convention is an indispensable barrier against abuses of power.

This is only true of individuals to whom the Geneva Convention was applied, who constituted only 4 million of the total of 12 million prisoners of war -1 in 3. It should also be noted that French and Belgian prisoners were deprived of the services of any protecting power, under the terms of an agreement between Germany and the governments of those two countries, both of which were occupied.

Among those who were refused the benefits of the Convention were Soviet prisoners in Germany and prisoners of war in the Soviet Union. The USSR was not a party to the Geneva Convention on the treatment of prisoners of war. On both sides of the front, captured soldiers had no legal protection and mortality was frightful. Of the 3 million prisoners of war in the USSR, about one third died.[3] In Germany there were reports of much higher mortality, amounting to three fifths (3.3 million dead out of 5.7 million prisoners).

The basic reason for this tragedy is easy to identify. Each of these two adversaries proclaimed that it was conducting a 'just war', this time in the name of different ideological principles. The enemy was accordingly a criminal, against whom one necessarily had to wage an implacable war.

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[3] Kurt Bohme. *Die deutschen Kriegsgefangenen in sowjetischer Hand*, Munich, 1966.

Allied prisoners in the hands of the Japanese forces received the benefits of the convention to a very limited extent. Japan was not a party to the Convention. On the insistence of the ICRC it agreed to apply it but only as a concession.

Finally on the pretext of legal or pseudo-legal arguments, some categories were more or less completely denied the benefits of the Convention. This was the case with 'partisans' in the occupied countries, Italian 'military internees' captured by the Germans after the armistice of 1943, prisoners transformed into 'civilian workers' and, in 1945, 'surrendered enemy personnel', which covered Axis soldiers who surrendered en masse at the time of the German capitulation.

One of the main objects of the revision made in 1949 was to increase the categories of persons who would be entitled to the status of prisoner of war in the event of capture. This was the intent of the long article 4, which is the veritable key to the Third Geneva Convention.

The most difficult point was that of the 'partisans' who continued to fight in occupied territory. In World War II, the occupying power did not regard them as combatants but outlaws, and subjected them to harsh repression.

The Diplomatic Conference of 1949 adopted the provisions of the Hague Regulations in specifying four conditions which combatants had to fulfill to obtain the benefits of international law: to have a responsible commander, to wear a distinctive emblem, to carry arms openly, to conduct operations in accordance with the laws and customs of war. It then assimilated partisans to militias and volunteer corps fighting in support of the regular army, so long as they 'belonged' to a party to the conflict. Then, breaking new ground in comparison to the Hague text, it specified that such formations might also operate in occupied territory.

This constituted a great step forward in the recognition of resistance movements, but we must realize that a great number of the resistant in the last world war would not have been covered by these provisions.

The Diplomatic Conference of 1974-1977 was also concerned with this sector since the world had been increasingly confronted by the phenomenon of 'guerrillas' -a very old term, but one, which was assuming new importance and one, which could no longer be ignored. The victims of the guerrillas, especially civilian victims, had to be protected.

Guerrilla warfare is characterized by the fact that the combatants often operate under cover, carrying out raids and ambushes and trying to create insecurity. Guerrilla groups are organized mainly when there is a substantial imbalance between opposing forces -heavily armed regular troops on one side and small groups of 'guerrilleros' on the other side attempting to make up for their inferiority by clandestine operations and even terrorism, a characteristic weapon of the weak. In such cases, government forces often devote all their resources to a virulent repression in which they also break the law.

The bitterly debated solution consisted first of all in defining armed forces as precisely as possible and then in enlarging the categories of combatants by qualifying the four traditional conditions of the Hague regulations. It was stated that the combatants should be distinguishable from the civilian population but it was not specified how this should be done.

It might be by means of a distinctive sign but at least by carrying arms openly. Nevertheless, the 1977 Protocol recognized that there are cases in which the guerrilleros cannot, without compromising their lives or the success of the operation, distinguish themselves from the population. They are therefore no longer expected to carry arms openly except during the combat itself and the deployment immediately preceding the attack.

A further point on which the 1949 version made a definite improvement was in the repatriation of prisoners of war at the end of the conflict. The 1907 Convention had stated that this should be done 'after the conclusion of peace'. However, the Treaty of Versailles, ending World War I, was not signed until 1920, which meant that many combatants did not come home until two and a half years after the last shot was fired. The Convention of 1929 sought to expedite the return by relating it to the conclusion of an armistice -but World War II for many countries ended without peace treaties and without armistices. Once more, millions of soldiers had to wait in the camps, some of them for as long as four years after the capitulation.

The revised text of 1949 states simply that the prisoners shall be released and repatriated without delay after the cessation of active hostilities. One might suppose that the matter had been settled for good, but a controversy arose at the end of the Korean War when a number of prisoners in the South refused to be sent back to the North. Should they have been repatriated against their will? The United Nations decided in the negative and no prisoners were forced to return if they did not wish to. In the future, while dealing humanely with individual cases, we must take care not to breach the fundamental principle of repatriation, lest we run the risk that eventually, on a variety of pretexts, no one will be repatriated.

We should also note that the 1949 Geneva Conventions, including the Convention on prisoners of war, have been ratified universally, a considerable advance over their 1929 versions, bearing in mind that lack of universality was so recently a stumbling block and the cause of so much tragedy in World War II.

4. Protection of civilians against arbitrary treatment

In peacetime, the situation of foreigners is determined by treaties I whereby persons and property are protected by the diplomatic and consular services of their own countries. When an armed conflict occurs, this whole edifice of contractual law collapses.

Yet, only a short time ago, many civilians, some of who had been established for decades or even for several generations in a region, were deprived of all legal protection and were left at the mercy of the authorities in the country they lived in. Too often they found no mercy.

After centuries of such shamefulness, our times have witnessed the triumph of the principle that military operations should be limited to the armed forces and that non-combatants should be left out of the conflict. At this point, we shall consider the question in relation to the protection of civilians against arbitrary treatment and abuses of power by the enemy, reserving for a subsequent heading the protection of the population against particular weapons.

The Hague Regulations of 1899, revised in 1907, have several basic provisions applicable to civilians. It is specified for example that occupation forces must respect 'family honour and

rights, the lives of persons and private property'. It only considers such protection however in the event of occupation of territory.

At the time of the 1907 revision, the Japanese delegation had proposed insertion of a clause stating that civilian inhabitants of territory belonging to an adverse power should not be interned except for reasons of military necessity. This amendment was rejected, and I would stress that this was done unanimously, not because the delegates mistrusted civilians but on the contrary because the principle of non-internment 'went without saying'.

Everyone saw what the real situation was in World War I. On the first day of mobilization, most of the states involved closed their frontiers and retained all persons of enemy nationality, nearly all of who were interned. We shall cite the name of only one of them, Dr. Albert Schweitzer.[4]

The ICRC improvised major efforts to assist the internees. Once more we can see how naive it is to believe in things that 'go without saying'. After the war, the ICRC sought to remedy such a painful and obvious deficiency in international law. It prepared a draft convention and proposed that the question of civilians be considered at the same time as the text on the treatment of prisoners of war. This initiative met with displeasure in high places. There were those who went so far as to say, not without hypocrisy, that such clauses would amount to treason against the cause of universal peace, which was the purpose of the new League of Nations. Accordingly the Diplomatic Conference of 1929 concerned itself only with military forces.

Nonetheless, the ICRC offered its proposal to the Fifteenth International Red Cross Conference at Tokyo in 1934, which approved it.

For civilians in enemy territory, the proposal would have limited internment to civilians subject to mobilization and those whom there was reason to suspect; it would have permitted those who wished to do so to go back to their countries; it would have forbidden forced evacuations and mass deportations; it would have provided freedom for all the others, subject to necessary measures of control and security; finally, it would have applied to civilian internees treatment at least equal to that of prisoners of war.

In occupied territories, deportation of population and the execution of hostages would have been forbidden and the civilians assured of the right to correspond and to receive relief.

Finally, the draft would have provided for controls corresponding to those covering prisoners of war under the Convention of 1929.

The Red Cross Conference asked the ICRC to consider, in agreement with the Swiss Government, the convocation of a diplomatic conference which would give effect to what was called the 'Tokyo Draft'.

The ICRC received full support from the Swiss Federal Council which agreed to convoke the Conference and sent the draft to the states as a basis for discussion. Replies to the invitation were slow in coming –the importance of the problem was far from obvious to many of the

[4] Born in Alsace when Alsace was part of Germany, Dr. Schweitzer was interned for a short time in what was then French Equatorial Africa and later in France. During his absence, his hospital fell into ruins.

recipients. It was not until 1939 that the date was fixed for the beginning of 1940. It was already too late and hostilities made the meeting impossible.

From the beginning of the war, the ICRC urged all belligerent states to put the Tokyo Draft into effect. In view of the general disinterest it found, the ICRC then suggested a more modest solution for civilians who found themselves in enemy territory when hostilities broke out, whereby any civilians interned would benefit from the relevant provisions of the Convention on prisoners of war. This solution was generally accepted by the powers, between whom a kind of agreement was reached through the intermediary of the ICRC. The result was that about 160,000 civilians enjoyed a legal status and guarantees comparable to those of prisoners of war.

Nothing was planned however for civilians in occupied countries, whereas the Tokyo Draft would also have protected this category of persons. In fact, the occupation of the greater part of Europe by the Axis Powers subjected millions of civilians to dependence on one single belligerent. Since there was nothing to counterbalance this and no chance for reciprocity to exert any moderating influence, these civilians were increasingly subject to arbitrary treatment. Millions of them were deported. Many were held as hostages, interned in concentration camps, tortured and killed. Everyone is aware of this great tragedy of our time.

In the absence of any legal basis, the ICRC took all possible initiatives. Although it was able to act to some extent in countries allied to Germany, in Germany it encountered deliberate opposition. All information about civilians was denied it and the camps were forbidden to its delegates except in the last phase of the war. Even so, a few concessions patiently gained one by one eventually made it possible to provide some food to the suffering victims and some lives were saved.

Post-war work for the development of humanitarian law was naturally dominated by the imperious need to obtain, finally, an effective diplomatic means to provide civilians with the guarantees which had for so long been cruelly lacking. As Max Huber, then president of the ICRC, said, 'The evolution of war toward an increasingly total form has virtually reduced both armies and the general population to the same level of danger and misery'.

The undertaking was difficult, for it involved an almost completely new legal domain. The Geneva Conventions had applied thus far only to the military, a well-defined category under the authority of responsible commanders and subject to strict discipline. It must henceforth embrace the whole unorganized mass of civilians, throughout every land.

Furthermore, the new Convention should not limit itself like its predecessors to persons who had already become victims of war but should prevent persons from becoming victims. To cite Max Huber again. 'We were engaged in a hand to hand combat with war itself, no longer simply to relieve suffering but to eliminate the sources of suffering'. Apart from this, the wounded and the prisoners were beings who had become harmless, which was not the case for a good many civilians. We were venturing into unfamiliar and uncertain territory.

The Fourth Geneva Convention thus constituted a major achievement for the Diplomatic Conference of 1949.

It enunciates the great principle that respect for the human person shall be assured in all circumstances, and accordingly forbids intimidation, torture, collective punishments, reprisals, the taking of hostages and deportations.

While recognizing the right of foreigners to leave a country at the beginning of or during a conflict, the Convention also confirms the right of the state to retain those who may bear arms or may possess dangerous secrets. Persons to whom permission to depart is refused shall have prompt access to a tribunal qualified to reconsider this refusal. They must be permitted to live a normal life.

Under what circumstances will it be permitted to intern civilians? Only if these persons seriously threaten the security of the state. Furthermore, if they are interned, they shall be allowed to seek reconsideration of their cases by a competent tribunal at six-month intervals.

In occupied territories civilians may not be compelled to work unless they are over the age of eighteen years and they may not be compelled to participate in military operations. The occupying power is obliged to ensure supplies of food and medicines, the operation of public services and maintenance of the health of the people. When it is unable to do so, it must accept relief shipments from abroad.

One section deals with legislation applicable in occupied territories. While protecting the population against arbitrary treatment, it provides that the occupying power shall be able to maintain order and combat insurrection.

In normal circumstances the occupant should maintain existing legislation and existing national courts.

A great advance was made in providing that all civilians deprived of their freedom, for any reason, would henceforth benefit from treatment, specified in detail, equivalent in substance to that of prisoners of war.

The additional Protocol of 1977 devotes little space to the specific protection of civilians against abuses of power. On the other hand we must make special mention of its remarkable Article 75 entitled 'Fundamental Guarantees' which takes up no less than three pages. This article even more than the famous Article 3, common to all of the 1949 Conventions - constitutes a mini-convention in itself, specifying the minimum treatment that must be accorded to all persons affected by war who would not otherwise be specifically protected by the Conventions, such as the citizens of neutral states or states not bound by the conventions, spies and mercenaries.

This 'summary of the law' makes up for a real deficiency and contributes to limiting arbitrary treatment, even though the safeguards it expresses are already contained in the national legislation of most countries. It has in particular a very complete enumeration of the judicial guarantees which must be granted to everyone. We may also refer to special stipulations for the benefit of refugees, women and children.

However, as we shall see below, it is in protection of the population against aerial bombardments that the 1977 Conference accomplished its most innovative legislative work.

5. Internal conflicts

For the Red Cross there is no question of legitimate or illegitimate conflicts -there are only victims to assist. The principle of humanity which governs its action, as it had governed the development of humanitarian law, covers all people who suffer, without distinction. Blood is the same colour everywhere, and the Red Cross must always accept the challenge to relieve suffering.

One problem of great and growing importance that the ICRC had to confront was to find a way to apply the rules governing international conflicts, or at least the essential principles of those rules, to internal conflicts.

Historically, civil wars were the first conflicts of this nature to be dealt with by the Red Cross. Shakespeare had long ago aptly likened this kind of war to suicide. Certainly it is one of the greatest curses of humanity, and probably just as old as humanity. Civil wars, in proportion, engender more suffering than international wars, because of the hatred and savagery which characterize them. Why is this? To be cynical about it, it might well be because we know so well the people we are fighting against and have our own reasons for detesting them. In contrast, in encounters between nations, how many soldiers have feelings of personal resentment against the enemy? Certainly very few.

It is difficult to find a better characterization of the mentality governing internal conflicts than the ugly comment attributed by Suetonius to Emperor Vitellius at the Battle of Bedriac. When one of his officers commented that the unburied bodies of his political adversaries smelled badly, Vitellius was quoted as saying, 'The body of an enemy always smells good - and all the better if it is the body of a compatriot'.

Alongside international wars history abounds with reports on uprisings against monarchs and the established order, often as a justified reaction against tyrannical abuses of power. They have been called revolutions, insurrections, rebellions, etc. Nowadays they are commonly called acts of subversion, and so on. These outbreaks resemble other wars like twin sisters, but with a characteristic and baneful difference: nobody believed that any law need be invoked in suppressing them, which has commonly been done with total brutality and abundant bloodshed.

It is not up to us to consider this in relation to the legitimacy or lawfulness of an uprising by a majority of citizens who aim to overthrow an oppressive regime. We are concerned only with humanitarian questions.

It was only in the 18th century that the idea arose of applying law even to those who had taken up arms against the rulers. The Neuchatel jurist, Emerich de Vattel, was the first to formulate this, though he did so somewhat timidly.

Less than twenty years after publication of Vattel's 'Law of Nations', great hope was felt during the American Revolution when both sides put the customary rules of war into effect. Disillusion came quickly however when other attempts to achieve autonomy were crushed with the utmost harshness, as in Greece, Poland and Latin America.

Despite the horrors of the American Civil War, the law was not completely ignored, thanks to President Abraham Lincoln and his legal adviser Francis Lieber who devoted a whole section

on internal conflict in his *Instructions for the Government of the Armies of the United States in the Field*, considering that it was the duty of both parties to respect the laws of war.

In later conflicts however there was a relapse into savagery and atrocities. After the uprising of the Paris Commune in 1871, nearly 25,000 persons were summarily executed. It was in this period that the ICRC was becoming increasingly active in the promotion of more humane concepts. It had to overcome enormous and virtually insurmountable obstacles, to bring down the walls of two sacrosanct citadels known as national sovereignty and the security of the state. It seemed and still seems quite clear that a government cannot have more mortal enemies than those who attempt to overthrow the established regime by force. It is self-evident to the government that they are criminals and it wants to have its hands free to crush the uprising with no interference from anyone who proposes to judge the legitimacy of the means it uses. It is not surprising therefore that humanitarian efforts in this delicate area have always encountered strong resistance from states and always had to deal with two accusations: interference in the internal affairs of the state and giving aid and comfort tb bandits and outlaws.

During the second Carlist war in Spain, 1872-1876, the ICRC first took the decisive step of concerning itself with the victims of a civil war. Through the intermediary of the president of the Spanish Red Cross, Dr. Landa -a noble humanitarian figure -it succeeded in having an order given to the army to respect the rebel wounded, medical personnel and prisoners.

A little later, on the occasion of the insurrection of Hercegovina against Turkey in 1874, the ICRC decided to undertake a direct relief action and sent a delegate to the scene, emphasizing that the motives of the Red Cross were 'exclusively humanitarian and apolitical'.

The possibility of regulations for civil wars was discussed at an International Red Cross Conference in 1912. The American delegate Clark, advocated the intervention of the Red Cross in such conflicts. His speech aroused lively reactions, one of them by the Russian representative, who said, 'the Red Cross Societies can have no duty to fulfil with respect to insurgent or revolutionary bands, who can only be regarded as criminals under the laws of my country'. This was far removed from the spirit of the Red Cross. No decision was taken.

This setback did not prevent the ICRC from acting, in 1917 and again in 1919, in the revolutionary events in eastern Europe. On 7 August 1918, Lenin signed a decree recognizing the Geneva Convention, but this did not mean that it was respected in the fighting. In Hungary, the ICRC obtained from Bela Kun the right to visit and assist detainees.

In 1921, there was a warmer reception for the idea of legalizing such intervention, and the International Red Cross Conference in that year proclaimed the moral right of the victims of civil wars to be treated in accordance with humanitarian principles.

1936 marked the beginning of the Spanish Civil War, which ravaged the nation for the next three years. The ICRC succeeded in moderating the suffering to some degree. It demanded respect for hospitals; its delegates visited 40,000 prisoners and exchanged hostages; families corresponded with prisoners through the intermediary of the Agency in Geneva.

After World War II, it was believed that there would be fewer international wars and more civil wars, with subversion as a common means of warfare. The ICRC therefore reverted to the idea of introducing into positive law a provision -the famous Article 3 common to all the

Geneva Conventions -which would attempt nothing less than the submission of national phenomena to international law.

This problem was solved by the Diplomatic Conference of 1949, after long and heated debate. The ultimate solution was new, audacious and paradoxical, marking a decisive step in the evolution of modern law and tending to limit the sovereignty of the state for the benefit of the individual.

The solution consisted of distinguishing between the fundamental principles of the Conventions -rules of humanity which have absolute value and must be applied in all circumstances -and other provisions which the parties to a non-international conflict should put into effect, wholly or in part, through special agreements.

As these principles had not been clearly defined, the Conference adopted a general formula in the text of Article 3 concerning respect for the person, which the ICI~C had proposed in vain as a preamble to the Conventions. The article enumerated acts which are prohibited in all circumstances, such as violence to life and person, outrages upon personal dignity, the taking of hostages and the passing of sentences which have not been pronounced by regularly constituted courts.

Article 3 did not have the effect however of preventing persons who take up arms against the established government from being sentenced on this charge on the basis of national legislation. The great step of obtaining the treatment of captured rebels as prisoners of war had not yet been taken.

However, the article specifies that its provisions 'shall not affect the legal status of the parties to the conflict' and that an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict'. Together, these confer upon the article the substance of a self-contained ‘mini convention’, as one delegate said.

As it stands, Article 3 constitutes an essential step toward universality for the law of Geneva. It has already rendered invaluable service and has been applied in practice in proportion to the good will of the states, for it must be acknowledged that some of them evade their responsibilities simply by denying the existence of an internal conflict.

Article 3 was only a first step however, for it was so embryonic and incomplete that an additional major development was called for. Accordingly, in preparing for the Diplomatic Conference of 1974, the ICRC considered that it should devote the whole of one of its two drafts for additional Protocols to this category of conflicts. In substance, it offered a simplified version of Protocol I, adapted to the special conditions prevailing in internal conflicts.

The price which had to be paid for acceptance of a detailed Protocol of this character was to define its field of application restrictively, making it less extensive than that of Article 3. It was accordingly limited to armed conflicts between governmental forces and organized armed forces under responsible command, which exercise such control over part of the national territory as 'to enable them to carry out sustained and concerted military operations and to implement the Protocol. The additional precaution was taken of excluding specifically such activities as riots, sporadic acts of violence and other acts of a similar nature.

Protocol II therefore applies only to conflicts of a relatively high degree of intensity, though they do not have to be typical civil wars since recognition of a state of belligerency is not required, nor the existence of a quasi governmental power on the insurgent side. In any event, as stated in the article itself, Article 3 of the 1949 Conventions remains in force and the ICRC can always invoke this in conflicts not covered by Protocol II.

There was a totally unexpected and disappointing development at the time of adoption of the final text of Protocol II. As the result of strong opposition by certain Third World countries, the document was stripped at the last minute of about half of its provisions, and the other delegations yielded without much of a struggle.

Protocol II, with its 27 remaining articles, lost a great deal through this summary and ill-considered mutilation, but even as it stands it represents a considerable advance in humanitarian law. Its most important provisions institute fundamental guarantees for all persons not taking part in hostilities, especially women and children, and humane treatment for persons deprived of their freedom. Criminal prosecution is attended by important judicial guarantees, but persons who have taken up arms against the government are still subject to trial.

Prior to the adoption of the Protocol, there was nothing to require the application of the law of The Hague to internal conflicts, and populations were thus left at the mercy of governments, especially with respect to the use of weapons and aerial bombardments. Protocol II made a bold innovation in overcoming this deficiency by adopting the principles of Protocol I. It stipulates that civilian populations and objects necessary for their survival shall not be the objects of attack. Acts and threats designed to spread terror are forbidden. Works and installations containing dangerous forces are protected in Protocol II as they are in Protocol I.

As we have seen. Article 3 in the 1949 Conventions and Protocol II apply only, *stricto jure,* to non-international armed conflicts. They do not apply in simple internal disorders or political tensions. In the latter cases, the ICRC tries to provide assistance to the victims and to visit political detainees wherever it is allowed to do so.

In legal terms, the protection of individuals in these circumstances relates more directly to human rights than to the law of Geneva, and we shall not discuss it here.

6. The law of war

As we have defined it, the law of war properly so-called, or the law of The Hague, establishes the rights and duties of belligerents in the conduct of operations and limits the choice of means to injure the enemy. It has a wider field of application than the law of Geneva but also possesses a humanitarian character, though less specific, because its principal object is to attenuate the evils of war and violence which is unnecessary for the purpose of the war -to weaken the resistance of the adversary. In comparing these two juridical domains, it has been said that the law of The Hague originates in reason rather than sentiment, in mutual interest rather than philanthropy, in direct contrast to the law of Geneva.

We shall consider here two aspects of the law of war which are of particuiar interest because of their pronounced humanitarian inspiration : protection of the civilian population against the effects of hostilities and the banning or limitation of the use of certain weapons.

While the whole of humanitarian law sprang from the great creative impulse given to it in Geneva in 1864, the first chapter of the law of war was written at St. Petersburg in 1868. Alarmed by the invention of a type of bullet which exploded on impact, Czar Alexander II - who had already shown his humanitarian convictions by abolishing serfdom –convoked a conference intended to 'attenuate as much as possible the calamities of war'. This led, on 11 December 1868, to the Declaration of St. Petersburg, which still binds seventeen states. This abolished not only explosive bullets but also, on the initiative of the Swiss delegation, 'any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances'. We may note in passing that the latter ban against inflammable projectiles was not respected during World War II. What confers profound significance upon the Declaration of St. Petersburg, however, is its preamble which straightway, with surprising rectitude set forth the first principle of the law of war:

> Considering...that the only legitimate object...to accomplish during the war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would, therefore, be contrary to the laws of humanity.

We may note that the Declaration also contains a commitment by its signatories to meet again in the future to decide upon the prohibition of other inhuman weapons. It might be well to bear this in mind.

The works of Lieber and Bluntschi had opened public opinion to the idea that regulation of war was both necessary and possible. This aspiration was concretized in the convocation by he Russian Czar of a conference for codification of the law of war which took place in Brussels in 1874.

The most extensively discussed question at this conference was the definition of combatants, the persons who had the right to participate in the fighting. It was at Brussels that the four famous conditions subsequently adopted word for word in the Hague regulations on the laws and customs of war were drafted. It was also specified that open and undefended towns and localities should not be attacked, an idea which was also reflected in subsequent texts signed at The Hague. The Brussels Declaration never had the force of law, since it was never ratified. It nevertheless marked an important stage. In 1880, the Institute of International Law adopted the Oxford Manual drafted by Gustave Moynier, one of the founders of the Red Cross. The Manual formulated the principles of the law of war with perfect clarity and established a proper balance between humanitarian ideals and military requirements.

In 1898 Czar Nicholas II convoked the first International Peace Conference at The Hague designed to limit the evils of war and forbid new weapons. This aroused great hopes, but the representatives of twenty-six countries, meeting on 18 May 1899, quickly abandoned the idea of reducing armaments or forbidding explosives and submarines. Nevertheless, the Conference forbade the launching of projectiles from balloons, the use of asphyxiating gas - which still belonged at that time to the sphere of science fiction -and 'bullets which expand or flatten easily in the human body'. The latter prohibition was designed to abolish the so-called dumdum bullets which were very much a military reality and the cause of terrible wounds.

The main task of this conference however was to draw up the 'regulations respecting the laws and customs of war on land' which were largely inspired by the Brussels Declaration and the Oxford Manuel. We shall refer to this in connection with the revised texts of 1907.

Together with the Convention for the Adaptation to Maritime Warfare of the Geneva Convention of 1864, the 1899 Conference was also marked by the drafting of a convention for the peaceful settlement of conflicts.

The Conference expressed its desire for the convocation of a second Peace Conference to complete its work. This was held in 1907, also at The Hague, but this time on the initiative of the President of the United States.

The Regulations and the two! other Conventions were revised, especially the one dealing with the peaceful settlement of conflicts, to which was added the outline of a procedure for arbitration to prevent such conflicts. Of the three previous Declarations, two were retained, the one concerning dumdum bullets and the one forbidding the launching of projectiles from balloons.

Among the new Conventions, one was devoted to the procedure for pening hostilities, and another to the rights and duties of neutrals Seven others dealt with maritime warfare and constituted the principal accomplishment of the 1907 Conference.

The Hague Regulations governed many wars in the 20th century and some of their provisions are still in force. They determined the rights and duties of belligerents in the conduct of hostilities and in particular the conduct of combatants, and they limited the choice of weapons. On a number of points, however, the Regulations were completed or replaced by the Geneva Conventions and recently by their additional Protocols.

Let us now take up the two principal domains of war.

a) Protection of the civilian population against the effects of hostilities

The principle of establishing a distinction between combatants and non-combatants took a long time to gain acceptance. For many centuries it was considered that war brought. into conflict not only states and their armies, but also their peoples. Accordingly, civilians were left at the mercy of the victors who, too often. even if they left them alive, subjected them to forced labour, stole their possessions and treated with contempt their most basic rights. Grotius acknowledged and accepted this situation in the period of the Thirty Years War.

The idea that the public should be kept apart from war first made its appearance in the 16th century but only became established in the 18th. Unfortunately, the enormous development in the 20th century of the means for making war, while it did not change the principle, put the practice in great peril. The menace of total war darkens the horizon for everyone.

The first world conflagration demonstrated the glaring insufficiency of the Hague Regulations. This was not surprising, for their provisions, as revised, dated from 1907 and the first bombardments by planes occurred during the Italo- Turkish war of 1911-1912. There was also a new affliction, gas warfare, which we shall discuss later.

Although there was agreement after World War I to prohibit chemical and biological Weapons in the Geneva Protocol of 1925, no general agreement could be reached for the regulation of aerial warfare. No one felt justified in convoking a Third International Peace Conference. At most, a commission of jurists meeting at The Hague in 1922 and 1923 drew up an excellent code on aerial warfare, including a list of military objectives. This never went beyond the drafting stage however. The ICRC made great efforts, but in vain. In March 1940, it was still doing what it could and proposed to the belligerents that they conclude an agreement confirming the general immunity of the civilian population and proclaiming that only military objectives could legitimately be attacked, but that proposal met with no success.

The cumulative ravages of 1939-1945 had no precedent. From 1940 onwards, the aerial war took on the terrible proportions that we remember, killing one and a half million civilians in all, of whom 600,000 were in Germany and 360,000 in Japan, plus countless injured, many of them disabled for life.

We were the helpless witnesses of an irreversible evolution of warfare toward an increasingly 'total' form, from conventional bombardment to atomic bombs, with such interim forms as 'carpet bombing', V-2 rockets and napalm. After the war ended, nuclear physics continued to pursue its horrifying course. and today a single thermonuclear bomb would suffice to annihilate a metropolis.

What was even more disturbing was the fact that even amidst the ruins of the ravaged cities, the nations did nothing even to restore the rules of 1907 -which were buried under the same debris -except for a Convention concluded at The Hague in 1954 under the.auspices of UNESCO for the protection of works of art and other cultural property.

The ICRC made a further attempt in that period to preserve civilian populations from extermination, even if this meant going beyond the traditional bounds of the Geneva Conventions. In undertaking this difficult venture, it started with the simple observation that the mass bombings of population centres in World War II had not 'paid off' in military terms.

In consultation with experts, the ICRC drew up 'draft rules' which it presented to the Nineteenth International Red Cross Conference in 1957. Unfortunately, the major powers had no intention of committing themselves to such a project, being unwilling to have their hands tied in the nuclear domain.

The ICRC refused to be discouraged by this setback. On the basis of encouragement it received from the Twentieth Red Cross Conference in 1965 and from the General Assembly of the United Nations in 1968, it drew up a series of provisions which finally found their place, with some modifications, in the Protocols additional to the Geneva Conventions. Adoption of this was the major achievement of the Diplomatic Conference of 1974-77.

Of all the provisions in this relatively impressive body of rules, we might single out for special mention a much-needed definition of the civilian population and of civilian objects, in contrast to military personnel and military objectives which may be attacked. The general immunity of the civilian population is expressly stated. It is specified that this population must not be attacked and that terror bombing is forbidden, together with indiscriminate bombing and reprisal bombing.

One article confirms the protection of historic monuments, places of worship and works of art against acts of hostility. Another forbids the starvation of civilians as a method of warfare. To support this purpose it is forbidden to attack agricultural areas, livestock, drinking water installations and other objects indispensable to the survival of the civilian population. A special provision deals with protection of the natural environment, which constitutes a great innovation. Another prohibits attacks against works containing dangerous forces, the release of which could cause severe injury to the civilian population, such as dams, dykes and nuclear energy plants, unless they are used in 'regular, significant and direct support of military operations'.

Additional provisions cover precautions necessary to prevent harm to the population, referring in particular to the need to identify military objectives before attacking them, the protection of non-defended localities and demilitarized zones, the status of which is to be recognized by agreement between the parties. Such clauses constitute the framework of a new system.

The total ban on reprisals against civilian populations was a triumph obtained only after lively debate. Some of the delegates thought this would be going too far and would hamper a country defending itself against an unscrupulous enemy who might be violating the protocol: that it could even change the outcome of battles and perhaps threaten the very survival of one of the parties. They proposed therefore to leave open the possibility of reprisals in exceptional cases in which they would be subject to regulation. Finally it was the absolute ban which prevailed. The participants, in the end, chose not to include in humanitarian law a license for the bombardment of civilians. They chose well.

b) The prohibition of certain weapons or restrictions on their use

This brings us to the problem of cruel or indiscriminate weapons. In this connection we are not concerned only with protecting the civilian population but also with determining whether the use of certain arms even against the military forces should not be prohibited on the ground that they cause unnecessary suffering.

Even in antiquity there was a tendency to forbid the use of certain weapons, poison, poisoned or burning arrows, barbed spears, etc. Along with the concept of the just war, the Romans were also familiar with the idea of good and bad weapons. They described as an 'evil war' (bellum nefarium) a war which was blind and total, one without law.

In the Middle Ages the Church made modest efforts to forbid some weapons, notably the crossbow. These initiatives however were frustrated by the unfortunate theory of the just war. Such efforts persisted into the 18th century when Vattel proclaimed that belligerents did not have an unlimited choice in the methods of war and that superfluous injuries should be avoided. It was too often argued however that everything is permissible in a just war, as a means of reprisal or in cases of necessity (*Kriegsraison*).

The St. Petersburg Conference in 1868, and the Hague Conference in 1899 and 1907 pronounced certain specific prohibitions, against explosive projectiles, poison, dumdum bullets, asphyxiating gases, etc., and formulated general principles of primary importance, which are still valid. They prohibited weapons causing superfluous injuries or injuries out of proportion with the purpose of the war. We shall enter into further detail under the heading of the principle of humanitarian law.

World War I brought with it a new affliction. This was known as gas war, though in fact it consisted of a liquid mist. The first toxic cloud, launched at Ypres in 1915 claimed 15,000 victims, including 5,000 dead. At the end of the conflict factories were turning out as many gas shells as ordinary shells.

After the war, there was a determination to eliminate this terrible threat, leading to the conclusion in 1925, under the auspices of the League of Nations, of the Geneva Protocol which now binds 85 states. The very brief text, signed on the condition of reciprocity, forbids the use in war of asphyxiating, toxic and comparable gases. This constituted a remarkable success for it has rarely been violated, at least on a large scale.

Contrary to usual diplomatic habits, the plenipotentiaries to the Conference in 1925 turned their attention boldly to the future and also prohibited bacteriological war, an act which was all the more remarkable since it dealt with a weapon which was still hypothetical. Such a war however was not and is not only a nightmare because general staffs have since carried out very advanced research in this domain and have gone on to manufacture and store materials which are occasion for great concern.

Of the 160 infectious diseases, technicians have chosen particular strains and rendered them more virulent by selection and have since produced them in quantity so that they can be spread in enemy territory and produce epidemics. A half-kilogram (1 pound) of botulism toxin would theoretically be sufficient to exterminate the population of the earth. The utilization of this weapon remains doubtful however because it involves too many unknown factors and because its military value has not been proved.

Today, chemical and biological war is forbidden by the letter of the law I -the Geneva Protocol -and also by the general principles of law and international usage. The condemnation of these two barbarous forms of warfare is therefore universal.

Toward the end of World War II, the peoples of the earth were suddenly confronted by an even more formidable weapon, the atomic bomb. The only two bombs of this type which have ever been used against human , targets, at Hiroshima and Nagasaki on 6 and 9 August 1945, caused more than 120,000 deaths and more than 100,000 injuries. Since then, the shadow of this new kind of war has continued to darken the horizon of mankind. The danger has continued to increase and science has now perfected thermonuclear projectiles a thousand times more powerful than their predecessors. One of them is sufficient to destroy a great city.

It is no longer only the existence of a multitude of individuals which is at risk, but the very survival of humanity. Is it lawful to use nuclear energy as a means of making war? This question has been heatedly argued. Its use is not expressly prohibited by the Conventions which constitute written humanitarian law and it has not yet been possible to regulate it by a general treaty. We may note however that a resolution by the United Nations General Assembly in 1961 formally condemned it as violation of the principles of the Charter and of humanity. The Protocols additional to the Geneva Conventions, in 1977, did not deal with the question directly and therefore did not much change the legal situation in this respect.

There is one case in legal literature. In the Shimoda case, a Japanese court concluded that the dropping of atomic bombs on Hiroshima and Nagasaki had been unlawful. The interesting presentation of the motivation for this judgement emphasized that a weapon is not necessarily

lawful by the simple fact that it is new; that the rules of The Hague are applicable by analogy to aerial bombardments; that the two cities attacked were undefended and did not constitute military objectives and, finally, that the effects of the bombs were more cruel than of chemical or bacteriological weapons.

Opinions differ with respect to the legal doctrine. In the absence of texts specifically devoted to the subject, we are obliged to refer to the general principles of law. Here, a distinction must be made between strategic weapons, bombs of enormous power, and tactical weapons, such as cannon shells. If we consider high-power nuclear bombs, we can see that they differ in nature and not only in degree from traditional projectiles, since they do not only exert mechanical effects but also thermal, radio-active and even genetic effects, the latter being still poorly understood. The ravages they cause are certainly out of proportion with the purpose of war, as we have previously defined it, since they destroy all life over a vast area, because the suffering they cause is indubitably excessive, because they inflict atrocious burns and condemn to a slow death many persons who are not killed outright.

The picture is somewhat different with respect to tactical nuclear weapons : if it is possible to produce 'clean' battlefield weapons, to aim them with precision at exclusively military objectives and make certain that their effects are limited in time and space, it is difficult to see, in view of the present status of the law, on what grounds one might forbid them, unless it might be because of the great risk of 'escalation' they entail.

Before leaving this subject we must stress the continuing urgency of having complete and precise regulations covering the employment of nuclear energy for purposes of war. Meanwhile, we must bear in mind that the general principles of humanitarian law continue to be fully applicable to this type of war, if some sorcerer's apprentice, unaware of the incalculable consequences of his act, should assume the terrible responsibility of resorting to nuclear warfare.

Apart from the so-called ABC weapons (atomic, bacteriological and chemical) there are numerous weapons described as conventional which may also have indiscriminate or excessively cruel effects. We may refer for example to incendiary weapons, including napalm and flame- throwers, fragmentation weapons, such as cluster bombs, small caliber, high velocity projectiles which may have effects like those of dum dum bullets, and finally such perfidious weapons as delayed-action bombs which endanger relief efforts, land mines and booby traps.

In preparing for the 1974 Diplomatic Conference, the ICRC did not include in its proposals the prohibition or limitation of specific weapons, since it felt that this subject was delicate because of its political and military implications. Some governments however, with Sweden in the lead, asked the Conference to consider this matter. The ICRC, in this period, convoked two conferences of government experts to examine the question, in 1974 at Lucerne and in 1976 at Lugano.

The Diplomatic Conference reached no conclusions on this subject but it recommended that another conference be called to deal with the matter. This conference met under the auspices of the United Nations in 1979 and 1980 and on 10 October 1980 adopted the 'Convention on Prohibitions or Restrictions on the use of certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects'. Even though the field

covered by this Convention was relatively narrow, it nevertheless constituted a remarkable and almost unhoped-for success.

The Convention itself contains rules of procedure and a summary of the relevant legal principles. The basic provisions are contained in three annexed Protocols, at least two of which must be ratified before a state can become a party to the Convention.

Protocol I prohibits the use of projectiles producing fragments which cannot be located in the human body by X-rays. This refers mainly to the despicable invention of fragmentation bombs filled with fragments made of plastics.

Protocol II condemns the use of mines, booby-traps and other devices against the civilian population or in such an indiscriminate manner as to cause to civilians incidental injury which is excessive with respect to the concrete and direct advantage sought. This refers in particular to mines placed outside of military zones. The Protocol also outlaws, in all circumstances, booby-straps designed to cause superfluous injury or unnecessary suffering. It specifically forbids placing booby-traps in apparently harmless objects -including in the list children's toys, a contemptible act which had to be forbidden because it had been done. The Protocol requires recording of the location of mines, which is to be published after the cessation of hostilities.

Protocol III made a great step forward by restricting the use of incendiary weapons. The prohibition of their use in all circumstances against civilians is confirmed and is extended to include even military objectives located within concentrations of civilians and to forests and other types of plant cover, except when such natural elements are used to conceal combatants or military objectives.

Finally the Conference passed a resolution concerning dangerous developments in the field of small-calibre weapon systems, asking governments to carry out further research on their effects and to exercise the utmost care in their further development.

These are the instruments of humanitarian law which have seen the light of day in recent years. They are milestones marking immense and undeniable progress in the crusade for the benefit of mankind. We may go so far as to affirm that they are determinant for the survival of humanity. Let us hope that their early ratification by all the powers on earth will give them universal force."

HUMANITARIAN LAW- A HALTING HISTORY OF GLOBAL EVOLUTION

V.R. Krishna Iyer[1]

INTRODUCTION

Universal compassion is an inalienable component of ancient India's cultural vision. in war and in peace. The Buddha renounced a princedom and spent a long life time in the ceaseless search for an end to human sorrow or *dukha*. Asoka, an Emperor who accepted Buddhism as his religion, renounced war as a means of conquest when he beheld the slaughter and ravages of a victorious
war he waged. Even amidst the clash of arms *Dharma* shall govern. Such is the Hindu heritage of Manu vintage. *The Manu Smriti says:*

> "Let not the king strike with concealed weapons, nor weapons which are barbed, poisoned or the points of which are blazing with fire.
>
> He should not strike when he is on his chariot, one who is on the ground; he should not strike a person who is an eunuch, or who has surrendered or is fleeing from the battle-field or one who is sitting or accepts defeat.
>
> Nor one who is sleeping, nor one who has lost his armour, nor one who is naked, *nor one who is only a spectator*, nor one who is engaged in fighting with another.
>
> Nor one whose weapons are broken, nor one who is afflicted with sorrow, nor one who is grievously wounded, nor one who is in fear.
>
> These are the restrictions on an honourable warrior, which every soldier must remember during war.
>
> This is the declared law for warriors, which a *Kshalriya* must not transgress, if he were to remain unblemished, when he is fighting with his foes in the battle-field. He should fight only in accordance with *Dharma*, which is hence called *Dharmayuddha.* " [2]

Indeed, the Constitution of India, in keeping with this sublime cultural estate, has provided in Article 51 an obligation on the State to promote international peace ad

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[1]Chairman, Indian Centre for Humanitarian Laws and Research, Former Judge, Supreme Court of India

[2]Manu VII 90-93 and 98; quoted by M. Rama Jois, *Legal and Constitutional History of India;*

security and foster respect for international law and treaty obligations in the dealings of organised peoples with one another. A fundamental duty has been cast on every citizen of India, to promote harmony among all the peoples of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus the ethos of Indian humanity is in keeping with humanitarian legality whose logical culmination is a world of non-violence. The Delhi Declaration of Rajiv Gandhi and Gorbachev (1989) summons the finest spirit of India's composite cultural heritage when it advocates a war-free global humanity. The deeper springs of humanitarian law distinguish the people of India convey the very fact that *Dharmayuddha* or the humanitarian regulation of warfare is in the very blood of Indian history.

Dynamic peace or *Shanti* in the Indian context, has a higher dimension and involves an inner spiritual conversion. Not mere cessation of armed conflict by formal regulations governing warfare but by a spiritual urge and divine perspective manifested in the Indian ideology of *Shanti*. Not a utilitarian object of reducing suffering but a humanitarian goal of ensuring a necessary environment for the unfoldment of the personality of every individual or community. The emphasis is not on the materialistic values of managing combat to avoid bloodshed but a lofty outlook of reverence for life which is at the root of the Indian idea of humanism. Indeed, when the Bible speaks of " the peace of God which passeth all understanding", there is a deeper perception of divine impulse than a mere superficial suspension of armed conflicts.

THE GROWTH AND DEVELOPMENT OF IHL

Be that as it may, the world wove humanitarian jurisprudence over the centuries out of the sight of terrible suffering and the humane response to such savagery and inhumanity. Monographs, as early as the 14th century, and paragraphs in theological works of the Middle Ages, were moved by considerations of obviating unjust wars and farewell to macabre inflictions.

Humanitarian law appeared in Europe during the Age of Enlightenment. "They formulated a fundamentally humanitarian doctrine according to which war should be limited to combat between soldiers, without posing a threat either to the civilian population or non-military objects."

It was mostly in Geneva that humanitarian law was developed, eventually to spread over the western world and to acquire the name of the "Law of Geneva". The Red Cross also owed its origin to Henry Dunant, a citizen of Geneva, who was so horrified by the bleeding scenes of wounded' soldiers abandoned on battle fields, that he made it his mission to find ways and means, in Law and practice, to protect the victims of war. At the instance of the International Standing Committee for Aid to Wounded Soldiers (The Committee of of Five), the Swiss Government convened a Conference in Geneva, which resulted in the signing. on 22 August 1864, of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

> "To emphasize the Swiss origins of the movement, the decision was soon taken to adopt, as the distinctive sign of the protection granted to wounded soldiers, the unversed colours of the Swiss flag (a white cross on a red ground), that is to say, a red cross on a white ground. In 1880, the Committee of Five became the International Committee of the Red Cross (ICRC), a name it has kept to this day. One by one, numerous National Societies were created and they adopted the same emblem. At the request of certain Islamic countries, the red crescent was also admitted. The red lion and sun was used for a time by Iran, but was abandoned (in 1980) in favour of the red crescent"[1]

The penetrating spirituality and compassion which inspires the Indian view of humanitarianism is reflected in a way in the culture and constitution of the Indian people. Nevertheless, when we come to social terms and strengthening of a world human order, international law cannot twinkle as an omnipotence in the sky nor shine futilely as the vanishing point of enforceable jurisprudence. So it is that a viable system of humanitarian laws, instrumentalities and operational strategies become necessary. Manu's *Yuddha Dharma* has practical value and ethical justification in this sense. World law, injecting humanist justice into brutal war victimisation, is still a slow soul-less process.

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[1] *International Review of the Red Cross*, July-August 1984

International jurists have distinguished between human rights law and *humanitarian Law*, but the current trend is to view both through a compassionate lens to find overlapping areas, without being allergic to compartmentalisation of the two branches of jurisprudence. One of the effective means by which humanitarian processes in situations of armed conflicts operates is the use of the sublime instrument of the ICRC (International Committee of the Red Cross). In our world of ubiquitous belligerances and butcheries verging on genocide, the perennial presence of the Red Cross and the Red Crescent is a source of comfort to the conscience of peaceful peoples everywhere. The ICRC teams, in spite of risks, do a great job in areas of conflict intra-national and international. Some of the less known adivities of the ICRC deserve to be disseminated. A.G. Noorani, in an article has brought out facts which citizens must know:

> "For instance, little is known about its services in tracing people separated from their families, known as the tracing activities. Throughout 1993 the ICRC's regional delegation based in New Delhi, which covers India, Bangladesh, Bhutan, Nepal and Myanmar, monitored the situation of some 1,75,000 refugees from Sri Lanka. in some 130 camps in Tamil Nadu and, what is more, kept them informed of ICRC activities in their home country. The ICRC continued to provide tracing services for refugees who had been separated from their families and to issue travel documents to various refugees temporarily residing in India and accepted for permanent resettlement in third countries."[2]

As the report makes clear, in law the work of the ICRC is based upon the Geneva Conventions and their Additional Protocols and the resolutions adopted by the International Conferences of the Red Cross and Red Crescent. Almost all states are bound by the famous Four Geneva Conventions of August 12, 1949, which in times of armed conflict, protect wounded, sick and shipwrecked members of the armed forces, prisoners of war and civilians. On June 8, 1977 two protocols were adopted. They reaffirm and amplify the humanitarian rules governing the conduct of hostilities (Protocol 1) and to extend the body of humanitarian law applicable in armed conflict which is not of an international character. India has ratified the Geneva Convention but it has not ratified the Additional Protocols. The Annual Report reveals that during his visit to New Delhi on March 9 and 10, 1993, the Delegate-General for Asia and Pacific of the ICRC raised with both the home secretary and the foreign secretary "the question of India's possible ratification of the Additional Protocols. "[3]

Knowledge is the locomotive of democratic action and if the Government of India has not ratified the humanitarian rules in the Protocol it is time popular pressure is put on the Central Government not to play truant, but to abide by the Gandhi essence of ratification of the Additional Protocol as a support for a regime of international non-violence. Thou shall not betray Art. 51 of the Constitution.

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[2] A.G. Noorani, *Economic and Political Weekly.* Vol XXIX No. 30, p. 1897

[3] *Ibid*

Conscience and compassion in legal locomotion, through sad scenes of horror and cries of wounded soldiers left in pitiless neglect, pressured the International Committee of the Red Cross to sponsor the Geneva Conventions and the Additional Protocols. These international agreements establish the principle of disinterested aid to *all victims of war without discrimination* since they, through wounds, capture or shipwreck, are no longer enemies or capable agents of hostilities but merely suffering and helpless humans.

GENEVA CONVENTIONS

Humanitarian law, with its humble origin in Geneva, has become now a bulwark against the harshness, hardship and horror of war. The Humanitarian Conventions have been tuned to the current needs of a warring world with no holds barred and adapted to defend bleeding mankind victimised by victory through massacre. In between the two World Wars, the ICRC has laid the foundation for the establishment of a number of new Conventions like the Convention on the Treatment of Prisoners of War. Indeed, this was signed in the summer of 1929 and has protected millions of captured soldiers. With the end of World War II, the need to develop the humanitarian dimensions of International law gained momentum. Governments and National Red Cross Societies facilitated the progress of this process:

> "Three former Conventions had to be revised: the Geneva Convention of 1929 for the Relief of the Wounded and Sick in Armies in the Field, the Xt. Hague Convention of 1907 for the adaptation to Maritime Warfare of the Principles of the Geneva Convention and the 1929 Convention on the Treatment of Prisoners of War. Furthermore, there was urgent need for a Convention for the protection of civilians, the absence of which had, during the world conflict, led to such grievous consequences."[1]

After careful scrutiny of the Draft Conventions, the matter came before the Conference held in Stockholm in August 1948. Considerable thought was bestowed on the various drafts and then emerged the 1949 Geneva Conventions.

The following four Conventions were the product of the fruitful debates:

I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949.

II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949.

III. Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949.

IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949."6

After further Committee discussions, the Final Act was signed by a large number of countries. The general provisions of the Final Act deal with international conflicts, enemy occupation and civil war. They were followed by other special provisions which the Contracting Parties may conclude dealing with the inalienability of the right of proceeded persons, the duties of Protecting Powers, the activities of the International Committee of

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[1] *The Geneva Conventions of August 12, 1949;* International Committee of the Red Cross; p. 2

the Red Cross and Conciliation procedure between the Contracting Parties. Further refinements were made to the texts, one of the important contributions being the attempt to define "War Crimes" in International Law. However, the fact remains, "War Crimes" eludes precise definition although its ghastliness does help identify, even without formal definition, that class of crimes.

The Geneva Conventions are now universally accepted, more or less. The first Geneva Convention deals with the wounded and sick, even as the Geneva second Convention (the Maritime Convention) is an extension of the first and applies to maritime warfare. The third Geneva Convention with its annexes deals with prisoners of war and vastly extends the Hague Convention on the same subject. Humane regulation of the conditions of those in captivity is an aspect of international law. The Prisoners of War Convention has helped numberless people involved in conflicts. Even so, it has been felt that agencies appointed to look after prisoners' interests and ensure that regulations concerning them are applied in full, should be as independent as possible of the political relations between the belligerents. This subject has been dealt with at length in the third Geneva Convention.

The Fourth Geneva Convention (civilians) is a constructive contribution in the humanitarian dimension to international law. This Dew Convention is an elaboration which runs into several Articles and prohibits in particular:

(a)- Violence to life and persons, in particular torture, mutilations or cruel: treatment

(b)- The taking of hostages.

(c)- Deportations.

(d)- Outrages upon personal dignity, in particular humiliating or degrading treatment, or adverse treatment founded on differences of race, colour, nationality, religion, beliefs, sex, birth or social status

(e)- The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples.[2]

There is no need in this article to go into greater detail except to state that now we have a fairly comprehensive set of Geneva Conventions. Even so, to witness the brutal violations of the humanitarian spirit in the maddening passion of battles among brothers of ester years, with Big Power megalomania and even the U.N. Peace-Keeping Forces, makes us realise 'the petty done and the undone vast' in the field of humanitarian jurisprudence. World War II was a macro-scale disaster with scenes of savagery no eye had seen before, no heart conceived ever, and no human tongue could describe the desperate theatres of terror. This global holocaust had a seminal impact of awakening humankind to the urgency and adequacy of forbidding and punitively dealing with belligerent barbarity in the name of human dignity and peaceful progress of all peoples.

[2]Id. p. 19.

THE MARCH OF LAW AFTER WORLD WAR II

The League of Nations addressed but minimally the laws to humanize war, even as, prior to World War I, precious little was achieved by way of regulating the laws of war. The optimist view that the world would disarm itself after the holocaust proved illusory. And the irony of it is that the Conference convened in Geneva in 1925 to end the arms trade, produced a treaty on supervision but never entered into force due to lack of ratifications. The use of poison had been. frowned upon by the Hague Regulations of 1899 and the Conference of 1925 strengthened it through the Protocol for the prohibition of the use in war of asphyxiating, poisonous and other gasses and of bacteriological methods of warfare. The ban of 1925 has not won its humanitarian objective as is seen from the contemporary world struggling to extinguish sources of chemical warfare.

> After the Second World War,. the United Nations showed the same of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermonuclear weapons for war purposes", and to report on the results at the next session. (Needless to say, no such special conference was convened). The authority of the Resolution was reduced even further by the fact that quite a few States (with the United States, the United Kingdom and France, all three nuclear Powers, among them) voted against , or abstained; the vote was 55 in favour, 20 against and 26 abstentions. Yet despite these defects, it is certainly permissible to see in the Resolution an expression of world opinion as represented in the General Assembly." [1]

1968, the Human Rights Year, twenty years after the birth of the U.N., found active interest being taken in the law of Anne conflicts and at the Teheran Conference diverse aspects of human rights in such situations figured in the discussions. The Teheran principles gave better protection to civilians, prisoners of war, and upheld the prohibition of chemical warfare.

Skipping for a moment the momentous decision of the United Nations in favour of national liberation of colonies --an important chapter in World Law- , the General Assembly proceeded to Impose restraints on certain mass weapons of destruction. The United Nations entered the area of law of war in the nineteen seventies and dealt with three aspects :

> "First and foremost, they contributed to cutting through the taboo resting on the subject. Secondly, they highlighted the idea of protection of human beings in their fundamental rights even in times. of armed conflict. And, thirdly, they made a valuable contribution to the debate on a number of specific questions, notably that of the position of guerrilla fighters in wars of national liberation."[2]

Thus the United Nations, in its sweeping concern for human rights, began to consider respect for human rights in armed conflicts. This lovely confluence between human rights and humanitarian justice is a beautiful blend of compassionate jurisprudence in its global and local applications

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[1] Resolution 1(1) of 24th January 1946

[2] *Id. P. 21.*

cognised by the UN. In this context, the General Assembly Resolution 2444 (XXIII) makes the first ever reference to the ICRC. Likewise, the ICRC, in its operations, began to be functional beyond the law of the Hague and took a new initiative by making a statement of fundamental principles governing the law of war, which no one would dare to deny. We may, at this stage, observe the happy process of two streams merging where The Hague and New York came together in one main flow. This close interaction between the UN and the ICRC is a strong foundation for the humanitarian law of armed conflicts in contemporary circumstances.

Many developments have taken place since and a whole new literature which deals with even nuclear weapons and protection of civilian populations and a indifference as the League of Nations vis-a-vis armed conflicts and the law of the Hague. However, the principal progressive step taken was the adoption, through an International Conference held in 1954 at the Hague under the auspices of the UNESCO, of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts. Cultural property of perpetual value is a global asset which shall not be a prey to the ravages of war. The international Military Tribunal at Nuremberg was also a great step to validate and integrate the punitive jurisprudence against war criminals.

In 1949, the International Law Commission, an organ charged with codification of international law, it is unfortunate, did not place the law of armed conflicts on its agenda. However, the London agreement (August 1945) for the prosecution and punishment of the major war criminals was a positive step in the development of international law in this area:

> "The Charter defined the three categories of crimes coming within the jurisdiction of the Tribunal and for which there would be individual responsibility (Crimes against peace, war crimes, and crimes against humanity). It also stated the principles of individual criminal liability, notably, the principle that the official position of defendants would not be considered as freeing them from responsibility or mitigating punishment', and the principle that an order would not free a defendant from responsibility but might be 'considered in mitigation of punishment if the Tribunal determines that justice so requires' .
>
> In 1946, the General Assembly of the United Nations in Resolution 95(1) reaffirmed these principles, as reformulated by the International Military Tribunal it its judgement (and therefore usually referred to since as the "Nuremberg principles") as generally valid principles of international law."[3]

The nuclear menace at traded the attention of the United Nations and the very first Resolution ever adopted by the General Assembly:

> "provided for the establishment of an Atomic Energy Commission, charged *inter alia* with the task of formulating proposals designed to eliminate nuclear weapons from national armaments. In the ensuing years, the aspect of disarmament, apparent in these terms of reference (as opposed to the wartime use of the weapons at issue), largely

[3]Frits Kalshoven, *Constraints on the Waging of War,* ICRC Publications pp. 18-19

dominated the debate, both in the Commission and its successors and in the General Assembly.

On 24 November 1961, however, the General Assembly, voted a Resolution focusing more particularly on the aspect of possible use of nuclear weapons. Resolution 1653 (XVI) declared that such use would be utterly unlawful on a number of grounds. The potential effect of this firm opening statement was considerably reduced, however, by part two of the Resolution which somewhat lamely requested the Secretary-general to consult the Governments of Member States to ascertain their views on the possibility host of other matters such as that "starvation of civilians as a method of warfare is prohibited", has done us proud as a civilised generation, ghastly praxis to the contrary notwithstanding. Frits Kalshoven rightly stresses:

"The international humanitarian law of armed conflict, rather than being an end in itself, constitutes a means to an end: the preservation of humanity in the face of the reality of war. That reality confronts us every day; the means remains therefore necessary.

The questions at issue in humanitarian law, no matter how varied and complicated, can be reduced to two fundamental problems: viz., the problem of balancing humanity against military necessity, and the obstacles posed .by the sovereignty of States. Sovereignty and military necessity are the two evil spirits in our story -and evil spirits we will not be able to exorcise. Although many, nowadays, regard State sovereignty as the main obstacle to a better society, it is cherished by the States themselves, both old and new, as their greatest asset and as an indispensable means to safeguard them against encroachments of their territorial integrity and , political independence. Any ostensible interference with, or supervision of, their behaviour in time of armed conflict is interpreted all too quickly as an encroachment of this precious sovereignty."[4]

One outstanding but dreadful gap needs to be highlighted, despite the impressive edifice of law. Here again, Frits Kalshoven may be aptly quoted:

"It should also be noted that none of the humanitarian treaties in force deals specifically with the use of nuclear weapons -quite irrespective of the expectations one might have of such a regulation. Another marked deficiency, and one that is far more directly noticeable in daily practice, arises from the absence of a set of special rules for guerrilla warfare, whether in the context of international or internal armed conflict. Warfare at sea was also largely disregarded during the recent conferences. Despite all this, the conclusion remains unaltered that much has been achieved in the sphere of international humanitarian law of armed conflict.

It should immediately be added that the adoption of treaty texts is a far cry from their application in practice. Observance of the treaty obligations restricting. belligerent parties in their conduct of hostilities is rarely an automatic thing: more often than not, it has to be fought for step by step, so as to prevent an armed conflict from degenerating into the blind, meaningless death and destruction of total war. This battle for humanity is not

[4] *Op. cit. p. 159*

> always won. Yet, each partial success means that a prisoner will not have been tortured or put to death, a band grenade not blindly lobbed into a crowd, a village not bombed into oblivion: that, .in a word, man has not unnecessarily from the scourge of war."[5]

The gruesome agonies of war-torn people and the distress and destruction even in civil wars desiderate a dynamic law of life which is the humanist root of *Dharma*. The soul of the Red Cross is alleviation of suffering, internal or international. As Noorani tersely sums up:

> "The legal bases of any action undertaken by the lCRC may be summed up as follows :
>
> In the Four Geneva Conventions of 1949 and Additional Protocol I, the international community gave the ICRC a mandate in the event of international armed conflict. In particular, the ICRC has the right to visit prisoners of war and civilian internees. The Conventions also confer on the ICRC a broad right of initiative.
>
> In situations of armed conflict which are not international in character, the ICRC also has a right of initiative recognised by the States and enshrined in the four Geneva Conventions.
>
> In the event of internal disturbances and tension, and in any other situation which warrants humanitarian action, the ICRC has a right of humanitarian initiative which is recognised in the Statutes of the International Red Cross and Red Crescent Movement and allows it to offer its services to governments without that offer constituting interference in the internal affairs of the State.
>
> Article 3, common to all the Four Conventions provides for ICRC's role , in the case of armed conflict not of an international character occurring in the territory' of a signatory to the Convention." [6]

Asoka's great rock edids and Jesus Christ's Sermon on the Mount are the ceaseless springs of love, caring and sharing, which create humanitarian law and operate the Red Cross Movement.

> One may conclude with the great thought of Grotius:
>
> "I must retrace my steps. and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part also because coactive tribunals lend to them their authority; things which nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called. or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men." .

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[5] *Id.* P. 160
[6] *Op. cit.*

The right to life and righteousness in social conduct are together the foremost human right " be it in the domain of internal or international rule of law. Sans humanitarian law, between 'civilised' nations and savage tribes 'thin partition do their bounds divide'. The finest hour of Humanitarian Law and International Red Cross arrives when, in the field of human conflict or calamity, the sick and wounded, the innocent civilians and helpless victims of armed conflict, find a source of justice and a means of rescue and hope; and then history will proclaim that never in the field of human conflict or harrowing suffering was so much owed by so many to so few. That is the globalisation of compassion by law and deed.

International Humanitarian Law and Human Rights Law

by Louise Doswald-Beck and Sylvain Vité

Introduction

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International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict. This trend can be traced back to the United Nations Human Rights Conference held in Tehran in 1968[1] which not only encouraged the development of humanitarian law itself, but also marked the beginning of a growing use by the United Nations of humanitarian law during its examination of the human rights situation in certain countries or during its thematic studies. The greater awareness of the relevance of humanitarian law to the protection of people in armed conflict, coupled with the increasing use of human rights law in international affairs, means that both these areas of law now have a much greater international profile and are regularly being used together in the work of both international and non-governmental organizations.

However, as human rights law and humanitarian law have totally different historical origins, the codification of these laws has until very recently followed entirely different lines. The purpose of this paper is to consider the philosophy of these two branches of law in the light of their origins, how in many essential respects they nevertheless coincide, how they have influenced each other in recent developments and, finally, to consider how their similarities and differences could influence their future use.

Origin and nature of human rights law and humanitarian law

The philosophy of humanitarian law

Restrictions on hostile activities are to be found in many cultures and typically originate in religious values and the development of military philosophies. The extent to which these customs resemble each other is of particular interest and in general their similarities relate both to the expected behaviour of combatants between themselves and to the need to spare non-combatants.[2] Traditional manuals of humanitarian law cite the basic principles of this law as being those of military necessity, humanity and chivalry.[3] The last criterion seems out of place in the modern world, but it is of importance for an understanding of the origin and nature of humanitarian law.

The first factor of importance is that humanitarian law was developed at a time when recourse to force was not illegal as an instrument of national policy. Although it is true that one of the influences on the development of the law in Europe was the church's just war doctrine, [4] which also encompassed the justice of resorting to force, the foundations of international humanitarian law were laid at a time when there was no disgrace in beginning a war. The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the nineteenth century in particular, what was perceived as civilized.[5] The law was therefore in large part based on the appropriate respect that was due to another professional army. We will use here as a good illustration of the philosophy underlying the customary law of war the Lieber Code of 1863[6], as this code was used as the principal basis for the development of the Hague Conventions of 1899 and 1907 which in turn influenced later developments.

The relevance of war being a lawful activity at the time is reflected in Article 67 of the Lieber Code:

"The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant".

The law was therefore based on what was considered necessary to defeat the enemy and outlawed what was perceived as unnecessary cruelty:

"Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Art. 14).

"Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district..." (Art. 16).

Two basic rules of international humanitarian law, namely the protection of civilians and the decent treatment of prisoners of war, are described in the following terms:

"Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit" (Art. 22).

The importance of respectful treatment of prisoners of war is referred to as follows:

"A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" (Art. 56).

"Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information" (Art. 80).

On the protection of hospitals the Lieber Code states:

"Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared..." (Art. 116).

"It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection..." (Art. 1 17).

The chapter relating to occupied territory specifies the action that an occupier may take for military purposes, in particular levying taxes and similar measures, but is very clear about the types of abuses that are prohibited:

"All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penal of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior"[7] (Art. 44).

Finally, in this small selection of articles, mention should be made of Lieber's caution to States in their resort to reprisals which were still generally considered lawful at that time:

"Retaliation will ... never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of *the misdeeds that may demand retribution.*

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of *regular war, and by rapid steps leads them nearer to the internecine wars* of *savages"* (Art. 28).

The Lieber Code was regarded at the time as generally reflecting customary law although in places it particularly stressed the importance of respecting humanitarian treatment which, in practice, was not always accorded. The Code was used as the basis for the first attempted codification of these customs at the Brussels Conference of 1874. Although the conference was not successful in adopting a treaty, the declaration which was adopted is very similar to the Hague Regulations of 1899 and 1907. Those Regulations are considerably less complete than the Lieber Code, and, like later treaties, do not expressly include the explanation for the rules as does the Lieber Code.

The fundamental concepts of the laws of war have remained essentially unchanged and are still based on the balance between military necessity and humanity, although less reference is now made to chivalry. The major characteristic of humanitarian law which first tends to strike a human rights lawyer is the fact that the law makes allowance in its provisions for actions necessary for military purposes. Much of it may therefore not seem very "humanitarian", and indeed many lawyers and military personnel still prefer to use the traditional name, "the law of war" or "the law of armed conflict." The way in which humanitarian law incorporates military necessity within its provisions is of particular interest when comparing the protection afforded by this branch of law and human rights law.

Military necessity has been defined as:

"Measures of regulated force not forbidden by international law, which are indispensable for securing the prompt submission of the enemy, with the least possible expenditure of economic and human resources". [8]

The Lieber Code describes military necessity as follows:

"Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God" (Art. 15).

The fact that military necessity is included in the rules of humanitarian law is well explained in the German Military Manual as follows:

"Military necessity has been already taken into consideration by the conventions on the law of war, because the law of war Constitutes a compromise between the necessities to obtain the aims of war and the principles of humanity".[9]

This balance between military necessity[I0] and humanity is broadly speaking achieved in four different ways.[11] First, some actions do not have any military value at all and

are therefore simply prohibited, for example, sadistic acts of cruelty, pillage and other private rampages by soldiers which, far from helping the military purpose of the army, tend to undermine professional disciplined behaviour. In this respect it is worth recalling that many of the early customs of war, which were set down in written instructions to armies,[12] were motivated by a desire to encourage discipline.

Secondly, some acts may have a certain military value, but it has been accepted that humanitarian considerations override these. On this basis, the use of poison and toxic gases has been prohibited.

Thirdly, some rules are a true compromise in that both the military and the humanitarian needs are accepted as important to certain actions and consequently consideration of both is limited to some extent. An example is the rule of proportionality in attacks, which accepts that civilians will suffer "incidental damage" (the limitation with respect to humanitarian needs), but that such attacks must not take place if the incidental damage would be excessive in relation to the value of the target (the limitation with respect to military needs).

Finally, some provisions allow the military needs in a particular situation to override the normally applicable humanitarian rule. Conceptually, these provisions resemble more closely the limitation clauses commonly found in human rights treaties. Some provisions introduce the limitation within the body of the protective rule, for example, medical personnel cannot be attacked unless they engage in hostile military behaviour. Secondly, certain protective actions required by the law are restricted by the military situation. For example, parties to a conflict are to take "all possible measures" to carry out the search for the wounded [13] and dead, and "whenever circumstances permit" they are to arrange truces to permit the removal of the wounded. There are also a number of limitation clauses that refer directly to military necessity. For example, immunity may in *"exceptional cases of unavoidable military necessity"* be withdrawn from cultural property under special protection.[14] Other examples are Article 53 of the Fourth Geneva Convention which prohibits the destruction of property by occupying authorities in occupied territory *"except where such destruction is rendered absolutely necessary by military operations",* and Article 54 of 1977 Protocol I which allows the destruction of objects indispensable to the survival of the civilian population in a party's own territory when this is *"required by imperative military necessity ".*

Unlike human rights law, however, there is no concept of derogation in humanitarian law. Derogation in human rights law is allowed in most general treaties in times of war or other emergency threatening the life of the nation.[15] Humanitarian law is made precisely for those situations, and the rules are fashioned in a manner that will not undermine the ability of the army in question to win the war. Thus in order to cease respecting the law an army cannot, for example, invoke the fact that it is losing for such violation of the law will not be of sufficient genuine military help to reverse the situation.

The philosophy of human rights law

Turning now to the nature of human rights law, we see that the origin of this law is actually very different and that this has affected its formulation.

The first thing that is noticed when reading human rights treaties is that they are arranged in a series of assertions, each assertion setting forth a right that all individuals have by virtue of the fact that they are human. Thus the law concentrates on the value of the persons themselves, who have the right to expect the benefit of certain freedoms and forms of protection. As such we immediately see a difference in the manner in which humanitarian law and human rights treaties are worded. The former indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights of the recipients of a certain treatment.

The second difference in the appearance of the treaty texts is that humanitarian law seems long and complex, whereas human rights treaties are comparatively short and simple.

Thirdly, there is a phenomenon in human rights law which is quite alien to humanitarian law, namely, the concurrent existence of both universal and regional treaties, and also the fact that most of these treaties make a distinction between so-called "civil and political rights" and "economic, social and cultural" rights. The legal difference between these treaties is that the "civil and political" ones require instant respect for the rights enumerated therein, whereas the "economic, social and cultural" ones require the State to take appropriate measures in order to achieve a progressive realization of these rights. The scene has been further complicated by the appearance of so-called "third generation" human rights, namely, universal rights such as the right to development, the right to peace, etc.

We have seen that humanitarian law originated in notions of honourable and civilized behaviour that should be expected from professional armies. Human rights law, on the other hand, has less clearly-defined origins. There are a number of theories that have been used as a basis for human rights law, including those stemming from religion (i.e. the law of God which binds all humans), the law of nature which is permanent and which should be respected, positivist utilitarianism and socialist movements.[16] However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean-Jacques Rousseau, as having prompted the major developments in human rights in revolutionary constitutions of the eighteenth and nineteenth centuries. These theorists of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. They founded their theories on analysis of the nature of human beings and their relationships with each other and came to conclusions as to the best means of assuring mutual respect and protection. The most commonly cited "classical" natural lawyer is Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. In his opinion the protection of private rights assures the protection of the common good because people have the right to protect themselves and the obligation to respect the same right of others. However, as the state of nature lacks organization, he saw government as a "social contract" according to which people confer power on the understanding that the government will retain its justification only if it

protects those natural rights. He generally referred to them as "life, liberty and estate". Positivist human rights theorists,[17] on the other hand, do not feel bound by any overriding natural law but rather base their advocacy for human rights protection on reason which shows that cooperation and mutual respect are the most advantageous behaviour for both individuals and society. The other important factor to be taken into account in the development of human rights is the existence of various cultural traditions and advocates for social development.[18] Although coming from different starting points, these influences stressed the importance of providing means to maintain life as well as assuring protection from economic and social exploitation. A particularly important development which influenced later human rights law was the creation of the International Labour Organization in 1919 which made major efforts, through the development of treaties and the installation of supervisory mechanisms, to improve economic and social (including health) conditions for workers.[19]

As the development of human rights progressed from theories of social organization to law, it is not surprising that lawyers began to analyse the nature of these rights from the legal theory point of view. Thus there is a plethora of articles arguing over whether human rights are really legal rights if the beneficiary cannot insist on their implementation in court.[20] The focus of this argument is on the nature of economic and social rights, which many legal theorists argue cannot therefore be described as legal rights.

However, the first major international instrument defining "human rights", namely the 1948 Universal Declaration of Human Rights, contains not only civil and political but also economic and social rights. In drafting it a conscious effort was made to take into account the different philosophies as to the appropriate content of human rights. It was only when the attempt was made to transform this document into international treaty law that the legal difficulties outlined above made themselves felt. The International Covenant on Civil and Political Rights (CP Covenant), 1966, requires each State Party to "*respect and to ensure to all individuals ... the rights recognized in the present Covenant*.....". [21] On the other hand, the International Covenant on Economic, Social and Cultural Rights (ESC Covenant),1966, requires each State Party to *"take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant*.....". [22] The main difference is that civil and political rights are perceived as not requiring any particular level of economic development, as for the most part they consist in individual freedoms. Yet it would not be accurate to say that respect for the CP Covenant does not involve the creation of certain State structures. In particular, the right to fair trial calls for certain infrastructures and professional training, and the same is true as regards the political rights listed in Article 25. However, it is a fact that the implementation of most of the economic rights does necessitate some resources and thought as to the best economic arrangement in order to achieve the best standard of living possible. The genuine difficulty thus created in giving a proper interpretation to the ESC Covenant in the particular circumstances of each State has a direct effect on the nature of the individual's economic rights.[23] In 1987 a committee was created in order to examine the reports submitted by States under the Covenant. Such a committee was not originally provided for, and although its creation would appear to show a willingness to examine the implementation of this instrument more carefully, the committee is finding that States are still somewhat reticent about having their economic policies carefully

analysed by an international body in order to assess whether they are compatible with the Covenant.[24]

A further development of importance in the philosophy underlying human rights law is the appearance of what are commonly referred to as "third generation" rights. [25] Third World States have in particular pointed out that in order to be able to show proper respect for economic and social rights, the appropriate economic resources are required, and that for this purpose they have a right to development. Other rights in this category are, for example, the right to peace or to a decent environment. It is clear that these factors have a direct effect on the quality of individuals' lives or even their very existence, but legal purists again indicate here that it is not possible to categorize these as human rights as they cannot be implemented by a court and also because the specific corresponding legal duties are unclear.

What is certain, however, is that these doctrinal differences with regard to economic and social rights and third generation rights have resulted in seriously divergent interpretations of human rights obligations, in terms both of what they really entail (economic and social) and of the extent to which they exist, if at all (third generation). Some doubt has even been expressed recently as to the universality of civil and political rights.[26] Although it is true that there are some differences in the terms of the United Nations Covenant, the European Convention, the Inter-American Convention and the African Charter, it is the opinion of these authors that their similarities are far more evident, and that they are essentially the same in their protection of basic civil rights and freedoms. Further, the extent to which the United Nations now investigates certain human rights violations, irrespective of whether the State concerned is a party to one of these treaties, indicates that it considers the rights concerned to be customary.

Conceptual similarities in present-day humanitarian law and human rights law

Having looked at the origins and formulation of these two areas of law, we can now turn to their present method of interpretation and implementation.

The most important change as far as humanitarian law is concerned is the fact that recourse to war is no longer a legal means of regulating conflict. In general, humanitarian law is now less perceived as a code of honour for combatants than as a means of sparing non-combatants as much as possible from the horrors of war. [27] From a purist human rights point of view, based as it is on respect for human life and wellbeing, the use of force is in itself a violation of human rights. This was indeed stated at the 1968 Human Rights Conference in Tehran as follows:

"Peace is the underlying condition the full observance of human rights and war is their negation".[28]

However, the same conference went on to recommend further developments in humanitarian law in order to ensure a better protection of war victims. [29] This was an acknowledgement, therefore, that humanitarian law is an effective mechanism for the protection of people in armed conflict and that such protection remains necessary because unfortunately the legal prohibition of the use of force has not in reality stopped armed conflicts.

A conceptual question of importance is whether human rights law can be applied at all times, thus in armed conflict as well, given that the philosophical basis of human rights is that by virtue of the fact that people are human, they always possess them. The answer in one sense is that they do continue to be applicable. The difficulty as regards human rights treaties is that most of them allow parties to derogate from most provisions in time of war, with the exception of what are commonly termed "hard-core" rights, i.e., those which all such treaties list as being non-derogable. These are the right to life, the prohibition of torture and other inhuman treatment, the prohibition of slavery and the prohibition of retroactive criminal legislation or punishment. However, the other rights do not thereby cease to be applicable, but must be respected in so far as this is possible in the circumstances. Recent jurisprudence and the practice adopted by human rights implementation mechanisms have stressed the importance of this, and also, in particular, the continued applicability of certain judicial guarantees that are essential in order to give effective protection to the "hard-core" rights.[30] However, the major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty language. Even outside armed conflict situations, we see that the documents attempt to deal with the relationship between the individual and society by the use of limitation clauses. Thus the manner in which the rights may be applied in practice must be interpreted by the organs instituted to implement the treaty in question. Although the United Nations Human Rights Committee, created by the CP Covenant, has made some general statements on the meaning of certain articles, [31] the normal method of interpretation by both the United Nations and regional systems has been through a decision or an opinion on whether a particular set of facts constitutes a violation of the article in question. A study of this jurisprudence shows that although at first sight an assertion of an individual right may seem very favourable to the individual, its interpretation in practice reduces its implementation considerably in order to take into account the needs of others.[32] Now, if we transfer this to a situation of armed conflict,

we can appreciate straight away the inconvenience of having to wait for decisions as to whether every action that takes place is justifiable or not, as the protection of people in armed conflict is usually literally a matter of life or death at that very moment. What is needed, therefore, is a code of action applicable in advance. Human rights lawyers have consequently turned to humanitarian law because, despite its different origins and formulation, compliance with it has the result of protecting the most essential human rights both of the "civil" and the "economic and social" type. The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey. This does have one very definite advantage from the legal theory point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights.

As space does not allow us to go into a detailed assessment of the similarities between human rights law and humanitarian law, we shall limit ourselves here to an impressionistic overview of the most important provisions of humanitarian law that help to protect the most fundamental human rights in practice.

The most important general observation to be made is that, like human rights law, humanitarian law is based on the premise that the protection accorded to victims of war must be without any discrimination. This is such a fundamental rule of human rights that it is specified not only in the United Nations Charter but also in all human rights treaties. One of many examples in humanitarian law is Article 27 of the Fourth Geneva Convention of 1949:

"...all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion".

Given the obvious risk to life in armed conflict, a great deal of humanitarian law is devoted to its protection, thus having a direct beneficial effect on the right to life. First and foremost, victims of war, i.e. those persons directly in the power of the enemy, are not to be murdered as this amounts to an unnecessary act of cruelty. These persons are mainly protected by the 1949 Geneva Conventions, with some extension of this protection in 1977 Additional Protocol I. As far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However, humanitarian law is not totally silent even here, for the rule that prohibits the use of weapons of a nature to cause superfluous injury or unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers.

[33] With regard to civilians, we have seen that the customary law of the nineteenth century required that they be spared as much as possible. Military tactics at the time made this possible, and civilians were less affected by direct attacks than by starvation during sieges, or shortages due to the use of their resources by occupying troops. However, military developments in the twentieth century, in particular the introduction of bombardment by aircraft or missiles, seriously jeopardized this customary rule.

The most important contribution of Protocol I of 1977 is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible. The balance between military necessities and humanitarian needs that was explained in the Lieber Code continues to be at the basis of this law, and the States that negotiated this

treaty had this firmly in mind so as to codify a law that was acceptable to their military staff. The result is a reaffirmation of the limitation of attacks to military objectives and a definition of what this means, [34] but accepting the occurrence of "incidental loss of civilian life" subject to the principle of proportionality. [35] This is the provision that probably grates most with human rights lawyers, not only because it in effect allows the killing of civilians but also because the assessment of whether an attack may be expected to cause excessive incidental losses, and therefore should not take place, has to be made by the military commander concerned. On the other hand, the Protocol protects life in a way that goes beyond the traditional civil right to life. First, it prohibits the starvation of civilians as a method of warfare and consequently the destruction of their means of survival [36] (which is an improvement on earlier customary law). Secondly, it offers means for improving their chance of survival by, for example, providing for the declaration of special zones that contain no military objectives [37] and consequently may not be attacked. Thirdly, there are various stipulations in the Geneva Conventions and their Additional Protocols that the wounded must be collected and given the medical care that they need. In human rights treaties this would fall into the category of "economic and social rights".[38] Fourthly, the Geneva Conventions and their Protocols specify in considerable detail the physical conditions that are needed in order to sustain life in as reasonable a condition as possible in an armed conflict. Thus, for example, the living conditions required for prisoners of war are described in the Third Geneva Convention and similar requirements are also laid down for civilian persons interned in an occupied territory. With regard to the general population, an occupying power is required to ensure that the people as a whole have the necessary means of survival and to accept outside relief shipments if necessary to achieve this purpose.[39] There are also provisions for relief for the Parties' own populations, but they are not as absolute as those that apply in occupied territory.[40] Once again, these kinds of provisions would be categorized by a human rights lawyer as "economic and social". [41] Finally in this selection of provisions relevant to the right to life, humanitarian law lays down restrictions on the imposition of the death penalty, in particular, by requiring a delay of at least six months between the sentence and its execution, by providing for supervisory mechanisms, and by prohibiting the death sentence from being pronounced on persons under eighteen or being carried out on pregnant women or mothers of young children. Also of interest is the fact that an occupying power cannot use the death penalty in a country which has abolished it. [42]

The next "hard-core" right is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Humanitarian law also contains an absolute prohibition of such behaviour, and not only states this prohibition explicitly in all the appropriate places [43] but goes still further, since a large part of the Geneva Conventions can be said in practice to be a detailed description of how to carry out one's duty to treat victims humanely.

As far as the prohibition of slavery is concerned, this is explicitly laid down in 1977 Protocol II;[44] the possibility of slavery is furthermore precluded by the various forms of protection given elsewhere in the Geneva Conventions. It is interesting to note in particular that this prohibition was well established in customary law, and is reflected in the Lieber Code's articles on the treatment of prisoners of war, who are not to be seen as the property of those who captured them, [45] and on the treatment of the population in occupied territory. [46]

As mentioned above,[47] human rights bodies are now recognizing the importance of judicial guarantees to protect hard-core rights although, with the exception of the Inter-American Convention, these are unfortunately not expressly listed as non-derogable. If human rights specialists had at an earlier stage taken a close interest in humanitarian law, they would have noted the extensive inclusion of judicial guarantees in the Geneva Conventions. This is because those drawing up humanitarian law treaties had seen from experience the crucial importance of judicial control in order to avoid arbitrary executions and other inhuman treatment.

The protection of children and family life is also given a great deal of importance in humanitarian law. It is taken into account in a number of different ways, such as the provision made for children's education and physical care, the separation of children from adults if interned (unless they are members of the same family), and special provisions for children who are orphaned or separated from their families.[48] The family is protected as far as possible by rules that help prevent its separation by keeping members of dispersed families informed of their respective situation and whereabouts and by transmitting letters between them. [49]

Respect for religious faith is also taken into account in humanitarian law, not only by stipulating that prisoners of war and detained civilians may practise their own religion,[50] but also by providing for ministers of religion who are given special protection.[51] In addition the Geneva Conventions stipulate that if possible the dead are to be given burial according to the rites of their own religion.[52]

This very brief review is by no means an exhaustive list of the ways in which humanitarian law overlaps with human rights norms. However, it should be noted that there are a number of human rights, such as the right of association and the political rights, that are not included in humanitarian law because they are not perceived as being of relevance to the protection of persons from the particular dangers of armed conflict.

The mutual influence of human rights and humanitarian law

The separate development of these two branches of international law has always limited the influence which they might have had upon each other. However, their present convergence, as described above, makes the establishment of certain closer links between these two legal domains conceivable.

In this connection, Article 3 common to the Four Geneva Conventions is revealing. A real miniature treaty within the Conventions, common Article 3 lays down the basic rules which States are required to respect when confronted with armed groups on their own territory. It thus diverges from the traditional approach of humanitarian law which, in principle, did not concern itself with the relations between a State and its nationals.[53] Such a provision would be more readily associated with the human rights sphere which, in 1949, had just made its entry into international law with the mention of human rights in the 1945 Charter of the United Nations and the adoption of the Universal Declaration of Human Rights in 1948.

The true turning point, when humanitarian law and human rights gradually began to draw closer, came in 1968 during the International Conference on Human Rights in Tehran, at which the United Nations for the first time considered the application of human rights in armed conflict. The delegates adopted a resolution inviting the Secretary-General of the United Nations to examine the development of humanitarian law and to consider steps to be taken to promote respect for it. [54] Humanitarian law thus branched out from its usual course of development and found a new opening within the UN, which had hitherto neglected it - unlike human rights, to which UN attention had been given from the start.

The convergence which began in 1968 slowly continued over the years and is still in progress today. Human rights texts are increasingly expressing ideas and concepts typical of humanitarian law. The reverse phenomenon, although much rarer, has also occurred. In other terms, the gap which still exists today between human rights and humanitarian law is diminishing. Influences from both sides are gradually tending to bring the two spheres together.[55]

The rest of this chapter will give a few examples illustrating the tendency we have just outlined.

Some of these illustrations are to be found in the texts of treaties. For example, the adoption in 1977 of the two Protocols additional to the 1949 Geneva Conventions was, in a certain sense, a reflection of what had happened in Tehran nine years earlier. The world of humanitarian law paid tribute to the world of human rights. The subjects and wording of Protocol I's Article 75, entitled "Fundamental guarantees", are in fact directly inspired by the major human rights instruments, for it lays down the principle of non-discrimination, the main prohibitions relating to the physical and mental well-being of individuals, the prohibition of arbitrary detention and the essential legal guarantees. The same could be said of Articles 4, 5 and 6 of Protocol II, which, in situations of non-international armed conflict, are the counterpart to the aforesaid article in Protocol I.

Another example appears in the 1989 Convention on the Rights of the Child. The adoption procedure for this Convention, the substance of the rules which it establishes and the built-in mechanism for its implementation clearly show that it belongs to the

family of human rights treaties. That did not prevent it, however, from casting a glance at the law of armed conflicts. It does so in Article 38, on the one hand by making a general reference to the humanitarian law provisions applicable to children (paragraph 1), and on the other hand by laying down rules itself that are applicable in the event of armed conflict.[56]

This tendency can also be seen in international instruments which are legally less binding than the Conventions we have just briefly surveyed. In particular, several United Nations General Assembly resolutions mingle references to humanitarian law and human rights within one and the same text. The General Assembly often states that it is "guided by the principles embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and accepted humanitarian rules as set out in the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977".[57]

A more restricted forum than that of the United Nations, namely the Islamic Conference of Ministers of Foreign Affairs, adopted an Islamic Declaration of Human Rights in April 1990.[58] Although expressly claiming to be a human rights instrument, this declaration contains provisions which derive their inspiration directly from humanitarian law. For instance, it stipulates that "in case of use of force or armed conflict", people who do not participate in the fighting, such as the aged, women and children, the wounded, the sick and prisoners, shall be protected. It also regulates the methods and means of combat.[59]

This declaration is one of the working documents used in preparation for the World Conference on Human Rights to be held in Vienna in June 1993. As such it is a sign that humanitarian law and human rights might again draw a little closer during that conference.

The interlinking of human rights and humanitarian law can also be seen in the work of bodies responsible for monitoring and implementing international law.

In this connection, it is interesting to note that in recent years the Security Council has been citing humanitarian law more and more frequently in support of its resolutions. The latest example of this tendency can be found in Resolution 808 (1993) on the conflict in the former Yugoslavia, in which the Security Council decided to establish an 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".[60]

A body more specifically concerned with the implementation of human rights, the Commission on Human Rights, likewise no longer hesitates to invoke humanitarian law to back up its recommendations.[61] The "Report on the Situation of Human Rights in Kuwait under Iraqi Occupation" presented at its 48th session is a clear example. [62]

To establish the law applicable to the situation in Kuwait, the Special Rapporteur begins by pointing out, in a chapter entitled "Interaction between human rights and humanitarian law", that "there is consensus with the international community that the fundamental human rights of all persons are to be respected and protected both in times of peace and during periods of armed conflict.[63] Customary international law provides the Rapporteur with some of the rules he seeks to apply. There are, *inter alia,* three

fundamental rules of humanitarian law which he singles out as being customary principles of human rights protection. These three principles stipulate: "(i) that the right of parties to choose the means and methods of warfare, i.e. the right of the parties to a conflict to adopt means of injuring the enemy, is not unlimited; (ii) that a distinction must be made between persons participating in military operations and those belonging to the civilian population to the effect that the latter be spared as much as possible; and (iii) that it is prohibited to launch attacks against the civilian population as such."[64] The Rapporteur further considers that the rules of customary law applicable to the occupation of Kuwait include Article 3 common to the 1949 Geneva Conventions, Article 75 of the 1977 Additional Protocol I thereto and the 1948 Universal Declaration of Human Rights. In terms of positive law, he considers that the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1949 Geneva Conventions can also be applied.

This brief review of the legal framework thus defined shows that the Commission on Human Rights is no longer concerned with marking an overly clear distinction between human rights and humanitarian law. Although the Commission was set up to promote the implementation of human rights, it does not hesitate to invoke humanitarian law when the situation so requires. It now seems to consider that its mandate is no longer confined to human rights but takes in a larger area comprising "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[65] This view of its terms of reference thus enables it to draw upon the rules of humanitarian law to make pronouncements on the situations it is asked to examine.

Outside the United Nations, one must look to the Inter-American Commission on Human Rights to find any hint of a similar tendency. In 1983, the organization *Disabled Peoples' International* filed a complaint with the Commission, accusing the United States of violating the right to life guaranteed by Article I of the American Declaration of the Rights and Duties of Man. During its invasion of Grenada that year, the United States had bombed a mental asylum, killing several patients. In its petition, the organization asked the Commission to interpret Article I of the American Declaration on the basis of the principles of humanitarian law. The Commission declared the petition to be admissible. In dealing with the fundamental aspects of the issue, therefore, the Commission had to base its decision on a provision drawn up in the spirit of human rights in order to apply that provision to an armed conflict.[66]

Outside official circles as well, the convergence of human rights law and humanitarian law is increasingly apparent in the form of private initiatives. Law specialists are concerning themselves more and more with situations involving widespread violence but which cannot be said to have reached the point where they could be described as armed conflicts and where humanitarian law could be applied. Such situations often induce the State concerned to declare a state of emergency and to suspend most of the human rights that it has undertaken to respect.[67] Though, as we have seen, such derogations must remain the exception and are in any case excluded for certain rights, there is a risk of a gap in the law appearing in that area. In order to fill it, a new approach is needed to protection of the individual. It is becoming apparent that legal instruments should be drawn up combining elements of both humanitarian and human rights law in order to provide rules that can be applied in peacetime as well as in wartime.

This objective was behind the adoption in 1990 of the Declaration of Minimum Humanitarian Standards, the so-called Turku Declaration.[68] This text makes it clear from the outset that its drafters are determined not to take a position on any dichotomy between humanitarian law and human rights law. It proclaims principles "which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances".[69] That determination finds expression in a succession of provisions based alternately on the spirit of human rights law (for example the prohibition of torture and the principle of *habeas corpus)* and on the spirit of humanitarian law (for example the prohibition on harming individuals not taking part in hostilities and the obligation to treat wounded and sick persons humanely).

The Turku Declaration is the work of a group of experts who met privately for the purpose. It therefore lacks the force in law that it would have if it had been adopted by an international body. But it is not meaningless; for one thing, some of its provisions have long been part of general international law. For another, it was drawn up by qualified specialists in order to meet a need acknowledged by the international community. It can thus not be ruled out that the Declaration will gradually gain recognition by a number of international legal institutions. A first step in this direction has already been taken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities which referred to it in its Resolution 1192/106 on the human rights situation in Iraq.[70]

Conclusion

It is very likely that the present trends will continue in future. The obvious advantage of human rights bodies using humanitarian law is that humanitarian law will become increasingly known to decision-makers and to the public who, it is hoped, will exert increasing pressure to obtain respect for it. On the other hand, one concern could be that the growing politicization of human rights by governmental bodies could affect humanitarian law. However, there are several reasons why this is unlikely. First, humanitarian law treaties are all universal and there are no regional systems which could encourage a perception that the law varies from one continent to another. Secondly, we have seen that humanitarian law does not present the kind of theoretical difficulties encountered by human rights law as regards "first", "second", and "third" generation rights. Thirdly, the most politically sensitive aspect of human rights law, namely, political rights and mode of government, is totally absent from humanitarian law. What will probably not be avoided, however, are the political influences that lead States to insist on the implementation of the law in some conflicts whilst ignoring others. This, however, is not new and it is to be hoped that a greater interest in humanitarian law will tend to bring about more demands for it to be respected in all conflicts.

There can be no doubt that the growing prominence of human rights law in recent decades is largely due to the activism of non-governmental human rights organizations. Several have now begun to use humanitarian law in their work[71] and may well exert a considerable influence in the future. Such an interest could encourage both the implementation and the further development of the law. As one of the major factors in the development of humanitarian law, namely the perception of honour in combat, has lost influence in modern society, there is a need for a motivating force to fill this void. A perception of human rights has in effect done so, and will continue to be of importance in the future. Another area in which interest in human rights could help further develop humanitarian law is that of internal armed conflicts. Common Article 3 and 1977 Protocol II are much less far-reaching than the law applicable to international armed conflicts and yet internal conflicts are more numerous and are causing untold misery and destruction. Given that human rights law is primarily concerned with behaviour within a State, it is possible that resistance to further responsibility in internal armed conflicts will be eroded by human rights pressure. We have already seen how there are moves towards further regulation in states of emergency [72] which have been influenced by humanitarian law although they are outside its sphere of action.

It may well be, however, that States will recognize their own interest in respecting humanitarian law and will not in future perceive themselves as being induced to show such respect solely because of human rights activism. The benefits of respecting humanitarian law are self-evident, in particular the prevention of extensive destruction and
bitterness so that a lasting peace is more easily established.[73] If the chivalry of earlier times cannot be resurrected, it would be a positive development if the military could be encouraged to take a certain pride in the professionalism shown when behaving in accordance with humanitarian law.[74] As this law is still largely rooted in its traditional origins, it is not alien to military thinking and has the advantage of being a realistic code for military behaviour as well as protecting human rights to the maximum degree possible in the circumstances. It is to be hoped that continued recognition of the specific nature of humanitarian law, together with the various energies devoted to

implementation of human rights law, will have the effect of enhancing the protection of the person in situations of violence.

Notes :

1. Resolution XXIII "Human Rights in Armed Conflicts" adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

2. For an interesting survey of these customs from different parts of the world, see Part I *of International Dimensions of Humanitarian Law,* UNESCO, Paris, Henry Dunant Institute, Geneva, 1988.

3. See, for example, L. Oppenheim, *International Law,* Volume II*, Disputes, War and Neutrality,* Seventh edition, Longmans and Green, London, 1952, pp. 226-227.

4. For a good summary of these doctrines, see S. Bailey *Prohibitions and Restraints in War,* Oxford University Press, 1972, Chapter I.

5. There are frequent references in the preambles of nineteenth century humanitarian law instruments to civilization requiring restraints in warfare, for example, the Declaration of St. Petersburg of 1868 to the effect of prohibiting the use of certain projectiles in war time: *"Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war..."*; 1899 Hague Convention II with Respect to the Laws and Customs of War on Land: *"Animated by the desire to serve... the interests of humanity and the ever increasing requirements of civilization .....*".

6. *Instructions for the Government of Armies in the Field,* 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Lincoln as General Orders No 100. Reproduced in Schindler and Toman, *eds., The Laws of Armed Conflicts,* Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1988.

7. Needless to say, this punishment would these days be a violation of the right to fair trial of the accused, which is reflected in Article 75 of 1977 Protocol I and equally applies to the treatment of a party's own soldiers.

8. *U.S. Air Force Law of War Manual.* There are similar definitions published in the United States Manual FM 27-10 and in the German Manual ZDv 15/10.

9. ZDv 15/10.

10. For a very good analysis of the concept of military necessity, see E. Rauch, "Le concept de nécessité militaire dans le droit de la guerre", Revue de droit pénal militaire et de droit de la guerre, 1980, p. 205.

11. See G. Schwarzenberger, *International Law as applied by International Courts and Tribunals,* Volume II, *The Law of Armed Conflict,* Stevens, London, 1968, pp. 10-12. These are not legal categories, but rather a conceptual way of grouping the different methods used for this purpose.

12. *Ibid.* at pp. 15-16.

13. Article 15, First Geneva Convention of 1949.

14. Article 11, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

15. Article 4 of the International Covenant on Civil and Political Rights, 1966; Article 15 of the European Convention on Human Rights, 1950; Article 27 of the American Convention on Human Rights, 1969. Curiously, the African Charter on Human and Peoples' Rights contains no derogation clause, but in general it has more far-reaching limitation clauses.

16. For a good presentation of the different human rights theories, see J. Shestack, "The Jurisprudence of Human Rights" in T. Meron, ed., *Human Rights in International Law,* Oxford University Press, London, 1984, Volume 1, p. 69.

17. In particular J. Bentham and J. Austin, in T. Meron, ed., *ibid.* p. 79.

18. Marx is commonly cited as the origin of this social development, but he was not the only theorist of that period to speak of the importance of social and economic rights. We may refer in particular to Thomas Paine who proposed, in *The Rights of Man,* a plan which resembles a type of social security system, including children's allowances, old-age pensions, maternity, marriage and funeral allowances, and publicly endowed employment for the poor.

19. For a general article on the work of the ILO, see F. Wolf, "Human Rights and the International Labour Organization" in T. Meron, ed., *Human Rights and International Law, op.cit.,* No. 16 above, Volume 11, p. 273.

20. See in particular M. Cranston, *What Are Human Rights?,* 1973. Also, Dowrick, *Human Rights, Problems, Perspectives and Texts,* Saxon House, Farnborough, 1979.

21. Article 2.

22 Article 2.

23. Illustrative of this problem is the extensive discussion of how the right to food should be implemented in P. Alston and K. Tomasevski, eds., *The Right to Food,* SIM, Utrecht, 1984.

24. See P. Alston, "The Committee on Economic, Social and Cultural Rights" in P.Alston, cd., *The United Nations and Human Rights, 1992.*

25. For a general article on this subject see K. Drzewicki, "The Rights of Solidarity - the Third Revolution of Human Rights", 53 *Nordisk Tidsski.ift fol International Ret,* 1984, p. 26.

26. There are various articles on the subject in Interculture, Volume XVII, Nos. 1-2 1984. An interesting address on "The universality of human rights and their relevance to developing countries" was also given by Dr. Shashi Tharoor at the Friedrich Naumann

Stiftung Conference on Human Rights, Sintra, Portugal, 14-16 November 1988 (available from UNHCR).

27. The main justification of the continued applicability of humanitarian law is that most of the rules have as their aim the protection of the vulnerable in armed conflicts and that these rules can be applied in practice only if they are applicable to both sides. Further, as with human rights philosophy, humanitarian law has as its major premise the applicability of protection to all persons, irrespective of whether the individuals are perceived as "good" or "bad".

28. Note 1 above.

29. Ibid.

30. See in particular:
- For the Human Rights Committee: *Lan a de Netto, Weismann and Perdomo v.Uruguay,* Com. No. R.2/8, A/35/40, Annex IV, paragraph *15; Camargo v.Colombia,* Com. No. R. 1 1/45, Annex XI, paragraph 12.2.
- European Court of Human Rights: *Lawless Case (Merits),* Judgment of 1st July 1961, paragraph 20 ff.; *Ireland v. United Kingdom,* Judgment of 18 January 1978, Series A No. 25, paragraph 202 ff.
- For the Inter-American Court of Human Rights: *Habeas corpus in emergency situations,* Advisory opinion OC-8/87 of 30 January 1987; *Judicial guarantees in states of emergency,* Advisory opinion OC-9/87 of 6 October 1987.

31. See in particular the following general observations:
5(13) on Article 4 of the Covenant, A/36/40, Annex VII;
7(16) on Article 7 of the Covenant, A/37/40, Annex V;
8(16) on Article 9 of the Covenant, A/37/40, Annex V;
13(21) on Article 14 of the Covenant, A/39/40, Annex VI.

32. See Higgins, "Derogations under Human Rights Treaties". *British Yearbook of International Law,* 1976-1977, 281.

33. The most recent codification of the prohibition of the use of weapons of a nature to cause unnecessary suffering is in Article 35(b) of 1977 Protocol I. This reasoning, however, is most clearly stated in the St. Petersburg Declaration of 1868: *"...the only legitimate object which States should endeavour to accomplish during war is to weaken the military fores of the enemy... this object would be exceeded by the disabled men, or render their death inevitable..."*

34. Articles 48 and 52.

35. Article 52(5)(b).

36. Article 54.

37. Articles 14 and 15 of the Fourth Geneva Convention and Articles 59 and 60 of 1977 Protocol I. It should be noted, however, that a non-defended area was protected from bombardment in customary law.

38. Article 12 of the ESC Covenant recognizes that everyone has the right to *"the enjoyment of the highest attainable standard of physical and mental health".* This goes much further of course than what is provided for in humanitarian law, but it is the only human rights provision under which the right to receive needed medical treatment could be categorized.

39. Article 55 of the Fourth Geneva Convention and Article 69 of Additional Protocol I.

40. Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I.

41. Article 11 of the ESC Covenant recognizes the right of everyone to "an adequate standard of living... including adequate food, clothing and housing".

42. Articles 68 and 75 of the Fourth Geneva Convention.

43. For example, Article 3 common to the Geneva Conventions prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".

44. Article 4(2)(f).

45. Article 74 in particular.

46. Articles 42 and 43 in particular.

47. Page 106.

48. For further detail, see D. Plattner, "Protection of children in international humanitarian law", *IRRC,* No. 240, May-June 1984, pp. 140-152.

49. The articles are too numerous to list individually, but the majority are to be found in the Third and Fourth Geneva Conventions and their Additional Protocols.

50. Article 34, Third Geneva Convention, and Articles 27 and 38(3), Fourth Geneva Convention.

51. Articles 33 and 35-37, Third Geneva Convention, and Articles 38(3), 58 and 93, Fourth Geneva Convention.

52. Article 17, First Geneva Convention; Article 120, Third Geneva Convention; Article 130, Fourth Geneva Convention.

53. Although the Lieber Code did make some mention of forms of protection that could be accorded in civil wars, treaty law did not do so until common Article 3 of the Geneva Conventions.

54. See footnote 1 above.

55. See: T. Mecron, "The protection of the human person under human rights law and humanitarian law", *Bulletin of Human Rights* 91/1, United Nations, New York, 1992.

56. "Convention on the Rights of the Child", *Human rights in international law, Basic texts,* Council of Europe, Strasbourg, 1991.

57. Resolution 46/136 on the situation of human rights in Afghanistan. See also Resolution 46/135 on the situation of human rights in Kuwait under Iraqi occupation and Declaration 47/133 on the protection of all people against forced disappearances.

58. This document was published by the UN under reference No. A/CONF.157/PC/35.

59. Islamic Declaration of Human Rights, Article 3.

60. See also Security Council Resolutions 670 (1990) and 674 (1990) on Iraq's occupation of Kuwait, and Resolution 780 (1992) establishing a Commission of Experts to enquire into breaches of humanitarian law committed in the territory of the former Yugoslavia. See also the Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992): S/25274.

61. Among the most recent examples, see in particular the Report of the Working Group on Enforced or Involontary Disappearances (E/CN.4/1993/25 paras. 508-510) and its Addendum on the situation in Sri Lanka (E/CN.4/1993/25/Add.l paras. 40.42), and the Report on Extrajudicial, Summary or Arbitrary Executions (E/CN.4/1993/46 paras. 60, 61, 664 and 684).

62. Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin (E/CN.4/1992/26).

63. *Ibid,* para. 33.

64. *Ibid,* para. 36.

65. As in Articles 63, 62, 142 and 158 common to the four 1949 Geneva Conventions. The Rapporteur considers that the principles set out in these articles are relevant to the case he is examining and that they belong both to human rights and to humanitarian law.

66. For further details on the Grenada affair, see D. Weissbrodt and B. Andrus, "The Right to Life During Armed Conflict: Disabled Peoples' International v. United States" 29, *Harvard Int. L.J.,* 1988, p. 59.

67. See Article 4(2) of the International Covenant on Civil and Political Rights, Article 15(2) of the European Convention on Human Rights and Article 27(2) of the American Convention on Human Rights.

68. For the text of the Declaration of Minimum Humanitarian Standards, see E/CN.4/Sub.2/1991/55 or the *International Review of the Red Cross,* No. 282, May-June 1991, pp. 330-336.

69. *Idem,* Article 1.

70. Other initiatives comparable to the Turku Declaration have been taken in recent years. Examples are:

Hans-Peter Gasser, "Code of Conduct in the event of internal disturbances and tensions", *Intet.natio al Review of the Red Cross,* No. 262, January-February 1988, pp. 51-53.
Theodor Meron, "Draft Model Declaration on Internal Strife", *International Review of the Red Cross,* No. 262, January-February 1988, pp. 59-76.

71. In particular Human Rights Watch, which has used humanitarian law in a number of its reports, e.g. *Needless Deaths,* issued in 1992, on the Second Gulf War.
A large number of these organizations have recently begun a campaign to reduce the severe problems caused by the indiscriminate use of land mines, by calling for better respect for existing humanitarian law and for the eventual ban of the use of anti-personnel mines.

72. See pp. 116-117 above.

73. The importance of humanitarian law for facilitating the return to peace was already indicated in nineteenth century instruments, including the Brussels Declaration of 1874.

74. Modern teaching methods of humanitarian law stress the importance of inculcating correct behaviour during military exercises, rather than separate lessons that appear to have nothing to do with practicalities.

INTERNATIONAL HUMANITARIAN LAW[*]

Hans-Peter Gasser[**]

LAW AND WAR: INTRODUCTORY COMMENTS ON INTERNATIONAL HUMANITARIAN LAW, PAST AND PRESENT

International humanitarian law is a branch of the law of nations, or international law. That law governs relations between members of the international community, namely States. International law is supranational, and its fundamental rules are binding on all States. Its goals are to maintain peace, to protect the human being in a just order, and to promote social progress in freedom.[1]

International humanitarian law- also called the law of armed conflict and previously known as the law of war -is a special branch of law governing situations of armed conflict -in a word, war. International humanitarian law seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostile
actions.

Today, at the end of the 20th century, can this still be considered to be a meaningful or legitimate goal?

War is characterized by outbursts of primitive, raw violence. When States cannot or will not settle their disagreements or differences by means of peaceful discussion, weapons are suddenly made to speak. War inevitably results in immeasurable suffering among people and in severe damage to objects. War is by definition evil, as the Nuremberg Tribunal set forth in its judgement of the major war criminals of the Second World War. No one could presently wish to justify war for its own sake.

Yet, States continue to wage wars, and groups still take up weapons when they have lost hope of just treatment at the hands of the government. And no one would condemn a war waged, for example, by a small State protecting itself against an attack on its independence ("war of aggression") or by a people rebelling against a tyrannical regime.

Law and war? Can the law help States settle their conflicts (which are inevitable in any man-made order) peacefully, i.e. without loss of life or material damage ? In other words, can the law help prevent war? Another question: in cases where war could not have been prevented, is it then the role of the law to concern itself with that war and its consequences, and thereby to give the war, as some maintain, an aura of respectability? Is

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[*] Translated from German by Sheila Fitzgerald and Susan Mutti. (From Hans Haug, for All, the, International Red Cross and Red Crescent Movement. Henry Dunant Institute. Hauput. 1993)

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[1] See Preamble to the Charter of the United Nations.

the law of any value on the battlefield or in prison cells? Or was Cicero right when he sceptically said, "Laws are silent amidst the clash of arms"? Our first task is to answer some of these questions to avoid misunderstandings.[2] Only then can we consider the existing system of international humanitarian law.

A. Humanitarian law and the prohibition of use of force

The starting point for any discussion of *jus in bello* is the means offered to States under contemporary international law for the peaceful settlement of conflicts without recourse to the use of force. The Charter of the United Nations prohibits war; it even prohibits the threat to use force against the territorial-integrity or political independence of any State.[3] States are to settle their differences in all circumstances by peaceful means. A State which attempts to use force against another State to achieve its ends contravenes international law, and commits an aggressive act, even when it is apparently in the right.

The UN Charter docs not, however, impair the right of a State to resort to force in the exercise of its right to self-defence.[4] The same holds true for third-party States who come to the aid of the State being attacked (right of collective self-defence). Finally, the United Nations may order military or non-military action to restore peace.[5]

Thus, war is prohibited under existing international law, with the exception of the right of every State to defend itself against attack.

The fact that international humanitarian law deals with war does not mean that it lays open to doubt the general prohibition of war. The Preamble to Additional Protocol I to the Geneva Conventions puts the relationship between the prohibition of war and international humanitarian law as follows:

> "Proclaiming their earnest wish to see peace prevail among peoples, Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force ….,
>
> Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of anned Conflicts and to supplement measures intended to reinforce their application,

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[2] For general information on the whys and wherefores of international humanitarian law see: Michael Walzer, *Just and Unjust Wars*, New York. 1977; Marie-Françoise Furet, Jean- Claude Martinez and Henri Dorandeu, *La guerre et le droit*, Paris. 1979; Geoffrey Best, *Humanity in Warfare*, London, 1980; William V O'Brien. *The Conduct of Just and Limited War*, New York, 1981; Jean Pictet, *Development and Principles of Humanitarian Law*, Dordrecht/Geneva 1985.

[3] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Charter of the United Nations, Article 2, para. 4.

[4] Charter, Article 5l.

[5] Charter, Chapter VIl, in particular Articles 41 and 42.

> Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any. othet use of force inconsistent with the Charter of the United Nations…."

International humanitarian law quite simply stands mute on whether a State may or may not have recourse to the use of force. It docs not itself prohibit war, rather it refers the question of the right to resort to force to the constitution of the international community of States as contained in the United Nations Charter. International humanitarian law acts on another plane: it is applicable whenever an armed conflict actually breaks out, no matter for what reason. Only facts matter; the reasons for the fighting are of no interest. In other words, International humanitarian law is ready to step in, the prohibition of the use of force notwithstanding, whenever war breaks out, whether or not there is any justification for that war.

A look at the recent past and at the present reveals how often war has been waged between States -even though international law prohibits the use of force. The following situations have arisen:

- One State attacks another: it has committed a forbidden act of aggression against another State.

- A State defends itself against an aggressor, exercising its right of self-defence. It can be backed by a third State (collective self-defence).

- The UN can decide on collective armed action when a member, in breach of its duty under the UN Charter, threatens or breaches the peace or commits an act of aggression.

Last but not least, an armed conflict can occur inside a country. It is then known as civil war. Since this is considered to be an internal State matter, the general prohibition of war does not cover what is often the especially bloody fighting of civil wars.

Clearly, therefore, international humanitarian law is also an essential part of the order of peace as set forth in the Charter of the United Nations. The international community cannot, therefore, allow itself to neglect international humanitarian law.

International humanitarian law is part of universal international law whose purpose it is to forge and ensure peaceful relations between peoples. It makes a substantial contribution to the maintenance of peace in that it promotes humanity in time of war. It aims to prevent -or at least to hinder -mankind's decline to a state of complete barbarity. From this point of view, respect for international humanitarian law helps lay the foundations on which a peaceful settlement can be built once the conflict is over. The chances for a lasting peace are much better if a feeling of mutual trust can be maintained between the belligerents during the war. By respecting the basic rights and dignity of man, the belligerents help maintain that trust. Once it is clear, moreover, that

international humanitarian law helps pave the road to peace, no further proof of its legitimacy is required.

The way is now open for the presentation of contemporary international humanitarian law, its history, principles and contents.

B. A glance at the history of humanitarian law

It is hardly possible to find documentary evidence of when and where the first legal rules of a humanitarian nature emerged,[6] and it would be even more difficult to name the "creator" of international humanitarian law. For everywhere that confrontation between tribes, clans, the followers of a leader or other forerunners of the State did not result in a fight to the finish, rules arose (often quite unawares) for the purpose of limiting the effects of the violence. Such rules, the precursors of present-day international humanitarian law, are to be found in all cultures. More often than not they are embodied in the major literary works of the culture (for example, the Indian epic *Mahabharata*), in religious books (such as the *Bible* or the *Koran*) or in rules on the art of war (the rules of Manu or the Japanese code of behaviour, the *bushido*). In the European Middle Ages, the knights of chivalry adopted strict rules on fighting, not least for their own protection. The notion of chivalry has survived to this day. It was not uncommon for the parties to conflicts to reach agreements on the fate of prisoners: these were the predecessors of our modern multilateral agreements. Such rules also existed and still exist in cultures with no written heritage.

In short, powerful lords and religious figures, wise men and warlords from all continents have since time immemorial attempted to limit the consequences of war by means of generally binding rules.

The achievements of 19th century Europe must be viewed against this rich historical background. Today's universal and for the most part written international humanitarian law can be traced directly back to two persons, both of whom were marked by a traumatic experience of war: *Henry Dunant*[7] and *Francis Lieber*.[8] At almost the same time, but apparently without knowing of each other's existence, Dunant and Lieber made essential contributions to the concept and contents of contemporary international humanitarian law. It in no way detracts from the importance of their contributions, however, to say that these two major figures did not invent protection for the victims of war. Rather, they expressed an old idea in a form adapted to the times.

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[6] See e.g. Emmanuel Bello, *African Customary Humanitarian Law*, Geneva, 1980.
[7] See Henry Dunant, *A Memory of Solferino*, 1862.
[8] See Richard Shelly Hartigan, *Lieber's Code and the Laws of War*. Chicago- 1983.

Dunant and Lieber both built on an idea put forward by Jean-Jacque Rousseau in *The Social Contract*, which appeared in 1762: "War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men, but as soldiers "Rousseau continued, logically, that soldiers may only be fought as long as they themselves are fighting. Once they lay down their weapons "they again become, mere men". Their lives must be spared.[9]

Rousseau thus summed up the basic principle underlying international humanitarian law, i.e. that the purpose of a bellicose attack may never be to destroy the enemy physically. In so doing he lays the foundation for the distinction to be made between members of a fighting force, the combatants on the one hand, and the remaining citizens of an enemy State, the civilian not participating in the conflict, on the other. The use of force is permitted only against the fonner, since the purpose of war is to overcome enemy armed forces not to destroy an enemy nation. But force may be used against individual soldier only so long as they put up resistance. Any soldier laying down his arms, obliged to do so because of injury, is no longer an enemy and may therefore to use the terms of the contemporary law of armed conflict, no longer be the target of a military operation. It is in any case pointless to take revenge on, simple soldier, as he cannot be held personally responsible for the conflict,.

The intellectual foundation for the rebirth of international humanitarian law in the 19th century was therefore laid. Henry Dunant could build on it. In his book, *A Memory of Solferino*, he did not dwell so much on the fact that wounded soldiers were mistreated or defenseless people killed. He was deeply shocked by the absence of any form of help for the wounded and dying. He therefore proposed two practical measures calling for direct action: an international agreement on the neutralization of medical personnel in the field, and the creation of a permanent organization for practical assistance to the war wounded. The first led to the adoption in 1864 of the initial Geneva Convention; the second saw the founding of the Red Cross [10] Only the first is of interest to us in the present context.

C. Protection of war victims through law

The *Convention for the Amelioration of the Condition of the Wounded in Armies*, in the Field (of 22 August 1864) lays the legal groundwork for the activities of army medical units on the battlefield.[11] Because they were neutralized, their immunity from attack could be upheld: medical units and personnel may be neither attacked nor hindered in the discharge of their duties. Equally, the local inhabitants may not be punished for assisting the wounded. The 1864 Convention made it clear that humanitarian work for the wounded and the dead, whether friend or foe, was consistent with the law of war. As everybody knows, it also introduced the sign of the red cross on a white ground for the identification of medical establishments and personnel.

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[9] Jean-Jacques Rousseau, A Treatise on the Social Contract, Book I, Chap. IV.

[10] On the history of humanitarian law see Best and Pictet (footnote 2); Pierre Buissier, History of the International Committee of the Red Cross: from Solfenno to Tsushima, Geneva, 1985; Andre Durand, History of the International Committee of the Red Cross: from Sarajevo to Hiroshima, Geneva, 1984

[11] For the text of the Convention, see Schindlerrroman, No.36.

It is interesting to note that in 1864 it apparently did not seem necessary to include in the Convention a provision generally protecting the wounded from ill-treatment. Rather, the Convention sets forth the conditions in which such protection can be offered legal scholars will be interested to note the special place of the 1864 Convention in the history of the law: it was part of a growing movement which started in the early 19th century to codify modern international law[12]

The 1864 Convention was accepted in an exceedingly short time by all the then independent States, and by the United States in 1882. In force for over forty years, it was revised in 1906 on the recommendation of the ICRC and on the basis of the experience of several wars. The First World War was a serious test for the law of Geneva, and resulted in a further revision in 1929. Four years after the end of the Second World War the (First) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (of 12 August 1949) was adopted. It is still in force and is therefore of interest to us in the context of the present study.

A Convention adopted at the 1899 Hague Peace Conference placed the victims of war at sea under the protection of the law of Geneva. A revised version of the Convention was adopted at the 1907 Hague Peace Conference, and later became the present (Second) *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (of 12 August 1949).

The above-mentioned Hague Peace Conferences examined another topic with a rich background in customary law: the ill-treatment of prisoners of war. The 1899 and 1907 *Conventions on the Laws and Customs of War on Land* (with the annexed Hague Regulations) contained some provisions on the treatment of prisoners. On the basis of the experience of the First World War, one of the two 1929 Geneva Conventions consisted in fact in a Prisoner-of-War Code, which in turn was also developed after the Second World War. The (Third) *Geneva Convention relative to the Treatment of Prisoners of War* (of 12 August 1949) remains in force to this day.

In addition to the process set in motion by Henry Dunant and the ICRC to codify the rules for the protection of the wounded, the sick and soldiers who had fallen into enemy hands, there were developments on a second front. Those developments are linked to the name of the German immigrant to America, Francis Lieber, and indirectly to that of the great Abraham Lincoln. President Lincoln asked Lieber, a lawyer, to put together a few rules on the conduct of war for the use of troops in the American Civil War. The resulting " Instruction for the Government of Armies of the United States in the Field" (General Order No.100), today usually referred to as the "Lieber Code", were published in 1863[13] The manual contained rules covering all aspects of, the conduct of war. The provisions of the Lieber Code were intended to influence the conduct of war with a view to preventing unnecessary suffering and to limiting the number of victims.

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[12] See Shabtai Rosenne, “Codification of international law”, in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol.1(1992), p.632.

[13] See Hartigan (footnote 8) and Schindler/Toman, No. 1.

D. Rules on limits to warfare

Lieber's work heralded two momentous developments. First, it set precedent for subsequent military handbooks and instructions on the law of war. Secondly, it marked the starting point for the second series of development in modern international humanitarian law, which saw the emergence of rule on the conduct of war itself. The first evidence of this was a short agreement the 1868 *Declaration of St. Petersburg*, which prohibited the use of projectile weighing less than 400 grammes.[14] The Conference convened by the Russia Tsar in St. Petersburg was able, without fuss, to prohibit the use of a certain type of ammunition in view of the fact that such projectiles uselessly aggravate the suffering of disabled men or rendered their death inevitable. Since the purpose of military operations, i.e. to disable the greatest number of enemy soldier does not require the infliction of such horrendous wounds, the diplomatic representatives were able to agree on the prohibition of the use of this type of projectile.

The *St. Petersburg Declaration*, as it is usually referred to, is important today not so much because of the actual prohibition as because of the consideration which resulted in that prohibition. As is explained in the Preamble, "the only legitimate object which States should endeavour to accomplish during war to weaken the military forces of the enemy" .In eliminating the possibility of total war, the St. Petersburg Declaration lends added strength to the above-mentioned principle of the law of war, namely that the belligerents at obliged to limit the use of force in meeting a (legitimate) military objective

Both Hague Peace Conferences which took place at the turn of the centur then attempted to set broader international legal limits to means and method of warfare. The most important result was the *Hague Convention No. IV of 18 October 1907 respecting the Laws and Customs of War on Land*, and the annexed *Hague Regulations*. This Convention has a long history, shared by the Lieber Code, the St. Petersburg Declaration, the 1874 Brussels Declaration, the Oxford Manual drafted in part by Gustave Moynier and published in 1880, and the Convention worked out by the first Hague Peace Conference in 1899.[15] The Hague Regulations respecting the Laws and Customs of War on Land codified the law of war and contains in particular rules on the treatment of prisoners of war, on the conduct of military operations -with an especially important chapter on the "Means of Injuring the Enemy, Sieges and Bombardments" –and on occupied territory.

The preambular paragraphs to Hague Convention No. IV contain one sentence which alone makes that treaty one of signal importance. The *Martens Clause*, so called after the Russian representative, stipulates that in cases not covered by the rules of law, "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established by civilized peoples, from the laws of humanity, and the dictates of public conscience". The Martens Clause

[14] Declaration of St. Petersburg of 1868 to 'he Effect of Prohibiting the Use of Certain Projectiles in Wartime, Scbindler/Toman. No.9.
[15] For the texts see Scbindler/Toman.

constitutes a "legal safety net" .Where there are loopholes in the rules of positive law, says the Martens Clause, then a solution based on basic humanitarian principles most be found.

The Regulations in the Laws and Customs of War on Land had to stand the test of two world wars. In its judgment of the major Nazi war criminals, the Nuremberg Tribunal considered that these Regulations had become part of international customary law and were therefore binding on all States.[16] This remains true to this day.

The topics dealt with in the Hague Regulations were subsequently developed to varying degrees. The chapter on prisoners of war was taken up, as has already been mentioned, in the 1929 Geneva Convention, whereas the Fourth 1949 Geneva Convention developed the legal rules pertaining to occupied territory. The actual law of the conduct of hostilities was taken up in Additional Protocol I of 1977.

The Second Hague Peace Conference also examined war at sea and adopted several conventions on different aspects of the law of war at sea. They were and in some cases still are the source of the law applicable to the conduct of war at sea, the customary rules of which continue to evolve[17]. The Conference also went a step further than the St. Petersburg Declaration and prohibited certain types of weapons and munitions. Most importantly, however, a conference convened by the League of Nations in 1925 adopted the *Protocol prohibiting the use of poisonous gases and bacteriological methods of warfare*. The prohibition of the use of poisonous gases in particular, which has become a rule of customary international law and is therefore binding on all States, has been an important factor in the struggle to ban inhumane weapons. At present, a comprehensive treaty on chemical weapons prohibits not only their use but also their development, production and stockpiling[18].

We have examined the separate development of the laws of Geneva and of The Hague up to the major revision of international humanitarian law which took place subsequent to the disaster of the Second World War. Let us now go on to the later developments.

E. Sources of modern humanitarian law

On 12 August 1949, the representatives of the 48 States invited to Geneva by the Swiss Confederation (as the depositary of the Geneva Conventions) unanimously adopted four new conventions for the protection of the victims of war[19] These conventions were the result of lengthy consultation which the ICRC had undertaken on the strength of its

[16] Trial of the Major War Criminals Before the International Military Tribunal~ Nuremberg, Vol. XXII,
[17] The law of war at sea is not discussed herc. See D. P Q'Connell, The Influence of Law on Sea Power, Manchester, 1975; Yoram Dinstein, "Sea Warfare", in Bemhardt (ed.), *Encyclopedia of Public International Law*, 1982, Vol.4, pp. 201-212.
[18] Geneva Protocol of 17 June 1925 for the prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare; and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 13 January 1993
[19] See Final Record of the Diplomatic Conference of Geneva of 1949, 3 vols.

experiences during the Second World War. hey were the work not only of legal experts and military advisers, but also of representatives of the Red Cross movement. The four Geneva Conventions of 12 August 1949 replaced the 1929 Conventions, and in part Hague Convention No. IV.

The first three Conventions cover well-known topics, namely protection of the wounded and sick, the shipwrecked and prisoners of war. The Fourth Geneva Convention, however, breaks new ground in that it protects civilian persons who have fallen into enemy hands from arbitrary treatment and violence.[20] Its most important section is that on occupied territories. The Fourth Geneva Convention is evidence that the international community had learned from failure since it is common knowledge that the worst crimes during the Second World War were committed against civilian persons in occupied territory. The 1949 treaties also led to a further, extremely important development: the extension of the protection under humanitarian law to the victims of civil wars.[21]

In the ensuing years, the Geneva Conventions have become the most universal of international treaties: they are presently binding on 175 States[22] -with few exceptions, the entire community of States.

The years after 1949 have not brought peace. Rather, the entire period has been characterized by countless conflicts. The decolonization of Africa and Asia was often achieved through violent clashes. In the struggle between the (materially) weak and the (militarily) strong, refuge was taken in methods of fighting which were hardly compatible with the traditional manner of waging war (guerrilla warfare) .At the same time, an unlimited arms race led to the development of arsenals with weapon systems based on the latest technology. The use of such .weapons, above all nuclear weapons, would have inevitably pulled the rug out from under any principle of international humanitarian law.

But the second half of the 20th century has also been characterized by the triumph of human rights. The Universal Declaration of Human Rights,[23] the Convention on the Prevention and Punishment of the Crime of Genocide, [24] the Refugee Convention,[25] the 1966 United Nations Human Rights Covenants,[26] and regional human rights treaties,[27] all have enhanced the protection by international law of individuals against abuse of power by governments and promoted individual well-being. International humanitarian law could not and did not wish to remain indifferent to those changes, When one finally remember that the 1949 Conventions almost completely pass over a very important point

[20] See Section 3 below
[21] See Section 5 below.
[22] As on 31 December 1992.
[23] Of 10 December 1948
[24] Of 9 December 1948
[25] Convention relating to the Status of Refugees, of 28 July 1951
[26] International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights, both of 16 December 1966.
[27] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950, with additional protocols; American Convention on Human Rights, 22 November 1969; African Charter on Human and People's Rights, June 1981

namely the protection of the civilian population from the direct effects of hostilities, it is easy. to understand why the ICRC, after much preparation submitted two new draft treaties in the seventies to governments for discussion and adoption.[28] 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 on 8 June 1977.[29] Protocol I contains new rules on international armed conflicts, Protocol II develops the rules of international humanitarian law governing non-international armed conflicts, The four 1949 Geneva Conventions remained unchanged, but were considerably supplemented by the Additional Protocols.

The Diplomatic Conference was attended by the representatives of 102 States and several national liberation movements, Conflicting viewpoints and tension between the participants made the Conference an accurate reflection of an international community comprising all peoples. While it is a historical fact that international humanitarian law up to and including the 1949 Conventions was based on European schools of thought, that can no longer be said of the 1977 Additional Protocols. Extra-European attitudes, other concerns and new priorities also influenced the texts, which nevertheless remain true to a universally accepted humanitarian goal, With the Additional Protocols, international humanitarian law gained a foot hold in the Third World.[30]

Both Protocols strengthen the protection of the defenseless to a considerable degree. Protocol I has been ratified by 119 States, and Protocol II by 109,[31] allowing us to conclude that both are on the way to becoming universal international law, like the 1949 Geneva Conventions. They entered into force for the two initial contracting States on 7 December 1978 and for every subsequent party six months after ratification or accession.

Protocol I brings together the laws of Geneva and of The Hague, which until then had developed separately. The view that it was not enough to assist the victims of hostilities finally triumphed. Rather, the law should set limits to military operations so that unnecessary suffering and damage can be avoided as much as possible. With the Fourth Geneva Convention on the protection of civilian persons and Protocol I, the law of Geneva moved a giant step closer to effective protection of the civilian population against the effects of war.

In addition to the two Additional Protocols, the years after 1949 saw further innovations in the protection under international law of persons and objects in time of war. There was the *Convention of 14 May 1954 for the protection of cultural property in the event of*

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[28] Since 1864, the ICRC hu prepared the draft for all treaties of the "Geneva law".

[29] See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva 1974-1977), 17 Vols. -George Aldrich, New life for the laws of war, 75 *American Journal of International Law* (1981), pp. 764- 783.

[30] See, *inter alia,* Cassese (ed.), *The New Humanitarian Law of Armed Conflict,* Naples, 1979; Michel Veuthey, *Guerilla et droit humanitaire,* 2nd ed., Geneva 1983.

[31] As on 31 December 1992

armed conflict. Strongly influenced by the Geneva Conventions, the treaty created a sort of "Red Cross for cultural property" and charged UNESCO with its implementation.

Reference must also be made to the *Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction.* The Convention decisively strengthened one of the prohibitions set forth in the 1925 Geneva Protocol, namely the prohibition of bacteriological weapons. The Chemical Weapons Treaty of 1993 prohibits not only the use but also the production and Possession of chemical weapons. *The Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques* (of 10 December 1976) was intended to nip in the bud the expansion of the conduct of hostilities in a new field, that of environmental modification techniques. These conventions were adopted in the framework of the United Nations.

Finally, the Convention of 10 October 1980 on *Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, and its three protocols, are also worth mentioning. Based on preparatory work done by the ICRC, the Convention was negotiated at a conference convened by the United Nations. Its aim is to limit the use of certain particularly grim weapons. The general prohibition of the law of The Hague and of Article 35 of Additional Protocol I is thereby given concrete form and made into specific prohibitions that can be applied in practice. The three protocols deal with incendiary weapons, mines and non-detectable fragments. Further protocols can be drawn up at any time at the request of contracting parties.

This impressive list of humanitarian law treaties should not blind us to the fact that the law for the protection of the victims of war is not limited to treaties, i.e. to written texts. Agreements between States are at present undoubtedly the most common source of international laws and obligations; they have not, however, replaced unwritten law, or Customary law, which contains important principles and rules. Large sections of the 1949 Geneva Conventions can be traced back to customary law.[32] Treaty law and customary law can therefore develop simultaneously along the same lines. Sometimes international customary law must step in, for example when States cannot reach agreement on a treaty rule.

The entire body of written and unwritten international humanitarian law is anchored in a few fundamental principles which form part of the foundation of international law. Those principles do not, however, take precedence over the law in force, nor do they replace it. Rather, they highlight guiding principles and thereby make the law easier to understand.

F. Fundamental roles or humanitarian law applicable in armed conflicts[33]

[32] See Theodor Meron, "The Geneva Conventions as Customary Law"., 81 *American Journal of International Law* (1987), pp. 348-370.

[33] Drafted by. group of legal experts from the ICRC and the Federation and published in the International Review of the Red Cross, 1978, pp. 248-249. Cf. Jean Pictet, *The Principles of International Humanitarian Law, Geneva.* 1967

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *matériel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

This concludes our short overview of international humanitarian law, past and present. We shall now examine in greater detail specific questions regarding this branch of law.

INTERNATIONAL HUMANITARIAN LAW: COMMON ISSUES

In this section we shall examine some general problems of international humanitarian law, with a view to making the presentation that follows easier to understand.

- A Notion and contents of international humanitarian law

In keeping with an ICRC definition, we understand international humanitarian law to be those international rules, established by treaty 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 the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are, .or may be, affected by the conflict.

This definition, which like every other is somewhat long-winded, requires explanation.

The aim of international humanitarian law is to protect the human being and to safeguard the dignity of man in the extreme situation of war. The provisions of international humanitarian law have always been tailored to fit human requirements. They are bound to an ideal: the protection of man from the consequences of brute force. The duty to respect the individual takes on special significance when the perpetrator of the violence is the State. Clearly, therefore, international humanitarian law is a part of that branch of international law safeguarding human rights from abuse by State power.

As is the case with every rule of law, the provisions of international humanitarian law are the result of a compromise, i.e. the weighing of conflicting interests. International humanitarian law must make allowance for the phenomenon of war and legitimate military goals. We call this the criterion of military necessity. On the other hand, the individual who does not or no longer participates in the hostilities must be protected as best as possible. The conflicting interests of *military necessity and humanitarian considerations* can be dealt with in rules which limit the use of force in war but do not prohibit it when such use is legitimate. In other words, the rules should protect the individual but not aim at an absolute protection from the effects of warfare, which would in any case be impossible. International humanitarian law can only do the best possible. This does not mean, of course, that it cannot set forth absolute prohibitions. For example, torture is forbidden in all circumstances without exception, because even from the military point of view torture is never necessary.

We can therefore infer that humanitarian law will only be endorsed by those responsible for using military force if it takes into account military considerations. In the real world, therefore, humanity must always take into consideration requirements of military necessity. In this the law does not sanction the use of brute force; it reflects a desire to set

realistic limits to the use of force which can be successfully applied. It is not the purpose of international humanitarian law to prohibit war or to adopt rules rendering war impossible. Rather international humanitarian law must reckon with war, the better to keep the effects thereof within the boundaries of absolute military necessity.[1]

B. Sources of international humanitarian law[2]

The four Geneva Conventions of 12 August 1949 for the protection of the victims of war are the main sources of international humanitarian law:

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

The Geneva Conventions have been supplemented with the two Additional Protocols of 8 J une 1977 :

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating. to the Protection of Victims of Non-International Armed Conflicts (protocol II).

The rules of international customary law also play an important role. Some of them set forth absolute obligations which are binding on an States (*jus cogens*).

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[1] For further reading on international humanitarian law, see: International Committee of the Red Cross and Henry Dunant Institute (eds*.), Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, 2nd ed., Geneva, 1987. The following are appropriate introductory texts: Geza Herczegh, *The Development of International Humanitarian Law*, Budapest, 1984; Frits Kalshoven, *Constraints on the Waging of War, Geneva*, 1987; Otto Kimminich, *Schutz der Menschen in bewaffneten Konfliklen*: *Zur Fortentwicklung des humanitaren Volkerrechts, Munich*, 1979; Hilaire McCoubrey, *International Humanitarian Law, The Regulation of Armed Conflicts*, Dartmouth, 1990; Oppenheim/Lauterpachl *International Law: a Treatise, Vol.II*, London, 1955; Jean Piclet, *Development and Principles of International Humanitarian Law*, Dordrecht/Geneva, 1985; Charles Rousseau. *Le droit des conflits armes*, Paris, 1983; Georg Schwarzenberger, *lnternational Law as Applied by International Courts and Tribunals, Vol.II: :The Law of Armed Conflict.* London, 1968; Maurice Torrelli, *Le droit international humanitaire*, Paris, 1985; Pietro Verri, *Appunti di diritto bellico*, Rome; 1990. -See also Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 and 4: *Use of Force. War and Neutrality*, Peace Treaties, 1982 UNESCO (ed). *International Dimensions of Humanitarian Law*, 1988; Swinarski (ed.). *Studies and Essays on International Humanitarian Law and on the Red Cross Principles in Honour of Jean Pictet, Geneva/The Hague*, 1984. See also the chapter on international humanitarian law in textbooks on general international law.

[2] See the list of major international treaties in the appendix

Although the 1977 Protocols have not yet been universally adopted,[3] we consider them as part of international humanitarian law for the purposes of our presentation.

C. Some definitions

To continue on what we said earlier, we must always differentiate between humanitarian law and the rules of international law governing the use of force between States. As we mentioned above, the United Nations Charter prohibits States from using force against another State except when the victim of an aggression defends itself against the"' aggressor (individual or collective self-defence).[4] This branch of law is often referred to as *jus ad bellum,* or - in modern terms -the rules governing the use of force.

International humanitarian law is not concerned with the lawfulness or unlawfulness of anned conflicts. *Jus in bello* deals with facts, with the fact of an armed clash, irrespective of what caused the conflict and whether it can be .said to have any justification. The Preamble to Additional Protocol I expresses this central premise in the following words:

> "Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the amled conflict or on the causes espoused by or attributed to the Parties to the conflict ..."

The lawfulness of specific wars has routinely been a matter of debate, and the answer depends on the judge.

International humanitarian law must also be distinguished from the law of arms control. The former limits the right of the parties to the conflict to use certain kinds of weapons or munitions, and in some cases even prohibits such use. The laying of minefields, for example; is subject to regulation, and the use of poisonous gases absolutely forbidden, because the effects are unacceptable from the moral standpoint. These prohibitions are founded on humanitarian considerations and are therefore absolute, i.e. the parties to the conflict must comply with them under all circumstances. The law of arms control is set down in disarmament agreements providing for the reduction or even the elimination of a certain weapons potential. Reciprocity is an important consideration in any disarmament agreement, and humanitarian concerns a secondary factor. Control mechanisms are of decisive importance.

It is more difficult to distinguish between international humanitarian law and human rights law. The two are so intertwined that we would be better off discovering what they have in common and how their priorities differ than trying to come up with a clear-cut definition for each.[5]

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[3] See footnote 31.
[4] See footnote 4.
[5] . For a general discussion of this point, see Aristidis Calogeropoulos-Stratis, *Droits humanitaire et droits de I'homme: La protection de la personne en periode de conflit arme*, Geneva, 1980

The promotion of human rights and their observance by Member States is one of the most important aims of the United Nations. *The Universal Declaration of Human Rights* (of 10 December 1948), the two *International Covenants of 16 December 1966*, one on civil and political rights, the other on economic, social and cultural rights, and other treaties on specific aspects of human rights protection are the results to date of a major effort to strengthen the position of the individual in the face of State power. Regional human rights agreements complete the picture.

Human rights agreements and the relevant rules of customary law safeguard a series of individual rights from State abuse. Those safeguards are valid in, all circumstances, at all times. Only in emergency situations and in strictly defined circumstances (known as situations of public emergency) do the different agreements allow for derogations from some of their provisions.

The treaties of humanitarian law protect particularly vulnerable categories of persons from abuse of State power as well. However, unlike human rights agreements, which contain general rules applicable at all times, the protective rules and mechanisms of international humanitarian law are applicable only in time of war, i.e. in exceptional circumstances. In this sense, international humanitarian law is that part of human rights law which is applicable in armed conflicts. In contrast, however, to the (peacetime) human rights agreements, there can be no derogation under any circumstances from any of its provisions since they are specifically intended for application in wartime.

A further specificity of international humanitarian law is the fact that its provisions govern relations with the enemy: a member of the enemy armed forces is entitled to protection as a prisoner of war, and the rights of the inhabitants of a territory occupied by an enemy Power are protected under the Fourth Geneva Convention, etc. Human rights agreements, however, affect above all the relationship between the authorities and citizens of the same State.

It is because they are applied in different circumstances that international humanitarian law has not taken all the basic rights and freedoms guaranteed under human rights agreements and turned them into protective conditions in time of war. The protection of persons deprived of their liberty from torture and other inhuman treatment, for example, can be found in both branches of the law, for it constitutes an absolute right in the true sense of the words. International humanitarian law does not, however, make provision for the protection of the freedom of expression or movement, for example, since those freedoms have an entirely different meaning in a bellicose context. On the other hand, the treaties of humanitarian law contain sections which are foreign to human rights texts, such as the rules on the use of weapons.

Another difference is that international humanitarian law contains many more rules requiring the individual or the community to act than classic human rights law.[6] This can

[6] The observance of social rights also entails an obligation to act. See the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.

be seen already in the 1864 Geneva Convention, Article 6, para. 1 of which reads as follows: "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for". The law of Geneva presently in force contains a wealth of such directions for action (although it cannot be said that the victim has a corresponding right to claim in court in the event of non-action).

International humanitarian law is often mentioned in the same breath as refugee law, the provisions of which apply whenever a person flees his homeland seeking protection in another country out of justified fear of persecution. Refugees exist in peacetime and in time of war. The Geneva Conventions contain some provisions which govern the specific situation of refugees in time of war[7] but do not weaken the protection provided under refugee agreements. Moreover, refugees are entitled to the same protection under humanitarian law as other civilians affected by the consequences of hostilities.

D. International and non-international armed conflicts

International humanitarian law recognizes two different categories of armed conflict.[8] The reference point for distinguishing between the two is the State border: wars between two or more States are considered to be international armed conflicts, and warlike clashes occurring on the territory of a single State are non-international (or internal) armed conflicts (usually known as civil wars). The situation in which a people rises up against colonial domination in the exercise of its right of self-determination is an exception: since the adoption of Protocol I, wars of national liberation have been considered to be international armed conflicts.

When examining the rules of humanitarian law applicable to either situation, one is immediately struck by the immense difference in their number. The Geneva Conventions and their Additional Protocols contain 20 provisions on internal armed conflicts against almost 500 on international wars. And yet, it can safely be said that the problems from the humanitarian point of view are the same whether shots were fired over or within the border. The explanation for this startling difference is to be found in the phrase "State sovereignty".

Experience has shown that States are as a rule perfectly willing to draw up exhaustive rules governing relations between them, even in time of war. It is in fact in their interests to have clear rules if they wish to improve the protection of their citizens from the arbitrary action of another State. As soon as the words civil war are mentioned, however, they cry, "Stop! That's an internal matter" .The international community may not interfere and international law must remain silent. This is why the adoption of common Article 3 of the Geneva Conventions by the 1949 Diplomatic Conference constituted a revolutionary achievement: it was the first breach in the wall of State sovereignty.[9]

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[7] See Fourth Convention, Art. 44, and Protocol I, Art. 73.

[8] See Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", RCDAI, Vol.163 II, 1979, pp. 117-163.

[9] See Rosemary Abi-Saab, *Droit humanitaire et conflits internes. Origines et evolution de la reglementation internationale.* Geneva/Paris, 1986. with bibliography.

At about the same time international human rights law started its climb to ascendancy. For the protection of human rights is nothing more than systematic interference in the internal affairs of the State through agreements of international law. The concept of humanitarian law for non-international conflicts was further strengthened by this development. Nevertheless, even after the adoption of Protocol II in 1977 the humanitarian constraints in civil wars remained modest in comparison to the law applicable in conflicts between States. The big , differences in both areas force us to present them separately.

E. The concept of "armed conflict"

As we have already pointed out, international humanitarian law is a special branch of law covering situations of armed conflict.

As is set forth in common Article 2 of the Geneva Conventions, "the present Convention shall apply in all cases of declared war or of arty other arn1ed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". If there is an armed conflict between two or more States, then international humanitarian law is automatically applicable, whether or not a declaration of war has been made, and immaterial of whether the parties to the conflict have recognized that there is a state of war. The only thing required for humanitarian law to become applicable is the circumstance of an armed conflict.

The expression "armed conflict" appears also in Article 3 of the Geneva Conventions, which deals with non-international armed conflicts, i.e. a confrontation not between two States, but between the government and a rebel movement.

When can an "armed conflict" be said to obtain? The Conventions themselves are of no help to us here, since they contain no definition of the term. We must therefore look at State practice, according to which any use of armed force by one State against the territory of another triggers the applicability of the Geneva Conventions between the two States. Why force was used is of no consequence to international humanitarian law. It is therefore irrelevant whether there was any justification for taking up weapons, whether the use of arms was intended to restore law and order (in the sense of an international police action) or whether it constituted an act of naked aggression, etc. It is also of no concern whether or not the party attacked resists. From the point of view of international humanitarian law the question of the Conventions' applicability to a situation is in fact easily answered: as soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention. The number of

wounded or prisoners, the size of the territory occupied, are of no account, since the requirement of protection does not depend on quantitative considerations.[10]

In practice there is occasional disagreement on the applicability of international humanitarian law in internal conflicts. The only criteria there should be the intensity of the violence and the need for protection of its victims. Frequently, however, governments are loath to discuss that matter, saying the disturbances are an internal affair of the State.[11]

Problems sometimes arise when one of the parties to the conflict denies that international humanitarian law is applicable, even though there is fighting. It has happened, for example, that a State declares a territory occupied by it as its territory, thereby laying the applicability of the law of Geneva open to question. In other cases, troops have marched into the territory of another State and replaced the government with a new team. The new (puppet) government has then declared that the foreign troops were lending friendly assistance and therefore acted with its consent. Does one then speak of intervention at invitation, or of occupation?

How can one bring the parties to a conflict to agree that international humanitarian law is applicable in a given situation ? First of all, it is up to the United Nations to say so, in a Security Council resolution. In reality, however, it is often the ICRC that ascertains the applicability of humanitarian law; it is not systematically ignored. Third States can also put pressure on the State concerned. Such reactions from the international community are important if the Conventions are not to remain a dead letter. It would also be desirable if the International Court of Justice were called on more often to clarify the legal situation.

International humanitarian law ceases to have any effect when the armed conflict is over,[12] that is to say, the individual convention ceases to be applicable once there are no pending issues relating to its subject matter and all the humanitarian problems it encompasses have been resolved. In. practical terms, this means that all prisoners of war have been repatriated, all civilian internees set free and all occupied territories liberated.

F. Two further concepts: "combatant" and "protected person"

International humanitarian law is based on two notions which required explanation before we can discuss its obligations in any detail: they are "combatant" and "protected person". All the provisions of the Geneva Conventions and the Additional Protocols hinge on these two key concepts. It must be clearly understood, however, that they are not necessarily opposites or mutually exclusive. A combatant can easily become a protected person (when he is wounded and surrenders, or taken prisoner of war) without losing combatant status.

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[10] Cf. *in particular The Geneva Conventions of 12 August 1949; Commentary published under the general editorship of Jean Pictet,* Article 2 common to the Conventions.

[11] For further details, see Section 5 below.

[12] *First, Second and Third Conventions, Art. 5; Fourth Convention, Art. 6*.

Although the law of war has a centuries-long history, it was not until Additional Protocol I of 1977 was adopted that the term "combatant" was defined. Article 43, para. 2 of the Protocol reads: "Members of the armed forces of a Party to a conflict... are combatants...". This leaves no room for misunderstanding: whoever is a soldier in the armed forces of a State is a combatant. The same article mentions one exception, that medical personnel and chaplains do not have combatant status, even if they are members of the armed forces.

Article 43 continues, saying of combatants that "they have the right to participate directly in hostilities" .In other words, combatants are allowed to fight. The corollary is that only combatants may participate in the hostilities. To sum up, the combatant -and only the combatant- is and will be entitled to fight. He is allowed to use force, even to kill, and will not be held personally responsible for his acts, as he would be were he to do the same thing as a normal citizen. But the combatant does not have a free hand, in that the means and methods by which he may wage war are limited by international law. Those limits are the subject of international humanitarian law, specifically those provisions pertaining to the conduct of hostilities and also known as the law of The Hague.

Anyone who uses force against the enemy but is not a combatant cannot claim the privileges of combatant status. He is personally liable for his actions and subject to the strictures (particularly harsh in time of war) of national law.

A "protected person" is anyone who, on the basis of the Geneva Conventions ...and their Additional Protocols, has the right to special protection, i.e. to special ~ protected status. The law of Geneva distinguishes between the following categories of protected persons: wounded, sick and ship wrecked members of the armed forces and civilians; prisoners of war; civilian internees; civilians on the territory of the enemy; civilians in occupied territories.

In the following pages we shall take a closer look at the rights and duties of protected persons and combatants. It must be clearly understood, however, that these concepts have a meaning only in the rules pertaining to international armed conflicts. The rules governing non-international armed conflicts recognize no privileged status for those participating in the hostilities, nor do they define hard and fast categories of protected persons. They simply make a general distinction between those using force and those who do not or who no longer can (the wounded, the sick, prisoners, populations not participating in the fighting)

G. Neutrality in war

When a State declares itself to be neutral that means it does not take part in a conflict between other States. The rules of the law of neutrality refer to the special rights and obligations characterizing the relationship between a belligerent State at war and a neutral

State.[13] Current usage also speaks of "States not involved in the conflict" which do not meet all the conditions for "neutrality" and do not wish to be considered as such. For the purposes of international humanitarian law, however, this difference is insignificant.

This is not the place to explain the international legal consequences of neutral status in a conflict. Suffice it to say that neutral States are mentioned in humanitarian law treaties in connection with humanitarian assistance in the broad sense. For example, wounded prisoners of war can be hospitalized in a neutral State.[14] Children evacuated without their parents from a combat zone may be accommodated in neutral countries.[15] The Conventions also refer to neutral States when it comes to organizing the evacuation or repatriation of protected persons.[16] Neutral parties shall also be authorized to run relief operations for needy civilians from their territory.[17] Operations of this kind shall not be considered as a breach of neutrality.

Finally, all the States not involved in the conflict play a vital role in the implementation of humanitarian law during an armed conflict, namely in that neutral States or other countries not a party to the conflict may act as Protecting Powers.[18]

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[13] See Rudolf L. Bindschedler, "Neutrality, Concept and General Rules", in Bernhardt (ed.*), Encyclopedia of Public International Law*, Vol.4, 1982, pp.9-14, and two of the Hague Conventions of 1907, both of which are still relevant: Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War

[14] .Third Convention, An. 109, para. 2.

[15] Fourth Convention, An. 24, and Protocol I, An. 78.

[16] Third Convention, Art. 109 and 111; Fourth Convention, Art. 132, para. 2.

[17] Fourth Convention, Art. 23; Protocol I, Art. 70.

[18] See Section 6 below.

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.) "Defenseless" 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.

> 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, II 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. It 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.[1]

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[1] First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130: Fourth Convention Article 147

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.[2]

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 whose hands the protected persons fall, however, the duty to refrain from certain actions translates as a duty to take action,

[2] Protocol I, Article II.

namely, to take all ecessary 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 I 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 added 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.[3] 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:

- All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
- 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

[3] Protocol I, Article 8.

wounded and sick of the 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.[4] They may not 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.[5] 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.

[4] First Convention, Articles 19 to 23; Protocol I, Articles 8 (e) and 12 to 14.
[5] First Convention, Article 22; Protocol 1, Article 13.

At sea, hospital ships perform the functions of hospitals on land.[6] 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.

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.[7] 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.[8] 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".[9] 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.[10] 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.[11] 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".[12]

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 persisted 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

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[6] Second Convention, Articles 22 to 35.
[7] First Convention, Articles 24 to 32; Second Convention, Articles 36 and 37; Protocol I, Articles 8(c) and 15.
[8] First Convention, Article 28.
[9] Protocol I, Article 16.
[10] First Convention, Article 24; Protocol 1, Article 8(d).
[11] First Convention, Article 26
[12] Protocol I, Article 17

hand, must not cause any harm to the wounded, sick and shipwrecked of the opposing side.[13]

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 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.[14] 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,[15] which also keeps record of all information.
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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.[16]

Another section of the chapter on the protection of wounded, sick and shipwrecked persons deals with the rules relating to *medical transports*.[17] 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.[18]

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

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[13] *Ibid.*
[14] Protocol I, Article 33
[15] See Gradimir Djurovic, *The Central Tracing Agency of the International Committee of the Red Cross*, Geneva, 1986.
[16] Protocol 1, Article 34.
[17] First Convention, Article 35; Protocol 1, Articles 8(g) and (h), and 21.
[18] Second Convention, Article 38; Protocol I, Articles 22 and 23.

difficulties, provided protection only for medical aircraft following a flight plan previously agreed by both sides.[19]
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 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,[20]over the "contact zone" (where military operations are taking place),[21] or over areas controlled by the adverse party.[22] 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).[23]

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.[24] 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

[19] First Convention, Articles 36 and 37; Second Convention, Articles 39 and 40.
[20] Protocol I, Article 25.
[21] Protocol 1, Article 26.
[22] Protocol I, Article 27.
[23] Annex 1 to Protocol 1: Regulations concerning identification
[24] Convention of 27 July 1929. Article 19.

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,[25] but also in domestic legislation.[26] 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.

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[27] 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

[25] First Convention, Articles 38 to 44, 53 and 54; Annex I to Protocol I, Articles 3 and 4.
[26] Through domestic laws for the protection of the emblem
[27] Protocol I, Article 85.3(f).

solutions based on modern technology.[28] 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.[29] 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 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".[30] 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.[31] 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

[28] Annex I to Protocol I.
[29] First Convention, Article 44.
[30] Third Convention, Article 13.
[31] Article 12

customs of war.[32] 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 1).[33] Lastly, members of the population who spontaneously take up arms to resist approaching enemy forces (*levée en masse*) are entitled to be treated as prisoners of war.[34] 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.[35] In general, any doubt as to the status of a captured person must be cleared up by a competent tribunal.[36]

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 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.[37] 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.[38] Also under the Third Convention, torture and other severe ill-treatment are considered war crimes.[39]

- Prisoners are entitled, immediately upon capture, to complete what is called a capture card,[40] which is then sent, via the ICRC Central Tracing Agency, to the official information bureau in the prisoners' own country.[41] The latter has the task to inform the prisoners' relatives. In this way, links with home and family can be rapidly re-established.

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[32] Article 4.A(2).
[33] Article 4.A(4) and (5).
[34] Article 4 A(6).
[35] First Convention, Articles 30 and 31; Third Convention, Article 33.
[36] Third Convention, Article 5 para. 2
[37] Third Convention. Article 7.
[38] Article 17.
[39] Article 130, and Protocol 1, Article 85.5.
[40] Article 70 and Annex IV
[41] Article 122

- 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".[42] 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.[43]

- Prisoners of war in good health may be required to work,[44] but may be employed in dangerous work only if they volunteer. Removal of mines is explicitly mentioned as dangerous work.[45] 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.

- Prisoners of war are entitled to correspond with their relatives (letters and cards being exchanged usually through the ICRC Central Tracing Agency).[46] They may also receive aid in the fonn of individual parcels.[47]

- A prisoner of war is subject to the law in the country of the detaining power especially the regulations applying to the armed forces.[48] 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 POW: for offences committed before capture (e.g. alleged war crimes committee (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. [49]

A very important group of provisions in the Third Convention is that dealing with the repatriation of prisoners of war.[50] 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.[51] This is a humane gesture towards combatants who will never again be involved in the war. Mixed medical commissions decide who will be

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[42] Article 25
[43] *Ibid*
[44] Articles 49 to 57
[45] Article 52 para 3
[46] third Convention, Article 71
[47] Article 72
[48] Articles 82 to 108
[49] Article 13, para. 3
[50] Articles 109 to 119
[51] Article 109

repatriated.[52] 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".[53]

- 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 POWs.

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 POWs did not wish to return to their country.[54] 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 POWs 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 ICRC delegates to determine objectively each prisoner's will. The ICRC takes part in the repatriation of POWs 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 I.[55]

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.[56] In accordance with this custom, instead of being interned, POWs 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.

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[52] Article 112
[53] Article 118
[54] Christiane Shield.Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, 1977, pp. 157 ff.
[55] Protocol I , Article 84.4(b)
[56] Third Convention, Article 21, para 2

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

Civilians are all those who are not members of the armed forces.[57] As such they are entitled to the protection of international humanitarian law. As "non-combatants", civilians may therefore not take part in hostilities. 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 (*levée 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 attack.[58] The collective punishment of civilians and measures aimed at intimidating or terrorizing the civilian population,[59] pillage, hostage-taking and reprisals against civilians are also forbidden.[60]

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[57] Protocol 1, Article 50.
[58] Fourth Convention, Article 28,reinforced by Protocol 1, Article 51(7).
[59] Article 33, para. 1.
[60] Articles 33, paras. 2 and 3, and 34.

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).[61] 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.[62] 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 the conflict must be treated as protected persons in the same way as nationals of the power of origin.[63]Special efforts must be made to reunite families.[64]

In addition to a comprehensive article on the protection of women,[65] Additional Protocol I contains new and important obligations for the treatment of children.[66] 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,[67] 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

[61] Articles 14 and 15; Protocol 1, Articles 59 and 60
[62] See Section 3. B; Fourth Convention. Articles 16 to 22 and 24 to 26
[63] Protocol I, Article 73
[64] Article 74
[65] Article 76
[66] Article 77
[67] Article 78

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 theatre 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".[68] 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 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.[69] 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.

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[68] Fourth Convention, Articles 35 to 46
[69] Article 42

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.[70] 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 longterm 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.

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

[70] Fourth Convention, Articles 47 to 78

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 reexamined 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 , roles 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 Wrold 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.[71] The new provisions cover the legal status of internees in every detail and prescribe their treatment of 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 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.

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[71] Fourth Convention, Articles 79 to 135

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.[72] If this is beyond its possibilities, then that power is obliged to permit relief operations by third States or by an "impartial humanitarian organization"

[72] Fourth Convention, Articles 55 and 56.

(usually the ICRC), and to facilitate such operations.[73] 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 maintenance 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.[74] 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[75] 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".[76] 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

[73] Article 59; Protocol I. Article 69
[74] Third Convention. Article 72, and Fourth Convention, Article 108
[75] Protocol I, Articles 61 to 67.
[76] Article 61(1).

defence tasks except in case of imperative military necessity".[77] 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.[78]

Protocol I even stipulates that members of the anned forces may belong to civil defence organizations,[79] provided, naturally, that they do not perform any combat duties. If they fall into the power of an adverse party, they may be treated as prisoners of war.

Civil defence organizations of neutral or other States not party to the conf1ict 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 conf1ict.[80]

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.

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[77] Article 62
[78] Article 66(4) and Annex I, Article I5
[79] Article 67.
[80] Protocol 1, Article 64

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

First, a few basic rules should be described, since they provide the context for the provisions on the conduct of war. These include the restrictions imposed by the law on the choice of ways and means of waging war. Finally, we will discuss in greater detail certain selected provisions.

It must be made perfectly clear at the outset that the international rules restricting violence in war are applicable in full in all situations that are subject to international humanitarian law. The law allows no leeway under the concept of "military necessity", previously referred to as " *Kriegsrason* ". This means that neither " *Kriegsrason* " nor considerations of military necessity can release anyone from the obligation of complying with international humanitarian law. The explanation is that the Geneva Conventions and the Additional Protocols have already struck the balance between the demands made on the law by the conduct of war and the requirements of humanity. " *Kriegsrason* " is thus satisfied by the law itself. There is no longer any excuse not to observe international humanitarian law.

A. General limitations on the conduct of war

The waging of total war, as we have said, cannot be reconciled with international law. Although under the UN Charter a State is permitted to offer armed resistance (e.g.,in legitimate self-defence), the conduct of war is at all times subject to the general principles of international humanitarian law as expressed by customary law and to international treaty law. In this context, it is worthwhile to recall the 1868 Declaration of St.

Petersburg, which presents in its preamble a complete programme for the law relating to the conduct of hostilities.[1] I t runs as follows:

> "Considering
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> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity; …."

The St. Petersburg Declaration -together with the Lieber Code -was the first of a series of measures codifying the limits on the conduct of hostilities. Essentially, these were the Hague Conventions of 1899 and 1907, in particular *Convention (IV) respecting the Laws and Customs of War on Land*, dated 18 October 1907, with the accompanying Regulations, which are especially significant in this context. Article 22 of those Regulations contains the following clause:

"The right of belligerents to adopt means of injuring the enemy is not unlimited". It has been pointed out that the Hague Regulations were the main legal criteria for assessing the conduct of hostilities during both world wars. The Nuremberg Tribunal stated that the content of those Regulations was part of international customary law and consequently binding on all belligerent States.[2]

When international humanitarian law was completely revised after the Second World War, only a small number of provisions directly affecting the conduct of hostilities was included in the Geneva Conventions of 12 August 1949. Those,. provisions are to be found in Part II of the Fourth Geneva Convention, under .the title "General Protection of Populations against certain Consequences of War" and deal, for example, with the establishment of safety zones and the protection .of civilian hospitals.

With its 1956 *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Tune of War*;[3] the ICRC drew the attention of world opinion to the importance of rules which set limits to war itself. However, the ICRC;s attempt to draw

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[1] See footnote 14
[2] See footnote 16
[3] Second version (1958), in Schindler/Toman, No.28

up a new convention proved to be premature, the major powers showing little understanding for the project. The ICRC's efforts nevertheless served to start a process which led in the first instance to the unanimous adoption by the UN General Assembly of a resolution that would prove to be decisive for the further development of international humanitarian law, namely Resolution 2444 (XXIII) of 19 December 1968, entitled "Respect for Human Rights in Armed Conflicts".[4]

The resolution, following on one adopted by the Twentieth International Conference of the Red Cross in Vienna in 1965,[5] confirmed three essential principles of international humanitarian law which, as stated in the text, must be observed by all governments or other groups involved in armed conflict. The three principles may be summarized thus:

- the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited;

- it is prohibited to launch attacks against the civilian population as such;

- a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible.

The unopposed confirmation of these three principles by the United Nations laid the groundwork for the development of international humanitarian law by the Diplomatic Conference of 1974-1977. Protocol I, relating to international armed conflicts, and Protocol II, relating to non-international armed conflicts, in fact translated the three principles into detailed directives and prohibitions. As general rules of customary international law, however, they can claim further validity, in particular also in respect of States that have not ratified the Additional Protocols.

The resolution of the International Conference of the Red Cross that served as the model for UN Resolution 2444 also contained a fourth rule which in the opinion of the major powers would have resulted in the prohibition of the use of nuclear weapons. Since the UN General Assembly did not take over this fourth rule, the obvious conclusion is that States were not willing to deal with the "nuclear question" in connection with international humanitarian law. This observation is of particular significance in the context of the discussion on the scope of Protocol I [6]

The development of international humanitarian law gave rise to a further principle, to be set alongside the three basic rules contained in Resolution 2444: the justly famous *Martens Clause.* It first appeared in the preamble to the *Hague Convention (IV) respecting the Laws and Customs of War on Land*, and in 1977 was worded as follows in Article I, paragraph 2 of Protocol I:

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[4] Schindler/Toman, No.31
[5] Resolution XXVIII, in *International Review of the Red Cross*, 1965, pp.588-590.
[6] See below, Section 4.C.c

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".

This clause testifies to the completeness of humanitarian protection: in the absence of an explicit rule for a certain type of conduct, it may not be assumed that such conduct is permitted. On the contrary, a solution must be found that, like international humanitarian law in general, meets the requirements of humane behaviour.

If the law of the conduct of war were to be summed up in a single word, then that word would be "limits", the limits to which the use of force is subject. As the antithesis of unlimited, the idea of limits precludes the notion of total war.

Some of the limits in question are described in greater detail below. We shall start with the extremely important restriction arising from the definition of those taking part in military operations, i.e., those who, under the law of war, are permitted to use force against persons and objects. We refer, of course, to combatants.

B. The concept of combatant

From the earliest times it has been accepted that the members of a State's armed forces are allowed to take part in war. This is self -evident, and is still true today. Article 1 of the 1907 Hague Regulations relating to war on land, however, goes a step further, stating that the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- to. be commanded by a person responsible for his subordinates,
- to have a fixed distinctive emblem recognizable at a distance,
- to carry arms openly; and
- to conduct their operations in accordance with the laws and customs of war.

Volunteer corps or private armies, and any type of self-appointed fighter have always been excluded from military operations under the law of war.

The Third Geneva Convention took over the limits set by the Hague Regulations, adding by way of clarification that the militia and volunteer corps described must belong to one of the parties involved in the conflict.[7] Only when a State assumes responsibility for their behaviour may such a group and its members take part in hostilities.

The Third Convention also mentions resistance movements and members of armed forces professing allegiance to a government not recognized by either of the belligerents.[8] Lastly, persons not members of the armed forces are entitled, on the approach of the enemy, to take up arms on their own initiative (*levée en masse*), but must respect the laws

[7] Third Convention, Article 4.A(2).
[8] Article 4.A(3).

and customs of war.[9] This right lapses as soon as the enemy forces have taken control of the area in question. The law of war does not allow persons living in occupied territory and not belonging to the armed forces to offer armed resistance to the occupying power.

Additional Protocol I has simplified the legal position by defining armed forces, in Article 43, as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates". It continues: "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".

All those belonging to such armed forces are combatants, i.e., are entitled to engage in combat. Consequently, they are permitted to use force that may extend to the killing of people or the destruction of objects, without being individually liable for such acts. The responsibility of combatants under criminal law is limited to the obligation to respect the provisions of international humanitarian law. If captured, combatants are entitled to the status of prisoner of war. Mercenaries and spies do not have combatant status.[10]

Medical and religious personnel are in a special position, in that they are in fact members of the armed forces, but are not entitled to take part themselves in hostilities.[11] Those not belonging to the armed forces of one of the parties engaged in conflict are not entitled to take part in military operations. If they nevertheless use force they are acting illegally. They are then referred to as irregulars and can be punished for a single act of violence.

Combatant status does not mean the fighter has *carte blanche*: as has been stated, members of the armed forces must at all times observe the rules of international humanitarian law applicable in armed conflict. Combatants who violate these rules usually retain their status, but may be called to account under penal law.[12] The combatant first obligation is to distinguish themselves from the civilian population. The whole law of war, indeed, rests on the requirement that members of the armed forces (= combatants) must ensure that they are distinguishable from the civilian population (= protected persons). Additional Protocol I reinforces this principle and translates it into specific provisions.[13]

How can combatants be distinguished in practice? Traditional law requires that the members of armed forces should have a distinctive emblem recognizable at a distance and should carry arms openly.[14] In practice, those in the armed forces differ from the civilian population in wearing a uniform. This rule is still in force, as explicitly stated in Protocol I.[15] However, the uniform is not a compulsory and essential attribute of combatants. Protocol I merely requires members of the armed forces to distinguish themselves from civilians "in order to promote the protection of the civilian population

[9] Article 4.A(6).
[10] Protocol I. Articles 46 and 47
[11] Article 43(2).
[12] Article 44(2).
[13] Article 48, and 49 to 58.
[14] The Hague Regulations on War on Land, Article I; Third Convention, Article 4.A(2).
[15] Protocol 1, Article 44(7).

from the effects. Of hostilities".[16] In response to the demands of Third World countries, the Diplomatic Conference of 1974-1977 redrafted the text relating to the obligation for armed forces to distinguish themselves from their environment. The new regulation, which is not simple, may be summarized as follows :

The basic rule remains the obligation of combatants to distinguish themselves from the civilian population. Members of the armed forces are released from this obligation only in situations "where, owing to the nature of hostilities an armed combatant cannot so distinguish himself".[17] From the discussion in the Diplomatic Conference it may be assumed beyond doubt that the exceptional situations in question are only those of belligerent occupation and wars of national liberation.[18] In such circumstances, combatants are permitted to "go underground" and hide among civilians, and are described as guerilla fighters (*guerilleros*). Nevertheless, even in this type of situation they must carry arms openly immediately before (i.e., during deployment preceding an attack) and during each military engagement -in other words, they must make themselves recognizable as combatants.

This new text, which to some extent legitimizes guerrilla warfare, was severely criticized. It was feared, for instance, that relaxation of the obligation for combatants to be distinguished at all times from the civilian population would encourage acts of terrorism. This fear is based, at least partly, on a misunderstanding,[19] since the new rule applies only to members of the armed forces of a State involved in an international armed conflict (or, in strictly circumscribed conditions, of a recognized national liberation movement). Groups or gangs of terrorists or individual terrorists are not covered by this provision, as they do not belong to any official armed forces. In any case, weapons may be hidden only in a few situations and for a limited period. And finally –and this is the strongest argument -the new definition relating to the rights and obligations of combatants in exceptional situations has not and never will release them from the obligation to observe the law of war, which forbids terrorist activities in all circumstances and without exception.[20]

Members of the armed forces retain their legal status as combatants even .if they violate their obligations and are liable to be prosecuted as war criminals.[21] If captured, they are prisoners of war and come under the protection of the Third Geneva Convention, even if they have been convicted. Irregulars, on the other hand, who fail to observe even the minimal requirement to carry arms openly before and during an attack lose their privileged status, even if they belong to armed forces, and may be prosecuted under penal law by the detaining power merely for taking part in hostilities -they have forfeited their

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[16] Article 44(3).
[17] Protocol 1, Article 44(3).
[18] See the commentaries on ProIocol I, Article 44(3)
[19] See Agora, "The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims", and Hans- Peter Gasser, "An Appeal for Ratification by the United States", *81 American Journal of International Law* (1987), pp. 912-925.
[20] See Hans-Peter Gasser, "Prohibition of terrorist acts in international humanitarian law", *International Review of the Red Cross*, 1986, pp.200-212
[21] Third Convention, Article 85; Protocol I, Article 44(2).

privileged combatant status.[22] It goes without saying, however, that they are still entitled to a regularly conducted trial and to humane treatment within the meaning of the Geneva Conventions.

C. limits on the choice of methods and means of warfare

Article 35 of Protocol I reinforces a principle of the law of armed conflicts that has already been mentioned and states:

> "In any armed conflict, the right of the Parties to the Conflict to choose methods and means of warfare is not unlimited".

This basic rule is supplemented as follows:

> "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

Article 35 adds a new prohibition as a general limitation on warfare:

> "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".

The three prohibitions are generally worded. On their own, they are insufficient to combatants as binding directives on what they are and are not permitted to do. More specific commands can be derived from these sources by two different ways: first the treaties themselves contain a number of specific and carefully defined prohibitions, some of which we shall examine more closely. Secondly, the above-mentioned basic rules give form to an auxiliary rule, the principle of proportionality, that in the absence of any special norm, helps to provide practical directives.

According to the principle of proportionality, the use of force and the resulting destruction must not be disproportionate to the objective and to the military advantage sought. You don't shoot sparrows with cannonballs. Any taking of life or destruction of goods that is superfluous, i.e., that is not necessary to achieve the -lawful -military objective, :must be eschewed. The principle of proportionality as found in the law of war is in no way an unfamiliar element, but a general principle of law that should guide any action by States. It is at all events a requirement that can be justified also in military terms, since it expresses the need to concentrate resources. The potential for destruction must be realized only where it is necessary from a military standpoint, and even then only to the extent to which it cannot be. avoided. The bombing of a peaceful village of no military importance is also an unjustifiable squandering of *matériel* and ammunition.

a. Prohibited methods of combat

[22] Protocol I, Article 44(4).

Among the general limitations traditionally set by the law of war we should first recall the idea of chivalry .This embodies the respect shown by fighting men to their opponents as human beings. In so far as they recognize fellow human beings on the other side they forego particularly cruel forms of attack and weapons, thus avoiding excessive suffering. Since such excessive suffering is never essential to attaining the given objective, chivalry in combat does not run counter to any compelling military considerations. Chivalrous conduct is compatible with the requirements of warfare.

Forbidden methods of combat include above all perfidy. Perfidy is defined as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence" .[23] Examples are attacks made under the protection of the white flag, or the feigning of incapacitation to fight, in order more easily to eliminate an adversary in the act of bringing assistance. On the other hand, simple ruses of war intended to mislead an adversary are naturally not prohibited. Examples of ruses are camouflage, mock operations and misinformation.

Protocol I contains a special role forbidding the misuse, in military operations, of recognized distinctive emblems, in particular the red cross or red crescent.[24] Misuse of the emblem is reprehensible, not only because an individual member of the enemy armed forces may be adversely affected, but also because such conduct generally destroys confidence in the emblem. The risk is that even legitimate use of the emblem will no longer be respected. For this- reason, the perfidious use of the distinctive emblem is, in certain , circumstances, a grave breach of Protocol I, that is, a war crime.[25] The same provisions also forbid misuse of the United Nations emblem, the perfidious use of which is likewise punishable.

It is also prohibited in all circumstances "to order that there shall be no survivors" or to conduct hostilities on this basis (to give no *quarter*).[26] Those who are *hors de combat* may not be attacked and their lives must be spared, as explicitly stated in another provision in the section of Protocol I relating to methods and means of warfare.[27] The killing of an enemy soldier who has recognizably ceased to fight is murder. In the same line of thought, Protocol I prohibits attacks on crew members parachuting from an aircraft in distress, since they are unable to defend themselves in that situation.[28] A different case is that of airborne troops dropped by parachute: they may be attacked while in the air.

The various prohibitions make clear that certain forms of conduct are so reprehensible that they may not be used against an enemy soldier (who may of course be combatted). Furthermore, members of armed forces are prohibited to attack protected persons, e.g.,

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[23] Protocol I, Article 37
[24] Article 38
[25] Article 85.3(f)
[26] Article 40
[27] Article 41
[28] Article 42

civilians or prisoners, or protected objects (such as hospitals), as we have already shown in the section relating to Geneva law.

b. Prohibited weapons

The law of war also prohibits a number of weapons and types of ammunition, or restricts their use. Protocol I, for example, forbids attacks with weapons or ammunition which have indiscriminate effects.[29] This means that arms or ammunition are prohibited which strike military objectives and civilians or civilian objects without distinction, because they can in any case not be accurately directed against a military target (e.g., a missile that cannot be accurately guided).

It is always prohibited to employ weapons or projectiles "of a nature to cause superfluous injury or unnecessary suffering".[30] This rule is frequently misunderstood, even represented as cynical, since, it is said, all suffering is unnecessary. That is of course correct: war in itself is cruel. The rule, however, stipulates something different: it forbids the use of weapons and ammunition that cause injuries that are not essential to attain the military objective, i.e., are superfluous. Since the objective can be attained through other, less cruel means, such injuries would be disproportionate. It is in this sense that the Declaration of St. Petersburg (1868) prohibits the use of explosive or flammable ammunition, and the First Peace Conference of The Hague (1899) declared the use of "dum-dum" bullets and of poison and poisoned weapons to be illegal.

The Second Peace Conference of The Hague adopted in 1907 limitations applying to war at sea, especially concerning the laying of mines.[31] These provisions prohibit free-floating mines, unless they self-destruct within one hour of their control being lost; the same rule applies to moored mines that break loose. Torpedoes that miss their mark must also become harmless.

It was only much later, following the adoption of Protocol I by the Diplomatic Conference of 1974-1977, that new prohibitions were successfully worked out to ban the use of unusually cruel conventional weapons. The *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, of 10 October 1980, has three Protocols covering the following types of weapons and ammunition: non-detectable fragments, mines and booby-traps, and incendiary weapons. Only the use of projectiles that leave undetectable fragments in the body was totally prohibited, while the use of the other two types of weapons was more closely regulated and restricted. The 1980 Convention also provides the framework for adding other protocols containing further prohibitions or restrictions.

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[29] Protocol 1, Article 51(4).

[30] Protocol I, Article 35(2)

[31] Hague. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines

In this context it is worth mentioning Article 36 of Protocol I. Under the title "New weapons" it obliges the contracting parties, when they study, develop, acquire or adopt a new weapon, means or method of warfare, to determine whether (and/or to ensure that) the use of such weapons, means or method is not contrary to international humanitarian law. What this represents is the humanitarian evaluation of projects for new weapon systems.

Weapons of mass destruction raise particularly important questions in this respect. The prohibition on the use of poison gases, as laid down in the *Geneva Protocol of 1925*, has a very wide scope. It is well known that poison gases caused indescribable suffering during the First World War. The powers of the time, assembled in the League of Nations, therefore solemnly declared, in the 1925 Protocol, that the use of poison gases was prohibited. The ban was respected during the Second World War, and remains in force as a rule of customary law.
However, the prevailing view is that only first use of poison gases is forbidden; States feel entitled to employ poison gases in response to a gas attack. Since the 1925 Protocol mentions only the use of poison gases on the battlefield, strenuous efforts were needed to prohibit or at least restrict also the development, manufacture, distribution and stockpiling of such material as well. The *Chemical Weapons Treaty* of 1993 has achieved that task.[32] The use of poison gases in war, however, is and remains prohibited under international customary law.

The 1925 Geneva Protocol also forbade the use of bacteriological weapons. In contrast to poison gases, these substances were later successfully and completely proscribed. The *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and Toxin weapons and on their Destruc*tion, of 10 April 972, bans these extremely cruel weapons comprehensively and effectively and contains provisions on verification.

c. Nuclear weapons

We now come to the most topical weapon of mass destruction, nuclear arms, and shall briefly consider some of the legal problems they raise.

It is an incontrovertible fact that at present there is no specific ban on the production, stockpiling and use of nuclear weapons. There are, however, a number of conventions that regulate some aspects of nuclear armament.[33] The question is often asked whether the rules of international humanitarian law - for example, the proscription of exceptionally cruel weapons or the ban on indiscriminate attack- do not constitute a ban on nuclear weapons as such, or at least on their use.[34] Replies have varied, and neither the

[32] See footnote 18
[33] See, for example, the Nuclear Weapons Non-Proliferation Treaty, of I July 1968, or the ban on the stationing of such weapons in space, contained in the Outer Space Exploration Treaty, of 27 January 1967, and the Treaty on Denuclearization of the Seabed, of 11 February 1971.
[34] From the abundant literature: Judge Nagendra Singh/Edward McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd ed., Dordrecht/Boston/London. 1989.

partisans nor the opponents of the ban theory can cite a prevailing opinion to support their particular argument.

It was against this background that the Diplomatic Conference began work in 1974 on the two draft protocols. Protocol I, which is the only one of interest here, does not mention nuclear weapons by name, but in Articles 51 and 35, for example, it codifies the prohibition of indiscriminate attacks and of the use of weapons causing unnecessary suffering. It is important to note in this context the concordant statements of the three Western nuclear powers that they did not intend in a Diplomatic Conference devoted to the development of international humanitarian law, to enter into negotiations on the regulation of nuclear weapons.[35] Their statements referred to the ICRC's commentaries on the draft protocols, and were not objected to by the representatives of the Soviet Union. In adopting Protocol I, France, Great Britain and the United States explicitly stated their interpretation of the scope of Additional Protocol I in relation to nuclear weapons, by issuing explanations attached to the Protocol. Again, the Soviet Union made no comment. Various States, in ratifying the Protocol, supplied clarifying interpretations on the subject,[36] without any objections being raised.

The history of Protocol I compels us to conclude that the Diplomatic Conference did not wish to touch on the law concerning the possible use of nuclear weapons. In other words, Protocol I does not alter the previous state of the law on the subject. This in no way means that the use of nuclear weapons is not limited by rules of international law. For it is indisputable and undisputed that general international law remains applicable, i.e., not only international treaty law (the Geneva Conventions) but also the principles of customary law. The statements made to the Diplomatic Conference by the representatives of the three Western nuclear powers explicitly confirmed the fact that the use of such weapons was subject to the general rules of international humanitarian law limiting the use of weapons. Among them are the prohibition of attacks on the civilian population as such, the ban on indiscriminate attacks and on the use of indiscriminate weapons, the requirement of proportionality, and the prohibition on weapons causing superfluous injuries. The silence observed by the Soviet Union and China should not be regarded as an objection to this interpretation.

D. Protection of the civilian population and civilian objects

One of the greatest achievements of the Diplomatic Conference of 1974-1977 is undoubtedly the reinforcement of the rule that belligerents must distinguish between military objectives, on the one hand, and civilians and civilian objects, on the other. This obligation is expressed as follows in Article 48 of Protocol I:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between

[35] See ICRC Commentary on the Additional Protocols, Protocol I, para. 1838-1861, and, with a divergent view. Horst Fischer, *Der Einsatz von Nuklearwaffen nach Art. 51 des L Zusatzprotokolles zu den Genfer Konventionen von* 1949, Berlin, 1985

[36] Belgium, Canada. Federal Republic of Germany. Italy, Netherlands and Spain

the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

Before examining individual prohibitions, we should once again recall the double protection guaranteed to the civilian population under international humanitarian law. Accordingly,' civilians in the hands of the enemy must be shielded from abuses of power and the civilian population must be spared the effects of military operations. The problems that arise are extremely diverse. While the first rule deals with the protection of human rights against the abuse of power in the special circumstances of war, the second sets limits to be observed in the planning and conduct of military operations.

Until the 20th century, war usually meant a confrontation between two armies seeking to settle an issue in battle. Consequently, military operations were largely restricted to the armed forces opposing each other or to the place under siege. Destruction occurred within the range of the weapons then available, i.e., small-arms and artillery. The concept of the battlefield contains the idea of geographic limitation. Civilians in the area were often able to move away or flee (or even watch the fighting from the surrounding hills). They were in less danger from cannon balls, i.e., from the military operations themselves, than from pillage, murder and arson by the troops. The real problems for the civilian population, therefore, first arose in the event of invasion by a foreign army.

The advent of the airplane fundamentally altered the nature of warfare and brought in its wake a vast potential for destruction to the civilian population. long-range missiles have taken this process even further. Bomb and missile attacks on strategic targets carry destruction far behind the front line, into the heart of a country, where they can strike at cities, towns, roads and railways, cultivated land and above all, at the population that is not involved in the hostilities. Although this has been the case at least since the First World War, it was only in 1977 that Protocol I gave specific form, adapted to today's circumstances, to the principles concerning the protection of the civilian population first enunciated in the Hague Regulations on War on Land and embodied in customary law.

The obligation to distinguish between the protected civilian population and civilian objects, on the pne hand, and objectives that may be attacked and, if necessary, destroyed, on the other, makes it imperative to know what may be considered as a military objective.

a. Military objectives

What is a *military objective*, and may therefore be subject to attack? The answer, since the adoption of Protocol I, is unequivocal. First, members of the opposing armed forces (with the exception of medical and religious personnel) may be combatted. Second, (lawful) military objectives are objects that "by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military

advantage".[37] This definition is couched in general wording and forbears (unlike previous attempts) to list individual installations or objects that might be of special military interest.

Protocol I defines civilians as persons not belonging to the armed forces.[38] Civilian objects are all objects that cannot be considered as military objectives.[39]

b. Civilian population

This is the background for the separate prohibitions laid down by Protocol I under the title "Civilian population -General protection against effects of hostilities". They are summarized below.

Under Article 51, neither the civilian population as a whole nor individual civilians may be the object of attack. The relevant provision continues: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" This not only forbids assaults intended to spread fear and terror among civilians, but also threats of such assaults. Individual terrorist acts are also prohibited, a ban that likewise applies (as already mentioned) in non-conventional (guerrilla) warfare.

Article 51, which is a key provision of Protocol I, thus prohibits indiscriminate attacks, i.e., attacks not directed against a definite military objective (e.g., area bombing) or in which the means and methods of warfare used cannot be restricted to a specific military objective ("blind" weapons such as poorly controllable missiles or randomly sown mines), or which bring into use other means and methods that make it impossible to observe the rules of international humanitarian law.[40] This prohibition strikes at the heart of modern warfare and sets clear limits at every stage to the preparation and conduct of military operations.

For a situation very frequently encountered during military operations, Article 51 contains a guideline in the form of a binding rule: The question is this: what is to be done if a planned attack on a (lawful) military objective would in all probability claim victims among civilians (who are protected) or cause damage to nearby civilian objects (housing, schools, hospitals, etc.)? Under Article 51, such an attack must be abandoned if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[41]

How is this rule to be understood in practice?

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[37] Protocol I, Article 52(2)
[38] Article 50(1)
[39] Article 52(1)
[40] Protocol I, Article 51 (4)
[41] Article 51.5(b)

As is to be expected, the law of war takes into account that in (lawful) military operations in modem war, there will be victims among the civilian population and damage to civilian property. However, such losses must be in reasonable proportion to the military advantage sought. In the case of operations in an area where civilians or civilian objects are likely to be present (which means virtually everywhere in modem warfare), military commanders must always assess the proportionality of the expected harm to civilians as compared to the intended military advantage.

This task is anything but simple. Its main requirement is that the military commander in charge should know the area of operations. He is therefore under the obligation to gather information on the location of military objectives and on the surrounding civilian areas, as explicitly stipulated in another provision entitled "Precautions in attack". [42] If there is a likelihood of excessive losses among civilians, the attack must be cancelled or suspended. The commander .is not required to do the impossible: decisions have to be made on the basis of the information actually available at the time, and cannot be based on information appearing later. In the event, however, a great deal is demanded of military commanders, since in the realities of war the very practical question arises as to how much destruction is or is not acceptable in the civilian surroundings of military objectives. Yet the effort is worthwhile, since what is at stake is the survival of the civilian population in modem war, with it immeasurable potential for destruction.

Article 51, which we have described fairly extensively because of its practical significance, additionally states that civilians are entitled to protection only as long as they do not take part in hostilities.[43] On the other hand, civilians may not be used to shield military objectives from enemy attack or to screen military operations.[44] Finally, the article prohibits attacks against the civilian population or individual civilians by way of reprisals.[45]

c. Civilian objects

In the attempt to protect human beings as much as possible from the effect of war, Protocol I prohibits attacks on a number of civilian objects.[46] As already seen, civilian objects may in general not be attacked, the description "civilian , applying to all objects that are not military objectives. In case of doubt," an object … normally dedicated to civilian purposes, such as a place of worship a house or other dwelling or a school " counts as being civilian and therefore must not be attacked, unless and until the commander in charge is convinced to the contrary.

Referring to the *Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Article 53 prohibits attacks against "historic

[42] Article 57
[43] Protocol I, Article 51(3)
[44] Article 51(7)
[45] Article 51 (6); see below. Section 6 C.c
[46] Article 52

monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".

Under Article 54, "objects indispensable to the survival of the civilian population" are all protected. Such objects are, for example, foodstuffs, livestock or drinking water installations. Naturally, objects of this kind are protected only to the extent that they are of use to the civilian population and not to the armed forces. The provision states categorically: "Starvation of civilians as a method of warfare is prohibited".

A general principle of international humanitarian law requires the protection of the natural environment in armed conflict. Article 55 of Protocol I gives that principle concrete form,[47] stipulating that "care shall be taken in warfare to protect the natural environment against widespread, longterm and severe damage". Since all military operations leave traces on the environment, only severe damage is prohibited.

Lastly, Article 56 prohibits attacks on "works and installations containing dangerous forces", particularly dams, dykes, and nuclear power stations. Protocol I bans attacks on such works because their destruction would not fail to have devastating effects on the civilian population. Consequently, nuclear power stations, dams and dykes may not be placed on the list of military objectives if the expected damage to them would "prejudice the health or survival of the population".

It has been pointed out that in the preparation of military operations various precautionary measures must be taken. This applies to attacks, where information must be obtained concerning above all the possible presence of (protected) civilians and civilian objects.[48] In the case of defensive action, care must be taken to ensure that there are no civilians in the neighborhood of potential military objectives.[49] The defending party, in other words, must help to ensure that its own civilians and civilian objects are not harmed by enemy military operations.

These provisions are supplemented by a reference to the possibility of placing certain geographical zones under special protection. The zones in question are hospital localities and zones, safety zones,[50] non-defended localities[51] -better known as "open cities" -and (permanently) demilitarized zones.[52] In all these cases, the zones in question may be neither defended nor attacked. With the agreement of the parties to the conflict, such zones may be placed under the control of representatives of the Protecting power or of the ICRC.

The reader will have noted that in this presentation of the limits to warfare, continuous reference has been made to provisions from Protocol I, i.e., to one of the conventions

[47] See also Protocol 1, Article 35(3).
[48] Protocol I, Article 57
[49] Article 58
[50] First Convention, Article 23; Fourth Convention, Article 14
[51] Protocol I, Article 59.
[52] Article 60.

belonging to the "law of Geneva". The "law of the Hague" became a real law on warfare only through Protocol I. From this it follows that "Hague law" and "law of Geneva" have been merged in Additional Protocol I. The distinction between the two cities as places where law was developed, each of them symbolizing a major contribution to international humanitarian law, is now merely academic.

Protocol I is at present binding on the majority of States, but not on all of them. So the question arises as to how far the law as set forth in this section is binding on the other States. The answer is not easy, but the following considerations may help: all the provisions described here stem from the general principle according to which distinction must be made in war between the civilian population and combatants, and between civilian objects and military objectives. This very generally defined principle is applicable in all circumstances and for all States. A few more specific directives are to be found in customary law, which is unwritten and is likewise binding on all States. The content of these rules of customary law, however, must be determined in each individual case, with the wording given to the corresponding norm by Protocol I being consulted.[53]

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Without going into detail, it may be concluded that the provisions of Protocol I relating to the protection of the civilian population from the effects of hostilities are not revolutionary. By this we mean that their essential content is binding as customary law even on States not bound by the treaty, the wording of which is important, however, in determining the exact meaning of the rules.

[53]. For the relationship between the Geneva Conventions and customary law, see Meron (footnote 32) and particularly Marco Sassoli, *Die Bedeutung einer Kodifikation fur das allgemeine Volkerrecht mit besonderer Betrachtung der Regeln zum Shutze der Zivilbevolkerung vor den Auswirkungen Feindseligkeiten* Besal/Frankfurt, 1990

THE SPECIAL CASE OF THE LAW OFNON-INTERNATIONALARMED CONFLICTS

"War is war" is the resigned comment of anyone who has seen the results: death, despair, hopelessness, hatred, but also villages and cities in ruins, economic development brought to a halt, etc. Anyone who studies international humanitarian law, on the uther hand, must acknowledge the fact that there are two sets of legal rules relating to the phenomenon known as "war": the law on international armed conflicts -extensively codified with clearly differentiated provisions and means of international supervision -and the law on non-international armed conflicts, consisting in a small number of generally worded rules, with no institutionalized international scrutiny.

This section will deal mainly with non-international armed conflicts, usually called civil wars. To complete the outline of the law on non-international armed conflicts, reference will also be made to two situations with some of the same characteristics, namely, internationalized civil war and internal disturbances and tensions, the latter being outside the scope of international humanitarian law. Finally, there will be an excursus on the law applicable in wars of national liberation.

A. History and content: an overview

First, the definition: non-international armed conflicts are armed confrontations that take place within the territory of a State, that is between the government on the one hand and armed insurgent groups on the other hand. The members of such groups -whether described as insurgents, rebels, revolutionaries, secessionists, freedom fighters, terrorists, or by similar names -are fighting to take over the reins of power, or to obtain greater autonomy within the State, or in order to secede and create their own State. The causes of such conflicts are manifold; often, however, it is the non-observance of the rights of minorities or of other human rights by a dictatorial regime that gives rise to the breakdown of peace within the State. Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power. In this context, reference is always .made to violent confrontations within a State, which nevertheless may in themselves reflect international conflicts and tension.

Any international interest in events taking place inside a State soon encounters a major obstacle, which is the attitude of governments that internal problems are to be excluded from outside interference. At stake is the meaning of a State's sovereignty within the international community. The principal attribute of sovereignty is the right to mould conditions within the country as the government concerned thinks fit. The assertion that international humanitarian law should be made applicable to internal confrontations is therefore at first sight a bold one. It calls for special justification. What induced the States to permit this inroad into their authority? What reasons can be adduced for setting up international rules for civil war?

First of all, States have certainly realized that unbridled violence and murderous weapons cause just as much injury and destruction in civil war as in conflicts between States. The horrible example of the Spanish Civil War gave the impetus for the first special provision relating to non-international armed conflicts to be incorporated into international humanitarian law: common Article 3 of the 1949 Geneva Conventions.

A further explanation is the enormous progress, since the Second World War, of the idea of Human Rights. International human rights law "interferes" quite consciously and deliberately in the internal affairs of States. The differences between humanitarian law applicable in non-international conflicts and human rights law do not alter the fact that both types of law are directed to a common purpose: to guarantee respect for human dignity at all times. It was therefore a logical consequence of historical developments that, only a year after the proclamation by the United Nations of the Universal Declaration of Human Rights of 1948, rules of humanitarian law for internal conflicts within States should be adopted. That this protection was further extended, thirty years later, in Protocol II is largely thanks to the 1966 *International Covenant on Civil and Political Rights.*

Of course, States retain the right to use force within their territory in order to restore law and order. International law contains no limitation of sovereign rights in internal conflicts corresponding to the UN Charter's prohibition of recourse to force in international disputes; it merely sets limits to the manner in which law and order may be established. This means that the right of governments to choose methods and. means is no longer unlimited.

This is the background against which the following international norms have emerged:

- *Common Article 3 of the four Geneva Conventions of 12 August 1949* : one result of the 1949 breakthrough, the deservedly much quoted Article 3, presents a list of rules which, as stated by the International Court of Justice in its judgment of 27 June 1986 in the dispute between Nicaragua and the United States,[1] are an expression of fundamental considerations of humanity. Article 3, therefore, is binding not only because it is part of international treaty law but also as an expression of (unwritten) general principles of law. It is absolutely binding international law: *jus cogens*. Yet the normative content of Article 3 is limited. In particular, it contains only a few rules relating to the protection of persons against the direct effects of the hostilities.

- *Additional Protocol II to the Geneva Conventions of 12 August 1949*, adopted on 8 June 1977. This short text, composed of 28 articles, extends humanitarian protection in civil wars by elaborating the concise rules of common Article 3. However, Article 3 remains applicable in its entirety for the parties to the Geneva Conventions and, in particular, is binding on States that have not ratified Protocol II. For the first time in the history of the law relating to internal conflicts, Protocol II codifies the prohibition of attacks on the civilian population and of the use of force against individual

[1] International Court of Justice, Case concerning *Military and paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits), para. 218

civilians. Today, almost 15 years after its adoption by the Diplomatic Conference, Protocol II bas been ratified by the majority of States,[2] a fact not to be taken for granted, since its origins were beset with obstacles. During the Diplomatic Conference held between 1974 and 1977, the carefully negotiated Committee draft was opposed in the last plenary sessions as unacceptable, and was changed within a few days into a much shorter and weaker text.[3] The Conference then adopted that text by consensus.

The disappointment' felt by many at the weakening of the draft text is understandable, since the States' desire to preserve their sovereignty obviously triumphed over humanitarian concerns. However, the text adopted has the important advantage that it withstood fierce political turmoil unscathed and after heated debate finally won acceptance even from States that had rejected it. What Protocol II lost in normative content it gained in acceptability, especially for Third World States with their great potential for crisis.

- Customary law: Alongside the somewhat meagre body of (written) international treaty law, the unwritten rules of customary law take on special significance for limiting force in internal conflicts. As already pointed out, the entire content of common Article 3 is now to be regarded as part of customary law. In addition, certain rules of customary law can be identified for areas not covered by Article 3 and only partly covered explicitly by Protocol II. First and foremost are a number of principles that set limits to the choice of means and methods of warfare. Yet it is no easy task to document these principles, as is usually the case with rules of customary law, since the behaviour of the parties to armed conflicts must be scrutinized and taken into account,[4]

- Special agreements between the parties to the conflict: Article 3 of the Geneva Conventions calls on the parties to a civil war to conclude special agreements making all or part of the provisions applying to international conflicts applicable to that civil war, One example might be an explicit or tacit understanding that, persons taking part in hostilities will be treated in accordance with the provisions of the Third Convention,

The law of non-international armed conflicts, lastly, has an interesting peculiarity, If it is to fulfil its purpose, this law must be accepted and observed by both sides, i.e., the government and the insurgents. International law, however, is binding only on entities that are subject to it, i.e "chiefly States. Insurgents, therefore, generally have the legal status of subjects with rights and obligations under international law only if they have

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[2] 109 States (on 31 December 1992).

[3] See R. Abi-Saab (footnote 42), pp, 131 ff.

[4] See Hans-Peter Gasser, .Armed Conflict within the Territory of a State: Some Reflections on the State of the Law Relative to the Conduct of Military Operations in Non-International Armed Conflicts", in *Im Dienste an der Gemeinschaft {Festschrift Dietrich Schindler),* Basel 1989, pp- 225-240. See also the Declaration on the Rules of International Humanitarian Law governing the Conduct of Non-International Armed Conflicts, published by the International Institute of Humanitarian Law (San Remo*), International Review of the Red Cross,* 1990, pp. 404-408

been recognized as such, something that has not occurred for many years. Yet there is no doubt in either theory or practice that insurgents are bound by international humanitarian law.[5] This has made it possible to avoid the issue -politically always explosive –of the possible recognition of insurgents. Consequently, common Article 3 states explicitly that its application shall not affect the legal status of the parties to that conflict.

B. Some specific points

After this general survey of the whys and wherefores of international humanitarian law applicable in non-international armed conflicts, we will examine more closely a number of specific points.

- ***Conditions for application***

Article 3 defines the scope of its own application only indirectly. It was left to State practice and legal literature to lay down directly applicable criteria for the concept of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". The paramount question here is what level of violence the conflict must reach before what began as an internal State problem becomes an issue of international law.

In evaluating the deliberations of the Diplomatic Conference of 1949, the Commentary on the Geneva Conventions edited by Pictet made a number of significant statements.[6] According to these, Article 3 is applicable when government and insurgents oppose each other in collective hostilities and using the force of arms. As a rule, the government employs the armed forces in such circumstances because the ordinary police forces no longer control the situation.

The insurgents carry on their struggle against the established power by conducting their own military operations, which presupposes a certain degree of organization. It is only when those engaged in the fighting are organized and are led by persons responsible for their operations that it can be realistically expected that obligations of international law will be respected and implemented. Protocol II has added, by way of clarification, that "internal disturbances and tensions", "riots", "isolated and sporadic acts of violence" and "other acts of a similar nature" on their own do not constitute armed conflicts and are therefore not subject to international humanitarian law.

Article 3 constitutes a very flexible instrument, probably the best possible international answer to internal conflicts, which are always extremely volatile politically. The vaguely defined conditions for its application mean that in any specific case respect for Article 3 can be demanded, without the actual situation having to be clarified from the legal

[5] The judgment of the International Court of Justice mentioned in foolnote 185, lakes for granted that the “Contras” are bound by Article 3

[6] . Commentary published under the general editorship of Jean Pictet, Fourth Convention, Article 3, pp.35-36.

standpoint. In some circumstances the authorities are thus spared from having to admit the weakness of their position.

Contrary to what many, including the ICRC, wished to see, Protocol II does not simply follow Article 3 of the Geneva Conventions with respect to the scope of the treaty's applicability. Article 1 requires that the insurgents must "exercise such control over a part of its territory as to enable them to carry out sustained and concrete military operations and to implement this Protocol". The control of territory is an additional requirement set by Protocol II. The civil wars in Spain and Nigeria, in which the insurgents held part of the country under their control, were examples of this narrowed field of application (as compared with Article 3 of the 1949 Conventions).

Consequently, under international humanitarian law pertaining today, there, are two types of civil war: the non-international armed conflict of high intensity, to which common Article 3 and Protocol II are cumulatively. applicable, and other internal armed disputes, which are subject only to Article 3.[7] This state of law is unsatisfactory, since it complicates the legal characterization of internal conflicts and thus inevitably gives rise to complications. It would be preferable for the (narrower) conditions for application in Protocol II to be more closely aligned with those in common Article 3, through the practice of States or by means of unilateral declarations made by the Contracting Parties when they ratify Protocol II.

If the conditions for the application of Article 3 or Protocol II are met, then the law is applicable *eo ipso*, without any further requirements, :n particular, without any declaration by the parties to the conflict. This is true not only for the government but also for the insurgents. The insurgents are free to express, in any form they choose, their intention to comply with international humanitarian law. Such a statement may be politically desirable, representing as it does the acknowledgement of legal obligations; however, from the legal viewpoint it is not essential, since the insurgent party is anyway bound to observe international humanitarian law applicable to that conflict.

Of mere historical interest is the notion. that the government of a State engaged in a conflict may recognize the insurgents as a belligerent party, which places civil war under the law applicable in international armed conflicts.[8] Such a declaration was last made during the Boer War (1902); recognition of the South as a belligerent in the American War of Secession was only tacit. If the conditions for the recognition of a conflict as a true civil war' are met, third party States may recognize the insurgents by means of a unilateral declaration, which then makes their relationship to the two parties in conflict subject to the rules governing neutrality. Neither of these forms of recognition are any longer current, particularly as today no government is willing to make unilateral legal qualifications of this kind. Third States in this way avoid the charge of interfering in the internal affairs of a sovereign State.

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[7] For an overview of the different types of conflicts, see Schindler (footnote 41).

[8] See Eibe H. Riedel, "Recognition of Belligerency", in Bernhardt (ed.), *Encyclopedia of Public International Law*, 1982, Vol. 4. pp. 167-171.

b. Excursus: international humanitarian law applicable in wars of national liberation [9]

Under traditional international law, disputes between a people exercising its right to self determination by fighting for its independence and the colonial power to which it is opposed were internal affairs of the colonial State. If the struggle attained a warlike level of violence, then common Article 3 of the Geneva Conventions was applicable. However, since the beginning of the 1960s, it has been increasingly the practice among States, based on claims by the Third World and as expressed in United Nations resolutions, to consider manifestations of a people's right to self-determination as an international event.

With the adoption of Article 1, paragraph 4, of Protocol I additional to the Geneva Conventions, on 8 June 1977, international humanitarian law drew the logical conclusions from this development and placed "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination" under the law relating to international armed conflicts. Once the necessary declaration has been " made by the liberation movement,[10] all the provisions of the four Geneva .Conventions and of Additional Protocol I are applicable to the conflict, but of course only if the State involved is a party to Protocol I.

c. Rules for the protection of war victims

The main rules are to be found in Article 3 of the Geneva Conventions They are part of general and universally recognized international law. Protocol II has developed these obligations by making them more specific, without introducing major innovations. But its provisions are binding only on State which are bound by Protocol II. It may be assumed that in future Protocol will be taken increasingly by other States also as a guideline for assessing the humanitarian obligations in a civil war. The more detailed provisions of Protocol II thus help clarify the general terms of Article 3.

Article 3 opens the list of obligations with the general instruction to belligerents to treat all those taking no active part, or no longer taking part in the hostilities with humanity, .in all circumstances and without adverse discrimination. The groups of persons concerned include especially the wounded and sick, prisoners, and all persons who have laid down their arms. Pursuant to this general obligation, which is deeply rooted in the idea of the inviolability
of human dignity, Article 3 prohibits:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- the taking of hostages;
- outrages upon personal dignity, in particular humiliating and degrading treatment;

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[9] From the abundant literature we mention only Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions 100 Protocols", RCADJ, Vol. 165 IV, 1979, pp. 353-446; Heather A. Wi1son *International Law and the Use of Force by National im modernen humanitaren volkerrecht,* Frankfurt 1988

[10] Protocol 1, Article 96 (3).

- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Protocol II takes these rules a step further, borrowing from the *International Covenant on Civil and Political Rights* of 16 December 1966, the United Nations' principal instrument codifying human rights law. Article 4 of Protocol II lays down the fundamental guarantees intended to ensure humane treatment. Article 6 sets forth in detail the requirements for a regularly conducted trial, while Article 5 constitutes a veritable code of rules relating to the treatment of people in custody, and is particularly revealing of the influence of human rights law.

This reference to the treatment of prisoners provides us with an opportunity to point out a basic difference between the legal regime applicable to civil wars and the law on international armed conflicts. Neither Article 3 nor Protocol II establish a special status for combatants or prisoners of war; they are content to set forth guarantees of humane treatment for any persons who lay down their arms or cease to take part in hostilities for any other reason. Insurgents who .are taken captive must without question be treated correctly in all circumstances -but they are not prisoners of war. Nothing in international law prevents the authorities from putting captured rebels on trial, on the basis of national penal law.

Humanitarian law lays down a series of rules on penal sanctions.[11] It forbids the death penalty for pregnant women, mothers with small children, and for young people under the age of eighteen years at the time the offence was committed.[12] Within the limits of these juridical guarantees, the State prosecuting the insurgents is free to treat them with the full rigour of the law. This difference from the legal regime applicable in international conflicts, with its privileged status for combatants and prisoners of war, is explained by the refusal of States to consider rebels or insurgents as anything but "ordinary" lawbreakers.

At the instigation of the ICRC, there has grown up since the Second World War a practice that takes into account both the peculiar situation of insurgents and government considerations. Accordingly, captured members of rebel groups should be treated as prisoners of war provided that they observe the rules applicable in combat i.e, in particular, that they carry arms openly and respect the principles of humanitarian law. Not until the war is over and emotions have died down should their fate be decided. If captured rebels have the prospect of a prison campt rather than of maximum security cells or the scaffold, then this would contribute to national reconciliation.

Article 3, lastly, also contains the characteristic humanitarian requirement that the wounded and sick shall be collected and cared for. This generally worded obligation is also developed by Protocol II . For example, medical and religious personnel are always

[11] First to Fourth Conventions, Article 3, para. 1 (l)(d), and Protocol II, Article 6.
[12] Protocol II, Article 6 (4)

to be protected.[13] Medical duties must be exercised in accordance with professional ethics. Such activities are protected from penal prosecution, at least partly.[14] Another new rule protects the emblems of the red cross and the red crescent.[15]

d. Limits to the conduct of hostilities

The rules to be discussed here are those that deal with the conduct of hostilities in civil wars, namely those that limit the right of the parties to choose methods and means of warfare.[16] Article 3 common of the four Geneva Conventions says nothing on the subject. The 1949 Diplomatic Conference took a hesitant first step into a new and difficult area by making reference to the .traditional scope of Geneva law only. By contrast, Protocol II ventures to make small but audacious moves in the direction of restricting warfare by means of international treaty law. In doing so it did not, however break completely new ground since customary law had already laid down a few guiding principles. Among these basic rules, three deserve to be quoted in *extenso*. They are embodied in United Nations Resolution 2444 which, as mentioned earlier, was adopted without opposition in 1968. As these principles make no distinction between the traditional categories of conflict, they form the basis of international humanitarian law as a whole.[17] They can be summed up as follows:

-the right to choose methods and means of warfare is not unlimited;
-it is prohibited to attack the civilian population as such;
-a distinction must be made at all times between combatants and civilians.

Total war is indefensible under international humanitarian law. Although Protocol II passes over the first principle in silence, there is no doubt that the latter applies in civil war. Specific rules which may have been derived from it are, however, more difficult to prove. To take but one example, the use of poison gases is also prohibited in non-international armed conflicts. Such gases have such horrific effects on human beings that they must without doubt be classified as one of the methods of warfare causing superfluous injury and unnecessary suffering. Moreover, poison gases cannot be employed without affecting the civilian population; this makes their use unlawful under the other two principles as well.

There are echoes of the second and third principles in Protocol II, which expressly forbids attacks on the civilian population or on individual civilians.[18] Anyone not taking part in hostilities must be respected. From this, it may be adduced that attacks on otherwise lawful objectives are illicit if they would cause disproportionate casualties among the civilian population.

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[13] Protocol II, Article 9
[14] Article 10
[15] Article 12
[16] See Gasser (footnote 188)
[17] See footnote 135
[18] Protocol II. Article 13

Special mention should be made of the new Article 18, dealing with the right of humanitarian organizations-- such as the National Red Cross and Red Crescent Societies- to offer assistance, and calling for relief operations to be carried out for the civilian population if the latter is suffering from undue hardship owing to shortages of food and medicines. The second clause becomes especially significant when considered in the light of the ban on the use of starvation as a weapon against the civilian population.[19] If the extent of food shortages so require, relief operations in favour of the civilian population must be allowed under humanitarian law, when necessary under international supervision.

Protocol II prohibits, without any exception, attacks on "works and installations containing dangerous forces", such as dams, dykes and nuclear power stations.[20] It also provides protection for cultural objects and places of worship.[21] Lastly, it forbids the forced movement of civilians.[22]

e. Implementation of the law and supervision of its application

The law relating to non-international armed conflicts differs most notably from the rules relating to international conflicts in the almost total absence of institutions and procedures at international level for ensuring compliance by the parties to the conflict. This is an unmistakable demonstration that civil war is considered as an internal occurrence, a threat to national unity. Evidently, in such situations the sovereignty of States makes it difficult to take measures which, like international supervision. are regarded as constituting interference in internal affairs and an encroachment on the absolute authority of the government in time of crisis.

Article 3, paragraph 2, of the Geneva Conventions contains the following simple sentence: " An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". Protocol II adds nothing to this provision, and leaves it as it stands. The sentence quoted merely upholds the right of the ICRC to make proposals on its own initiative on humanitarian grounds in an internal conflict. Other humanitarian organizations may do the same, although this has hardly ever happened.

According to the generally accepted interpretation, governments and insurgents must at least give due consideration to the ICRC's "offer of services"; however, they are free to accept or reject it as they see fit. Experience has shown that in most cases the offer is accepted, because the ICRC's humanitarian work for the victims of war is obviously in the interests of the parties to an armed conflict. The activities of the ICRC have no effect on the legal status of the insurgents, and, in particular, the presence of ICRC delegates does not internationalize the conflict.

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[19] Article 14
[20] Article 15
[21] Article 16
[22] Article 17

f. Civil war with third-party intervention

Civil wars that are not associated in some way with international events are almost unknown, and few internal conflicts are conducted "behind closed doors". The influence exercised by third-party States takes various forms, and may go as far as armed intervention. The international confrontation then becomes a "proxy war", often waged in the interests of outside powers. International law as it is generally interpreted raises no objection to the intervention of a third-party State on the side of the government and at its invitation. Intervention on the side of the insurgents, however, is considered as unwarranted interference in the internal affairs of the State concerned, and is thus contrary to international law.[23]

Civil wars that become "internationalized non-international armed conflicts" pose unusual problems for international humanitarian law.[24] The ICRC attempted to have the law supplemented with specific rules taking account of this mixed type of war, but to no avail. In practice, therefore, the law must be satisfied with interpretations of expediency, on the basis of which the rules applicable for the particular relations between the various parties to the conflict have to be worked out. Generally speaking, it is desirable for the law on international conflicts to be applicable, if and for as long as the armed forces of the third-party State are involved in the conflict, for the simple reason that humanitarian problems arise in the same way as in an ordinary international conflict, and must be resolved accordingly.

In detail, the legal position is as follows:

- between the government and the insurgents, Article 3 and Protocol II apply;
- between the government and a third-party State intervening on the side of I. the insurgents, the law relating to international cunflicts becomes applicable;
- between the third-party State intervening on the government side and the insurgents, Article 3 and Protocol II apply;
- between States intervening on both sides, the law relating to international conflicts must be observed.

This solution, worked out from the lessons of experience, seems obvious (with the possible exception of the third-named relationship, which does in fact have an international component). Yet States and parties to civil wars have so far scarcely heeded it. Major difficulties usually arise with regard to the status of captured insurgents. The ICRC seeks pragmatic ways in which to ensure that the treatment of captives will meet humanitarian standards. One solution would be to treat captured rebels as if they were prisoners of war, without giving them *de jure* prisoner-of-war status.

g. Disturbances and tensions

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[23] See Michael B. Akehurst. “Civil War”, in Bernhardt {ed.). *Encyclopedia of Public International Law-, Vol. 3*. 1982, pp. 88-93.

[24] See Hans-Peter Gasser. “Internationa1ized Non-international Armed Conflicts: Case Studies of Afghanistan. Kampuchea and Lebanon” in 33 The American University Law Review {1983), pp.14S.161.

Our discussion of the scope of Article 3 of the Geneva Conventions showed that international humanitarian law is applicable in internal disputes only if the hostilities attain a certain level of intensity. If this is not the case, then the situation is not an armed conflict but "only" said to be disturbances, unrest, tensions, riots, etc. Situations such as these are not subject to humanitarian law. They are nevertheless of humanitarian interest, since they may give rise to human problems on a par with those of civil war. From the legal viewpoint it should be remembered that even in crises of the kind described, human rights must be protected. Under the different conventions on human rights, this protection can of course be greatly reduced if a state of emergency has been declared. We are therefore quite right to ask whether human rights guarantees in times of internal unrest should not be strengthened.[25] Efforts have been made to encourage observance of non-binding codes of conduct as a means of ensuring respect for a minimum humanitarian standard.[26]

In its endeavour to safeguard human dignity in times of internal tensions and disturbances, the ICRC has taken an unusual route.[27] Without mentioning international law, it offers its services, as an intermediary in humanitarian matters, to the government of the State concerned. Then, with the consent of the authorities, the ICRC delegates visit places of detention holding persons deprived of their liberty in connection with the disturbances, and, where necessary, take action to improve the conditions of detention. In this context, the ICRC speaks of its right to take humanitarian initiatives. This right is based on resolutions of the International Conference of the Red Cross and codified in the Statutes of the International Red Cross and Red Crescent Movement.[28]

C. Article 3 and Protocol II as codification of fundamental human rights law for civil war situations

International humanitarian law and human rights have developed separately. They even vary greatly in content, a fact easily explained by the differences in their fields of application. Human rights law sets limits to the power of the State with respect to all persons subject to its authority, including nationals; said limits apply at all times. International humanitarian law, on the other hand, is a special law created for war; it influences relations between the belligerents for the purpose of guaranteeing the human rights of persons in the power of the enemy.

However, in a civil war, "persons in the power of the enemy" are at the .same time nationals of the country concerned. Consequently, the protection provided under human rights law and under humanitarian law overlap. The fact that human rights protection can

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[25] See Theodor Meron, Human Rights in Internal Strife:. Their International Protection, Cambridge, 1987.
[26] See Hans-Peter Gasser “A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct”, *International Review of the Red Cross*, 1988, pp. 38-58. -see also the *Declaration of Minimum Humanitarian Standards* (of 2.12.1990), Turku/Abo 1991, also published as a UN document: E/CN.4/Sub. 2/1991/55
[27] See "ICRC Protection and Assistance Activities In Situations not Covered by International Humanitarian Law", In*: International Review of the Red Cross* (1988), pp. 9-37
[28] Statutes of the Red Cross and Red Crescent Movement, Article 5.2(d) and 5.3.

be curtailed in wartime (under the provisions relating to states of emergency) is proof that human rights guarantees are incomplete. Nevertheless, the well developed international monitoring procedures and implementation mechanisms of human rights treaties supplement the more "indirect" effects of the law of Geneva. Furthermore, the more visible campaigns for the protection of human rights can facilitate the work of humanitarian organizations in areas of conflict. Humanitarian law and human rights have separate existence. In the particularly tragic circumstances of civil war, they must complement each other and thus provide better protection for the victims.

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: ASPECI'S OF CONTROL AND REPRESSION

The purpose of a legal provision is to influence human behaviour. Every norm is an order: do this in this way, do not do that. Such commands or prohibitions- in other words, this standard of behaviour- must then be implemented. This Is as true for rules of humanitarian law as it is for national law, e.g., a penal code or road traffic regulations. The fact that, in international humanitarian law, the rule applies in the first place to sovereign States does not alter the principle: that rule imposes an obligation.

The chief difference between domestic law and international law is to be found at the level of implementation, i.e., how application is monitored and infringements repressed. While a State has machinery for implementing the law in its territory (administration, law courts, police force, etc.), the international community is composed of a great number of individual States, on the one hand, and international organizations, such as the United Nations, on the other. They are together responsible for implementing international humanitarian law. Yet the means of imposing their authority is limited.

Is international humanitarian law at all respected? If the media are to be believed, there is a distressing lack of respect for the law. But first impressions can be misleading: the public is regularly informed of grave or other breaches of humanitarian law; but when the provisions of this law are observed, nothing is heard. Yet every time someone reaches out towards a wounded enemy, every time a prisoner is properly treated or civilians are spared during a military operation, standards of humanitarian law are being observed. This type of lawful conduct is very often taken for granted; it has become routine, as indeed it should.

Humanitarian law is respected not only because this is required by treaties between States, by domestic penal law or by military orders, but also for other reasons which have little to do with legal arguments. Indeed, in addition to legal constraints, there are other influences acting on the behaviour of armed forces, police services and other national bodies. These are realistic considerations based on arguments of a political nature. For example, as long as a party to the conflict must reckon that, if its own armed forces violate humanitarian law, then the other side will do the same, that party will respect the law in its own interests, in an effort to keep its own nationals from harm. The implementation of humanitarian law in practice depends to a large extent on expectations based on the notion of reciprocity. In political terms, this means that any party involved in a conflict will keep to its obligations because- and as long as it expects the same to be done by the other side. Mutual expectations or considerations of reciprocity are powerful stimuli in favour of the observance of humanitarian law, even though the obligations are legally absolute, and the absence of reciprocity can never justify the violation of humanitarian rules.

Another factor favouring observance of humanitarian law is public opinion. Few governments welcome a "bad press", and so public opinion, national and international, is able to influence those in office.

At a very different level is the following reasoning: military leaders know very well that a murdering and plundering army is not worth much in military terms. In other words, respect for humanitarian rules is an element of discipline, which is an essential characteristic of an

effective military unit. To put it simply, observance of international humanitarian law is not merely a burdensome duty, it is clearly in the interests of commanders of the armed forces.

Humanitarian law must stand the test of practical implementation, otherwise it is meaningless. The prospects of success are greater if the rules to be applied take into account not only humanitarian objectives but also military requirements. For international humanitarian law is not intended to make war impossible, but to set limits to it. The law as it stands today, as codified in the Geneva Conventions and the two Additional Protocols, takes military considerations into account. The universal adoption of the law of Geneva by States testifies to this.

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention/Protocol in all circumstances. " These are the words of Article 1 common to the four Geneva Conventions of 1949 and to Additional Protocol I. To facilitate comprehension, we may classify the resulting commitments as follows:

- commitments to be fulfilled irrespective of any state of conflict;
- obligations that must be met by the parties' to the conflict in the event of an armed conflict;
- sanctions in the event of breaches of commitments under humanitarian law;
- role of third-party States not involved in the conflict: the notion of collective responsibility for the observance of international humanitarian law.

A. Obligations in time of peace

The conditions should already be created in peacetime to ensure that in armed confrontations the obligations of humanitarian law can be fulfilled.[1] Military preparedness consequently presupposes the ability to pursue military operations while respecting the limitations set by international humanitarian law. All authorities and persons that are in any way concerned with the Geneva Conventions and the Additional Protocols must therefore be trained for their duties. Civil authorities and all ranks of the armed forces are likewise affected.

To ensure the observance of humanitarian law, the following measures must be taken:

-*Enactment of laws, regulations and other instructions*: first of all come the legal provisions for penalizing breaches of the Geneva Conventions and Additional Protocol 1.[2] Prohibited acts must be incorporated into domestic penal law or disciplinary regulations applicable to the armed forces, and penalties for breaches laid down. Furthermore, prosecuting officers and courts must be designated.

[1] Under the heading "Measures for execution"', Article 80(1) of Protocoll states: .'The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol,"

[2] First Convention, Article 49; Second Convention, Article SO; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 80

-*Training of armed forces* :[3] international humanitarian law will be observed only by those who know it. It may sound like a platitude to say this, but the fact is all too often ignored. Therefore manuals, instructions and teaching aids for training members of the added forces are of central importance. The texts of the international conventions must thus be translated into a language that the target group at which it is aimed understands. This means also that humanitarian aw must be built into the instruction in such a way that its observance becomes second nature, a natural reflex. Suitable teaching methods must ensure genuine training in the most important obligations. Combat personnel must know not only how to handle their weapons, they must be completely aware of what they may and may not do with them.

The knowledge required depends on the rank and duties of the individual members of the added forces. While the ordinary combatant needs to master a few simply worded basic rules -e.g., how to behave towards an enemy who surrenders, or towards a civilian -those in the rear who have to deal with prisoners need to know much more. Commanding officers and those on the operational staff must be conversant with the rules that set limits to the conduct of military operations. Moreover, they should be supported at the higher staff levels by special legal advisers.[4]

The same applies to those civilians who are in any way concerned with the application of international humanitarian law, for example, members of the government or other national authorities, public servants or magistrates.

It is extremely important to disseminate knowledge of humanitarian law authoritatively in time of peace, since this is the precondition for respect of its obligations in time of war.

-*Material preparations*: arrangements must be made to guarantee respect for protected persons and objects. These include, for instance, the marking of hospitals and ambulances with the red cross of the red crescent. Hospital ships must be marked with the protective emblem and equipped with the prescribed radio identification signal. Medical aircraft must be provided, in addition, with a blue light signal. In general, States party to the 'Conventions must at least give a potential aggressor the opportunity to distinguish between military objectives and protected persons and objects. This means, for example, that hospitals should not be built in the vicinity of a major military facility, and that military objectives should not be sited close to populated areas.

B. Obligations in the event of war

During an armed conflict, the provisions of international humanitarian law in its entirety must be observed from the onset of hostilities. It is not necessary for war to be declared or for there to be a recognized state of war for this law to be applicable to the belligerents. Humanitarian law does not, of course, suffer the fate of those treaties and agreements that lapse, either wholly or in part, when war breaks out, since it is expressly conceived for the special situation of armed conflict. In other words, a state of war is no reason not to abide by existing legal commitments (as may be permissible, for example, for large areas of human rights law in a state of emergency). This is true for the law applicable in international conflicts and that applicable in non-international conflicts. Nor can one of the parties repudiate its obligations

[3] First Convention, Article 41; Second Convention, Article 48; Third Convention, Article 121; Fourth Convention, Article 144; Prot(KX)J I, Article 83; Protocol II, Article 19
[4] Protocol 1, Article 82.

by denouncing the humanitarian law conventions, since any denunciation would take effect only after the war was over.[5]

The first obligation of a party to the conflict after the outbreak of war is to appoint a Protecting Power.[6] A Protecting Power is a (neutral) State not taking part in the conflict which is mandated by one of the parties to the conflict (with the agreement of the other side) to protect its humanitarian interests in the conflict; in so doing it also helps to implement international humanitarian law.[7] The Geneva Conventions and Additional Protocol I attribute to the Protecting Power a number of tasks of a humanitarian nature, the most important of which are visits to prisoner-of-war[8]) and internment[9] camps and work on behalf of civilians in the power of the enemy (especially in occupied territories).[10]

Representatives of the Protecting Power must be given access to all places where there may be protected persons, so as to obtain a firsthand impression of how the law of Geneva is respected in practice. Independently of this right of visit attributed to the Protecting Power, the ICRC is entitled to visit places of detention and internment.[11]

In the years since the Second World War, however, parties involved in a conflict have shown that they are no longer willing to nominate Protecting Powers, as prescribed by international law.[12] The main objection to the system of Protecting Powers appears to be the fear that the appointment of a Protecting Power might have unacceptable legal consequences (such as, for example, recognition of the adverse party or of the international character of a conflict). That fear is misplaced. The institution of Protecting Powers was introduced into the system of international humanitarian law to facilitate the application of obligations under international humanitarian law. The appointment of a Protecting Power should therefore not give rise to interference extraneous to the matter at hand.

The institution of the Protecting Power reaches far back in history. Now he rules relating to the designation of these powers and to their duties in wartime Ire incorporated into the Geneva Conventions.[13] Additional Protocol I has laid down rules of procedure intended to facilitate the appointment of a Protecting Power.[14] Under these rules, the ICRC shall offer its services to the parties to a conflict and urge them to designate Protecting Powers, in mutual agreement. If no Protecting Powers are designated in accordance with the procedure, each of the parties should entrust a third-party State, unilaterally, with the tasks of the Protecting Power.[15] If this also fails to be done, then "a humanitarian organization, such as the International Committee of the Red Cross," shall assume the *humanitarian* tasks of the Protecting Power.[16]

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[5] First Convention, Article 63; Second Convention, Article 62; Third Convention, Article 142; Fourth Convention, Article 158; Protocol 1, Article 99; Protocol II, Article 25
[6] First to Third Conventions, Article 8, Fourth Convention, Article 9.
[7] See Gerlinde Raub, "Protecting Power", in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol.9, 1986, pp. 314-320.
[8] Third Convention, Article 126
[9] Fourth Convention, Article 143
[10] *Ibid*
[11] Third Convention, Article 126(4); Fourth Convention, Article 143(5).
[12] See Francois Bugnion, "Le droit humanitaire applicable aux conflits armes intemationaux, Le problem du controle", *in Annaels d'etude.internationales*, Geneva, 1977, pp. 29-61.
[13] See footnote 218.
[14] Protocol I, Article 5
[15] . First to Third Conventions, Article 10(2); Fourth Convention, Article 11(2).
[16] First to Third Conventions, Article 10(3); Fourth Convenlion, Article 11(3); Protocol I, Article 5(4).

In the various conflicts since 1945, it has always been the ICRC that has leapt into the breach, yet without ever having been designated explicitly as a substitute for the Protecting Power. In contrast to a Protecting Power, the ICRC never acts as the agent of one of the parties to the conflict (to which it would have to be accountable); the Committee always acts in its own name. The ICRC has indeed received from the community of States as a whole the mandate to devote itself to ensuring respect for the obligations of a humanitarian kind arising from international law applicable in armed conflicts. This mandate derives from international law, i.e., the Geneva Conventions and their Additional Protocols. ICRC delegates, moreover, are entitled to visit all places in which there are protected persons.[17] In any case, the Committee has a comprehensive right of initiative in humanitarian matters.[18]

The Protecting Powers should play an essential role in implementing international humanitarian law in conflict. It is regrettable that the system does not fulfil this role today. As frequently occurs in such situations, practice has developed a substitute for facilitating the implementation of international humanitarian law: the activities of the ICRC

It goes without saying that in the event of war the parties to the conflict must take all measures within their territory to enable them to meet their obligations, supported by the preparatory measures taken in time of peace.[19] This holds true in particular for members of the armed forces, who are called upon to apply the knowledge and the skills acquired during training. It must be emphasized once again that respect for humanitarian rules forms part of discipline.

What are the consequences of a breach of international humanitarian law? What steps can be taken to repress such a breach or to prevent further unlawful acts?

C. Breaches of international humanitarian law

The non-observance of a provision of international humanitarian law has repercussions both at the national level and internationally. These must be considered separately.

a. Criminal proceedings before national courts

The Geneva Conventions and Additional Protocol I stipulate that certain particularly serious violations committed in the course of an international armed conflict must be considered as criminal offences. They list a number of acts that should be punished as grave breaches.[20] Among these are wilful killing, torture or other forms of inhumane treatment of protected persons (e.g., prisoners of war, civilian internees, or inhabitants of occupied territory), or attacks on the civilian population or individual civilians resulting in death or serious injury to the body or health of the victim. Grave breaches of this kind are considered war crimes.[21]

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[17] See footnote 223

[18] First to Third Conventions, Article 9; Fourth Convention, Article 10; on the duties of the ICRC in the event of conflict, see also Protocol 1, Article 81

[19] See Protocol I, Article 80(2): High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol. and shall supervise their execution

[20] First Convention. Articles 49 and 50; Second Convention. Articles 50 and 51; Third Convention. Articles129 and 130; Fourth Convention. Article 146 .and 147; Protocol 1, Article 85

[21] See Protocol I. Article 85(5)

In the event of a suspected grave breach of the Conventions or the Additional Protocol, criminal proceedings must be brought against the suspect, unless the person is handed over to a third-party state which then institutes penal proceedings (principle of *aut dedere aut judicare*) States party to the Conventions are supposed to take penal or disciplinary action also in the case of less serious breaches of humanitarian law. Since criminal proceedings can only take place if domestic legislation penalizes the act in question, defines punishment and lays down the procedure to be followed, it is essential for the relevant laws to be enacted already in peacetime. As mentioned above, this is one of the obligations of each State party to the Conventions.[22]

International humanitarian law has thus established individual responsibility, with penal sanctions, for observance of its obligations. This responsibility applies to each individual, who must answer for his conduct. Special responsibility rests on the shoulders of military commanders, who are obliged to do everything possible to prevent breaches of the. Conventions and of Additional Protocol I in the area under their command.[23] If a commander neglects to give the necessary instructions or permits shortcomings in the required supervision, then he must answcr under criminal law if grave breaches occur in his area of command.[24]

Difficult problems arise when .the defendant pleads the exception of superior *order*. In such a case, a person accused of a grave breach does not deny the offence, but states that he acted under orders from a superior, and that therefore he should not be punished. Many of the defendants in the trials following the end of the Second World War pleaded thus. The London Four-Power Agreement (of 8 August 1945), which established the International Military Tribunal to judge major war criminals, laid down, however, that even those persons who acted under orders were responsible for their acts.[25]

In connection with the judgments of the Nuremberg Court, there has grown up a rule of customary law which has influenced domestic legal systems. According to this principle, everyone is personally responsible for his actions, even when acting on orders. Yet a subordinate may proceed on the assumption that any order he is given by a superior is legal. However, if it is clear to the subordinate that the order would result in a breach of the law, then he must refuse to obey it, but only if the possibility of doing so really exists. If he nevertheless carries out the order and in so doing commits a breach of international humanitarian law, then he must accept the legal consequences. He may be given the benefit of mitigating circumstances.[26]

Naturally, a superior who gives an unlawful order is liable to penal prosecution. The Statute of the Nuremberg Court stated explicitly that even the Head of State may have to answer for his actions.

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[22] See above. Section 6 a
[23] Protocol 1, Article 87
[24] Protocol 1, Article 86(2).
[25] See Hans-Heinrich Jescheck, ."war Crimes", in Bernhardt (ed.), *Encyclopedia of Public international Law*, Vol.4, 1982, p.297
[26] The Diplomatic Conference of 1974-1977 could not agree on a generally acceptable draft provision, which is why Protocol I has no rule on superior orders. Customary law retains its validity

Grave breaches of international humanitarian law (or war crimes) may be punished not only by the detaining power but also by any State in whose power the suspected culprit may be.[27] This is known as universal jurisdiction. States must also afford each other assistance, for example, by handing over a suspect to another State and thereby waiving the right to try him, or by providing evidence.[28] Finally, reference should be made to the provisions relating to penal procedure.[29] The law of Geneva is intended to ensure the. rights of suspects and of defendants.

As of now, there is no international criminal court. The decision of the Security Council of 22 February 1993 to establish such a tribunal for Yugoslavia is an important step toward realising criminal responsibility on the international level.

b. International responsibility of States

Breaches of international humanitarian law by members of the armed forces of a State entail the responsibility in international law of the State concerned. This means that the State must answer to the injured State for the consequences of each and every case of unlawful conduct by each and every member of its armed forces.[30] The offending State must restore the legal situation and possibly, pay damages to the injured State.[31]

What means of redress are open to the injured State? It can issue a protest and df,mand of the other party to the conflict to refrain from further breaches. The Protecting Power can also take action in this sense.[32] The injured State can in any case demand an inquiry.[33] Such an inquiry, however, requires the consent of all those involved, i.e., in particular the accused party, and this has never yet been achieved. Protocol I has introduced a welcome innovation, based on the notion of third party mediation: the International Fact-Finding Commission.

The *International Fact-Finding Commission*, referred to in Article 90 of Additional Protocol has the task, on request, to clarify the facts alleged to be a grave breach of the Conventions and the Protocol, or another serious violation of international humanitarian law. Every State party to the Conventions may, on ratification of Protocol I or at a later date, declare that it recognizes *ipso facto* the competence of the Commission; to date, 33 States have done so.[34]In a specific case a State may also recognize the Commission's competence on an *ad hoc* basis.

The Commission is composed of fifteen persons "of high moral standing and acknowledged impartiality" appointed by the parties to Protocol I which have recognized the jurisdiction of the Commission. It has two functions. One is to enquire into any facts alleged to be a grave

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[27] "Each High Contracting Party shall be under the obligation to search for persons .." First Convention, Article 49(2); Second Convention, Article 50(2); Third Convention, Article 129(2); Fourth Convention, Article 146(2).
[28] Protocol I, Article 88
[29] Third Convention, Articles 129(4) and 105 to 108; Fourth Convention, Article 146(4), with a reference to the Third Convention Articles 105 to 108.
[30] From the abundant literature. See, for Example, Luigi Condorelli, "L'imputation a l'Etat d'un fait internationalement illicite: solutions classiques et nouvelecs tendances". RCADI, Vol.189 VI. 11184. pp.145-149
[31] Protocol I. Article 91
[32] See footnote 218
[33] First Convention, Article 52; Second Convention. Article 53; Third Convention. Article 132; Fourth Convention, Article 149.
[34] Position on 31 December 1992. After reception of the 2Oth declaration the Commission was established on 25 June 1991. (As on Aug. 31. 1996, 48 states have made the declarations).

breach. The other is to offer its services to the parties to restore an attitude of respect for the humanitarian treaties. It is not the duty of the Commission to give a legal opinion on the situation, i.e., the lawfulness or otherwise of the conduct in question. Despite his limitation, the International Fact-Finding Commission will undoubtedly make a valuable contribution to improving the protection of human rights in war.

The injured party may also turn to the ICRC, requesting it, as part of its humanitarian work, to urge the adverse party to observe the rules of humanitarian law. It can likewise appeal to the United Nations and through it to the whole community of States. Lastly, it can appeal to the International Court of Justice in The Hague, but only if the accused State recognizes the Court's competence.

In conclusion, we should recall one way in which the injured States may not react. In contrast to the possibility normally available under international treaty law, a State cannot refuse to meet its own obligations under the humanitarian conventions on the grounds that the other side has grossly violated its obligations.[35] The obligations derived from international humanitarian law are not subject to the condition of reciprocity, but must be respected in all circumstances and unconditionally by each contracting party.

The Geneva Conventions and the Protocols may, however, be denounced like any other international treaty. Denunciation would in no circumstances take effect until the end of the conflict.[36] It is of course not possible to denounce customary law rules which are part of *jus cogens*, since such rules are not at the discretion of individual States.

c. Reprisals

The various means of redress open to injured States should not lead us to overlook the fact that international humanitarian law -like large areas of international law in general -is still very far from being a system of law that can guara.1tee peaceful implementation of its obligations. Normally the consent of the accused State is required for any fact-finding or arbitration procedure to be carried out when a breach of the law is claimed. Such consent is not likely to be forthcoming in the highly emotional climate of a war. For this reason, the original, "primitive" way of enforcing a legal claim is still of great importance: this is self-help. A typical form of self-help is reprisals.[37]

By reprisals is meant a usually unlawful and prohibited form of conduct, which is permitted in certain conditions, provided that its aim is to stop illegal conduct by the enemy and tu bring him to behave in accordance with the law. Reprisals must stop as soon as violations cease. In any case, reprisals are permitted only in the event of grave offences, and only as a last resort when all other measures have failed to achieve their aim, which is to cause the adversary to respect his obligations. The expected damage must be in reasonable proportion to the original breach of the law. Finally, reprisals may be ordered only by the highest political authorities of the State concerned.

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[35] See Vienna Convention on the Law of Treaties, 23 May 1969, Article 60(5).

[36] . First Convention, Article 63; Second Convention, Article 62; Third Convention, Article 142; Fourth Convention, Article 158

[37] . See Frits Kalshoven, *Belligerent Reprisals*, Leyden/Geneva, 1971, and *ICRC Commentary on the Additional Protocols*, para. 3423-3459

Humanitarian law now contains a great number of rules that are absolute, i.e., that cannot be set aside by retaliatory action. For example, it is prohibited to carry out reprisals against the wounded on the battlefield[38] or the shipwrecked,[39] against prisoners of war,252[40] against the civilian population in general,[41] or against hospitals or medical transports[42] and the like. Under Additional Protocol I, moreover, attacks by way of reprisals on residential areas, i.e., on the civilian population, are prohibited without exception [43]

Accordingly, reprisals are in themselves unlawful conduct, to which resort may be made in strictly circumscribed conditions, in order to put an end to breaches of the law by the other side. The extensive prohibition of reprisals in Additional Protocol I was one of the most controversial innovations of the law of 1977.[44] Some saw the threat of reprisals as above all a means of deterrence. The enemy should realize that he will pay dearly for any breach of the rules. This should give him an incentive to respect the obligations undertaken. Against this, it was said that on moral grounds it could not be proposed that the civilian population should be made the victim for breaches of law committed by the government or the armed forces. Lastly, it was pointed out, with examples at hand (e.g., from the Second World War), that reprisals always led to counter-reprisals. They did not reduce violence, but on the contrary escalated the use of violence and thereby ran counter to the avowed objective.

To summarize a difficult point, it may be stated that reprisals against human beings under the control of the enemy can never be permitted. Even if an attack on the civilian population were considered permissible by way of reprisal, such a measure could be used only as a last resort, e.g., to avert a calamity. It should be recalled that reprisals may never be employed to punish the adversary or to satisfy the desire for revenge

D. Collective responsibility for the implementation of humanitarian law

In its judgment in the case of *Nicaragua vs. the United States*, the International Court of Justice in The Hague stated that the four Geneva Conventions were in certain respects the extension of the general principles of international humanitarian law and, in another respect, simply the expression of those principles.[45] The object of the principles is the protection of the human being and of inherent human dignity. They are therefore not concerned with the interests of the parties to the conflict: what is at stake are general considerations of humanity. Grave breaches of the protection provided by humanitarian law are therefore of concern to more than just the parties directly involved in a conflict; they affect all States bound by the humanitarian conventions.

Article 1 common to the four Geneva Conventions and to Additional Protocol 1 draws the logical conclusion and enjoins the contracting parties not only to respect the individual Conventions and the Protocol, but also to "ensure respect" for them. Quite clearly, States are thus collectively obliged to assume responsibility for compliance with international humanitarian law.

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[38] First Convention, Article 46
[39] Second Convention, Article 47
[40] Third Convention, Article 13(3).
[41] Fourth Convention, Article 33(3).
[42] See footnotes 250 and 251
[43] Protocol I, Articles 51(6) and 52(1).
[44] See *lCRC Commentary on the Additional Protocols*, para. 3423-3459
[45] See footnote 185

There is little in the treaties to indicate how a third-party State not implicated in a conflict can fulfil this responsibility. It has been shown that under the principle of universal jurisdiction, in the case of penal repression of grave breaches of the Conventions or Additional Protocol I, a third-party State is obliged to bring a suspect before its own court.[46] A new provision in Protocol I, which calls on the contracting parties to act "jointly or individually, in cooperation with the United Nations", goes one step further.[47] This Article confirms an established State practice. Accordingly, any third-party State may lodge a complaint with a party to the conflict having committed breaches of international humanitarian law. This may be done through diplomatic channels, i.e., in confidential communications between governments, or by means of a public protest. The ICRC has repeatedly addressed itself to all the parties to the Geneva Conventions, urging them to make the parties to a conflict observe international humanitarian law.

It is no doubt within the competence of the United Nations to act in the event of breaches of international humanitarian law. As a rule, the UN is in any case concerned in some way with the armed conflict that provides the opportunity for the breach of law. Respect for international humanitarian law by the parties to that conflict is thus but one aspect of all the issues raised by confrontation. It is to be hoped that the United Nations, as the voice of the international community, will in future give still more attention to the observation of international humanitarian law. Moreover, the ICRC, with its great experience in humanitarian diplomacy, deserves the support of all States in its activities in areas of conflict. The effort is worthwhile: the goal is human survival in war and the protection of human dignity.

[46] . See above, Section 6.C.a

[47] Protocol 1, Article 89. See Hans-Peter Gasser, "Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations", Hazel Fox and Michael Meyer (eds.), Effecting Compliance, 1993, pp.15-49

Appendix

1. Major treaties on international humanitarian law in chronological order

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. St. Petersburg, 29 November/ 11 December 1868
- Declaration concerning Expanding Bullets ("dum-dum bullets"). The Hague, 29 July 1899
- Convention (IV) respecting the Laws and Customs of~War on Land and annexed Regulations on the Laws and Customs of War on Land. The Hague, 18 October 190
- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva 17 June 1925
- Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948
- Convention (I) for the Amelioration of the Condition of Wounded andSick in Armed Forces in the Field. Geneva, 12 August 1949
- Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. Geneva, 12 August 1949
- Convention (III) relative to the Treatment of Prisoners of War. Geneva 12 August 1949
- Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
- Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954
- Convention on the Prohibition of the Development, Production an Stockpiling .of Bacteriological (Biological) and Toxin Weapons and of their Destruction. 10 April 1972
- Convention on the Prohibition of Military or any Other Hostile Use (Environmental Modification Techniques. 10 December 1976
- Protocol Additional to the Geneva Conventions of 12 August 1949, al1 relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977
- Protocol Additional to the Geneva Conventions of 12 August 1949. and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11), 8 June 1977
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. 10 October 1980
- Protocol on Non-Detectable Fragments (Protocol I)
- Protocol on Prohibitions or Restrictions on the Use' of Mines, Booby-Traps and Other Devices (Protocol II)
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)

2. Text editions

- Schindler/Toman, *The Laws of Armed Conflicts*, 3rd ed., Geneva 1988- most comprehensive collection of treaties and other texts on international humanitarian law Roberts/Guelf, *Documents on the Laws of War, 2nd ed*., Oxford 1989

Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts

Stephen P. Marks

The notion of emergency situations and derogations from fundamental principles when public order so requires is common to all legal systems, including the system of the international protection of human rights.

This chapter concerns the problem of human rights in emergency situations with reference to three types of such situations, each different from the other but all sharing certain elements which reduce human rights to their most precarious level.

Since the situations to be examined are fundamentally different from each other, it is best to define beforehand what is meant by "emergency" situations. Let us first see what the dictionaries have to say.

According to one dictionary[i] an "emergency" may be defined as a "sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency, pressing necessity. " Emergency is an unforeseen combination of circumstances that calls for immediate action. From this definition two ideas emerge: the situations to be dealt with here are not "normal", "ordinary" 'situations, commonly to be met with in the implementation of human rights. They are consequently preceded or followed by situations regarded as normal, hence their *temporary* character. In addition, as the legal analysis of the consequences that are drawn from such situations shows, they do not call into question the *principles*, which remain valid.

Another dictionary[ii] defines "emergency" as a "political term, to describe a condition approximating to that of war". This brings out even more clearly what is meant in this chapter by "exceptional circumstances": the extreme emergency situation is that of war and, the closer the emergency situation considered is to war , the more the difficulties encountered in respect of the protection of human rights are the same as those prevailing in time of war .

In short, an "emergency situation" will be understood here as one resulting from temporary conditions which place institutions of the State in a precarious position and which leads the authorities to feel justified in suspending the application of certain principles.

So long as the planet's resources are not distributed in accordance with each people's needs, the most deprived countries will have to contend with exceptional circumstances of "under-development"[iii]. The leaders of such countries often consider that the enjoyment of certain human rights is, in such circumstances, a luxury that their peoples

cannot afford until a more or less long time has elapsed. Under-development thus constitutes the first emergency situation to be examined.

Earthquakes, famines, fires, floods and other "natural" catastrophes constitute other situations in which certain of the most fundamental rights (the right to life, the right to an adequate standard of living) may no longer be ensured by the authorities of a country, who feel it necessary to discontinue the application of other rights in order to protect the most essential rights. This is the second emergency situation which will be dealt with here.

Lastly, the third emergency situation is that of internal disturbances and armed conflicts, the body of law appertaining to which is, as we shall see, by
far the most developed.

1. EMERGENCY ARISING FROM ECONOMIC AND SOCIAL CONDITIONS AS A WHOLE

> Many of our compatriots suffer from permanent malnutrition and from all the at-tendant mental and physical diseases; their poverty and their ignorance make all talk of human freedom derisory .
>
> Julius Nyerere ,

The economic and social conditions of those countries referred to as "developing countries" are characterized by poverty, disease, a runaway increase in population, inequalities and a whole series of factors which are measured statistically in relation to the so-called "developed countries". According to such criteria as *per capita* income, there are today over 800 million absolute poor in the world. The quantitative approach is open to criticism at two levels, the economic and the semantic: at the economic level because it does not take into account the differences in kind, and in particular the differences in structure, between the economically developed countries, the economy of which usually forms a whole in which all the elements interlock with each other, and the materially backward countries, the economy of which is disjointed, because it is formed of juxtaposed economies, and dominated, particularly through trade and as a result of movements in capital; and at the semantic level because development cannot be understood solely in terms of economic growth, an increase in productivity, national income availability of consumer goods, etc. , but must be viewed in the specific context of each society, of each national situation, and encompass the most varied aspects of social and cultural life[iv]. Thus the economically "developed" countries are often "under-developed" from the point of view of quality of life, measured in terms of participation by all social groups in the active life of the nation and the effort to bring about full development of each human being, and the equilibrium between man and his natural environment. Thus understood, "development" calls for changes, both in the materially

backward countries and in the economically advanced countries. The Executive Board of Unesco, in 1969, clearly and eloquently expressed man's role in development and the link the latter has with human rights in the following terms:

"Development is meaningful only if man, who is both its instrument and beneficiary., is also its justification and end. It must be integrated and harmonized: in other words it just permit the full development of the human being on the spiritual, moral and material level, thus ensuring the rights of man in society, through respect for the Universal Declaration of Human Rights".[v]

More recently, Unesco, in the introduction to the chapter in its Medium Term Plan devoted to "Man as the Centre of Development", explained the links between peace, human rights and development in the following way:

"Conditions will be favourable to development only if there is a general climate of peace conducive to the mobilization of all available resources for the achievement of economic growth and social well-being, and if the dignity of the individual and his place and role within the community are given due recognition by the full observance of human rights. But the converse is equally true: the promotion of human rights and the reinforcement of peace are inconceivable without an improvement in the material living conditions of the population at large, which can only be achieved by development. The necessary implication is not perhaps that all men must immediately be able to enjoy the fruits of development and of effective equality of circumstances and of opportunity, but at least that a movement to improve the lot of all must be launched, that the most obvious ills must be remedied, that efforts must be made to improve living conditions in accordance with the requirements of justice, that peoples must have a share in decisions concerning the paths to be followed in their development and must themselves work for it. and that new horizons with tangible prospects of improvement must be opened up for them".[vi]

It is important to reflect seriously on the meaning of development which is more than a question of economic parameters-in order to understand the problems of human rights in the developing countries. Under-development, understood holistically, is of course the result of the internal structures of the countries concerned, but also and above all of the structural relations between the developed countries of the "centre" (North) and the under-developed countries of the "periphery" (South). Under-development consequently has historical and structural causes which must be understood before a judgment can be made of the state of human rights in those countries. The state of these rights is necessarily bound up with the structures and mechanisms involved in the exploitation of resources, the domestic and international market, and political and military alliances at the world level. In any case, most developing countries and particularly the poorest among them do not exercise full sovereignty over their resources, do not control the price of the raw materials that they sell to the industrial countries and even less the price of the manufactured goods that they have to buy, and their economic infrastructure has been developed as a result of either direct foreign domination (through colonialism or occupation) or indirect foreign domination by way, for instance, of foreign landowners.[vii] The form of this domination varies in time and in space but it is always present when one takes a close look at the position of the developing countries and it is inseparable from the problem of human rights.

This being so, it is understandable that the self-determination of countries and peoples and sovereignty over their natural resources should be regarded as fundamental principles of human rights, set forth in Article 1 of the two United Nations Covenants and analyzed elsewhere in the present work.[viii] It can be said that the elimination of the fundamental causes of under-development is itself a human right. However, it is not only the elimination of colonialism and neo-colonialism which constitutes the link between human rights and development: the right to development has itself been considered as a human right.[ix] Indeed the existence of this right has been affirmed by the Commission on Human Rights of the UN, particularly in Resolution 4 (XXXIII), 4 and 5 (XXXV) and 6 (XXXVI), and by the General Conference of Unesco, particularly in Article 3 of the Declaration on Race and Racial Prejudice. The General Assembly adopted the Commission's position on the existence of this right in Resolution 34/46 of 7 December 1979.

It is not the purpose of this chapter to analyze the interrelations between development and human rights,[x] nor the right to development as a human right; but far more modestly to raise the question as to whether and to what extent under-development, in international human rights law, constitutes an emergency situation giving rise to the application of special rules relating to the implementation of human rights?

The basic texts

In Chapter IX of the Charter of the United Nations on international economic and social co-operation, the goals of (a) higher standards of living, full employment and (b) conditions of economic and social progress and development are placed before (c) universal respect for, and observance of human rights and fundamental freedoms among the objectives to be promoted by the United Nations "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations". Admittedly, Article 55 does not establish a hierarchy between the three paragraphs (economic and social development, cultural and education co-operation and respect for human rights), but it seems clear that the first is at least as important as the other two.

It was indeed on account of Article 55(a) that the drafters of the Universal Declaration of Human Rights added to the draft Preamble a clause according to which the peoples of the United Nations "have determined to promote social progress and better standards of life in larger freedom"[xi] The view was not taken, however, that for the purposes of human rights, a distinction between States according to their level of development belonged in a declaration proclaimed to be "a common standard of achievement for all peoples and all nations" and which was to be implemented by "progressive measures, national and international".

Moreover, the Declaration contains, in Article 29 (7), a clause on the limitation to which human rights shall be subject and which must be determined by law for the purpose of

meeting, *inter alia*, the just requirements of "morality. ..and the general welfare in a democratic society".[xii] During the discussion on this paragraph, Commission III of the General Assembly seems to have interpreted the words "the general welfare" as signifying economic and social requirements.[xiii] Although the idea of an emergency situation arising from social and economic conditions may be considered to originate with article 29 of the Universal Declaration, the developing countries were not being referred to specifically.

It was necessary to wait for the International Covenant on Economic, Social and Cultural Rights of 1966[xiv] for this idea to be clarified, but only as regards the status of aliens. Thus, Article 2, paragraph 3, of the Covenant reads: "Developing countries, with dye regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

The place given to this idea, and to the rights to self-determination and to sovereignty over natural resources in the Covenant, reflects the shift in the power base of the countries involved between 1948 (the Declaration) and 1966 (the Covenants). This evolution was subsequently to become far more rapid and the notion of an emergency situation in the sense understood in this chapter was quickly to emerge.

On the occasion of the International Conference on Human Rights, convened by the General Assembly to mark the twentieth anniversary of the Universal Declaration of Human Rights[xv] and held in Teheran from 22 April to 13 May 1968, a special study on "Some Economic Foundations of Human Rights" was prepared by Mr. Jose Figueres.[xvi] On the basis of this study, the Conference adopted Resolution XVII entitled "Economic development and
human rights" which includes the following paragraphs:

"*The International Conference on Human Rights,*
Believing that the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights and that there is a profound inter-connection between the realization of human rights and economic development,

Noting that the vast majority of mankind continues to live in poverty, suffer from squalor, disease and illiteracy and thus leads a sub-human existence, constituting in itself a denial of human dignity, Noting with deep concern the ever-widening gap between the standards of living in the economically developed and developing countries,

Recognizing that universal enjoyment of human rights and fundamental freedoms would remain a pious hope unless the international community succeeds in narrowing this gap,

Considering the close relationship between the terms of international trade and other economic, fiscal and monetary measures, national or international, on the one hand, and the possibility of narrowing this gap by rapid economic development, on the other,"

The central idea of this resolution is taken up again in the "Proclamation of Tehran", adopted at the closure of the Conference, which stipulates in operative paragraphs 12 and 13:

"12. The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community.
...

13. Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development".

The "inherent correlation between .the enjoyment of human rights and economic development" referred to in Resolution XVII and the obstacle constituted by the gap between economically developed and under-developed countries is now at the centre of the reflections on the implementation of human rights at the United Nations and elsewhere.[xvii] The implications of the argument that under-development constitutes an emergency situation concern not only civil and political rights-but also economic, social and cultural rights-for the enjoyment of the former are not possible without that of the latter. Indeed, after considering a study on economic and social rights,[xviii] the Economic and Social Council affirmed "its conviction that early realization of economic, social and cultural rights can be achieved only if all countries and peoples are able to attain an adequate level of economic growth and social development and if all countries institute all necessary measures with a view to eliminating inequality in income distribution and social services in accordance with the International Development Strategy for the Second United Nations Development Decade".[xix]

Although the text relating to the International Development Strategy[xx] indicates with a certain precision the goals and objectives pursued together with measures calculated "to create in the world a more just and more rational economic and social order", it was soon superseded by decisions which go a great deal further in attempting to identify the causes of, and solutions to, under-development in the world and which tell us more about the links between development and the protection of human rights.

The most far reaching event in this regard was the Sixth Special Session of Human Rights the United Nations General Assembly, which adopted the Declaration and Programme of Action on the *establishment of a new international economic order* (3202 (S- VI). As regards the causes of under-development, the Declaration unhesitatingly states that "the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved". It recalls that the present system "was established at a time when most of the developing countries did not even exist as independent States" and is therefore "in direct conflict with the current developments in international political and economic relations". From the relation of interdependence existing among all the members of the world community, it draws the conclusion that the prosperity of all depends on that of the constituent elements and that it is consequently necessary to put an

end to the imbalance existing between developed countries and under-developed countries. Further to these decisions, and in conformity with Section VI of the Programme of Action, the General Assembly adopted, at is 29th session, the *"Charter of the Economic Rights and Duties of States"*[xxi] as the "first step in the codification and developments of the matter". The Charter begins by reaffirming the "fundamentals of international economic relations" .which consists of fifteen principles including "respect for human rights and fundamental freedoms". However, there is no mention of human rights as such either in the Declaration, or in the Programme of Action, or elsewhere in the Charter. Be that as it may, from the standpoint of the implementation of human rights, the provisions of these texts do identify some of the structural changes to be made before the Third World countries and the developed countries can be considered equals. It is indicative of the increasing tendency to link respect for human rights to the establishment of a new international economic order that the Commission on Human Rights decided to expand its traditional agenda item on realization of economic, social and cultural rights and special problems of developing countries to include:

"the effects of the existing unjust international economic order on the economies of the developing countries, and the obstacle that this represents for the implementation of human rights and fundamental freedoms". [xxii]

Two other post-1974 statements of the development-human rights *problématique* deserve mention: in defining the concepts which should guide future human rights work in the UN system, the General Assembly, in 1977 , affirmed, *inter alia:*

"1 (b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development"[xxiii]

Whatever view one may have on the claims put forward by Third World countries-and they have been criticized either for going too far and endangering development prospects for all or for being oriented towards the elites and neglecting the real development problems of the dominated masses-the fact remains that, for these countries, until a new international economic order is achieved, the economic and social conditions of under-development will constitute an emergency situation making the implementation of at least some human rights difficult, if not impossible.

Even in this case, however, the *principle* of the *enjoyment* of all human rights remains unchallenged;[xxiv]only the *exercise* of certain rights may not be fully ensured, or may even be discontinued so long as the emergency situation lasts.

The reality of under-development and the implementation of certain human rights

While slavery has been practically eliminated since the anti-slavery movement of the 19th century and is prohibited by legislative provisions established in the 20th century , cases of its persistence have been pointed out, particularly in the developing countries. The practice of slavery in its classic , form has been attributed to the consequences of economic and social conditions, such as nomadism and a very low level of national

income which does not make it possible to pay for the services provided by the slave.[xxv]Considering the large number of develoing countries which have ratified the Slavery Convention and the Supplementary Convention on the Abolition of Slavery,[xxvi] it can be said that the develoing countries recognize the absolute character of the prohibition against slavery for, despite the difficulties encountered in the attempt to eliminate it completely in the world, under-development cannot
be considered to be a justification or an excuse for the condition of slavery.

The same is true for *torture and cruel, inhuman or degrading treatment*. Even though one of the explanations given for the persistence of torture is that the developing countries do not have the means to provide adequate training for the police and to obtain the desired information in any other way, the obligation to abolish torture and similar practices is incumbent on all States, regardless of their level of development.[xxvii]

The prohibition of genocide is a third example of a human right which no country feels justified in violating.[xxviii] The most recent cases of this crime have, however, occurred in developing countries.[xxix]

As regards the right to a *fair trial*, the independence of the judiciary, the rights to defence, the adversary character of the procedure, and the making public of the proceedings. all these elements seem to be regarded as fundamental guarantees which do not depend on the state of development.[xxx] Improving the administration of justice and the use of legal aid on a large scale, however, require means which are not available to many countries, but the most elementary principles of justice are recognized to be binding upon all countries without exception.

The right to *free choice of employment*, recognized by Article 23 of the Universal Declaration offers a more difficult example. The participants in the United Nations seminar held in Dakar in 1966 held the view that the economic and social situation of Africa did not make it possible, for the time being, to implement that right, for the need to protect the population against unemployment sometimes made it necessary for a certain amount of control to be exercised in respect of choice of employment.[xxxi] Constraint in this regard may take several forms: compulsory civilian service for the unemployed, the obligation to perform work useful to the community, the obligation to work land in conformity with a development plan, guidance at the level of training, etc. Sometimes it will be difficult to distinguish between restrictions on free choice of employment. in order to meet the needs of development, and forced labour, prohibited by the ILO Conventions.[xxxii] Like all exceptions in the matter of human rights, this particular one may be compatible with human rights only insofar as it is in the general interest, effectively required by the situation and proportionate to the needs involved.

It has often been observed that the *right to private property* has undergone a negative evolution since the Universal Declaration. Its very existence was challenged at the time that Article 17 of the Declaration was being drawn up.[xxxiii] While the restrictions on this right may be related to under-development, the right itself has been called into question by the developing countries,[xxxiv] some of which pointed out that this right may impede

development.[xxxv] In any case, the right to property is not included in the 1966 Covenants and is subject to an important limitation founded on the general interest in the European[xxxvi] and American[xxxvii] regional conventions.

Far more difficult is the question of *freedom of expression and of the press*. While the right to seek, receive and impart information has given rise to complex problems in the developed countries, its implementation meets with different and more considerable problems in the developing countries. The consequences of unlimited freedom in this field can indeed be easily imagined for a country that has very small resources at its disposal for a national press, for television and radio programmes, for the training of journalists and media technicians, etc. Such a State is at the mercy of those who possess such resources, that is to say, of a class of society which does not represent the masses, or of foreign interests. It is then generally recognized that a balance must be established between the maintenance of national solidarity and unity, on the one hand, and the right of everyone to express himself or herself freely and to receive information, on the other.[xxxviii] Considering the precarious situation of certain newly independent States, it is not surprising that they restrict freedom of information more than in the developed countries. Moreover , information plays an essential role in the education and mobilization of the people and consequently in the development process. It may then seem a necessity for the State to hold a monopoly. But such a situation may also lead to arbitrariness or may prevent the masses from learning the truth about facts which concern them.

In contrast with the developed countries, the problem of information arises in the developing countries both at the level of the technical facilities (printing presses, radio and television broadcasting stations, film studios and cinemas, press agencies, etc.) and at the level of political structures and attitudes (existence or not of an opposition party, level of political awareness of the masses, etc.). In most cases, no private group commands the necessary capital, unless it is foreign or financed from abroad, to found information enterprises. A certain degree of government intervention to make the media more independent of such foreign interests may, in the view of the countries concerned, be necessary .As a communication network becomes established, and as political stability becomes assured, the restrictions to which the exercise of freedom of information is subject lose their justification and greater freedom is required.

The last example to be examined is that of *freedom of association*. The political reasons invoked in regard to freedom of information also hold for political association, insofar as the existence of a single party is considered by several newly independent countries to be essential for development. Thus, for instance, the African countries need to be able to rely on national unity in order to reap the fruits of development in the face of colonial concupiscence and the special interests of tribes or other groups.[xxxix]

Any exception to the principle of freedom of political association, justified by the specific conditions of the developing countries, must however be compatible with *each person's right to take part in the conduct of public affairs in his or her country* , to choose his or her representatives or be elected in genuine periodic elections by universal suffrage and

by secret ballot. The right to take part in political life must be the object of special attention in a single-party system in order for the party to become and to remain the expression of the will of the governed.[xl] If the party becomes the tool of a dominant minority which seeks to stay in power by means of bogus elections, then the development of the entire country suffers.[xli] In such cases, the only remedy seems to lie in clandestine action and in the use of violence by the opposition. Here as elsewhere in this chapter, the dialectic expressed by the third preambular paragraph of the Universal Declaration comes into play: " ...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

Misuse of under-development as a pretext for abusive limitation on human rights

For one of the most outstanding African jurists and former President of the UN Commission on Human Rights, "all these developing States, constantly threatened by disorder and economic difficulties, consider themselves to be permanently in an emergency situation".[xlii] In his view, what is involved is not so much justifying exceptions to the exercise of certain human rights on account of the conditions of under-development, but rather issuing a warning against the abuses which may result from using a limited emergency situa- tion as an excuse which is perpetually invoked. "One must not wait for under-development to be throttled once and for all (if ever it can be) in order subsequently to attempt to observe the rules governing human rights and freedoms".[xliii]

In requesting the study on the question of the duties of the individual and the limitations to the exercise of human rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities stated that "limitations imposed on the exercise of human rights should not serve to justify an abuse which would lead to violations of human rights".[xliv] The rules of interpretation generally applied to clauses of exception[xlv] should, moreover, prevent certain abuses of the notion of emergency arising from the state of under-development. First of all, certain rights are to be respected at all times and in all places. Secondly, the restrictions must be provided by law[xlvi] and applied solely for the purpose for which they have been provided and, above all, should not serve as a pretext for political repression. Lastly, they should not give rise to any discrimination on grounds of race, 'sex, colour, language, religion or social condition. The specific character of the emergency situation arising from under-development makes it possible to consider as inadmissible in international human rights law any emergency measure taken to protect the privileges of an elite or a dominant minority and which does not contribute to the economic liberation of the entire population.

The full exercise of all human rights must of course be guaranteed as soon as social and economic conditions permit. But how, in the absence of reliable indicators and competent bodies, can one judge whether these conditions have been met or the emergency situation ended? What steps can be taken to prevent those practices which have become customary during the "emergency situation" from continuing indefinitely, without even the rulers

and the governed realizing it? The application of the notion of emergency to conditions of under-development must therefore be handled with utmost care. The struggle for liberation against colonialism and neo-colonialism and for development in the interest of the populations of the under-developed countries is also the struggle for human rights. If the exercise of certain rights is discontinued on account of that struggle, considered as an emergency situation, which, by definition, is temporary , then the measures must also be temporary and they do not in any case derogate from the principle, which remains valid, of universal respect for, and observance of, human rights, based on the UN Charter .

This difficulty of determining the duration of the emergency situation in the case of under-development does not arise in the situation arising from *force majeure.*

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[i] H. C. Black, *Black's Law Dictionary* (5th Edition), West Publishing Co. , Minnesota. 1979, p. 469

[ii] A *Supplement to the Oxford English Dictionary*, Vol. 1, A-G, p. 934, Oxford. 1972

[iii] The significance of the notion of under-development, a term covering a highly complex reality, is briefly discussed below

[iv] One of the best descriptions of the terminological and methodological problems of the notions of "development" and "under-development" is to be found in Gunnar Myrdal, *Asian Drama.: An Inquiry into the Poverty of Nations*, the Twentieth Century Fund. New York, 1968, Vol. III, Annex I, pp. -1839-1878. More recently. among the hundreds of outstanding contributions to the understanding of the problems of development. Willy Brandt, in his introduction to the report of the commission he chaired, wrote: "One must avoid the persistent confusion of growth with development. .." *North-South, a Program for Survival. The Report of the Independent Commission under the Chairmanship of Willy Brandt*, the MIT Press, Cambridge, Massachusetts, 1980, p. 23. (Hereinafter referred to as "Brandt Commission Report").

[v] See Malcolm S. Adiseshiah: *It is time to begin: the human role in development: some further reflections for the seventies*, Unesco, Paris, 1972.

[vi] General Conference, Nineteenth Session, Medium-Term Plan (1977-1982), Unesco, 1977, para. 323. Concerning the interrelationship between human rights, peace and development, see the report of a UN seminar on the subject held in New York on 3-14 August 1981, Doc. ST/HR/SER.A/10; and Stephen Marks, "The Peace-Human Rights -Development Dialectic", *Bulletin of Peace Proposals*, VoI. 11, No. 4, 1980, pp. 339-347

[vii] Among the vast literature on this subject, see, for example, the Brandt Commission Report, Chapters 1,2,3,4,9, 12, 13; Dieter Ernst (ed.) *"The New International Division of Labour, Technology, and Under-Development, Consequences for the Third World"*-Campus Verlag, Frankfurt/New York, 1980; Mohammed Bedjaoui *"Towards a New International Economic Order"*, Unesco, Paris, Holmes and Meier Pub., New York-London, 1979

[viii] . See *supra*, Chapter 1. See also, Hector Gros Espiell, "The Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination", report for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN4/Sub.2/390, in particular the analysis of the definition, scope and legal nature of self-determination.

[ix] Although earlier formulations have been made, the first systematic attempt to define this right was made by Keba M'Baye. See "Le droit au développement comme un droit de l'homme", *RDJ/HRJ*, VoI. V, No.2-3, pp. 503-534 (1972), "The Emergence of the 'Right to Development' as a Human Right in the Context of a New International Economic Order", Unesco, Doc. SS-78/CONF .630/8, and "Le développement et les droits de l'homme", Rapport introductif, Colloque de Dakar sur le développement et les droits de l'homme

(Septembre 1978), *Revue sénégalaise* de Droit, December 1977, No.22, pp. 19-51, esp. 33-51. A considerable amount of background material on the subject may be found in the report of Unesco's expert meeting of 1978 on "Human Rights, Human Needs and the Establishment of a New International Economic Order", which was submitted to the Commission on Human Rights for its consideration of the right to development, along with the Secretary-General's report (E/CN.41l334). See also Stephen Marks, "Emerging Human Rights: A New Generation for the 1980s? " *Rutgers Law Review*, VoI. 33, No.2, 1981, pp. 444-445.

[x] One of the first articles to tackle this problem clearly is that of Karel Vasak, "Droit de l'homme et sous-developpement", *Comprendre*, No.31-32, Societe europeenne de culture, Venice, 1968, pp. 1-6. See also, Stephen Marks, "Human Rights and Development: Some reflections on the study of development, human rights and peace", *Bulletin of Peace Proposals*, VoI. 8, No.3, 1977, pp. 236-246; Philip Alston, "Human Rights and the New International Development Strategy", *Bulletin of Peace Proposals*, VoI. 10, No.3, 1979, pp. 281-290; Osita C. Eze, "Les droits de l'homme et le sous-developpement", RDJ/HRJ, VoI. XII, Nos. 1-2, pp. 5-18; see also "Study on the New International Economic Order and the Promotion of Human Rights", Progress Report by Raul Ferrero, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Doc.E/CN.4/Sub.2/477, 18 August 1981)

[xi] See, concerning the origin of this clause, Albert Verdoodt, *Naissance et signification de la Declaration universelle des droits de l'homme*, Louvain-Paris, 1964, pp. 308-309

[xii] Pursuant to Resolution 9 (XXVII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a Special Rapporteur prepared a "Study of the Individual's Duties to the Community and the Limitation on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights" (UN doc.E/CN.4/Sub.2/432/Rev .1, and Adds.1-7). The special Rapporteur mentions, in connexion with this clause, that "in certain regions of the world community. ..the pressing necessity is the satisfaction of basic social needs, the promotion of the well-being and economic security of the great masses. " (UN Doc.E/CN.4/Sub.2/432, (Rev.l), para. 584)

[xiii] Verdoodt, op. cit. , pp. 269 and 271

[xiv] For a more detailed account of this Covenant, see *supra*, Chapter 5 and *infra* Chapter 11

[xv] Resolution 2081 (XX) of 20 December 1965, Resolution 2217 (XXI) of 19 December 1966 and Resolution 2339 (XXII) of 18 December 1967

[xvi] Document A/CONF .32/L.2

[xvii] The value of the affirmations of the Proclamation is in this respect challenged by some, e.g. Moskowitz, *International Concern with Human Rights*, Sijthoff, Leyden; Oceana Publications Inc., Dobbs Ferry, N. Y., 1974, pp. 18-20.

[xviii] Requested by the Commission in its Resolution 14 (XXV) of 13 March 1969, the study was published in 1973 under the reference number E/CN .4/1108 and Add. 1 to 10; supplemented by observations, conclusions and recommendations, it was revised in 1974 (E/CN.4/1131 and Corr. 1).

[xix] Operative paragraph 2 of Resolution 1867 (L VI) adopted on 17 May 1974. For more recent developments in relation to the International Development Strategy, see Alston, loc. cit.

[xx] See Resolution 2626 (XXV) of 24 October 1970

[xxi] See document A/9946 of December 1974

[xxii] Commission Resolution 6 (XXXVI). Pursuant to the same resolution, the United Nations organized a seminar on this subject in Geneva on 30 June-11 July 1980. See Report ST/HR/SER.Al8).

[xxiii] General Assembly Resolution 32/130 of 16 December 1977, para. (b).

[xxiv] It is worth quoting in this regard para. 1 (a) of Resolution 32/130, which has already been mentioned: " All human rights and fundamental freedoms are indivisible and interdependent".

[xxv] United Nations Division of Human Rights, *Seminar on Human Rights in Developing Countries*, Dakar , 8-22 February 1966, Report under reference number ST/TAO/HR/25, para. 20. See also report of the Working Group on Slavery of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at i~ fifth session (E/CN .4/sub.2/434.) According to information submitted to the Sub-Committee there are still 250,000 slaves in the world. To take the example of Mauritania, the information minister, Dahane Ould Ahmed Mahmoud, declared in J uly 1980 that "Slavery is the most primitive, hateful form of exploitation of man by man. We know it still exists in our country .The previous colonial and neo-colonial regimes tried to cover up the practice. It will take a long process before we are finally rid of this hateful practice." (*International Herald Tribune*, 12 September 1980.)

[xxvi] Nearly one hundred developing countries have ratified one or both instruments

[xxvii] ST/TAO/HR/25/, paras. 36-43

[xxviii] The Convention on the Prevention and Punishment of the Crime of Genocide has been ratified by over 50 developing countries

[xxix] See "Study of the Question of the Prevention and Punishment of the Crime of Genocide", prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN Doc. E/CN .4/Sub.2/416

[xxx] See, for instance, United Nations Division of Human Rights, Seminar on Special Problems relating to Human Rights in Developing Countries, Nicosia, Cyprus, 26 June to 9 July 1969, report published in 1970, reference number ST/TAO/HR/36, paras. 87-100 and 151. The magistrates, lawyers and professors of law participating in the Conferences of Jurists organized by the International Commission of Jurists in Athens (1951), Delhi (1959), Lagos (1961), Bangkok (1965), Barbados (1971), and Dakar (1978) did not fail to emphasize the fundamental need for independent and impartial tribunals in the developing countries. As regards the Arab States, the Symposium of Human Rights and Fundamental Freedoms in the Arab Homeland, organized by the Union of Arab Lawyers in Baghdad on 18-20 May 1979, called on Arab States to abolish tribunals of exception, apply due process of law and guarantee the independence of the judiciary. Similarly, the African Charter of Human and Peoples' Rights, which was adopted in June 1981, includes substantial provisions concerning the administration of justice. At the colloquium on Human Rights and Economic Development in Francophone Africa, held in Butare, Rwanda, the participants agreed that "the autonomy and independence of the judiciary must be strengthened in order to ensure the proper and impartial administration of justice". See Hurst Hannum, "The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis", *Universal Human Rights*, Vol. 1, No.2 (April.June 1979), pp. 63-87, at p.84.

[xxxi] ST/TAO/HR/25, paras. 60-87.

[xxxii] See *supra*, Chapter 6 and *infra*, Chapter 12

[xxxiii] Verdoodt, op. cit., pp. 170-175

[xxxiv] ST/TAO/HR/25, paras. 88-105.

[xxxv] *Ibid*. , para. 92.

[xxxvi] Additional Protocol to the European Convention on Human Rights, of 20 March 1952, Article 1.

[xxxvii] American Convention on Human Rights of 22 November 1969, Article 21.

[xxxviii] ST/TAO/HR/25, paras. 128-149. See more generally International Commission for the Study of Communication Problems, *Many Voices, One World*, Kogan Page, London/ Unipub, New York/Unesco, Paris, 1980.

[xxxix] Cf. ST/TAO/HR/25, paras. 150-179.

[xl] An International Seminar on Human Rights, Their Protection and the Rule of Law in a One-Party State convened by the International Commission of Jurists in Dar-es-Salaam in September 1976 concluded "that the one-party system was fully consistent with the preservation of fundamental human rights and t.he

maintenance of the rule of law, provided that its political form was a truly democratic one (emphasis added), Human Rights in a One-Party State, Search Press, London, 1978, p. 110.

[xli] The Unesco text quoted earlier continues as follows: "Development imposed from above may well remedy certain injustices and reduce potential sources of conflict, but it cannot contribute to the promotion of human rights and the strengthening of peace as decisively as development centered on man, and that alone, can do".

[xlii] Kéba M'Baye, "Les réalitiés du monde noir et les droits de I'homme", *RDH/HRJ* , Vol. II, No.3, 1969, p. 389.

[xliii] *Ibid*. , p. 383.

[xliv] Resolution 9 (XXXVII) adopted on 21 August 1974 by 13 votes to 0, with 10 abstentions. The work plan of the study requested by this resolution includes examination of the question whether the "general welfare" can be regarded as a justification for temporary limitations to certain rights and freedoms with a view to the acceleration of economic and social development in the developing countries or to ensure environmental protection or public health. E/CN ;4/Sub.2/L.627 , annex, paras. 18, 19.

[xlv] The legal analysis of these rules, based on the principal human rights instruments, will be provided in the next section. See also Rosalyn Higgins, "Derogations from Human Rights Treaties", *The British Yearbook of International Law*, 1967-1977, pp. 281-320

[xlvi] See Oscar M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality", *Harvard International Law Journal*, Vol. 17 (1976), pp. 503-557.

EMERGENCY ARISING FROM FORCE MAJEURE: NATURAL CATASTROPHES

> When something is described as a "natural" disaster, it is in most cases merely because its causes or workings cannot be discerned nor a remedy found.
>
> Amadou-Mahtar M'Bow

Impact of catastrophes on human rights in general

The emergency situation which arises on the occasion of natural catastrophes[i] generally, but not necessarily, begins the moment that the event takes place. Insofar as the catastrophe has been foreseen-and it is the role of the Red Cross and of the United Nations Disaster Relief Co-ordinator to assist States in anticipating and planning relief[ii]-it is for the government of the country affected to take the necessary measures to reduce in advance the effects of the event in the interests of the entire population.

Over and above the measures relating to the planning of relief which do not affect the exercise of human rights (appointment of a single co-ordinator , training of administrative and medical personnel, storage of tents, blankets, foodstuffs, etc.), it may conceivably be necessary to impose, prior to the disaster, certain restrictions on freedom of movement and residence (forced evacuations from areas in danger of being affected), the freedom of the press and other information media (the need to inform the population of what should be done and to avoid panic)[iii], freedom of employment (use of the labour force to build shelters, dykes, etc.), the right to property (requisitions) and other rights which may be subject to the strictly necessary limitations for the purpose, under the terms of the international instruments, of meeting the just requirements of the general welfare (Art. 29 of the Universal Declaration) or for the protection of national security, public order or public health (*inter alia*, Arts. 19 and 21 of the Covenant on Civil and Political Rights).

In the few texts currently in force which expressly provide for exceptions in cases of *force majeure,* in particular certain ILO Conventions, the period of emergency includes the "threat" of danger, that is to say, the period before the event. A provision concerning exceptions in cases of war or emergency is included in at least eight international labour conventions.[iv] Taking the Convention (No.29) on Forced Labour, 1930, as an example, the obligations it contains do not apply to "any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such .as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general, any circumstances that would endanger the existence or the well-being of the whole or part of the population".[v] In addition to containing an excellent definition of emergency situations this paragraph illustrates the possibility of taking into account, in a legal text, the period which precedes the calamity

("threatened calamity", "any circumstance that would endanger"). The ILO Committee of Experts on the Application of Conventions and Recommendations specifies in this connection that "the length and extent of compulsory service, as well as the purposes for which it is used, should be strictly limited in accordance with the requirements of the situation" and it compares this stipulation with that of Article 4 of the International Covenant on Civil and Political Rights.[vi]

This being said for the period before the natural catastrophe, we shall now analyse the derogation clauses of human rights instruments which may apply after the outbreak of such catastrophes to other emergency situations.

Derogation clauses

The derogation clause is contained essentially in Article 4 of the Covenant on Civil and Political Rights, Article 15 of the European Convention and Article 27 of the American Convention.[vii] These three texts do not, however, allow derogations to be made from the right to life, from the prohibition against torture and inhuman or degrading treatment or punishment, from the prohibition against slavery and from the principle of the lawfulness and non-retroactivity of penal laws. The list of these rights is reproduced in Table I. In addition, the authorized derogations must not be inconsistent with other obligations under international law , must be strictly required by the exigencies of the situation and be notified to the competent body.

It will be the competent body's task to assess whether the public emergency invoked following the natural catastrophe justifies the application of the derogation clause. Case-law in this field, in particular that of the European Commission and Court of Human Rights, relates to situations of conflict, and the case of a natural catastrophe has not yet arisen. The ILO Committee of Experts on the Application of Conventions and Recommendations has had occasion to express its opinion concerning a situation involving a natural catastrophe, namely the Nicaragua earthquake:

"The Committee has taken cognizance, with deep regret, of the earthquake suffered by the city of Managua and of the magnitude of this national catastrophe. In extending to the government of Nicaragua its profound sympathy and expressing its sincerest wishes for a rapid return to normalcy, the Committee, fully conscious of the seriousness of the situation in the country and the difficulties arising for the normal fulfilment of its international obligations, has considered it necessary to suspend the examination of the questions relating to the application of ratified Conventions by this country .The Committee hopes that the Government will be in a position in due course and with the help of the ILO to give full effect to its obligations under the conventions ratified by Nicaragua".[viii]

In this instance what was involved was a town and consequently only part of the population. The text of the Convention Concerning Force or Compulsory Labour, quoted above, specified, moreover, that the danger may concern "the whole or part of the population", which appears normal where natural catastrophes are concerned. The precedents of the organs of the European Convention, on the other hand, seems more restrictive, for in the case *Gerard Lawless v. Republic of Ireland*,[ix] the Court defined a "public emergency threatening the life of the nation" as "an exceptional situation of crisis or emergency which affects *the whole population* and constitutes a threat to the organized

life of the community of which the States is composed".[x] True, this precedent relates to situations of conflict and not cases of natural catastrophes, and the question consequently arises whether the interpretation given of Article 15 by the Commission would be the same in the event of a natural catastrophe affecting only part of a State's territory.

In addition to derogation clauses, the international texts provide for a number of restrictions, either in the formulation of certain rights or in specific clauses of exception. The remainder of this section concerns the possible use of these restrictions in cases of natural catastrophe, but applies, *mutatis mutandis*, to situations of conflict which are examined further on.

The articles relating to the right to life (Art. 6 of the Covenant on Civil and Political Rights, Art. 2 of the European Convention, Art. 4 of the American Convention) make an exception for the death penalty (and in the sole case of the European Convention, for death when it results "from the use of force which is no more than absolutely necessary"): a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection. All these cases justifying deprivation of life could occur during natural catastrophes.

The prohibition against forced labour (Art. 8 of the Covenant, Art. 4 of the European Convention, Art. 6 of the American Convention, ILO Conventions No. 29 and No. 105) does not cover work required of a person under detentionor "any service exacted in cases of emergency or calamity threatening the life or well-being of the community" or "any work or service which forms part of normal civil obligations".[xi] The attitude of the ILO Committee of Experts in regard to the question of forced labour in cases of catastrophe has already been mentioned. As for the European Commission, it examined this provision in particular in the *Iversen v. Norway* case[xii]: this case concerned a Norwegian dentist assigned against his will to a remote region in the north of the country, in accordance with a provisional law of 1956. While four of the six members of the majority of the Commission (which concluded that the application was not admissible) considered that the work demanded of *Iversen* was neither unjust nor oppressive and that the Commission consequently did not need to judge of the applicability of Art. 4 (3), the two others were however of the opinion that the service in question constituted a reasonable service in the case of an emergency threatening the well-being f the community within the meaning of that Article.

Table 8.1
Human Rights Norms Applicable in Cases of Non-International Armed Conflicts of Public Emergency Threatening the Life of the Nation

Norm	Article establishing the norm which remains applicable at all times and in all places				
	ECHR[1] *(see Art.15)*	*COV. C and P*[2] *(see Art.4)*	*ACHR*[3] *(see Art.27)*	*Geneva Conventions*	*Protocol II*[4]
Right to life	Art.2[5]	Art.6[5]	Art.4	Art.3a	Art.4.2.a.e
Prohibition against torture, degrading treatment or punishment	Art.3	Art.77	Art.5 (1)	Arts.3 & 6	Art.4.2.a.e
Prohibition against slavery and servitude	Art.4 (1)	Art.8(1 & 2)	Art.6	Art.3b[7]	Art.4.2.c.f[7]
Principle of lawfulness and retroactivity	Art.7(1)[6]	Art.15(1)[6]	Art.9	Art.3d[8]	Art.6.2.
Prohibition against medical experiments		Art.7			Art.5.2.e
Non-imprisonment for debts		Art.11			
Recognition of legal personality		Art.16	Art.3		
Freedom of thought, conscience and religion		Art.18	Art.12		Art.5.1.d.
Political rights			Art.23		
Protection of the family			Art.17[9]		Art.4.2.e,5.2.a
Right to a name			Art.18		
Rights of the child			Art.19		Art.4.3
Right to a nationality			Art.20		

NOTES:

1. ECHR—European Convention on Human Rights.
2. COV. C and P—International Convention on Civil and Political Rights.
3. ACHR—American Convention on Human Rights.
4. Protocol—Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
5. Except for death resulting from "the use of force which is no more than absolutely necessary" (Art.2) or "lawful acts of war" (Art.15).
6. Except for crimes according to the general principles of law (7(2) and 15(2)).
7. Prohibition against the taking of hostages.
8. Indispensable judicial guarantees, prohibition of summary convictions.
9. This relates to the right to marry and protection of the rights of spouses in the ACHR, whereas Art.4.2.e of Protocol II concerns the protection of women against indecent assault, and Art.5.2.a concerns the detention of men and women belonging to the same family.

As regards the right to liberty, the limitations prescribed in the texts (Art. 5 of the European Convention, Art. 7 of the American Convention, Arts. 9 and 10 of the Covenant on Civil and Political Rights) authorize lawful arrests and detentions in normal circumstances. It is also permitted to detain a person likely to spread an infectious disease (Art. 5 (1) (e) of the European Convention), which may prove to be necessary during a natural catastrophe, particularly during an epidemic.

In general the articles of international human rights treaties which reaffirm or proclaim a right contain a second paragraph setting out the limitations which may be invoked and applied in cases of, natural catastrophe as well as other emergency situations.

Like emergencies arising from social and economic conditions as a whole, those founded on *force majeure* resulting from a natural catastrophe must be handled with care. The temptation is great to plead the need to waive international human rights norms in order to cope with the consequences of a natural catastrophe. Natural catastrophe, provided that it constitutes a public emergency threatening the life of the nation, may be invoked under the conditions laid down by the international human rights law in order to take measures derogating from certain human rights but not from all of them. Similarly, when a natural catastrophe makes it necessary for human rights to be subjected to certain restrictions, these are limited by the provisions mentioned above. In practice, in contrast with the emergency situation founded on under-development, emergencies arising from natural disasters have not been the subject of many discussions from a human rights perspective. The reason for this may be that such emergencies correspond more closely to the situations provided for in the international instruments and have, for that reason, greater chance of being controlled by the competent organs.

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[i] By natural catastrophe is meant, in particular , epidemics, famines, earthquakes, floods, tornadoes, typhoons, cyclones, avalanches, hurricanes, volcanic eruptions, drought and fire. The definition given by the Red Cross is as follows: " A disaster is a catastrophic situation in which the day-to-day patterns of life are-in many instances-suddenly disrupted and people are plunged into helplessness and suffering and, as a result. need protection, clothing, shelter, medical and social care, and other necessities of life". League of Red Cross Societies, *Red Cross Disaster Relief. Handbook*, 1976, Chapter II, p. 13.

[ii] By Resolution 2816 (XXVI) of 14 December 1971, the General Assembly invited the Secretary-General to appoint a relief co-ordinator, whose office (UNDRO) entered into service on 1 March 1972. The Red Cross has developed principles of action and planning in cases of disaster. See League of Red Cross Societies, *Red Cross Disaster Relief. Handbook*,1976.

[iii] On the problems of control by the State of public information in time of natural disaster, see *Disaster Prevention and Mitigation, A Compendium of Current Knowledge*, Vol. 10, "Public Information Aspects", Office of the United :Nations Disaster Relief Co-ordinator, United Nations, New York, 1979.

[iv] Hours of Work (Industry), 1919 (No. 1), Art. 14; The Night Work of Young Persons (Industry), 1919 (No.6), Art. 4; Forced Labour, 1930 (No.29), Art. 2(2) (d); Hours of Work (Commerce and Offices), 1930 (No.30), Art. 9; Hours of Work (Mines and Coal) (revised), 1935 (No.46), Art. 16; The Night Work of Young Persons (Industry) (revised), 1948 (No. 90), Art. 5; Work Clauses (Public Contracts), 1949 (No.94), Art. 8; and Weekly Rest (Commerce and Offices), 1957 (No.106), Art. 13.

[v] Art- 2, para. 2 (d). Emphasis added.

[vi] *Forced labour*, extract from the report of the thirty-eighth session (1968) of the Conlmittee of Experts on the Application of Conventions and Recommendations, ILO, Geneva, 1968, p. 201.

[vii] To this list may be added the derogation clauses of exception contained in the International Labour Conventions mentioned above and Article 30 of the European Social Charter. This last article authorizes derogations from the obligations of the Charter without identifying the obligations which have to be respected even in emergency situations.

[viii] International Labour Conference, 58th session, 1973, Report III (Part 4A).

[ix] Petition No. 332/57, Yearbook 2, pp. 309-341.

[x] *Publications of the European Court*, Series A, 1961 p. 56 et seq. (emphasis added). In its definition given in the same case, the Commission states that the emergency "affects not certain individual groups, but the whole population". *Publications of the European Court*, Series B, 1960-1961. "

[xi] The passages quoted are from Art. 8 of the Covenant; the other texts are almost identical, except for that of the International Labour Conventions, already quoted

[xii] Application No. 1468/62, Yearbook 6, p. 279.

EMERGENCY ARISING FROM THE EXISTENCE OF INTERNAL DISTURBANCES AND ARMED CONFLICTS

> ...between the oppressors and the oppressed everything is settled by force
>
> Franz Fanon

The relationship between violence and human rights

While under-development is often regarded as a form of *structural violence,* while natural catastrophes are essentially the result of the *violence of nature* often aggravated by conditions of under-development, the emergency situation which is the subject of the third part of this chapter concerns the *direct and open violence of individuals and groups.*

Municipal law regulates human conduct under the control of the State which has a monopoly over the use of force. It is in the logic of this system that the use of force which is not authorized by the State is regarded as an aberration in relation to the legal system considered. But the internal legal system may itself be founded on violations of human rights. Is violence carried out against the authority of the State for the purpose of protecting human rights recognized in international human rights law? Do limits exist to the use of violence by the State, limits imposed by international human rights law? Such are the questions which arise when one examines the relationship between violence and human rights.

The dialectic between human rights and violence did not escape the drafters of the Universal Declaration. The third preambular paragraph stipulates that: "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The idea, of course, is not new. Without going all the way back to Socrates' *Apology*[i] the following passage from Vattel, writing in the middle of the 18th century , illustrates the tradition of the right of resistance: " ...as for those monsters who, bearing the title of sovereigns, make themselves the bane and horror of mankind, they are wild beasts that all men of feeling justly want to eliminate from the earth".[ii]

While the French Declaration of 1789 and especially that of 1793 as well as the United States Declaration of Independence establish the right to revolt in a revolutionary context, the 1948 Universal Declaration is primarily the expression of a movement to preserve peace for all time. But in an international "order" where law is the result of power relations,[iii] peace founded in injustice and violation of human rights cannot last and inevitably leads to violence.[iv]

As defined by international human rights law, human rights include two dimensions which make it easier to understand their relationship to violence: *oppression* is negation, through direct or structural violence, of civil and political rights; misery is the negation, essentially through structural violence, of economic, social and cultural rights which results from inequalities between individuals, groups and States. The institutions for the protection of human rights which operate in conformity with the provisions of international conventions may alleviate certain effects of those structures, but they are incapable of bringing about by themselves the political changes necessary for oppression and hardship to disappear .Such changes are very often achieved by violence, and it is here that lies the central aspect of the relationship between violence and human rights.[v]

The social sciences, and in particular political science and peace and conflict research, have developed typologies, models and indicators which distinguish between the different manifestations of violence.[vi] To understand violence from the point of view of the international dimensions of human rights, four types of situations should be distinguished, namely international disturbances internal armed conflict, wars of national liberation and international wars.

Internal disturbances and tensions

Public order is threatened when individuals or groups commit acts of non-organized violence, that is to say, violent acts which do not constitute military operations conducted in accordance with a concerted plan. Such acts are usually repressed in accordance with a national penal law; from the point of view of international human rights law, there are no a *priori* grounds for considering such a situation as justifying a derogation from the applicable rules. Likewise, internal tensions, caused by opposing political forces and not entailing military operations, do not necessitate the application of emergency measures.

It is only when internal disturbances constitute a real threat to the life of the nation that the international instruments provide for the possibility of derogating from the rules normally applicable. In fact, the problem here is one of assessment of the solution which depends primarily on the national authorities and where appropriate, on the case-law of the controlling organ under international instruments.

In cases of internal disturbances which do not constitute an emergency situation, certain problems may arise, particularly with respect to mass arrests of persons charged with political offenses. Special international standards have been drawn up to improve the protection of prisoners, namely, the "Standard Minimum Rules for the Treatment of Prisoners" adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in its Resolution of 30 August 1955. The purpose of these rules is to set out "what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions", without however precluding new methods and practices, provided that they are consonant with the principles governing the protection of human dignity. Of these rules, mention should be made of non-discrimination, freedom of belief, respect for human dignity and a whole series of

standards concerning the distribution of prisoners, accommodation, hygiene, discipline, etc. ; the right to make requests or complaints to the prison administration is also recognized; lastly , special rules are prescribed for certain categories of prisoners and persons under detention. The implementation of these rules was on the agenda of the Fifth and Sixth United Nations Congresses held respectively in Geneva in September 1975 and in Caracas in September 1980[vii] and additional standard-setting activities have supplemented them considerably. Among the draft instruments which hopefully will soon be widely accepted are a Convention on Torture and other cruel, inhuman and degrading treatment or punishment,[viii] a body of principles for the protection of all persons under any from of detention of imprisonment[ix] and a set of principles of medical ethics relevant to the role of health personnel in the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment.[x]

Certain provisions of the general human rights instruments assume particular importance during periods of internal disturbances. These are primarily the protection of individual freedom against arbitrary arrest and detention, guarantees of a fair hearing, including the non-retroactivity of criminal laws, the right to be defended, the prohibition of torture and inhuman or degrading treatment and punishment, and freedom of association.

Every day cases arise, in every region of the world, illustrating the lack of respect for these rights in periods of internal disturbances. International human rights law is now sufficiently developed for it to be possible to consider that the State which fails to respect the human rights provisions applicable to such situations does not fulfil its obligation, assumed under the Charter of the United Nations, to promote respect for, and observance of, human rights.

Armed conflicts not of an international character

When a conflict assumes the dimensions of an armed confrontation, the life of the nation is immediately considered to be threatened, with the result that the derogation clauses are able to be invoked. In such cases, all those human rights norms from which no derogation is allowed remain applicable.

These norms are confirmed or supplemented by the specific law of non-international armed conflicts which forms part of humanitarian law, outlined elsewhere.[xi] Although the Universal Declaration did influence the drafters of the Geneva Conventions,[xii] the systems of international human rights law' and that of humanitarian law tackle the problem of internal armed conflicts in different ways. The first falls in the framework *of jus ad bellum* as envisaged by the Charter of the United Nations, according to which recourse to force is prohibited and which is consequently aimed at the preservation of peace. The second, on the other hand, forms part of jus in bello: it establishes rules governing the use of force without examining the causes of the conflict in accordance with the principles of the Red Cross and in particular the principles of humanity.[xiii]

Present-day humanitarian law is not confined to conventional situations of war; it also provides, in Article 3 common to the four Geneva Conventions of 12 August 1949, for

norms applicable to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"[xiv] According to the commentary on the Geneva Conventions, Article 3 "ensures at least the application of humanitarian rules recognized as being essential by civilized peoples".[xv] Briefly summarized these are the rules of *non-discrimination corporal* well-being (prohibition of murder, mutilation, cruel or humiliating treatment and torture), *personal freedom* (prohibition of the taking of hostages and of summary executions) and *elementary due process* .

These rules may have a lesser or greater scope according to whether they are interpreted, as is recommended in the commentary,[xvi] in the light of other articles in Conventions concerning "human treatment". It is stipulated, in addition, that "the Parties to the conflict should. ..endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

Aware both of the difficulties involved in having a common article 3 applied by the parties to an internal conflict and of the need to extend the list of the recognized rights, the ICRC examined this problem at meetings of experts (1953, 1955, 1962 and 1969), International Conferences of the Red Cross (Istanbul, 1969; Teheran, 1972), a consultation of experts (1970) and conferences of government experts (1971,1972). The United Nations Conference on Human Rights of 1968 marked a turning point in this connection in that it recognized "the need for additional international humanitarian conventions or for possible revision of existing Conventions to ensure the better protetion of civilians, prisoners and combatants in all armed conflicts. .." It also requested the Secretary-General, after consultation with the ICRC, to draw the attention of Member States to the rules existing on the subject.[xvii]

It was in this context that the Swiss Federal Government convened the Diplomatic Conference on "the reaffirmation and development of international humanitarian law applicable in armed conflicts" which met in 1974, 1975, 1976 and 1977. Considerable preparatory work was carried out by the ICRC on the question of non-international conflicts[xviii]. This work culminated in the drafting of one of the two additional Protocols to the Geneva Conventions dealing specifically with the protection of victims of non-international armed conflicts.[xix] The "fundamental guarantees" are defined in Article 4 of the Protocol II as follows:

" Article 4 (Fundamental guarantees)

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishment;
(c) taking of hostages;
(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any of the foregoing acts".

Furthermore, special rules are provided in Article 5 of the Protocol for persons deprived of liberty, and principles of penal law, in particular the prohibition of retroactive laws and punishments, the presumption of innocence, the protection against self-incrimination, and the right to be present at trial with all necessary rights and means of defence are reaffirmed.

Wars of liberation

Although the drafters of the 1949 Geneva Conventions did not lay down special rules for armed conflicts in which one of the parties claims to be availing itself of its right to self-determination[xx] the delegates to the 1974-1977 Diplomatic Conference and the ICRC attached particular importance to this question, no doubt because the States participating in the Conference were more numerous and less European in 1974 than in 1949 and several of them had acquired their independence through wars of liberation. The importance of this matter was further illustrated by the presence of observers from liberation movements engaged in combat and the disagreement which arose in connection with some of these movements.

Closely bound up with the international dimensions of human rights, the right of peoples to self-determination is in fact enshrined among the purposes and principles of the United Nations (Articles 1 and 2 of the Charter) and has been reaffirmed many times in the context of human rights. The first operative paragraph of the Declaration on the Granting of Independence to Colonial Countries and Peoples stipulates: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights. ...". This right is again reaffirmed in Article 1 of the two 1966 Covenants; it is dealt with in detail in another chapter.[xxi]

The United Nations General Assembly has insisted for several years that the rules of humanitarian law should apply to combatants in movements engaged in the struggle of peoples labouring under the yoke of colonial and foreign domination to secure their liberation and self-determination.[xxii]

Thus the first phase consisted in granting to combatants in liberation movements the protection provided for war prisoners according to the 3rd Geneva Convention. The ICRC attempted to do this by proposing to the Diplomatic Conference that a paragraph worded as follows to Article 42- "new category of prisoners of war" of Draft Protocol I (international armed conflicts) be added:

"3. In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", members

of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war as long as theyare detained".[xxiii]

Doctrine is divided on the question[xxiv] especially since what is involved is granting a legal status to wars of liberation by equating them, for the purposes of the application of the Geneva Conventions, with international armed conflicts. Aware of these divergencies of opinion the ICRC took the view that draft paragraph 3 of Article 42 of Draft Protocol I quoted above was sufficient and that it was not fitting to include a reference to wars of liberation in the article devoted to the scope of the Protocol. The Committee responsible for Article 1 (general principles) of Protocol I considered, however, that it was not sufficient and it adopted the following paragraph:

"The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[xxv]

If the Protocol containing this provision in its Article 1, paragraph 4, is ratified by a large number of States, there will no longer be any doubt as to the applicability to wars of liberation of the norms of international law relating to the protection of victims of international armed conflicts.

International warfare

According to article 2 common to the four Geneva Conventions, all the provisions of those Conventions shall apply when two or more Contracting Parties are engaged in an armed conflict, "even if the state of war is not recognized by one of them". They shall also apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

A summary of these norms is given in another chapter[xxvi] and, for a more thorough examination, reference must be made to the *travaux preparatoires* and the actual texts of the Conventions[xxvii] and of the Additional Protocols[xxviii] as well as to the Commentary of the ICRC[xxix] and to the standard manuals on the law of war and humanitarian law.[xxx] It is worth recalling, however, for the purposes of the present chapter , some of the norms of humanitarian law applicable in international conflicts, in order to bring out the nature and specificity of this branch of international law. Generally speaking, the purpose of these norms is to ensure that "the .belligerents shall not inflict on their adversaries harm out of proportion to the object of warfare which is to destroy or weaken the military strength of the enemy".[xxxi] Some of these norms come under the so-called law of the Hague (by virtue mainly of Convention N 0. IV of 1907 signed at the Hague and of the Regulations annexed to that Convention), the fundamental principle of which is that "the belligerents do not have an unlimited choice of the means of inflicting damage on the enemy";[xxxii] others form part of what is known as law of Geneva (by virtue of the Conventions of 1949 signed at Geneva) according to which "persons placed hors de combat and those not participating directly in the hostilities shall be respected, protected and treated humanely".[xxxiii]

I t may seem naive to affirm such principles when those in charge of military operations seek but one thing: to win the conflict at the least cost for their side, and may even seek the total destruction of the enemy regardless of any strategic consideration. The temptation is to conclude cynically that military exigencies will always prevail in their minds over humanitarian principles. Experience shows however that it is not impossible to reconcile humanitarian considerations with military exigencies and to involve the military, who, .better than anyone, are acquainted with the horror of war , in this task. The ratifications of the Geneva Conventions (more than 150) and the entry into force on 7 December 1978 of the additional Protocols prove that, at least at the level of legal commitment, the military and diplomatic authorities of practically all countries wish to see military exigencies reconciled with humanitarian principles. So long as the causes of armed conflicts have not been eliminated, these norms of humanitarian law constitute a hope for the victims of such conflicts; the effective application depends on their dissemination and on the political will of the parties to the conflict to respect them.

From the very general principles mentioned above a number of more specific principles derive which are common to the different categories of victims of war, as well as principles pertaining to the protection of wounded, sick and shipwrecked persons (Conventions I and 11), principles pertaining to the treatment of prisoners of war (Convention 111) and principles pertaining to the protection of civilians (Convention IV).

A soldier who has been placed *hors de combat* is to be given shelter and to be treated humanely. Medical care is to be given without discrimination, except for reasons of medical urgency. Medical and religious personnel must not be prevented from performing their functions, but they must observe strict military neutrality. Should they fall into the hands of the enemy, the latter can retain them only if the medical and religious needs of prisoners of war so require; otherwise, repatriation is the rule. Even under detention, such personnel enjoy certain facilities for the performance of their functions. Other provisions of Conventions I and II concern the medical care dispensed by the civilian population and relief societies, the immunity of medical buildings and establishments, the assignment of medical material, the means of transport and the distinctive emblem.

As for prisoners of war (POWs), their treatment is governed by the 143 articles of Convention III. The detaining Power must treat them humanely, respect their persons and their honour, and cannot transfer them to the territory of a country which is not a party to the Convention. The sole information that a POW is required to provide concerns his surname, first names, age, rank and regimental number. The places of internment must be salubrious and life must be organized in them in such a way as to maintain the physical and mental health of POWs, including, adequate food and medical care and the possibility of practising one's religion and of having intellectual and sports activities. Detailed provisions govern work, financial resources, relations with the outside and with the authorities, discipline and repatriation. In order for POW s to be acquainted with these provisions, the Convention must be posted. Lastly, norms pertaining to the protection of the civilian population are contained in the 159 articles of Convention IV. While "safety zones", intended for wounded, sick, and disabled persons, expectant mothers, women

with young children and aged persons, have not been established as the Convention provides (but without making it an obligation), it may sometimes be possible to establish a "neutralized zone" in the region where fighting is .taking place for the protection of the local population and the wounded and sick. Apart from these provisions, wounded and sick non-combatants, the infirm, and expectant mothers are entitled to particular protection and respect. Civilian hospitals and their personnel are protected and all civilians are entitled to give news to their families and to receive news from them. The most important norm concerning the civilian population is contained in article 27 of Convention IV which stipulates:

"Protected persons are entitled, in all 'circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence of threats thereof and against insults and public curiosity".

Furthermore, protected persons must not be compelled to provide information, and it is specifically forbidden to cause them physical suffering ("not only, ..murder, torture, corporal punishments, mutilation and medical and scientific experiments not necessitated by the medical treatment of a protected person, but also. ..any other measures of brutality whether applied by civilian or military agents"), to subject them to collective penalties, measures of intimidation or of terrorism, or reprisals. Pillage and the taking of hostages are also prohibited. These are but a few examples of the rules concerning the general protection of populations against certain effects of war and the status and treatment of protected persons. Other provisions of the Convention deal more particularly with aliens on the territory of a party. to the conflict, occupied territories and the treatment of internees.

The ICRC and the Diplomatic Conference have endeavoured to develop measures for the protection of victims of international armed conflicts. This subject is dealt with by Protocol I, which supplements the Geneva Conventions, particularly with regard to wounded, sick and shipwrecked persons, methods and means of combat, prisoner-of-war status and the civilian
population.

Some of the norms of protection provided for by the Protocol are particularly relevant to human rights. For instance, Article 11 protects the physical and mental well-being of protected persons and prohibits, in particular , mutilations or medical or scientific experiments not justified by medical treatment. Persons carrying out medical activities compatible with professional ethics cannot be punished for those activities nor be compelled to act in a manner contrary to the rules of professional ethics or to reveal information concerning the adverse party (Article 16). In addition, reprisals against the wounded, the sick and medical personnel are prohibited (Article 20). As regards methods and means of combat, the following basic rules are reaffirmed in Article 35:

"Article 35 (Basic rules)

1. In any armed conflict, the right of Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment".

Perfidy (Article 37), the refusal to give quarter (Article 40), and attacks on an enemy *hors de combat* (Article 41) are also prohibited.
The basic rule concerning respect for the civilian population specifies that "the Parties to the 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" (Article 48). In addition, "acts or threats of violence the primary purpose of which is to spread terror among the civilian population", "indiscriminate attacks" and "reprisals" against civilians are prohibited (Article 51).

Article 75 lists the fundamental guarantees enjoyed by civilians in the power of a Party to the conflict and not protected by the Geneva Conventions, namely, nationals of the interested Party to the conflict and combatants who do not fulfil the conditions necessary for them to be considered as prisoners of war[xxxiv] The norms applied to them are those of humane treatment covered by Articles 27,31,32,33 and 34 of the 4th convention and reiterated in Article 4 of Protocol II,[xxxv] together with the judicial guarantees affirmed in Articles 64 to 75 of the 4th Convention, including the principle of the personal character of penal responsibility, the principle *non bis in idem*, presumption of innocence, and the non-retroactivity of penal law. Lastly', special measures are prescribed for women and children (articles 76-78).

The means employed to supervise the implementation of the Geneva Conventions are examined in another chapter.[xxxvi]

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[i] For the history and theory of the right and duty of resistance, see Haim A. Cohn, "The Right and Duty of Resistance", RDH/HRJ, Vol. I, No.4, 1968, pp. 491-516.

[ii] E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliques a la conduite et aux affaires des nations et des souverains*, 1758, new edition, Paris, 1830,. Book II, Chapter IV. para. 56.

[iii] This generally recognized principle is expressed by numerous authors, including, in particular , B. V .A. Roling, *International Law in an Expanding W orld*, Pjanbatan, 1980.

[iv] This idea was reaffirmed by the General Conference of Unesco at its 18th session in Resolution 11, preambular para. 17: "Considering that peace cannot consist solely in the absence of armed conflict but implies principally a process of progress, justice and mutual respect among the peoples designed to secure the building of an international society in which everyone can find his true place and enjoy his share of the world's intellectual and material resources, and that *a peace founded in injustice and violation of human rights cannot last and leads inevitably to violence"* (underlining added).

[v] On the necessity to have recourse to armed struggle to achieve respect for human rights, see P. Pierson-Mathy, *La creation de L' Etat par la lutte de liberation nationale,- le cas de Guinee Bissau,* Collection "New Challenges to International Law", Paris, Unesco, 1980.

[vi] See Johan Galtung, "The Specific Contribution of Peace Research to the Study of the Causes of Violence: Typologies", in A. Joxe (ed.), *Violence and its Causes*, Paris, Unesco, 1980, pages 83-96.

[vii] See Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1-12 September 1975), "The Treatment of Offenders, in Custody or in the Community, with Special Reference to the Implementation of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the United Nations", Working Paper prepared by the Secretariat, Document A/CONF56/6; and Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Caracas, Venezuela, 25 August to 5 September 1980), "The Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners", Working paper prepared by the Secretariat, Document A/CONF .87/11.

[viii] This draft convention was prepared further to a proposal of the Fifth United Nations Congress, endorsed by the General Assembly in Resolution 3452 (XXX) of 9 December 1975. By resolutions 32/62, 33/178, 34/167, 35/178 and 36/60 the General Assembly requested the Commission on Human Rights to draw up the Convention.

[ix] The General Assembly requested the Commission on Human Rights to study this question in its resolution 3453 (XXX) of 9 December 1975. The Commission asked the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to draw up a body of principles. The draft was adopted by the Sub-Commission in 1978 (resolution 5 C (XXXI). By its resolution 34/169 of 17 December 1979, the General Assembly adopted the Code of Conduct for Law Enforcement Officials, but decided, by resolution 35/177 of 15 December 1980 to defer to its thirty-sixth session the draft Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. In relation to this subject, Daniel O'Donnel of the staff of the International Commission of Jurists (lCJ) prepared a study on "States of Siege or Emergency and Their Effects on Human Rights" with recommendations by the ICJ which was submitted to the Sub-Commission (Doc. E/CN.4/Sub.2/NGO/93, 26 August 1981).

[x] By its resolution 3453 (XXX) of 1975, the General Assembly invited the World Health Organization to give further attention to the study and elaboration of principles of medical ethics relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment. The invitation was conveyed to the WHO by resolution 31/85 of 13 December 1976. In January 1979, the Executive Board of WHO decided to endorse the principles set forth in a report of the Director General on "Development of codes of medical ethics" containing, in an annex, a draft body of principles prepared by the Council for International Organizations of Medical Sciences. The draft principles were brought to the attention of the General Assembly at its 34th session (document A/34/273), which requested the Secretary General to circulate the draft Code of Medical Ethics to Member States, Specialized Agencies concerned and NGO's and to report to the 35th session (resolution 34/168). Comments were communicated to the General Assembly (Docs. A/35/37 and Add. 1 and 2, A/36/140 and Add. 1-4), who continued considering the matter in 1982 (resolution 36/61).

[xi] See *supra*, Chapter 5 and further on in this chapter.

[xii] Several draft Preambles to the Conventions contained a direct reference to the Declaration but were not adopted by the Diplomatic Conference. See Records of the Diplomatic Conference of Geneva, Vol. III (Annexes), pp. 96-100 and the proceedings, Vol. II-A, pp. 761-766.

[xiii] . This is the principle of endeavouring "to prevent and alleviate human suffering wherever it may be found" which was affirmed, *inter alia*, by the 20th International Conference of the Red Cross, Vienna, 1965.

[xiv] These terms were first employed at the 17th International Conference of the Red Cross at Stockholm in 1948. The more conventional terms of "civil war" still appeared in the resolutions of the l0th and 16th International Conferences of the Red Cross.

[xv] . ICRC, *The Geneva Conventions of August 12, 1949, Commentary*, Vol. IV, Geneva 1956, p. 39.

[xvi] *Ibid.*, pp. 44-46.

[xvii] Resolution XXIII. See also General Assembly Resolution 2677 (XXV) of 9 December 1970.

[xviii] See, *inter alia*, "Protection of victims of non-international conflicts", report submitted by the ICRC to the 21st International Conference of the Red Cross, Istanbul, September 1969, published in Geneva, May

1969; and volume V of the documentation submitted by the ICRC under the same title to the Conference of Government Experts, Geneva. May-June 1971, published in Geneva, January 1971.

[xix] The material field of application of Protocol II expressly excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". This Protocol shall apply to all conflicts which are not covered by Protocol I (i.e. conflicts between two or more Contracting Parties or wars of national liberation) "which take place in the territory of a High Contracting Party between its armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military operations and to implement this Protocol". (Article I of Protocol 11). These two Protocols were adopted by the Diplomatic Conference on 10 June 1977 and entered into force on 7 December 1978 in accordance with Article 25 of Protocol I and Article 23 of Protocol II.

[xx] The draft submitted by the ICRC to the Stockholm Conference of 1948 quoted as examples of non-international armed conflicts "civil war, colonial conflicts, or wars of religion". The Conference decided not to include examples.

[xxi] See K.J. Partsch, *supra* Chapter 4.

[xxii] Among the many resolutions the following may be quoted for reference: 2767 (XXVI), 2795 (XXVI), 2796 (XXVI), 2871 (XXVI), 2874 (XXVI), 2908 (XXVII), 2918 (XXVII), 2945 (XXVII), 2946 (XXVII), 2955 (XXVII), 2979 (XXVII) and 2980 (XXVII).

[xxiii] The conditions are those required of "organized resistance movements", namely: "(a) that they are under a command responsible to a Party to the conflict for its subordinates; (b) that they distinguish themselves from the civilian population in military operations; (c) that they conduct their military operations in accordance with the Conventions and the present Protocol". See ICRC, Draft Additional Protocols to the Geneva Conventions of August 12,1949. Commentaries, Geneva, 1973, pp. 48-54.

[xxiv] See the favourable interpretation of Georges Abi-Saab. "Wars of National Liberation and the Laws of War", *Annales d'etudes internationales*, Vol. 3. Geneva. 1972. pp. 93-117; and the unfavourable interpretation of Henri Meyrov.itz. "Les guerres de liberation et les Conventions de Geneve", *Politique Etrangere*, 39th year, No.6, 1974, pp. 607-727. See also, Michel Veuthey , *Guerilla et droit humanitaire* Institut Henry-Dunant. Geneva, 1976, La guerilla: le probleme du traitement des prisonniers", *Annales d'etudes internationales* Vol. 3, Geneva, 1972, and "Guerres de liberation et droit humanitaire". RDH/HRJ. Vol. VII, No.1, pp. 99-107, and Charles Chaumont, "La recherche d'un critere pour I'integration de la guerilla au droit international humanitaire comtemporain", *Melanges offerts a Charles Rousseau, La Communaute internationale*, Editions A. Pedone. Paris. 1974. pp. 43-61: Bert V .A. Roling, "The Legal Status of Rebels and Rebellion", *Jounrnal of Peace Research* Vol. XIII, 1976, pp. 149-163, and Natalino Ronzitti, "Wars of National Liberation - A Legal Definition", *The Italian Yearbook of International Law*, Vol. I, 19i5, pp. 192-205. Meyrowitz has proposed that this category of conflicts be considered as a distinctive category of international but not inter-State armed conflict. Henri Meyrowitz. "La guerilla et le droit de la guerre: problemes principaux", *Revue belge de droit international*,. Vol. VII. 1971-1. pp. 56-72, p. 64.

[xxv] The amendments proposed at the First Diplomatic Conference with a view to ex- tending the application of the Conventions and the Protocols to wars of liberation are to be found under reference CDDH/1/5, 11,13,41, and 42. The text just quoted. CDDH/I/71. was submitted by Argentina, Honduras. Mexico, Panama and Peru and adopted by 70 votes to 21 with 13 abstentions.

[xxvi] See *supra*, Chapter 5

[xxvii] Final Record of the Diplomatic Conference of Geneva of 1949,4 vols., Bern, Federal Political Department, 1949.

[xxviii] *Final Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974-1977), 17 vols., Bern, Federal Political Department, 1978.

[xxix] . ICRC, *The Geneva Conventions of August 12,1949, Commentary*, published under the direction of Jean S. Pictet, Vol. I to IV, Geneva, 1952-1960.

[xxx] Delio Jaramillo Arbelaez, *Derecho internacional humanitario (Convenios de Ginebra);* Bogota, Colombia, Universidad Santo Thomas de Aquino, 1975; G. Balladone-Pallieri, *Diritto Bellico*, 2nd edition, Padova, CEDAM, 1954; S.D. Bailey, *Prohibitions and Restraints in War*, London, Oxford University Press, 1972; G. Cansacchi, *Nozioni di Diritto Internazionale Bellico*, 4th ed. Torino, Giappichelli, 1963; E. Castren, *The Present Law of War and Neutrality*, Helsinki, Suomalaisen k.s.k.o., 1954; G. L. Dorsey (ed.) *The Law of Conflict*, Saint Louis, 1973; G.I.A.D. Draper "The Geneva Conventions of 1949"; *Collected Courses of the Hague, Academy of International Law*, Vol. 114,1965; R.A. Falk, *Law, Morality and War in the Contemporary World*, New York, Praeger, 1963; L. Friedman, *The Law of War: A Documentary History*, New York, Random House, 1972,2 vols; M. Greenspan, *The Modern Law of Land Waifare*, Berkeley, University of California Press, 1959; A. Guerrero Burgos, *Nociones de Derecho de Guerra*, Madrid, Jura, 1955; J. Hinz, *Kriegsvolkerrecht*, Cologne, Heymanns, 1957; F. Kalshoven, *The Law of Warfare: A Summary of its Recent History and Trends in Development*, Leyden, Sijthoff and Geneva, Henry Dunant Institute, 1973; R.J. Miller, *The Law of War*, Lexington Books, Massachusetts, 1975; M.S. McDougal et F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, New Haven, Yale University Press, 1961; L. Oppenheim (H. Lauterpacht, ed.) *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, 7th ed., London, 1963; J.S. Pictet, *Les principes du droit international humanitaire*, Geneva, 1966; J .S. Pictet, *Humanitarian Law and the Protection of War Victims* (series of lectures given at the International Institute of Human Rights, Strasbourg, 1972), Henry Dunant Institute, 1975; A.I. Poltorak & L.I. Savinskij, *Vooruzhennye Konflikty imezhdunarodnoe pravo osnovnye problemy* (Armed Conflicts and International Law. BasicProblems), Moskva, Nauka, 1976: G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 2: *The Law of Armed Conflict*, Westview Press, Boulder, Colo. and London, 1968: J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War -Law*, 2nd ed., Revised, New York, Rinehart and Company, 1959; D.W. Ziegler. *War, Peace and International Politics*, Boston. See also J. Toman & Huynh Thi Huong, *International Humanitarian Law. Basic Bibliography*, Geneva, Henry Dunant Institute. 1979 for extensive additional references.

[xxxi] The terms chosen to express this principle, as well as several others referred to further on, are taken from J. Pictet, *Humanitarian Law and the Protection of War Victims* (series of lectures given at the International Institute of Human Rights, Strasbourg. 1972), Henry Dunant Institute. 19i5, p. 31.

[xxxii] . *Ibid*., p. 33

[xxxiii] *Ibid*.

[xxxiv] These conditions are set out in article 44 of Protocol I.

[xxxv] . The text of this article is reproduced above.

[xxxvi] See *infra*. C. Dominice, Chapter 14.

COMPARISON BETWEEN THE DIFFERENT TYPES OF CONFLICT SITUATIONS IN TERMS OF THE APPLICABLE NORMS AND THE NOTION OF *JUS COGENS*

It has become clear that the different situations of violence considered here give rise to the application of norms pertaining either to international human rights law (IHRL) or to the international law of armed conflicts (ILAC),[i] or to both at the same time. The level of protection afforded by IHRL is highest in time of peace and diminishes as a situation approaches war , as when, for instance, attacks on life due to "lawful acts of war" are permitted. conversely, the level of protection afforded by ILAC is relatively limited in peacetime (obligation to disseminate the Conventions, to modify legislation, etc.), but is very developed when there is a situation of international war. The relationship between the two systems is illustrated diagramatically in Table II. The two curves cross roughly at the moment of civil war. For IHRL this means a public emergency threatening the life of the nation, during which the applicable norms may be restricted to thos considered as non-derogatable. ILAC, the sitaution is one which common article 3 of the Geneva Conventions and article 4 of Protocol II apply. In other words at the intersection of the two curves the minimum norms of the two systems apply.

Table 8.2
Comparison of Level of Protection as a Function of the Type of Conflict Under International Human Rights Law and International Humanitarian Law

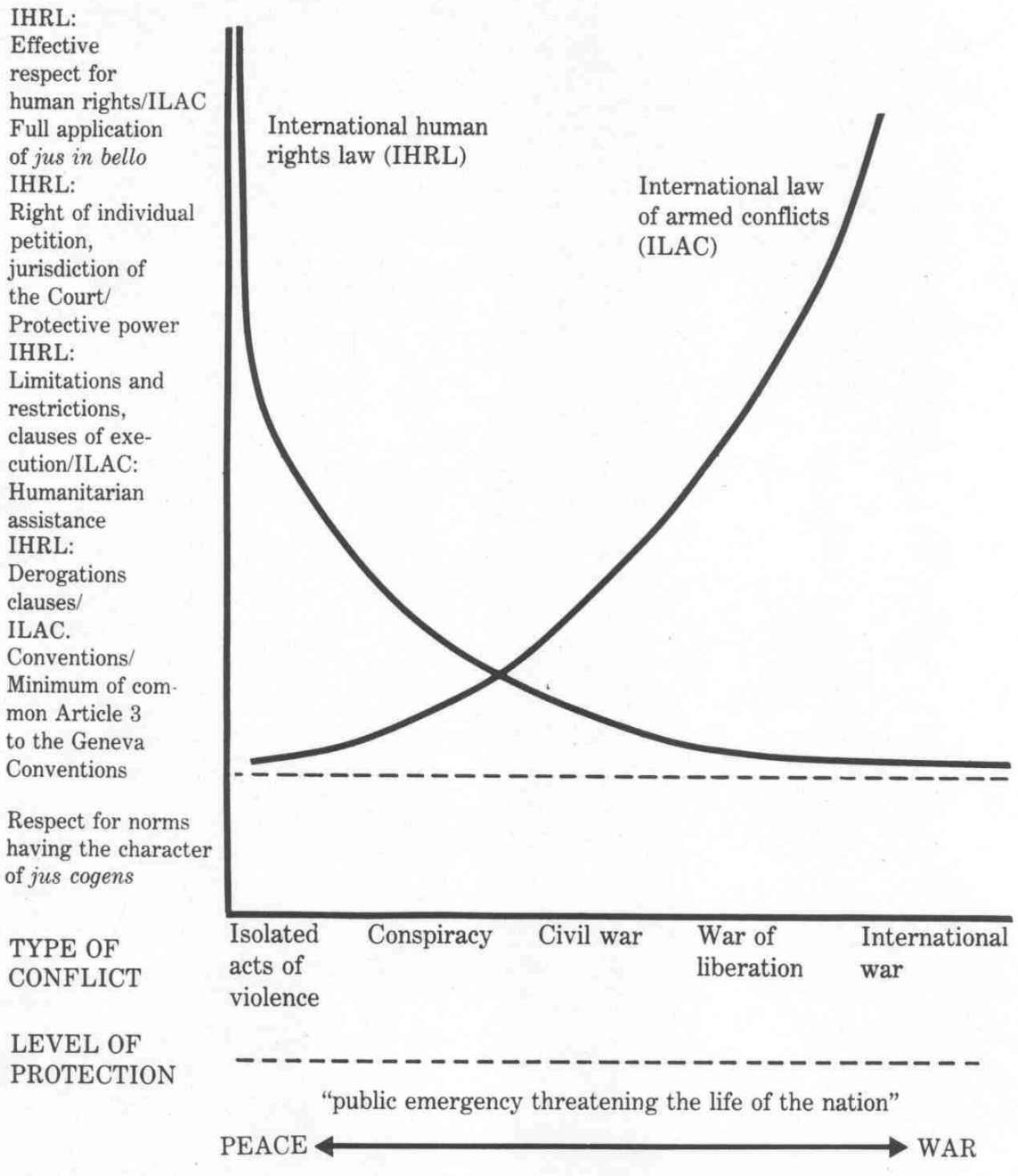

Table II also shows that the level of protection afforded both by IHRL and ILAC never descends below respect for norms having the character of *jus cogens.* What is meant by this? As it appears in articles 44,53, 60 and 64 of International Law Commission, the conception of *just cogens* is founded on the legal effects of a norm having the character of *jus cogens.* What is involved, according to article 53 of the Vienna Convention, is a norm accepted and recognized by the international community of States as one from which no derogation is permitted and which can only be modified by a subsequent norm of the same character. Such was the conception of several delegates to the 1949 Diplomatic Conference in regard to the nature of the norms of the Geneva Conventions.[ii] Moreover, several articles can be interpreted along these lines on account of their objective nature, since they establish obligations which are not of a contractual character.[iii] Common article 3 defines rules which are applicable "at any time and in any place" and lays down, according to the Commentary, imperative rules.[iv] Similarly the provisions of IHRL relating to emergency situations have the effect of limiting the power of the contracting States to discontinue the application of certain articles.[v]

Another approach to the notion of *jus cogens* consists in examining the content of the norms. Professor Verdross includes,for instance, "all norms of general international law created for humanitarian purpose" among the norms of *jus cogens.* [*vi*] . The International Law Association has identified as deserving urgent solution the question of the "imperative character in respect of the norms of international law, *(jus cogens*)of the principles relating to the protection of the human person contained in the Geneva Conventions".[vii] It would no doubt be false to claim that all the norms of ILAC and all the rights of IHRL from which there can be no derogation have the character of *jus cogens.* Rosalyn Higgins considers that "neither the wording of the various human rights instruments nor the practice thereunder lead to the view that all human rights are *jus cogens*," although she does recognize that "there certainly exists a consensus that certain rights-the right to life, to freedom from slavery or torture-are so fundamental that no derogation may be made.[viii]. Indeed, not to consider some norms o an ILAC as imperative norms having the character of *jus cogens* would disregard the obvious legal effects of certain instruments and the fundamental character, unchallenged by the international community, of several principles.

Table III below shows the interface of these norms and points out in particular that certain norms considered to be fundamental in IHRL are not so considered in ILAC and vice-versa, while other are common to IHRL and ILAC and, more often than not, are also norms having the character of *jus cogens* (JC).

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[i] . It is possible to conceive of humanitarian law as a branch of IHRL since what is involved is "respect for human rights in periods of armed conflict" to adopt the terms used by the United Nations since the Teheran Conference (see Resolutions 2444 (XXIII). 2852 (XXVI) and 3032 (XXVII)). For the sake of clarity, IHRL and ILAC are considered here to be two separate systems of legal protection. The two systems are also systematically compared in Aristidis S. Calogeropoulos - Stratis. *Droit humanitaire et droit de l'homme. La protection de la personne en periode de conflit arme,* Graduate Institute of International Studies, Geneva, 1980

[ii] See for instance, Records of the Diplomatic Conference of Geneva, Vol. III (Annexes), No.187, 188, 189, pp. 97-98.

[iii] It is possible to analyze in this way common articles 1 and 2 of the four Conventions, article 7/7/7/8 respectively and 51/52/131/148 respectively. See also article 60, para. 5, of the Vienna Convention.

[iv] *Commentary*, vol. IV, p. 40

[v] See Table 8.1.

[vi] "*Jus dispositivum* and *jus cogens* in International Law", *American Journal of International Law*, 1966, Vol. 60, p. 59. See also *The Concept of Jus Cogens in International Law, Papers and Proceedings* (report of the Conference organized by the Carnegie Foundation at Lagonissi), Greece, April 1966, Geneva, 1967, pp. 13, 99, 106 and 107.

[vii] Resolution adopted at the 54th Conference, The Hague, 1970

[viii] Rosalyn Higgins, "Derogations under Human Rights Treaties", *The British year book of International Law* 1976-1977, Oxford, Clarendon Press, 1978, p. 282

Conclusion

The three types of emergency situations examined in this chapter differ from each other in many respects, but they also have many features in common. For countries which have not known affluence for centuries, if ever they did, under-development is the rule rather than the exception. On the other hand, a natural catastrophe places before the national authorities a new situation with which they may not be able to cope. Armed conflicts, produce situations in which the authorities are challenged either from within or outside the country by a military force which, by definition, does not wish to comply with the laws of the State in question. The three situations differ as to their duration, the appropriate means of contending with them, the relatioship between the national authorities and the population, and the sources of the applicable rules.

They nevertheless have enough in common for it to be possible to put forward a few general ideas concerning human rights in emergency situations. First of all, all three types of situations relate to major concerns of the international community. The establishment of a new international economic order provides, for the whole of the United Nations system, fresh impetus for the fight against under-development; the establishment and development of the office of the United Nations Disaster Relief Coordinator and the magnitude of recent catastrophes illustrate the growing importance of this question; the Geneva Diplomatic Conference, in which more than 130 delegations participated, and the deadly internal as well as inter-State conflicts which have arisen in many parts of the world, emphasize the need to adapt the relevant laws to current realities.

More important than the topicality of these questions are the links which exist between them. Speaking of the drought in Africa, the Director-General of Unesco said:

"We must learn fast, very fast, from this terrible experience in view of the imminence, if not already the actual presence, of other calamities, caused in this case by an economic crisis and a recession, the effects of which, by their unequal impact on nations and social groups, bring starkly into the open the inequalities which were previously concealed from many people by affluence and its attendant sense of well-being in the wealthier countries. ...Yet these dire events are not the result of fate, to be received with resignation. When something is described as a "natural" disaster, it is in most cases merely because its causes or workings cannot be discerned nor a remedy found".[i]

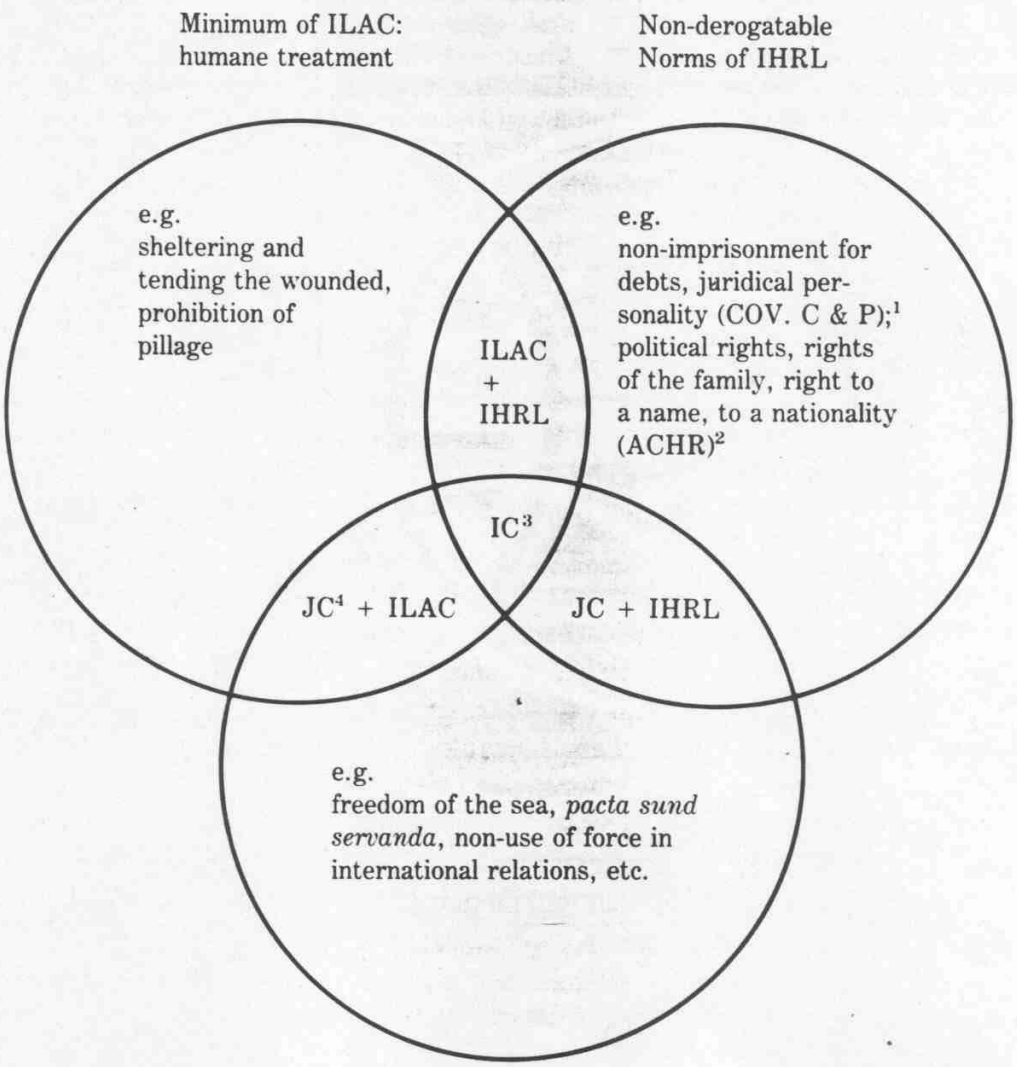
"Natural" disasters, indeed have a much more devastating effect upon the developing countries than upon the rich countries, precisely because the state of under-development makes them more vulnerable. And these same under-developed countries are the theatre of armed conflicts, which the major industrial powers have been able to eliminate from their mutual relations by shifting them towards the under-developed periphery.

These three situations relate to moments in the life of a State entity when that entity is least inclined to burden itself with human rights. Concerned by the need to assure the survival of the nation, the national authorities wish to be bound by as few constraints as possible.

In these circumstances, it is essential and urgent to define clearly the human rights obligations that. States must respect whatever the situation prevailing on their territories. Considering themselves to be engaged in the struggle for human rights when they take measures in favour of develop ment, to assist victims of disasters, to liberate themselves or to repulse the aggressor, States will reveal the full measure of their attachment to human rights by respecting the human rights applicable in such exceptional circumstances which, it is to be

hoped, will be more and more "exceptional" in fact. As long as these conditions exist, they will reduce human rights to their most precarious level and it is at that level that we can see the extent to which human rights are reality or mere illusion.

Table 8.3
Interface Between International Law of Armed Conflicts and International Human Rights Law Showing the Place of Norms Having the Character of *Jus Cogens*



NOTES:
1. COV. C & P—International Convention on Civil and Political Rights.
2. ACHR—American Convention of Human Rights.
3. IC—The "indestructible core" of human dignity (prohibition of torture, slavery, degrading or humiliating treatment or punishment, the arbitrary deprivation of life, adverse discrimination and judicial guarantees recognized as indispensable).
4. JC—Norms having the character of *jus cogens*.

NOTES

[i] Address by Mr. Amadou-Mahtar M'Bow at the opening of the 12th Summit Conference of the Organisation of African Unity , Kampala, 29 July 1975.

SECTION 2

CONFLICTS OF A NON-INTERNA TIONAL CHARACTER

CHAPTER XIV

NON -INTERNATIONAL ARMED CONFLICTS
GEORGES ABI-SAAB

Armed strife within human communities is probably the earliest known form of war. On historic and statistical record, such conflicts have been no less frequent brutal or devastating than inter communal (or, to use contemporary legal idiom interstate) wars.

Important as it has always been, this type of armed conflict was totally ignore(up to 1949 in the successive international legal efforts at codifying and developing the rules of the law of war; though paradoxically enough the first modern endeavour in this field which inspired the international action that followed –the Lieber Code[i] -was elaborated in the context of the American Civil War .This omission was not an oversight but a natural consequence of the sovereignty reflex of States, which explains their resistance to any attempt at extending to these conflicts the application of the laws of war .

I. The Traditional Approach

Until the adoption of the Geneva Conventions of 1949, the prevailing view was that internal conflicts were not subject to international legal regulation, but that they fell within the domestic jurisdiction of the State on whose territory they take place -which really means of "the established government" of that State –and are therefore exclusively governed by its municipal law. Any dealings by third parties with "the rebels" was considered an act of intervention in the internal affairs of that State.

This legally radical separation of internal wars from the international level, was not, however, as rigorously observed in practice as it sounded in theory. One can cite numerous instances, both before, and particularly after the Napoleonic wars, of intervention by major European powers against democratic uprisings in Europe, not to speak of their increasing interest in conflicts arising in different parts of the Ottoman Empire, and in their extra-european spheres of influence as a prelude to their formal colonization; or of the intervention of the United states in the frequent internal upheavals in Latin America.

However, a changing international context characterized by a greater degree of stability in the global balance of power, and the rise of the positivist doctrines of the State both in municipal and international law, led, by the end of the Nineteenth century, to the crystallization and hardening of the traditional approach described above.

Even according to this traditional approach, the legal status of internal conflicts could be radically altered by resorting to the institution of "recognition of belligerency". If such a

recognition emanated from the established government, it entailed the application of *the jus in bello* in its entirety to its relations with the rebels; if it emanated from third parties it enabled them to require to be treated as neutrals by both belligerent parties.

But as the recognition of belligerency is a purely discretionary act, it has been of a very rare occurrence, especially in the twentieth century. And even in the few instances when it did take place, it intervened at an advanced stage of the conflict -usually after the rebels had secured control over a part of the national territory and the parties started to assert belligerent rights on the high seas, i.e. when the armed conflict in its material aspects became similar to an interstate areas. For it is only then that reciprocity could come into play and the institution of recognition of belligerency would offer some advantage to the established government or to third parties with a view to protecting their interests in the areas held by the rebels as well as their maritime commerce behind the shield of neutrality.

Indeed, when the Institute of International Law adopted in 1900 a resolution on the rights and duties of foreign powers in case of insurrection,[ii] it considered control by the insurgents of part of the national territory a necessary precondition for "recognition of belligerency" by third parties. In its absence, recognition would be considered "premature", and would constitute an act of intervention in the internal affairs of the State concerned. In any case, recognition of belligerency by third parties did not bind the government of that State. its effects were limited to the relations of the belligerents with the recognizing third parties, i.e. to the "external" aspects of the armed conflict, but did not affect the relations between the belligerents themselves. In other words, it had no direct incidence on the conduct of hostilities or on the protection of their potential victims -questions which are the main concerns of humanitarian law.

Apart from this purely consensual institution, States resisted any attempt at mandatory international regulation of internal conflict. It is true that a few progressive voices advocated, also around the turn of the century, a theory of an "obligatory recognition of belligerency", which would have extended *ipso jure* the application of the *jus in bello* to the relations between the belligerents, once the conditions of recognition of belligerency by third parties were met. But these voices were in advance on their time, and remained without echo.[iii]

This does not mean that efforts were not made to help the victims of internal conflicts on purely humanitarian and "operational" -rather than legal- grounds. Indeed, already in the late nineteenth century and the early twentieth, opinions were expressed from time to time within the ICRC and by representatives of National Societies in the International Red Cross Conferences in favour of extending their activities to cases of internal armed conflict. But it was not until 1921, following the practical activities of the National Societies and the ICRC in the internal upheavals which took place in several European countries, particularly in Russia and Hungary at the end and after the First World War, and a series of reports by National Societies on their role in such upheavals, that the International Red Cross Conference adopted a series of resolutions asserting the right and

even the duty of the National Societies as well as the ICRC to provide relief to the victims of civil wars.[iv]

When the Statutes of the ICRC were revised in 1928, a new paragraph was added to Article IV enumerating the aims and objects of the ICRC, still unchanged in the current version, which read:

> "d) to be a neutral intermediary, whose intervention is recognized to be necessary, especially in case of war, civil war or civil strife;..."

That was, however, an internal legal mandate which laid down the line of action to be pursued by the Red Cross organisms including the ICRC in such situations, but which imposed no legal obligation on governments to accept or allow such activities on their territories or to apply all or part of the laws of war or the Geneva Conventions in case of internal armed conflict.

The upheavals of the interwar period, and particularly the Spanish Civil War, brought out clearly the limits of this extra-legal or "on sufferance" humanitarian approach to internal conflicts; and preparations were in process for a revision conference in 1940 to deal with this as well as other defects in the existing conventions when the Second World War broke out.

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[i] Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber and promulgated as General Order No.100 by President Lincoln on 24 April 1863. These Instructions are reproduced in: *The Laws of Armed Conflicts. A Collection of Conventions. Resolutions and Other Documents*, Edited by D. Schindler and J. Toman, 3rd edition, Dordrecht, Martinus Nijhoff Publishers, Geneva, Henry Dunant Institute, 1988, pp. 3-23. Cf. in general, on the Lieber Code as well as on the subsequent developments up to and including Protocol II, Rosemary Abi-Saab, *Droit humanitaire et conflits internes. Origines et evolution de la reglementation internationale*. Geneve/Paris, Institute Henry-Dunant/Editions A. Pedone, 1986, 280 p.

[ii] Institut de droit international. *Annuaire*. 1900, Vol. 18, p. 229. Institut de droit international. *Tableau general des resolutions* (1873-1956), publie par Hans Wehberg. Bale, Editions juridiques et sociologiques S.A.. 1957, pp. 171-173

[iii] Fiore, E.G. *Nouveau droit international public*, Paris, 1885, p. 285; Bluntschli, Jean-Gaspar. Le droit international codifie. Paris, Felix Alcan, 1895, para. 512

[iv] *Dixieme Conference internationale de la Croix-Rouge. tenue a Geneve du 30 mars au 7 avril 1921. Compte-rendu*, pp. 217-218.

II. Common Article 3

I. The Elaboration of Common Article 3

After the War , and as a result of its traumatic impact, the drive for the revision of the Geneva Conventions regained and even gathered momentum. In this respect, the approach to internal conflicts was greatly influenced, apart from the lessons of the Spanish Civil War, by the massive atrocities committed against minority groups during the war and the surge of the movement for the international protection of human rights within the United Nations. It was strongly felt that a minimum of humanitarian legal regulations should apply in all armed conflicts, regardless of their internal or international character .

Thus the *Draft Conventions for the Protection of War Victims*, prepared by the ICRC and submitted to the XVII International Red Cross Conference at Stockholm in 1948, contained a fourth paragraph of Common Article 2, which reads:

> "In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status."[i]

This draft, while maintaining the distinction in legal status between international conflicts and conflicts not of an international character would have led to the integral application of the Conventions to the latter. This maximalist approach met with heavy resistance both in Stockholm and later at the Diplomatic Conference of 1949 in Geneva. One of the main concerns of its opponents was that in spite of the express formal denial of any effect of such an integral application on the legal status of the parties to the conflict, the possibility such a solution opens to "rebels" to appoint another State as "Protecting Power" would inexorably internationalize the conflict. It would amount to an *ipso jure*, i.e. mandatory and automatic, recognition of belligerency.

In these circumstances, even according to the proponents of this solution, the integral application of the Conventions would have had to be limited to characterized civil wars, which were materially identical to interstate conflicts, such as the Spanish Civil War. In other words, the internal armed conflict had to be strictly and restrictively defined. But the elaboration of such a definition proved to be a highly controversial and an almost impossible task.

The alternative minimal solution, which finally prevailed, was to apply to internal armed conflicts not the Conventions as such but only the basic principles of these Conventions;

a solution which can be workable even with a loose definition or in the absence of any definition of the internal armed conflict. At one stage of the negotiations an attempt was made to enumerate these basic principles in a draft preamble to the Conventions. But as later on, the idea of an elaborate substantive preamble was abandoned, these principles were included in a separate article specifically addressing itself to internal armed conflicts.[ii]

Thus Article 3, Common to the four Conventions, reads:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :
> (1) Persons taking no active part in the hostilities, including members of armed forces, who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> b. taking of hostages ;
> c. outrages upon personal dignity, in particular humiliating and degrading treatment;
> d. the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

2 .Common Article 3 in Practice

This article -which was described as a "Convention within the Conventions" and "a Convention in miniature" -though falling short of the maximalist solution, constituted a great step forward in relation to pre-existing law. Its mere existence made a big dent in the wall of State sovereignty by establishing the principle of the applicability of a minimum of humanitarian regulation whenever an internal armed conflict materializes on the territory of a State, as a matter of legal obligation and independently of any act of will

on the part of the "established government". But in spite of this breakthrough at the level of principle, the article suffers from technical deficiencies which were progressively revealed by the difficulties that have surrounded its application since 1949.

A) In the first place, when the application of humanitarian law depended on "recognition " (of belligerency or, alternatively, of insurgency) there was no problem identifying the conflicts to which they apply or determining the moment from which this application became operative. But the "automatic" character of common article 3, i.e. its ipso jure operation in all conflicts not of an international character, combined with its very condensed and vague formulation, gave rise to such problems.

Indeed, the article defines only negatively the armed conflicts to which it should apply, by stating what they are not, but without providing any substantive or procedural criteria for their identification. The absence of a substantive definition of these conflicts raises the problem of their threshold, i.e. what are the minimum (necessary and sufficient) conditions which make it possible to ascertain the existence of an "armed conflict not of an international character", and how to distinguish such conflict from lesser forms of violence and breakdown of the civil order which do not reach that threshold (and which are referred to in ICRC language as "internal disturbances and tensions")?

And the silence of the article as to the procedure (i.e. the competent authority) for determining the existence of such a conflict -a procedure which could have mitigated the inconveniences of the absence of a substantive definition –raises the problem of the moment from which the existence of such a conflict cannot be denied, particularly by the "established government".

B) At the other end of the spectrum, the absence of a substantive definition raised also the problem of the ceiling of this category of conflicts, i.e. their distinction from international armed conflicts. This problem proved to be particularly acute in view of the nature of the strategic and "political configurations of post-war international relations which favoured certain types of armed conflicts difficult to classify along the international/non-international spectrum.

For while the world was quickly divided into two antagonistic blocks by the cold war and the policy of containment was followed, the nuclear balance of terror prevented degenerating into a generalized conflagration. The pent up pressures found their outlets in that vast zone of competition between the two blocks -the Third World -which was in the process of decolonization and nation building.

Thus, while the Third World War did not materialize, the post-war world witnessed the proliferation of "limited wars" which though often taking place on the territory of one State, are in reality "wars by proxy" with the encouragement and the covert and sometimes overt intervention of the contending blocks. Many of these "limited wars " thus reflect certain characteristics of both international and non-international armed conflicts, which makes it difficult to determine with certainty their legal status in relation to the Conventions. Examples of these ambiguous conflicts are those between divided

States, territories or zones of occupation, civil wars with foreign intervention (either on the side of the "established government" or on the side of the "rebels"), and wars of national liberation.

C) Even if the preceding difficulties were resolved, or in cases where they do not arise, there remains the problem of determining the scope of protection provided in common article 3. As was mentioned above, this article contains, in a highly condensed form, the principles of the Conventions, respect for which is considered essential in all armed conflicts. I ts compact and general language makes it highly non "self-executing" (or self-sufficient) as a legal regulation, and leaves a wide margin for interpretation, hence controversy, as to the scope of protection it affords.

Given the conditions in which humanitarian law is called upon to apply, what is most needed is a clear regulation of specific hypotheses and situations. This is done in large measure in the almost 500 articles of the Conventions in relation to international armed conflicts; but obviously not in common article 3 alone in relation to non-international armed conflicts. Thus numerous crucial issues which proved to be of frequent recurrence and great practical consequence (such as the treatment, protection and access to captured combatants and civilian detainees, and the protection of civilian populations against indiscriminate attacks) are not, or only obliquely, addressed by this article.

D) Yet another source of inextricable practical difficulties relate to the nature of conflicts to which common article 3 is called upon to apply. Indeed, the great majority of non-international (as well as some international) armed conflicts constitute at least in their early stages what strategists call "asymmetrical conflicts'. In such situations, the large disparity in strength -especially in air and fire power -between the parties, leaves no choice to the weaker one, usually the "rebels", but to carryon a "poor man's war", by resorting to non-conventional or guerrilla warfare, based on mobility, surprise and camouflage. But the Geneva Conventions (and The Hague Regulations before them) are modelled after conventional warfare where regular armies -composed of military personnel clearly distinguishable from civilian populations -confront each other along an equally distinguishable front line. This poses in an acute manner the question of their adequacy and their practical applicability to guerrilla warfare. To the extent that common article 3 draws on the principles and underlying approach of the Conventions, it suffers from the same defects as regards guerrilla warfare.

E) Finally, the elaborate mechanisms of implementation and scrutiny established by the Conventions are not referred to, except in a very diluted form, in common article 3. This limitative approach was a condition *sine qua non* for acceptance of the solution of common article 3 by governments; it was essential for them as a protection against such political dangers as the appointment by "rebels" of a Protecting Power, which would in fact, if not in law, confer on them an international status.

It is precisely to avert this objection that common article 3, paragraph 4, expressly provides that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict". In spite of this disclaimer , however, common article 3 does

confer certain objective legal status on "rebels" in conflicts not of an international character. This status is more limited in its legal effects than the one deriving from the "recognition of belligerency" as it does not entail the application of the *jus in bello* as a whole (but only those principles enumerated in common article 3). On the other hand, it is an objective status emanating from the Conventions themselves and thus transcending the discretionary and relative character of the "recognition of belligerency". Its effect is to have a minimum legal standard apply, independently of the will of the established government, as soon as violence attains a certain threshold.

These legal and political consequences of the application of common article 3 explain the reluctance of governments to admit the applicability of the article in concrete situations involving them. But even when they admit it, they do not have an obligation to submit to any "scrutiny". Common article 3, paragraph 2, merely stipulates :

> "An impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict".

Neither the tender of the offer of services nor its acceptance are obligatory. Both remain optional for the humanitarian body and for the government in question.

This guarded approach, in deference no doubt to the traditional considerations of sovereignty under conditions of stress, rendered the application of common article 3 even more problematic. The ICRC offer of services was not always accepted by the "established government", especially when it denied the existence of the conflict, and in any case rarely at the very beginning of the conflict. But even when it was accepted, the text left much room for controversy as to what the role of the ICRC is and what it is supposed to do. Thus even the acceptance of the ICRC offer did not necessarily ensure the strict adherence to the letter and spirit of common article 3, as witnessed in many recent conflicts.

* * *

In the face of such difficulties, the consistent strategy of the ICRC was to strive to extend its activities to all situations of internal conflict, disturbances or tension; in other words, to use the ambiguities of the text in order to push the threshold as far down as possible, and to establish its *locus standi* to act even in situations falling below it. In particular, the ICRC strove to have access in all such situations to prisoners and detainees with a view to ensuring their humane treatment, an activity which is highly prized by the ICRC and in which it feels particularly confident.

As part of this strategy , commissions of experts were established from time to time to help clarify the law and consolidate humanitarian initiatives and action. Thus a "Commission of experts for the examination of the question of assistance to political detainees" was convened in 1953, and another "for the study of the question of the application of humanitarian principles in the event of internal disturbances" in 1955. In

both cases, humanitarian standards (especially for the treatment of prisoners and detainees) were found to exist, on the basis of the 1949 Conventions, common article 3 (in spite of the fact that the situations envisaged did not fall formally within their ambit) and the international legal instruments for the protection of human rights.[iii] Moreover, the role of the ICRC was asserted, particularly as an exercise of its "right of initiative" (which was considered as morally binding on governments, as long as the ICRC made a clear distinction between the humanitarian on the one hand, and the legal and political aspects of the case on the other). But the most important from the point of view of-common article 3 was the "Commission of experts for the study of the question of aid to the victims of internal conflicts" which met in 1962 and which found that "the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organization".[iv]

But these were mere expert opinions which could not by themselves bind governments, and which were in any case, and in spite of their usefulness, too brief and general to serve as an effective complement to common article 3.

The increasing awareness of the shortcomings of article 3 on the one hand and the proliferation of internal conflicts which -far from being a peripheral appendage to international conflicts -proved to be the most typical and endemic form of armed conflict of present-day international relations on the other, were at the basis of the feeling of dissatisfaction with the state of the law, and explain in large part the efforts starting in the late sixties for updating humanitarian law; efforts which culminated in the adoption of the two Protocols Additional to the Geneva Conventions in 1977.

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[i] Pictet, Jean (ed.). *Commentary of the Geneva Conventions of 12 August* 1949, Vol. III - Geneva Convention Relative to the Treatment of Prisoners of War. Geneva, ICRC, 1960, p. 31

[ii] . *Ibid.*

[iii] *ICRC. Commission of Experts for the Examination of the Question of Assistance to Political Detainees (Geneva. June 9-11. 1953).* Geneva, ICRC, 1953,8 p. -ICRC. *Commission of Experts for the Study of he Question of the Application of Humanitarian Principles in the Event of Internal Disturbances (Geneva. October 3-8. 1955),* Geneva, ICRC, 1953,8 p

[iv] ICRC. *Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts (Geneva. October 25-30. 1962),* Geneva, ICRC, 1962, p. 3.

III. Protocol II

I. The Groundwork

Prompted by the newly found interest of the UN General Assembly, following the Teheran International Conference on Human Rights of 1968, in the "respect of human rights in armed conflicts", [i]i.e. in the development of humanitarian law, and capitalizing on the revival of political interest in the subject, the ICRC started to prepare for a new effort in that direction. It presented a substantial report on the subject to the XXIst International Red Cross Conference held at Istanbul in 1969,[ii] then convened a Conference of Government Experts which met in Geneva in 1971 and 1972. In the light of the deliberations of this Conference, the ICRC prepared two draft Protocols Additional to the Geneva Conventions -one dealing with international conflicts, the other exclusively devoted to non-international armed conflicts -to serve as bases for discussions of the Diplomatic Conference which was convened by the Swiss Federal Government in Geneva in 1974 and which adopted the two Protocols at the end of its fourth session in 1977.

At the first session of the Government Experts Conference in 1971, the Norwegian experts put forward the idea of a single additional protocol to the Third (Prisoners of War) and the Fourth (Civilians) Geneva Conventions; a protocol which would apply to all armed conflicts, whether internal or international.[iii] But this maximalist solution was too idealistic to attract wide political support, and was quickly abandoned in favour of a Canadian proposal of a separate "Draft Protocol to the Geneva Conventions of 1949 relative to conflicts not of an international character".[iv]

At the second session of the Government Experts Conference in 1972, the lCRC submitted two preliminary draft Protocols. As far as non-international armed conflicts are concerned, the ICRC followed a three-pronged strategy with a view to achieving maximum feasible extension of humanitarian protection. Apart from a complete draft Protocol of 48 articles which aimed at elaborating in much greater detail the substantive protection provided in common article 3 and at clarifying its ambit, it endeavoured to deal with the problems of ceiling and threshold. In relation to the former, an annex to the draft Protocol provided for the integral application of the Geneva Conventions to internal conflicts in which the "rebels" possess a high degree of organization and exercise effective control over part of the national territory, as well as (though with some qualifications) to cases of internal armed conflict with operational military intervention by a foreign power.[v] But this attempt at internationalizing high intensity internal armed conflicts was strongly resisted, and the ICRC dropped the idea in the draft Protocol it submitted to the Diplomatic Conference.

As far as wars of national liberation are concerned, "most of the experts... who spoke on the subject [during the first session of the Government Experts Conference] considered that wars of liberation were international armed conflicts".[vi] As a result, the ICRC

prepared a preliminary draft declaration which was submitted to the second session which provided two alternative versions: the application of a) at least common article 3 and its projected additional Protocol, or b) a list of rules to be appended to the declaration.[vii] But this proposal was rejected by the overwhelming majority as being either too little (by the proponents of the international status of wars of national liberation, who were the large majority) or too much (by their opponents).[viii] As a result, the ICRC all but ignored the issue in the draft Protocols it submitted to the Diplomatic Conference.

As concerns the threshold, the ICRC had put forward in the background documents it submitted to the Government Experts Conference, the idea of a "Declaration of fundamental rights of the individual in time of internal disturbances or public emergency".[ix] But this draft declaration -which was patterned after international humanitarian law and the International Covenant on Civil and Political Rights - reproduced common article 3 almost entirely while adding new elements to it. No wonder that when it came up for discussion during the second session of the Conference in 1972, it was strongly resisted.[x] As a result, the ICRC did not refer to the matter at all in the draft Protocol submitted to the Diplomatic Conference.

In the light of the deliberations of the Government Experts Conference, the ICRC concentrated its efforts, in the draft Protocol submitted to the Diplomatic Conference, on the clarification of the concept and ambit of non-international armed conflicts and on elaborating at great length the substantive protection.

Draft Protocol II was not examined so to speak during the first session of the Diplomatic Conference in 1974, a session which was practically wholly devoted to the controversy over wars of national liberation, and which ended up by the adoption in committee of an amendment to article 1 of draft Protocol I, recognizing the international character of such wars.[xi]

However, even in the opening general debate, both in plenary and in the first committee during the first session, but particularly after the adoption of the above-mentioned amendment, strong doubts were expressed towards the very idea of a Protocol wholly devoted to non-international armed conflicts. The two most populous states of the world, China and India, in addition to Indonesia, the Philippines, Iran, several Latin American and African countries criticized the idea either in its principle, or, more frequently, in a roundabout manner, by suggesting very limitative conditions for its application or drastic reductions in its content.

Though basically reflecting a concern by many (but not all[xii]) Third World countries lest the projected Protocol would in fact serve as an instrument of internationalizing their internal problems and as a basis for foreign intervention in such situations, a more limitative approach to certain aspects of the Protocol was also adopted both by the socialist states and by some Western countries, particularly Canada. To start with, this approach took the form of restrictive amendments to draft article 1, defining the material field of application of the Protocol.

2. The Ambit of Protocol II

Article 1 of the ICRC draft Protocol II provided:

> "1.- The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949 taking place between armed forces or other organized armed groups under responsible command.
> 2.- The present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia* riots, isolated and sporadic acts of violence and other acts of similar nature.
> 3.- The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949,"

The restrictive amendments to this draft article crystalized around two ideas. The first was to introduce a requirement of recognition by the government of the territorial state of the applicability of the Protocol to a situation arising on its territory.[xiii] This requirement, which is reminiscent of the institution of recognition of belligerency, would have completely defeated the purpose of the Protocol. This is why, in spite of the insistence of its proponents, and the sympathy with the aim of the amendment which was shared by many others, it had no chance of success.

The other restrictive idea was to introduce a high intensity requirement, particularly territorial control, as a condition for the applicability of the Protocol. A Pakistani amendment was introduced in this sense;[xiv] and it was this limitation that was finally adopted, once it became clear that the ICRC draft as it stood had no chance of securing the necessary majority.

Article I of Protocol II, in its final version, reads:

> "1. This Protocol, which develops and supplements Article 3 common to the Geneva Convention of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces or other organized armed groups which, under responsible command, exercise such control over a pa-rt of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

This text differs from the ICRC draft in several respects:

1) The ICRC draft provided a positive definition of non-international armed conflict which was clearly inspired by the formula of the 1962 Commission of Experts, based upon the collective character of the hostilities (i.e. armed conflict) and the organization of the parties to the conflict. To these requirements, the final version adds that of territorial control by the rebels, which must be substantial enough to "enable them to carry out sustained and concerted military operations...". This last phrase could be constructed as not only requiring a high intensity armed conflict, but even as implying that the territorial control should be such as to allow the rebels to resort to conventional warfare, though such a construction, it is submitted, would be exaggerated.

All the same, the requirement of territorial control excludes from the ambit of the Protocol, many, if not most, current forms of internal armed conflicts, in particular, all the low intensity asymmetric conflicts, urban guerilla and other highly mobile forms of guerilla warfare. It also makes it more difficult to argue in favour of the application of the Protocol to situations, frequently met in recent conflicts, in which territorial control shifts or rotates (sometimes following sunset or sunrise) between governmental and rebel forces.

2) *Ratione personae*: unlike the ICRC draft which applies to all conflicts between any "armed forces or other organized armed groups under responsible command", the Protocol applies only to armed conflicts between the armed forces of a High Contracting Party and "dissident armed forces or other organized armed groups". In other words, while the ICRC draft would have applied to any armed conflict between organized armed groups, whether one of them is governmental or not, the final version applies only to armed conflicts between governmental and dissident or rebel forces. Thus an armed conflict between two or more non-governmental groups, as was the case in the Lebanese civil war, would not be covered by this article, if it is interpreted literally.

3) While the definition provided in the ICRC draft coincided with the concept of non-international armed conflict as it was then understood, the draft did safeguard, *ex abundante cautela*, the autonomy of common article 3 in relation to the field of application of the new Protocol, with a view to preserving the possibilities of future evolution through application and interpretation of this article, particularly by extending its ambit through lowering its threshold.

With the restrictive conditions inserted into article 1, the safeguard of the autonomy of common article 3 became a matter not of precaution but of necessity, as it became clear that the Protocol would cover only one species, the most characterized and intense one, of the armed conflicts governed by common article 3.

But the reverse is not true in the sense that all armed conflicts which are covered by article 1 of the Protocol are a *fortiori*, and remain, governed by common article 3. It is only in this sense that the opening phrase of article 1 can be understood: "This Protocol, which develops and supplements Article 3... without modifying its existing conditions of application...". The Protocol supplements, but does not replace or displace common article 3 in relation to one species only of the armed conflicts governed by the latter, and does not limit the application of common article 3 to this species (and it is in this sense that it does not modify its conditions of application).

4) Paragraph 2 of the adopted article, the same as the ICRC draft, excludes from the field of application of the Protocol "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature...". This is a logical conclusion of the introduction of a positive definition in the ICRC draft, and *a fortiori* of the much more restrictive definition of the adopted article. But the adopted article, unlike the ICRC draft, goes on to characterize the excluded situations "as not being armed conflicts". This characterization was strongly defended by the East German delegation[xv] and reflects the restrictive attitude of the socialist group as to the threshold of internal conflicts. Its purpose was to seal this threshold once and for all, in order to ward off the dangers of humanitarian concern and intervention in situations falling below it, and more particularly to foreclose any possibility of future evolution of common article 3 in the direction of a lowering of threshold and embracing one or more of the excluded situations.

In other words, the added phrase was intended more for common article 3 than for the conflicts covered by the Protocol and which are far removed from the situations it deals with. But if this characterization is harmless in the context of the Protocol (and was, in consequence easily acceptable in order to reach consensus), it is obviously very dangerous if transposed to common article 3. This is why the transposition was quickly refuted by certain delegates on the ground of the autonomy of common article 3 in relation to the Protocol;[xvi] an autonomy which it safeguards in its article I, as was explained above.

3. The Contents of Protocol II

The ICRC draft Protocol II contained 47 articles divided into eight parts. Both in its structure and contents, it strikes by its parallelism with draft Protocol I, with the notable exception of the absence of prisoner of war status for captured combatants (and the consequences thereof).

The reticence encountered as regards the very idea of the Protocol, and the restrictive amendments and obstructionist tactics of several very active delegations should have sufficed to make it clear that a "law of war" approach (along the lines of the inter-state armed conflict model) would be very hard to get through, and that only a "human rights" approach, (based on the government- subject model) stood some chance of commanding general acceptance. But the adoption in committee in 1975 of the revised version of article I, which limits the application of the Protocol to characterized high intensity armed

conflicts materially identical to inter-state wars, encouraged well-intentioned and maximalist delegations to push for an even greater parallelism between the two Protocols through an almost literal transposition of provisions adopted for Protocol I into Protocol II. In the meantime, the active opponents of the Protocol continued their guerilla warfare against it, while a majority of delegations, particularly from the Third World, adopted a rather reserved position, holding their judgment until they could gauge the final result.

As it emerged from the committees during the last session of the Conference in 1977, the Protocol (whose articles were adopted by very weak majorities and large numbers of abstentions) was even more elaborate and analogous to protocol I than the ICRC draft. It was clear that such a Protocol stood very little chance of commanding the two thirds majority necessary for its final adoption in plenary. At that stage, the acute realization by the ICRC and the proponents of the Protocol (as well as by its opponents) that there was a serious risk of failure, led to a last-minute salvage operation, which went quite a way towards appeasing the opponents of the Protocol, in the form of a Pakistani "simplified" draft (prepared with the active participation of the Iraqi and the Canadian delegations). The reason for their resigned acceptance of this rather truncated version is very well expressed in a phrase by a Dutch delegate that "half an egg is better than an empty shell". The simplified version was discussed and adopted in plenary with minor modifications. By comparison to the ICRC draft it has 28
articles (instead of47), of which 10 are mere final clauses. Only 15 articles deal with substantive protection (instead of 33), as the first three define the scope of application of the Protocol.

The Omissions: Substantively, what differentiates the simplified version from its predecessor is that it was radically expurgated of three elements which figured in the ICRC draft (and whose omission is also significant in revealing the motivations of the governments which were lukewarm towards the Protocol).

1) The term "parties to the conflicts", though used in common article 3, was systematically removed and the articles were either reformulated or, where reformulation was impossible, dropped. Thus, draft article 3 (reiterating the final paragraph of common article 3) which provided that: "The application of the Protocol or any eventual special agreements shall have no effect on the status of the parties to the conflict...", and which was included for the sole benefit of governments, was dropped because it obviously could not stand without the use of the expurgated term.

The resulting Protocol reads like a series of injunctions addressed exclusively to governments, or rather of unilateral undertakings subscribed to only by them. But of course this cosmetic reformulation cannot alter the legal basis and structure of the Protocol. After all, common article 3 continues to apply to these conflicts, together with Protocol II which is supposed to supplement it, and the "parties to the conflict" figure prominently in common article 3. Moreover, even a superficial analysis of the contents of the Protocol reveals that its prescriptions are addressed to all those who take part in the armed conflict. It follows that to the extent that "rebels" are directly attributed rights and obligations under common article 3 and Protocol II, they are the addressees of their

provisions and thus have an objective legal status under these legal instruments, whether they are mentioned expressly therein or not. This status is much more limited than the one emanating from a "recognition of belligerency", but it is an ipso *jure status* which. at least in theory. is both objective (i.e. independent from the will of the government) and automatic (i.e. arising directly from the legal instrument, as soon as the situation provided for comes into being).

Once it is established that the Protocol is addressed and applies to both parties, another related question arises: whether and on what basis it is legally binding on "rebels". It is true that as a matter of practical consideration, the rebels are the weaker party and thus have an interest in the application of humanitarian law and can thus be deemed to have accepted its legal instruments. But this would bring us back to the consensual solutions which are clearly incompatible with the *ipso jure* effect of these instruments. A more acceptable legal explanation is that once the Protocol is internationally accepted in the name of the State by its government, it becomes part of the law of the land, and thus binds both individuals and government, including any actual or future government, as well as any counter movement which disputes the representativity or the authority of such government.

2) Part IV on Methods and Means of Combat, which dealt with part of the '"Law of the Hague", and which constitutes, at least symbolically, the hard-core of a "law of war'. approach, was completely dropped (though draft article 22 on “quarter” was included in article I. paragraph I, as will be described below). But this Part did not exhaust the "Law of the Hague", and indeed substantial aspects of it, much more important than the rules provided in Part IV, survive in Part VI on "Civilian Population".

In any case, the applicability of the discarded rules to non-international armed conflicts (including those governed by Protocol 11) as part of the "Law of the Hague" on the basis of customary law, is not affected by this deletion, though of course this remains subject to controversy both as to the principle itself and as to the scope of its application.

3) In the third place, Part VII of the ICRC draft, on the "Execution of the Protocol" was also dropped, particularly draft article 39, which under the title "Co-operation in the Observance of the Present Protocol" provided:

> "The parties to the conflict may call upon a body offering all guarantees of impartiality and efficacy, such as the ICRC, to co-operate in the observance of the provisions of the present Protocol. Such a body may also offer its services to the parties to the conflict."

But even this provision -which did no more than reiterate, perhaps in a more explicit manner, the voluntary system of scrutiny provided in the second paragraph or common article 3 -ran into heavy resistence and had to be reduced to its simplest expression ("The ICRC may offer its services to the parties to the conflict") in order to secure its adoption in Committee, before it was completely dropped in the final simplified version.

Likewise, the only article which survived from Part VI on Relief (article 18 in the final Protocol) refers ambiguously only to "relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent...) organizations" {which "may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict"), without any express mention of the ICRC or other international humanitarian organisms. But clearly this provision can be interpreted as including, in addition to national societies, the ICRC delegations present in the territory of the State concerned.

In any case, here again this omission cannot change the legalities of the situation. For, as was observed by several delegates, as the Protocol "develops and supplements", common article 3 "without modifying its existing conditions of application", this article -and in particular its second paragraph concerning the offer of services by humanitarian organizations -continues to apply to all non-international armed conflicts, including those covered by Protocol 11.[xvii] Paradoxically, it can thus be said that in this respect it is common article 3 which "develops and supplements" the Protocol rather than vice versa.

The great reluctance to recognize a role, be it on a consensual basis, for third parties, even humanitarian ones, in non-international armed conflicts reflects the great wariness of most Third World governments about the possibility or opening a wedge for foreign intervention in their internal troubles under a humanitarian guise. The ICRC draft included an article 4 entitled "Non-Intervention" which was aimed at meeting this concern and which read: "Nothing in the present Protocol shall be interpreted as affecting the sovereignty of States or as authorizing third States to intervene in the armed conflict".

The final adopted version (article 3) reads :

> "1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> 2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."

Not only is this version much more elaborate and stronger in tone and content but it also does not limit the interfering subjects to "third States", in order to cover also non-state entities including humanitarian and relief organizations. The same concern also explains the deletion from article 18 on relief, of the last sentence of paragraph I of the corresponding article in the ICRC draft (article 33) which provided that "relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict".

The extent of the fear of intervention is well illustrated by an Indian amendment which would have suspended the application of the Protocol in case of foreign intervention.[xviii] Though this extreme proposal was not pushed through, it was symptomatic of the general state of mind and atmosphere which prevailed at the Conference on the subject.

In conclusion, the three categories of omission, despite appearances, do not change the legalities of the situation, as the expurged elements continue to produce their legal effects in the armed conflicts governed by the Protocol, on the basis either of common article 3 or of customary law. But appearances are important for governments, and the omissions leave them with much room for manreuver through interpretation.

If in what it was made not to say the Protocol falls short of common article 3, it remains to be seen how much, if at all, it has added to it in what it does say.

The Additions: The contribution of the Protocol to common article 3 has to be sought in the substantive protection it provides for the potential victims of the armed conflicts it governs. These are described in article 2 ("Personal field of application") as "all persons affected by an armed conflict as defined in Article 1".

Three Parts of the Protocol (II, III and IV) are devoted to substantive protection :

A) Part III "'Wounded, Sick and Shipwrecked", elaborates in two articles (article 7 "'Protection and care", art. 8 "Search ") the general proposition of common article 3, para. 1 (2), that: "The wounded and sick shall be collected and cared for". But the great addition, which has been almost transposed from Protocol I is the detailed protection provided for medical and religious personnel (article 9), medical duties (article 10), medical units and transports (article II), as well as for the distinctive emblem (article 12).

B) Part II "Humane Treatment" is composed of three very long articles (4 to 6). They correspond to common article 3 par. I (I) which, it may be useful to recall, uses the same terms in the general formulation of the principle of humane treatment, without any adverse distinction, to all persons who are in the power of a party to the conflict and who are not taking an active part in hostilities, before enumerating more specifically four injunctions, the first three dealing with the physical and moral integrity of the protected persons while the fourth deals with the problem of “due process of law" in penal prosecutions.

Article 4 of the Protocol on "Fundamental guarantees" covers materially the same ground as the general principle and the first three specific injunctions of common article 3 para. I (1), but it adds much in terms of elaboration and concrete application. It is very close to the corresponding parts of article 75 of Protocol I (which bears the same title, but covers as well the scope of articles 5 and particularly 6 of Protocol II); and both have drawn their inspiration from the International Covenant on Civil and Political Rights (e.g. articles 6, 7 and 8) as well as from the Fourth Geneva Convention (article 33). In addition, the provision concerning .'quarter" was inserted at the end of its first paragraph

(after the deletion of the Part on .'Methods and Means of Combat") and those on the special protection of children were added to it as paragraph 3.

Article 5 deals more particularly with the treatment of persons whose liberty is restricted and who, as a result, need in addition to the fundamental guarantees of article 4, special protection relating to the conditions of their detention or restriction of freedom. Many of the standards set therein find their sources in the Third and Fourth Geneva Conventions, as well as in the International Covenant on Civil and Political Rights (e.g. article 10). But as they apply to all persons whose liberty is restricted and not only to those who have participated in hostilities, they cannot be said to constitute a special treatment similar to that of prisoners of war .

Article 6 deals with the “due process of law” and corresponds to the fourth specific injunction of common article 3 para I (1), which it elaborates to a great extent. It finds its sources both in the Third and Fourth Geneva Conventions and the International Covenant on Civil and Political Rights (e.g. articles 14, 15) as well as in article 75 of Protocol I. Article 6 does not prohibit criminal prosecution of persons for their mere' participation in the hostilities, for such immunity can only derive from the granting of prisoner of war status to captured combatants. The only element in the ICRC draft which pointed in that direction, namely the reprieve from executing capital punishment until the cessation of hostilities, met with heavy resistance and failed to be adopted (though the exhortion to the authorities to grant as wide an amnesty as possible at the end of hostilities, which was intended more particularly for this hypothesis, was maintained).

Though these three lengthy articles are heavily inspired by the International Covenant on Civil and Political Rights, they are not superfluous in relation to it, for two reasons at least. In the first place, they are more detailed and more geared to factual situations likely to arise in armed conflicts. Secondly, they cannot be waived, whereas certain corresponding provisions of the Covenant, under its article 4, can in case of emergency (which obviously includes an internal armed conflict). Thus, in these respects, the Protocol sets a higher threshold. At the same time, the Covenant provides for many contingencies which are not covered by the Protocol. The two instruments are thus complementary where there is an identity of parties, but can be applied independently where there is no such identity.

C) If Part II clearly follows a "human rights" approach, Part IV on "Civilian Population" is by contrast strongly influenced by a "law of war" approach. The difference is particularly clear when it comes to determining the protected persons. Part II prescribes "humane treatment" of all persons in their power by the parties to the conflict, without distinguishing between those who had taken part in hostilities and those who had not (the same as Part III on "Wounded Sick and Shipwrecked"). Part IV, on the other hand, necessarily distinguished *civilians*, defined in article 13 para. 3, as those who (and "for such time as they": do not "take a direct part in hostilities", and who are consequently entitled to “general protection against the dangers arising from military operations” (article 13 para. 1), from those who do take part in hostilities (i.e. combatants though the Protocol was systematically expurgated of that term to avoid any semblance of status

attaching to it), and who obviously are not entitled to such protection. This distinction derives inexorably from the legal structure of the prescribed rules. F or with the exception of the last two articles of Part IV (art 17 "Prohibition of forced movement of civilians", and art. 18 "Relief societies and relief action") which, like those of Part 11, are clearly addressed to the party to the conflict which controls the protected persons, the core articles of Part IV are addressed simultaneously to all parties to the conflict and perhaps more particularly to the one which does not control the protected civilian population; a structure which places them squarely within the "Law of the Hague" i.e. the law governing the conduct of hostilities and combat.

Though heavily pruned in the final version of the Protocol, these articles still include the fundamental rule of "general protection of the civilian population against the dangers arising from military operations" (article 13 para. 1) which imposes an obligation of due diligence and discrimination on the parties to the conflict in all circumstances; the prohibition of taking civilians for a target (including indiscriminate attacks and threats or attacks aiming at terrorizing the civilian population) (article 13 para. 2); the protection of objects indispensableto the survival of the civilian population i.e. the prohibition of starvation as method of combat (article 14); the protection of works and installations containing dangerous forces (article 15); and the protection of cultural objects and places of worship (article 16). These provisions have been taken almost literal from Protocol I and constitute even in the context of that Protocol, and *a fortiori* in Protocol II, an innovation and a great step forward in the protection of civilians.

* * *

It is too early to evaluate Protocol II in the light of practice. On the basis of its legislative history, it is clear that the great wariness and sensitivity of a large number of states, particularly of the Third World, as regards all possible sources of foreign intervention in their internal affairs, has led to a very high threshold for the application of the Protocol, and has thus excluded from its ambit all but the most intense and characterized civil wars, which constitute a very small proportion of contemporary internal conflicts. And while it thus resolves, albeit restrictively, the problem of the substantive definition of the conflict, it leaves open the other problem of the procedural determination of its existence. At the same time, and this is its other fundamental shortcoming, the role of humanitarian organisms both in terms of relief and of co-operation in the implementation of the Protocol, is drastically reduced. On both these points, the Protocol has to be supplemented by common article 3.

Where Protocol II comes into its own is in the substantive protection, it provides through its much greater, and greatly needed, elaboration of the elliptic declarations of principle of common article 3, and through introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transports.[xix]

The legislative history clearly indicates that Protocol II represents the most of what was realistically possible to achieve in the international community of 1977.

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[i] See the stream of resolutions starting with the United Nations General Assembly resolution 2444 (XXVIII) of 19 December 1968 and the series of Secretary-General reports, the first submitted in 1969, all under the title mentioned in the text.

[ii] XXIst International Conference of the Red Cross, Istanbul, 1969. *Reaffirmation and Development of the Laws. and Customs Applicable in Armed Conflicts. Report submitted by the ICRC*, Geneva, ICRC; May 1969.

[iii] . ICRC. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971*): Report on the Work of the Conference. Geneva*, 1971. (Doc. CE/Com. 11/1-3), p. 61.

[iv] *Ibid*. (Doc. CE/Plen. 2 bis), pp. 57-61

[v] ICRC. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second session 3 May-3 June 1972): *Report on the Work of the Conference. Vol. 2 Geneva*, ICRC, 1972, p. 22.

[vi] XXIst International Conference of the Red Cross, Istanbul, 1969. *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts.* Reports submitted by the ICRC, Geneva, ICRC: May 1969, p. 54 (para. 321).

[vii] ICRC. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second session 3 May-3 June 1972): *Report on the Work of the Conference.* Vol. 2. Geneva, ICRC, 1972, p. 23.

[viii] .*Ibid*., Vol. 1, p. 201 (para. 4.217-4.224).

[ix] .ICRC. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971): Vol. V -*Protection of Victims of Non-International Armed Conflicts* (Doc. CE/56). Geneva, 1971, pp. 85-88

[x] ICRC. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second session 3 May-3 June 1972): *Report on the Work of the Conference*. Vol. 1. Geneva, ICRC, 1972, pp. 124-125 (para. 2.564-2.570).

[xi] On this question, see Abi-Saab G., Wars of National Liberation in the Geneva Conventions and Protocols. *Recueil des cours*, Vol. 165, 1979-IV, pp. 353-446

[xii] E.g. Egypt CDDH/I/SR. 24.

[xiii] E.g. the amendments of Romania CDDH/I/30

[xiv] CDDH/I/26; also in the same vain Indonesia CDDH/I/32, and Brasil CDDH/I/79.

[xv] CDDH/I/SR. 28; CDDH/I/SR. 29, para. 30

[xvi] E.g. Italy CDDG/I/SR. 29, para. 25; Federal Republic of Gennany, CDDH/I/SR. 29, para. 5: CDDH/SR. 49, para. 58

[xvii] E.g. Egypt CDDH/SR. 56, Annex, p. 6.

[xviii] CDDH/I/240.

[xix] It is to be regretted however that the only draft provision which provided specific protection to captured combatants and which aimed at avoiding the commitment of the irreversible in the heat of the battle (the reprieve of capital punishment executions for offences related to the conflict until hostility has ceased), failed to be adopted.

IV. Some Concluding Remarks

Only time can tell whether Protocol II was worth the effort and whether what was really needed was a detailed regulation for cases in the upper reaches of the category of non-international armed conflicts rather than around its threshold or, for that matter, for the category as a whole.

In the meantime, three types of cases can be distinguished:

1) At the apex there are the intense and characterized internal armed conflicts covered by Protocol 11, which constitute only one part of the non-international armed conflicts governed' by common article 3, and for which the Protocol provides detailed regulation which elaborates and adds to the prescriptions of common article 3. This means that common article 3 continues to apply to all the armed conflicts governed by Protocol 11, and can thus fill the gaps left open in the Protocol, such as the one relating to the role of the ICRC. Moreover, for states parties to the International Covenant on Civil and Political Rights, the Covenant continues to apply and where the guaranteed rights coincide, the higher standard or stricter obligation prevails.

2) In cases falling below the very high threshold defined by article1 of Protocol 11, particularly where rebels do not exercise territorial control, only common article 3 applies (supplemented for those states which are parties to it, by the International Covenant on Civil and Political Rights).In relation to these conflicts, the direct contribution of the Diplomatic Conference and the ensuing Protocols in providing answers to the problems revealed in practice by the application of common article 3, is rather limited. The Protocols succeed simply in clarifying the status of, and the law applicable to, certain doubtful ceiling cases, such as wars of national liberation (recognized by Protocol I as international armed conflicts) and high intensity internal armed conflicts, which are now covered by Protocol II (though the third case in this category, i.e. non-international armed conflict with foreign operational military intervention, did not receive any clarification).

Indirectly, however, Protocol II can have a substantial impact in elucidating the material protection provided for in common article 3. Indeed, both Part II on "Humane Treatment" and Part III on "Sick, Wounded and Shipwrecked" elaborate in greater detail and more concrete terms the general principles enunciated in common article 3, and can legitimately be considered as an authoritative interpretation of these principles. Part III on the protection of "civilian population", though constituting an innovation, can also be taken into consideration in the interpretation of common article 3, which, being a part of a law-making multilateral treaty of humanitarian import, has to be interpreted in the light of its unfolding object and purpose, and according to the principle of inter-temporal law of its evolving legal environment of which the Protocol is a part.

The Protocol does not help, however, in providing either any guidance as to the definition of non-international armed conflicts, of which it covers only one species, or a procedure for the determination of the existence of such a conflict; and of course it remains silent on the role of international humanitarian organisms in securing the observance of humanitarian rules. On all these questions, it is the accumulated practice, particularly of the ICRC, which continues to provide whatever guidance there can be had both for conflicts covered by common article 3 as well as by Protocol 11, but particularly for those covered only by common article 3.

3) Where no progress at all has been achieved and where there is even a semblance of regression is in defining the threshold of non-international armed conflicts, more particularly as it relates to internal disturbances and tensions which hover below it, and which have been expressly classified in article 1 para. 2 of the Protocol as "not being armed conflicts". But as was mentioned above, this classification which stands as far as Protocol II is concerned, does not automatically apply to common article 3, whose ambit and conditions of application have been kept separate from those of the Protocol.

This does not mean that these situations constitute non-international armed conflicts in the sense of common article 3. But the general policy of the ICRC has always tended towards assimilating them to non-international armed conflicts, but without classifying them legally as such. And there is no reason why, if practice follows suit, such an evolution cannot be hardened into law. in the meantime, these situations remain subject to the existing international instruments of protection of human rights, such as the International Covenant on Civil and Political Rights for those States which are parties to it, as well as the Universal Declaration of Human Rights. But in addition we have the principles of the Geneva Conventions which are the irreducible hard-core applicable in all circumstances and which provide the ICRC with a *locus standi* (but not a right binding on the State concerned) to exercise its right of initiative in such situations. And it is through such initiatives that the JCRC sets the pattern for the development of humanitarian law.

Notes

Protection of Human Rights During Internal Conflicts: Convergence of International Humanitarian Law and Human Rights Law

U. V. Kadam*

Most flagrant violations of basic human rights norms on a large scale are quite common during a state of internal conflict. The modern history is replete with instances of such conflicts and horrifying accounts of human rights violations and inhuman practices. Therefore, there is a greater need of protecting some basic human rights norms during such situations. In the process of development of international human rights law account has been taken of this particular problem. The Universal Declaration of Human Rights. which is regarded as the basic instrument on human rights does not contain a specific provision on this question. The reasons could be, first, the Declaration is a non-binding instrument intended to set certain international standards which the states were encouraged to follow in good faith. Therefore It was perhaps thought unnecessary to look into more specific issues at that time. Secondly, at the time when the Declaration was discussed. debated and adopted; the Geneva Diplomatic Conference on Humanitarian Law was also taking place and the question of regulation of internal conflicts was on the agenda of this Conference. This forum and process was considered to be more appropriate to address the question. However, during the subsequent developments in the field of human rights law, especially during the process of articulation of certain specific rights the issue was taken up and some legal provisions have been adopted.

In the field of human rights law the question of internal conflicts comes up in the context of protection of human rights during a state of emergency. Whereas, the international humanitarian law -which is primarily concerned with regulation of armed conflicts -it comes up in -the context of regulation of internal armed conflicts. It must be acknowledged at this juncture that the concept of 'state of emergency' is broader than the concept of 'internal conflict'. There may exist a state of emergency even if there is no internal armed conflict as such. However, more often than not, during internal armed conflicts, the state authorities are bound to proclaim a state of emergency under the domestic law. It is therefore, clear that a situation of internal armed conflict is the one which demands application of international human rights law as well as international humanitarian law. An attempt is made here to examine the recent developments in both these areas of international law in so far as regulation of internal conflicts is concerned. Such examination assumes considerable significance in view of the fact that most of the contemporary armed conflicts are internal rather than international .There is a growing need to strengthen international legal norms that deal with internal armed conflicts.

International Human Rights Law

As mentioned earlier, although the Universal Declaration of Human Rights is generally regarded as a basic standard of human rights, yet it was not intended to create binding

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legal obligations. The really significant development of human rights law was initiated by the adoption of a number of binding treaties under the auspices of the United Nations. Thus the International Covenant on Civil and Political Rights articulates civil and political rights and incorporates them in a binding law-making treaty. It contains a specific provision in this regard. Article 4 of the Covenant reads as under :

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to .the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour , sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary , on the date on which it terminates such derogation"

This provision enables a State Party to disregard its obligations under the Covenant in order to enable it to deal with the extraordinary situation which poses a threat to the very existence of the State Party. This is in keeping with the doctrine of self-defence which find~ expression in domestic as well as internal legal system. An individual is permitted to use reasonable amount of force to protect his or her life and property. A state, in international law". is permitted to use military force to repel an armed attack" By the same token, a state may be compelled to use certain amount of force against persons on entities operating within its own territory if such persons or entities pose a threat to the very existence of the state[1] .The right of a State Party to depart from the obligations under the Covenant to deal with the threat to the life of the state has come to be known as the right of derogation. Thus, Article 4 is founded on a principle which is essential for the preservation of the territorial sovereignty of a state.

It would be now. apposite to examine the parameters within which the principle is supposed to operate. Article 4 itself incorporates certain conditions. These law down the scope of the right of derogation. The first condition is that there must exist a public emergency which threatens the life of the nation. The circumstances invoked as justification of emergency measures must be very serious, constituting an imminent, and not an imaginary or perceived. threat to the very existence of the nation. State authorities are not entitled to rely on Article 4 in order to protect the existing political and economic

[1] This type of situation also raises the question of right of self-determination as well, but it is outside the scope of this paper.

structure, when the disorders or riots are due to demands for a general participation in the conduct of public affairs.[2]

The second requirement is that the specific measures taken in derogation of the obligations to deal with the emergency situation are valid only to the extent they are strictly required by the exigencies of the situation. Exceeding the limit will amount to violation of the obligations under the Covenant. Besides, the measures so justified by the emergency ought not violate the obligations of the state under international law in general. For example, the Covenant in Article 25 expressly recognizes a right of participation in the political process within a state. If there is unrest that is motivated by a demand for political participation, if at all there is any derogation, it must be accompanied by efforts to create political conditions which allows for general participation.

The most important feature of Article 4 is the recognition of the doctrine of non-derogable rights. It means that howsoever grave the situation might be, a State Party is not permitted to disregard certain core rights and principles which are to be treated as 'non-derogable'. According to Article 4. these rights and principles are :

1. Right to life.
2. Prohibition of torture, and cruel, inhuman or degrading treatment or punishment.
3. Prohibition of slavery, slave-trade. and servitude.
4. Non-imprisonment on the ground of inability to fulfil a contractual obligation.
5. Non-retroactivity of criminal law
6. Right to recognition as a person before law
7. Right to freedom of thought, conscience and religion
8. Non-discrimination on the ground of race. colour, sex. language, religion or social origin.

These rights are regarded as most basic at all times, and hence, no derogation trom these is permitted even during a grave emergency situation. These are expected to afford minimum protection to the population. It is obvious that if greater protection is to be afforded to -the people, more and more rights must be treated as non-derogable. Is the concept of non-derogable rights a static concept? Certainly not, because as society advances and civilisation progresses, it is possible to expand the concept with a view to ensure that most of the human rights guarantees are not suspended even during extraordinary situations. This will disentitle the state authorities from adopting measures necessary to preserve the statehood without compromising the basic human rights of the people.

It is indeed heartening to note that the United Nations is making a serious attempt to bring some more important human rights within the purview of non-derogable rights. In 1977, the Subcommission on the Prevention of Discrimination and Protection of

[2] Asbjorn Eide. .Internal Disturbances and Tensions' in UNESCO. *International Dimensions of Humanitarian Law* Henry Dunant Institute. Geneva. 1989, p. 244.

Minorities of the United Nations Commission on Human Rights expressed its concern at the manner in which certain countries dealt with human rights during states of emergency. It initiated a comprehensive study of the implications for human rights in view of the events that were occurring at that time[3]. Later, at the Subcommission's request, the Economic and Social Council appointed a Special Rapporteur to (a) draw up and update annually a list of countries which proclaim or terminate a state of emergency; (b) examine, in the annual reports, questions of compliance by states with internal and international rules guaranteeing the legality of the introduction of a state of emergency-: (c) study the impact of emergency measures on human rights; and (d) recommend concrete measures with a view to guaranteeing respect for human rights in situations of state of emergency[4]. Two significant conclusions can be drawn from the series of reports submitted by the Special Rapporteur :

(a) Under states of emergency that have been lawfully proclaimed, i.e., those that are in conformity with the relevant domestic and international norms, national institutions do not suffer unduly and the emergency measures are applied only for a limited period. In these cases, the rights most commonly suspended by governments are linked to individual freedoms, and range from limitations on freedom of movement to preventive detention. The restrictions frequently also encompass freedom of expression and assembly.

(b) In contrast, when states of emergency diverge from the relevant legal norms, there is a general tendency to perpetrate and concentrate excessive and arbitrary authority in the hands of the executive branch. Changes affecting institutions that generally occur in these circumstances concern parliaments, whose legislative authority is restricted or which are even dissolved. A similar phenomenon seems to affect the judiciary .The decrees instituting states of emergency are sometimes followed by mass dismissal of judges, the creation of special courts and the restrictions or suspension of judicial review.[5]

The efforts of the Commission on Human Rights to address the question of the protection of human rights during states. of emergency, are complemented by the initiative taken by some non-governmental organisations of international lawyers. A set of principles known as 'Siracusa Principles' were adopted at a meeting of experts convened by the International Commission of Jurists and International Association of Penal Law in 1984.[6] The International Bar Association in 1985 adopted the Paris Minimum Standards on State of Emergency and Human Rights[7] The Geneva Guidelines for the Development of Legislation on States of Emergency were adopted at a meeting of experts organized by the Association of International Consultants on Human Rights at the request off the

[3] UN DOC. E/CN. 4/Sub. 2/1982/15.
[4] UN DOC. E/CN. 4/Sub. 2/1995/20.
[5] *Ibid*., p. 6.
[6] Reprinted in *Human Rights Quarterly*, John Hopkins, University Press, Vol. 7, No.1, Feb. 1985.
[7] Report of the Sixty-first Conference of International Law Association at Paris, 1985, pp. 57-96

Special Rapporteur[8] The same Association organized another meeting of experts on non-derogable rights at Geneva in May 1995. The main question addressed by the meeting of experts was whether the list of non-derogable rights is adequate, or whether it can or should be expanded[9]. The most recent is the Turku Declaration of Minimum Humanitarian Standards which the Commission of Human Rights decided in 1995 to forward to governments for their comments.

The Paris Minimum Standards propose that the rights of ethnic, religious and linguistic minorities and the right to a remedy should be recognized as non-derogable. The Geneva Guidelines add the right to self-determination to the list of non-derogable rights. The Turku Declaration includes the right to legal personality, freedom of thought and religion, the rights of the child, the right to honour, the right not to be compelled to leave one's own 'territory', the right of families to remain together if displacement occurs, and the obligation to make efforts to protect the rights of minorities and peoples among the non-derogable norms.

In addition to the International Covenant on Civil and Political Rights, the three regional human rights treaties namely, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples Rights also contain provisions comparable to Article 4 of the Covenant. While addressing the question of human rights during states of emergency, the provisions of certain other international instruments may also be relevant. These are: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Suppression of the Crime of Apartheid and the Convention on the Rights of the Child [10]

[8] Reprinted in the 1991 report of the Special Rapporteur. UN DOC. E/CN. 4/Sub. 2/1991/ 28/ Rev. I. Annex I

[9] The Report of this meeting is reprinted in 1995 report of the Special Rapporteur/UN. DOC. E/CN. 4/ Sub. 2/ 1995/20. Annex I. The present writer participated in the two meetings organised by the Association in 1991 and 1995.

[10] A detailed examination of these instruments is beyond the scope of this paper. The author intends to undertake an examination of these instruments later.

International Humanitarian Law

International humanitarian law primarily deals with armed conflicts between two or more states. Nevertheless, it contains certain norms and rules which are applicable to non-international or internal armed conflicts.

An early attempt was made in 1912 to adopt certain agreements to provide aid to victims of internal conflicts[1]. However there was considerable opposition to this proposal. Later, in 1921, the 10th International Conference of the Red Cross adopted the principles that all victims of civil wars, social disputes and revolutions are entitled to humanitarian assistance[2]. However, the first treaty provision in this respect is to be found in Article 3 common to all the four Geneva Conventions of 1949. Even at the time of adoption of this Article there was substantial debate over its inclusion and the Geneva Diplomatic Conference rejected the notion that all the laws of war should apply to internal conflicts[3]. Eventually, there was some agreement on adopting a provision which will bind parties to observe a limited number of fundamental humanitarian principles in internal armed conflicts and thus the common article was incorporated in the four Conventions. The important provisions of this Article are summarised as follows.

a) Persons not taking part in armed hostilities, and wounded and sick persons shall be treated humanely without any discrimination on the basis of race, colour , religion, faith or sex, etc.

b) The above mentioned persons shall not be subject to violence to life and person, cruel treatment and torture. They cannot be taken as hostages, their personal dignity shall be respected, they shall have a right of fair trial.

c) The wounded and sick persons shall be given due attention.

d) An impartial humanitarian body such as the ICRC may offer its services to the parties to the conflict, of course, if the concerned state permits.

Since Article 3 refers to 'Parties to the conflict' rather than mere states parties to the Convention, it is clear that the insurgents involved in an internal conflict against the lawful government are also expected to follow the humanitarian standards.

The most significant development in the regulation of internal armed conflicts took place in 1977 when Protocol II Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter ‘the Protocol’) was adopted. It is intended to develop and supplement common Article 3 of the 1949 Conventions.

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[1] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, Clarendon Press,Oxford, 1982, p. 447
[2] *Ibid.*
[3] *Ibid.*

The Protocol applies to those armed conflicts which take place within the territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and also to implement the Protocol [4]. It is not applicable to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature which do not amount to an armed conflict[5]. Now it must be seen what 'human rights' guarantees are contained in the Protocol. In doing so, the terminology of human rights law, rather than that of humanitarian law, is adopted so as to establish a link between the two sub-disciplines of international law.

Right to Life and Personal Liberty

The Protocol prohibits violence to life, cruel treatment such as torture, mutilation or any form of corporal punishment. Persons in custody should not be detained near combat zones, so that they are not exposed to danger arising out of armed conflict. Of course, the Protocol recognizes the fact that personal liberty may be restricted in times of armed conflicts. But it prohibits outrages on personal dignity, especially humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. In so far as civilians are concerned, the Protocol has elaborate provisions for protection of their life and personal liberty

Right to a Fair Trial

The fundamental guarantees necessary to ensure that there shall be a fair trial of persons subject to prosecutions are contained in the Protocol. They deal with informing the grounds of arrest, non-retroactive application of criminal law, presumption of innocence, right not to be tried in absentia, -non-incrimination, right to defend, etc.

Freedom of Movement and Right to Reside

This is available to civilian population. There are restrictions on displacement of the civilian population. The Protocol indirectly recognizes the right to reside in a particular part of the territory.

Freedom of Expression

Although the Protocol does not guarantee freedom of speech and expression specifically, yet it ensures that the persons subject to detention are allowed to send and receive letters. This, in a limited way, ensures freedom of expression.

Right to Equality

[4] Article 1
[5] *Ibid.*

The Protocol is to be applied to all persons affected by armed conflicts without any discrimination on the basis of race, colour, sex language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status. This is expected to ensure equality and non-discrimination.

Right to Health and Food

This is the most predominant provision of the Protocol. It insists on the provision of medical treatment at all times. The elaborate provision: pertaining to the wounded, sick and shipwrecked contained in part II of the Protocol are nothing but guarantees of right to health. Both civilians and persons involved in conflict are entitled to the right to food All persons are to be provided with food and drinking water and must be afforded safeguards as regards health and hygiene and protection against rigours of the climate and the dangers of armed conflict. In respect of persons detained, the detaining authorities are prohibited from doing any thing that is likely to endanger their physical or mental health and integrity.

Rights of the Child

In international human rights law, rights of the child have been circulated during the recent past[6]. The Protocol has provisions aimed at providing care and aid required by children especially as regards their education, reunion with families, restrictions on conscription, etc.

Rights of Women

The Protocol prohibits outrages upon personal dignity Rape, enforced prostitution and indecent assaults are specifically prohibited. Where women are to be detained, they shall be held in quarters separated from those of men and shall be under the immediate supervision of women. The entire Protocol is to be applied without any discrimination of the basis of sex.

Freedom of Religion

The Protocol guarantees freedom of religion of detained persons. They shall be allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance as well.

Prohibition of Slavery

The Protocol specifically prohibits slavery and slave trade. By imposing restrictions on conscriptions, it also ensures that there shall be no forced labour.

[6] A Convention on the Rights of the Child has been adopted in the year 1989. It was preceded by a non-binding declaration in 1959

Cultural Rights

The Protocol prohibits committing any acts of hostility directed against historic monuments, works of art or place of worship which constitute the cultural or spiritual heritage of peoples. Their use for military activities is also prohibited.

Parallelism between human rights law and international humanitarian law

From the above examination of humane standards to be followed during internal conflicts in accordance with human rights law and international humanitarian law, it is apparent that most of the rights which are non-derogable under international human rights law are also protected by international humanitarian law. However, the Protocol II rights appear to be more extensive than those safeguarded by the International Covenant on Civil and Political Rights. An attempt was made during the Diplomatic Conference that led to the adoption of Protocol II to derive certain norms from human rights covenants and incorporate them in Protocol II[1].

What is significant to note is that the International humanitarian law provides protection for a large number of human rights and prohibits the suspension of any of its prescriptions during states of emergencies. Besides, the standards incorporated in this law is helpful in broadening the concept of non-derogable rights. As noted earlier, some of the economic and social rights find expression in Protocol II. The International Covenant on Economic, Social and Cultural Rights does not contain any provision on derogation. The Chairman of the Committee on Economic, Social and Cultural Rights once suggested that the nature of the rights contained in the Covenant and the fact that the case for derogation in times of emergency from, for example, the right to food or to health care would seem inherently less compelling than the case for derogation from the right to peaceful assembly or the right to vote[2]. However, in our opinion, it would be fallacious to prioritorise and compartmentalise human rights into civil and political on the one hand and economic and social on the other. The latter category of rights are equally important, And an attempt must be made to incorporate certain basic economic and social rights in the concept of non-derogable rights.

It is also clear that the number of rights available during states of emergency is lesser than the rights available during armed conflicts. The broader rights should also be extended to states of emergency by modifying international human rights law standards so that there is greater protection to the people in states of emergencies even if there is no armed conflict as such. The fact that the broader rights are available during armed conflicts is itself a compelling ground for making them available during a less serious situation of state of emergency even if there is no armed conflict as such.

Often a discussion. on issues like the one under consideration is confined to academic exercises and may lead to recommendations which are by and large unacceptable to most of the states. But the initiative taken by the United Nations as well as non-governmental organizations of international lawyers has had some practical impact. The United Nations Special Rapporteur has pointed out that a number of countries have modified their domestic legislation to accommodate the broader concept of non-derogable rights, and in particular, there is growing recognition of the competence of the courts to monitor lawfulness of the proclamation of a state of emergency, or in specific cases, to terminate arbitrary measures[3]. A number of states, which are in the process of transition, have sought the assistance of the United Nations Center for Human Rights in reforming their domestic human rights

[1] Antorio Cassesse (ed), The New Humanitarian Law of Armed Conflicts, Editoriale Scientifica, Napoli, 1980, pp. 117-8
[2] Alston and Quinn, "The Nature and Scope of States Parties Obligations under the International Covenant on Economic, Social and Cultural Rights", 9 *Human Rights Quarterly*, 1987 p.217
[3] UN DOC. E/CN. 4/Sub.2/1995/20, p. 7.

legislation including the Constitutions[4]. These states have shown willingness to incorporate the new and evolving norms and standards of human rights, including those relating to non-derogable rights, in their Constitutions and domestic legislation. Given the inherent weaknesses in international legal system and problems faced in the process of aligning domestic legislation with international standards, this is an extremely encouraging development.

[4] *Ibid*., P. 8.

THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF POLITICAL DETAINEES

by Jacques Moreillon

Last February we devoted an article to a book by Jacques Moreillon, ICRC delegate-general, which had been published by the Henry Dunant Institute.[1] We give below an English version of one chapter (translated by us) of the book which, we would state, was submitted as a thesis to the Graduate Institute of International Studies, Geneva, under the sole responsibility of the author. (Ed.)

First ICRC visits to political detainees: Russia (1918) and Hungary (1919)

RUSSIA –1918

The February 1917 Revolution had hit the Russian Red Cross hard, since most of its leaders were persons very close to the imperial family.[2] One of the first decisions of the provisional government had been to remove members of the Red Cross Society's general directorate, in March 1917, about the time of Nicholas II's abdication, followed by that of his brother Michael. A troubled period ensued for the Society when "soviets" set up by its employees sought to infiltrate the directorate. Their action undoubtedly made the Society more democratic, but also very disorganized.

With the October Revolution, the confusion steadily worsened, and undel a decree issued on 6 January 1918 by the Council of People's Commissars, all the property of the National Red Cross was confiscated by the State, its Committee dissolved, and a new Committee formed to re-organize the Society .[3]

At that time, there were no ICRC delegates in Moscow or Petrograd, but several representatives of Red Cross Societies of neutral countries had been very active in both places during the previous years. The Swedish Society had acted as intermediary between Russia and Germany for the despatch of parcels to prisoners of war and to civilian internees of both countries, and its representatives had distributed, to them and to the disabled, whole train loads of relief supplies from Sweden; the Norwegians had specialised in the forwarding of mail to prisoners of war; the Danish Red Cross was equally active, organizing the repatriation-through Denmark-of wounded prisoners of war

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[1] *Le comite international de la Croix-Rouge et la protection des detenus politiques*, Henry Dunant Institute, Geneva -Editions I' Age d'Homme, Lausanne, 1973

[2] 2 THORMEYER, F. *Les effets de la Revolution russe sur la CR*. Bulletin international des societes de la Croix-Rouge, No 192, October 1917, pp. 458-468.

[3] Report by Mr. Ed. Prick on his work in Russia-1.11.1918 ICRC records- Mis.1.5.

to Russia and Germany, and its delegates were sent, often accompanied by nursing nuns, to visit civilian and prisoner-of-war camps.[4]

Indirectly, however, the ICRC was present in Russia in the person of its Vice-President, Mr. Edouard Odier, at that time the Swiss Minister at Petrograd. In his anxiety to prevent the collapse of the Russian Red Cross, Mr. Odier not only informed Geneva of the situation arising from the January 1918 decree,[5] but on his own initiative appointed Mr. Edouard Prick, a Swiss national living in Russia who had worked since 1914 with the Russian Red Cross, as an ICRC delegate on a provisional basis pending confirmation from the International Committee in Geneva.[6] Mr. Prick's mandate, confirmed in writing by the ICRC in May 1918[7]
and deliberately couched in vague terms, authorized him to lend assistance to the National Red Cross Society and to keep in touch with other Red Cross Societies represented in Moscow and Petrograd.

In fact, Mr. Frick had not waited for the ICRC confirmation to reach him before approaching the new and youthful leaders of the Russian Red Cross and inducing them to request the People's Commissars to promulgate a new decree to supplement and amend the decree of 6 January 1918. In their view, the Russian Red Cross should be "part of the international association of the Red Cross, whose activities are based on the Geneva Conventions of 1868 and 1907 (sic). Its prerogatives as such should be preserved and, because it must devote its efforts to the relief and repatriation of prisoners of war, all that belonged to it in the past should be returned to it pending the final settlement of the war."[8]

Encouraged by the initial success which the mere presentation of such a request by the Russian Red Cross represented, Mr. Frick strongly urged the ICRC to support it and to approach the government accordingly. He believed that the Bolsheviks were beginning to fear that to cut themselves off from the Red Cross movement would be to deprive their wounded soldiers and prisoners of the protection of the emblem, and that to nationalize the National Society's property would be to run the danger of making it lawful war booty for the enemy in occupied territories.[9]

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[4] Minutes of the first meeting of the International Conference of neutral Red Cross Societies at Petrograd on 4.6.1918. ICRC records -Mis. 1.5.

[5] *Rapport general du CICR sur son activite de 1912 a 1920,* p. 186. presented by the ICRC to the Xth International Conference of the Red Cross, Geneva, 1921,257 pp. (Hereafter, Rapport general CICR, 1912-1920); ICRC library-362.191/7.

[6] Letter from the Swiss Legation in Russia (Mr. Edouard Odier) to the ICRC, dated 2.4.1918, ICRC records-Mis. 1.5. 5 ICRC General Report, 1912-1920, p. 187; ICRC library-362. 191/7).

[7] ICRC General Report, 1912-1920, p. 187; ICRC library-362

[8] Letter (undated) sent by the Collegial body for the administration of the Russian Red Cross to the ICRC, annexed to the letter dated 2.4.1918 from the Swiss Legation in Russia (Mr. Edouard Odier) to the ICRC. ICRC records- Mis. 1.5.

[9] Letter from Mr. Prick, delegate of the ICRC, to the Swiss Legation in Russia (Mr. Odier), dated lor 2.4.1918 (annexed to the letter dated 2.4.1918 from the Swiss Legation in Russia to the ICRC). ICRC records- Mis. 1.5

The ICRC followed the advice of its new delegate and, in its letter of 6 May 1918 to the Commissar for War, in Petrograd, requested that the January decree be withdrawn and the Russian Red Cross allowed to continue its activities as in the past.[10]

In June 1918, Mr. Frick undertook to co-ordinate in an "International Conference of representatives in Russia of Red Cross Societies of neutral countries" the work those Societies were doing for prisoners of war of all nationalities and for the numerous victims of the civil war.[11]

From the beginning of June to the end of September 1918, the Conference-which in its eally stages was attended by the ICRC delegates and representatives of the Russian, Swedish, Danish and Norwegian Red Cross Societies-applied itself to a number of tasks which included assistance to foreign civilians imprisoned in Moscow and Petrograd and often totally deprived of any effective diplomatic protection.[12]

In the course of those visits, the prisoners sent to hospital were the object of special solicitude. In the wards, Russian political detainees were not kept separate from non-Russians, and Mr. Prick was thus the first ICRC delegate to bring direct aid to persons imprisoned in their own country for political reasons. Of course, it would be misleading to lay too much stress on the significance of such a precedent. If we have given the history of this episode in some detail, it is because it was clearly a special situation created by the revolution in the aftermath of the war and not the de1iberate initiation of a new policy. The ICRC delegate made the visits a.s part of a number of other relief activities. Moreover, he was not the only one. To visit those detainees, for when Mr. Prick left Petrograd at the end of September 1918 in order to report to Geneva and, contrary to his plans, did not return to Russia (having been appointed by the ICRC to fulfil more important duties), the prison visits were continued by a Dutchman and a Dane, at least until the end of 1918.[13]

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[10] *Bulletin International de la Croix-Rouge*, No.195, July 1918, pp. 447-449.

[11] Report by Mr. Prick (ICRC) on his work in Russia, 1.11.1918. Report by Dr. Piaget to the ICRC, 3.6.1919. ICRC records-Mis. 1.5.

[12] The Conference of neutral Red Cross Societies decided also to undertake the following activities :

-general provision of relief to POWs;

-aid to the civilian population of Omsk in Siberia;

-supply of wheat to hospitals and other medical establishments ;

.-endeavours to carry out with the White Russians exchanges of hostages and the repatriation of children from those areas in Siberia which were in the hands of the White Army;

-combating epidemics, especially in the Caucasus.

See, especially, Report by Dr.Piaget to the ICRC,3.6. 1919. ICRCrecords-Mis.l.5

[13] Report by Dr. Piaget to the ICRC, 3.6.1919. ICRC records-Mis. 1.5.

It is difficult to ascertain how many visits to political detainees were made and by whom, but it is likely that there were several dozen of them. In any case, the International Committee referred to them as if they were its own special concern, in so far as they were conducted under the aegis of the Conference of neutral Red Cross Societies, whatever may have been the nationality of the visiting delegates.[14]

Nor is there anything in the ICRC archives to show whether Mr. Eugene Nussbaum, who was appointed ICRC delegate in Petrograd by Mr. Odier in October 1918, also carried out visits of this kind. It is possible but not certain.[15]

On 2 June 1919, the premises of the International Conference were, like most of the Legations and Embassies in Petrograd, attacked, pillaged and sacked. Together with 80 other members of foreign diplomatic missions, the ICRC delegate was arrested. He was freed and expelled from Russia a few weeks later .[15]

However, the question was not entirely dropped and it will be seen in a later chapter what steps were subsequently taken by the International Committee in respect of the political detainees in the Soviet Union.[16]

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[14] Rapport general ICRC 1912-1920, p. 192. ICRC library-362. 191/7. This is borne out by the publication in this report (see footnote 9, p. 192) of a 1etter, dated 12.12.1918, sent to the Conference by the Government of the Federal Soviet Republic, stating that "in reply to your report of the l0th instant, we inform you that the shortcomings pointed out in the said report, in respect of the present condition of the prison sick-bay, will be given serious consideration and that we shall take all necessary measures to remedy them" (our translation).

[15] Report by Mr. E. Nussbaum to the ICRC, 22.6.1920. Report by Mr. E. Prick on his work in Russia, 1.11.1918. ICRC records-Mis. 1.5.

[16] According to an article by a member of the pre-revolution Red Cross Society, Mr. Georges Lodygensky, which appeared in the *Revue internationale* of June 1920 (No.18, pp. 654-670) under the heading *La Croix-Rouge et la guerre civile en Russie de 1919 a 1920*, it would seem that in 1919 the ICRC delegate in Kiev, together with members of neutral Red Cross Societies, visited and gave aid to political detainees held in Kiev prisons on a number of occasions. This action was continued despite five changes of regime in a single year, with corresponding changes in those imprisoned. No first-hand reports, however, have been found to provide details.

HUNGARY -1919

On 21 March 1919, Bela Kun set up the dictatorship of the proletariat in that part of Hungary which had not been occupied by the Rumanians, Serbs or Czechs, in other words, mainly in Budapest. Mr. Haccius, the ICRC delegate, had just arrived in Budapest to deal with the problem of providing aid to non- Hungarians and to the civilian population but, more important still, to repatriate Russian prisoners of war. His work, carried on in the midst of unforeseen revolutionary events, may be considered as the first action in which the ICRC was engaged for the sake of purely "political" detainees. (To speak of internal disturbances can hardly be justified, as the Communist coup d'etat encountered only slight resistance and practically no blood was shed.)

Here it was not a matter, as in Russia, of the help intended for foreigners occasionally benefiting nationals detained with them, but of a deliberate decision to adopt new tactics in the interests of victims whose only chance of help lay with the ICRC.

Who took this decision ? Haccius or the International Committee ? And why ? If taken by the Committee, was it with or without the realization that it was unprecedented ? These are questions to which an answer should be found, yet the archives often compel conjecture.[1]

On 28 March 1919, because of the change in the situation, the ICRC extended the mandate it had originally granted to Haccius, telling him specifically: "You are authorized in your capacity as delegate of the ICRC to deal on its behalf with matters concerning the Red Cross and prisoners of all nationalities".[2] This was indeed *carte blanche*, but we do not think that the International Committee had Hungarians in mind when it spoke of " all" nationalities. However, since the records of the Committee and of the Missions Commission (*Commission des missions*) are silent on this point, we must admit that this is only supposition on our part. What induces us to think in this way is that in that period Haccius himself did not seem to think he should concern himself with prisoners of Hungarian nationality. In his letter of 29 March, referring to "a programme of work for the International Red Cross delegation in Budapest",[17] no mention was made of political detainees. In fact, his chief concern seemed to be to obtain the favour of the Hungarian Red Cross and of the Hungarian Government in the interests of his mission in general.[3]

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[1] ICRC records-Mis. 4.5.

[2] Letter from the ICRC to Mr. A. Haccius in Budapest, 28.3.1919. ICRC records -Mis. 4.2., box 4, doc. 58, folio 89.

[3] Letter No.1 from Mr. Haccius to the ICRC, 25.3.1919.

"I obtained yesterday an interview with "citizen" Dr. Krcyrsik, secretary to Bela Kun, People's Commissar for Foreign Affairs. I explained to him the humanitarian aim of the relief mission, the studies that had been made and what had been done; I also reminded him of the services rendered to Hungarian prisoners of war by the International Red Cross.

He replied that he fully recognized the great services rendered by the International Red Cross and that it was the government's desire to remain on good terms with it. I explained to him that if he would guarantee that I would not be in any way hindered in the accomplishment of my task, I would report his views to the ICRC in Geneva.

My conditions were as follows :

1. a safe-conduct,

2. freedom of communication with the ICRC,

3. supervision of the Russian prisoners of war not willing to volunteer for the

Faced with a government whose policies had the rigid doctrinaire character of theories being put into practice for the first time, the main concern of the ICRC delegate was to convince the men with whom he had to deal that the Red Cross ideal-whether at national or international level-was not incompatible with international Communism. It seems that Haccius succeeded in doing so, for on 10 April 1919, through the Hungarian Red Cross, he was informed by Agoston, Minister of Foreign Affairs, that an ordinance guaranteeing the neutrality of the Red Cross had just been issued by the government. The ordinance contained the following official comment: "The Government of the Republic of Councils of Hungary, in ensuring, by this ordinance, a privileged position for the International Red Cross on the territory of the Republic is fully aware that the Red Cross of Geneva is not an alliance of governments but of peoples".[4]

This favourable attitude probably encouraged Haccius to go further. At all events, in a letter sent in May 1919 to the ICRC,[5] he wrote that, in agreement with Major Freeman, the British Commissioner for the Danube, and despite the reluctance of the "lower orders", he had decided to concern himself "at all costs. ..with political hostages and detainees". He added that "it was intolerable that demands be constantly made on the ICRC to intervene on behalf of the 750,000 Hungarians held prisoner outside Hungary while Hungarians in prison in their own capital were being ill-treated". He asked the ICRC to forgive him for having taken the decision on his own authority: "It was risky and outside my terms of reference. ..but. ..I could no longer defer taking action until authorization arrived from Geneva".

These lines show plainly that the delegate acted on his own initiative without instructions from the ICRC. Moreover, when the letter was written, authorization to visit the prisons had

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Hungarian army,

4. surveillance and protection of foreign missions and detachments retained in

Budapest,

5. contact with Mr. Prick at Stanislau...

I believe it is desirable not to underestimate the influence of the International Red Cross with the new Government and the extent of the humanitarian work it could do for Russian prisoners of war and allied missions " (our translation). ICRC records- Mis. 4.5, vol. 1., folios 95-96.

[4] The full text of the "Ordinance of the People's Commissariat for Foreign Affairs, No.2086, concerning the legal position of the International Red Cross in Geneva in the Republic of Councils of Hungary" is as follows (our translation) : "The International Committee of the Red Cross in Geneva and all its institutions and representatives shall enjoy the protection afforded to neutrals: it shall be placed, where its operations on the territory of the Republic of Councils of Hungary are concerned, under the protection of the Republic's authorities. In the accomplishment of their humanitarian tasks, the Red Cross of Geneva and the Hungarian Red Cross must not be subject to any improper influence, whether political or otherwise. All possible measures should be taken to enable the International Red Cross to carry out freely, on the territory of the Republic of Councils of Hungary, its humanitarian tasks, for only in this way can it bring help to the wounded, the sick and prisoners of war .

I command all civil and military authorities to treat the International Red Cross bodies with all possible consideration and to take steps to protect its institutions and emblems against any violence or misuse whatsoever. The Hungarian Red Cross is represented at the International Red Cross, with the latter's consent, by permanent delegates.

The Government of the Republic of Councils of Hungary, in ensuring, by this ordinance, a privileged position to the International Red Cross on the territory of the Republic, is fully aware that the Red Cross of Geneva is not an alliance of governments but of peoples." ICRC records-Mis. 4.5/67, vol. 2, folio 187.

[5] Letter No.31, from Mr. Haccius to the ICRC, 3.5.1919. Report on his visit to the Gyujtofoghaz prison on 28.4.1919. ICRC records-Mis. 4.5/68 and 4.5/70, vol. 2, folios 188/192.

already been requested by Haccius, since he had written "on 26 April to the ICRC: "1 tried to make clear to the Ministry, through an intermediary, that it would be much better if I were granted the authorization to visit the prisons before applying for it on the orders of the International Committee".[6]

The authorization must have been received shortly afterwards, because, on 28 April 1919, in Gyujtofoghaz prison, the ICRC, for the first time in its history, visited political detainees exclusively (48 political detainees and 131 hostages), with the express authorization of the government of the State to which they belonged.[7]

The delegate's efforts did not cease there; he went much further. After visiting other political prisoners, he asked for the release of all hostages over sixty years of age, and obtained the release of about 280 of them "after a careful re-examination of the reasons for their arrest".[8]

The rather curious way in which Haccius defended his theoretical position under Bela Kun's regime may be related here. It would seem that the reasoning which finally convinced the Hungarian Communists, and which was originally propounded by Haccius, was as follows: since Marxism abolished the concept of fatherland, substituting the struggle between classes for the struggle between nations, the new enemy (the bourgeois) had to be put under the protection of the international Conventions which until then had protected the former enemy (the foreigner). In other words, in a world now split horizontally, international law had to abandon its antiquated vertical position and adapt to the new conditions.

"Those who were considered as enemies of the proletariat should enjoy the rights and guarantees extended to belligerents by the Geneva and Hague Conventions." [9]

The allusion to the Red Cross of Geneva as "an alliance of peoples and not of governments", made by the Foreign Minister, Agoston, seems to indicate that this argument had had its effect on the men in power .The Republic of Councils' express recognition of the neutrality not only of the ICRC but also of the Hungarian Red Cross is all the more interesting in those circumstances. Was it because the National Society was considered as the "Hungarian branch of the International Committee of Geneva " ?[10] Possibly.

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[6] Note No.26 from Mr. Haccius to the ICRC, 26.4.1919. ICRC records-Mis. 4.5/79, vol. 3, folio 209.

[7] Letter No.31, from Mr. Haccius to the ICRC, 3.5.1919. Report on his visit to the Gyujtofoghaz prison on 28.4.1919. ICRC records-Mis. 4.5/68 and 4.5/70, vol. 2, folios 188/192.

[8] "Summary of the action by the ICRC Mission at Budapest", undated, received in Geneva on 19.8.1919. ICRC records- Mis. 4.5/216, vol, 6. p. 556

[9] Rapport general CICR 1912-1920, pp. 201-206. ICRC library-362.191/7.

[10] Ordinance No.62 of 9.7.1919 issued by the People's Commissariat for Public Welfare and Health stated: "The Commissariat for Public Welfare and Health orders the following in order to safeguard the neutrality of the Hungarian Red Cross Society, recognized in conformity with rescript No. 20.086/pol. 1919 of the People's Commissariat for Foreign Affairs.

1. On the territory of the Republic of Councils, the Hungarian Red Cross Society, as the Hungarian branch of the International Committee of the Red Cross at Geneva, is placed under the special international protection of the Republic of Councils.
2. All persons, and especially the military and political authorities, shall treat the Hungarian Red Cross Society and all its institutions, bodies and personnel in accordance with its neutral character, shall ensure the efficient protection proper to its neutrality, and shall support its work.
3. Those authorities which have seized or requisitioned any property whatsoever, whether movable or fixed, belonging to the Hungarian Red Cross. ..must. ..restore all such property...» (our translation).

But, whatever the motives, the Government's attitude implied a profound understanding of the fundamental characteristics of the Red Cross, even though the reasoning behind that appraisal was not quite the same as that of the men in Geneva in 1919.

On 1 August 1919, Bela Kun's regime was overthrown: the Rumanians occupied the country for a few weeks until Horthy's government came into power, when the "white terror", as it was called by some, was unleashed. That its excesses soon diminished was no doubt partly due to the numerous and vigorous representations made by the delegates of the ICRC (Mr. Haccius at first and then Mr. Burnier) who continued to carry out, under the reactionary government, the activities they had begun under the Communist regime, but not, of course, for the same victims !

The delegates, who protested strongly, denounced the brutality of which they saw signs, demanded explanations from the government and, an exceedingly rare occurrence in the history of the ICRC, even the punishment of the guilty parties. They conducted themselves as men quite sure of their rights, and the authorities treated them as such. These efforts bore fiuit, for Mr. Burnier, on 1 April 1920, in a summarized account of his work in the prisons, declared that he had not found anyone in the prisons who complained of having been brutalized or beaten after 28 August.[11]

The success of this first action in support of political detainees led its authors to draw from it, for the first time, general conclusions as to the future of the Red Cross; Mr. Haccius, in a letter dated 22 October 1919, referring to an article dealing with ICRC activities under Bela Kun, wrote: "The idea I had in mind was to bring out clearly that the work of the Red Cross must now be extended to a wider field of action than in the past". [12]

As for Mr. Burnier, he had imagined "setting up, under the patronage of the ICRC, a Commission, a sort of impartial International Committee of people who were not Hungarians and who had no personal interests in Hungary, to enquire into all acts contrary to humanitarian principles".[13] It is not known what made him give up this idea.

The ICRC was alive to the fact that a further step forward had been taken. In its publications-and particularly in its *Rapport general d'activite, 1912-1920* – a prominent part was given to the account of its delegates' activities for political detainees, and it took full responsibility for the way in which they had tackled both the problem and the authorities. The ICRC was all the more appreciative of the results which its delegates' activities had produced as it fully realized their very special nature and, above all, their lack of a legal foundation. "The application of the Geneva and of the Hague Conventions-concluded for the case of conflicts between peoples-to a conflict between nationals of a single country was a moot point. ..And

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In the letter in which the President of the Hungarian Red Cross informed Mr. Haccius of the text of the ordinance, he stated that this decree confirmed "with entire certainty the neutrality of our Society on a plane above all politics". ICRC records Mis. 4.5/134, vol. 4, folios 359/360.

[11] Letter No.1713 from Mr. Burnier, ICRC delegate in Budapest, to the ICRC, 1.4.1920. ICRC records-Mis. 4.5./624, vol. 11. folio 1217.

[12] Letter No.932 from Mr. Haccius, ICRC delegate in Budapest, 22.10.1919. ICRC records-Mis. 4.5/358, vol. 8, folio 752.

[13] Report No. IV from Mr. Burnier, ICRC delegate in Budapest, to the ICRC, 21.4.1920. ICRC records-Mis. 4.5/645, vol. 12, folio 1261.

by what right did a foreigner, whose function as an instrument of international relations rested precisely on his extraterritorial status, interfere in what was legally a purely internal political matter ?"[14]

So, as after Solferino, a spontaneous action gave birth to a general principle, and developed from the desire to ensure that such action could be repeated in the future with even greater effect.

[14] *Rapport general* CICR, 1912-1920, p. 201, ICRC library-362.191/7.

IN THE SHADOWLAND BETWEEN CIVIL W AR AND CIVIL STRIFE: SOME REFLECTIONS ON THE STANDARD-SETTING PROCESS

PETER H. KOOIJMANS

1. Introduction

2. The humanitarian law approach

3. Provisional evaluation of the humanitarian law approach

4. The human rights law approach

5. Provisional evaluation of the human rights law approach

6. Comparison of the humanitarian law approach and the human rights law approach

7. Concluding remarks

1. INTRODUCTION

International humanitarian law and international human rights law have much in common, nevertheless their roots are completely different. What they have in common is their focus on respect for human values and for the dignity of the human person. But the angle from which this common object of concern is approached is intrinsically and basically different. The origins of humanitarian law lie in inter-state relations, while those of human rights law lie in the relations between the Government and the governed within the State. Humanitarian law intends to alleviate human suffering which is the direct result of armed conflict, and armed conflict, until recently was seen as armed conflict between States. Human rights law (at least in its modern sense) originated with the development of constitutional law; it only became internationalized when during World War II it was realized that the protection of the basic rights of the human person could not be left to the State, since this State, although intended to be the guarantor of these rights , is also in the position to be their main violator[1]. The internationalization of human rights thus has as its goal a strengthening of the legal protection enjoyed by a citizen against his own State.

It is only in the period since World War II that these two branches of human values-oriented law really touched upon each other, and internal conflict was the meeting-place. The post-war era was characterized not so much by inter-state armed conflicts in the traditional sense of the word as by conflicts which started. as internal conflicts and sometimes received an international dimension by rather strong involvement of foreign

[1]Tomuschat, *Human Rights in a World-Wide Framework.* Some *Current Issues*, 45 ZaoRV 560 (1985).

powers but nevertheless remained localized within the border of one State. For this reason it is only logical that humanitarian law extended its concern to this type of conflict as well : human values are as much threatened by internal conflicts as they are by genuine inter-state conflicts .

Since, however, an internal conflict is situated within the border of one State it is also covered by human rights law. Basically that law concerns the relationship between the Government and its (rebellious) subjects, albeit under rather abnormal conditions. Internal conflict may cover a wide variety of situations, from riots to full-fledged civil war, but in all its ramifications it is a true shadowland which is situated between humanitarian law and human rights law. Since both are focused on the preservation of human dignity, their fields of interest converge. Both have tried to develop rules for this shadowland, to bring it under control and to preserve the values they have in common. But the sad truth is that until now both have failed in this effort. The shadowland between civil war and civil strife thus far has successfully eluded adequate regulation. In one of his books Meron states that:

> 'ideally there should be a continuum of norms protecting human rights in all situations, from international armed conflicts at one end of the spectrum to situations of non-armed internal conflict at the other. In every situation, there should either be a convergence of humanitarian and human rights norms, or one of these two systems of protection should clearly apply.[2]

In view of the fact that until now it has been impossible to bring the shadowland under control the question seems justified: does the convergence of the field of interest of both human values-oriented branches of law automatically lead to a convergence of the legal systems and therefore to a convergence of the rules? Or is a continuum of norms impossible because of their different origins and, consequently, their different-characters? If that would be the case, an ultimate solution can .only be found in Meron' s second alternative, viz. by bringing it firmly under the application of only one of the systems of protection. By approaching the shadowland from two sides in order to explore its crevices and unravel its secrets, we ourselves may increase the number of shadows and therefore make its surface more untraceable.

In order to have an effective set of rules two conditions should be met:
a) it should be clear in which situations the rules are applicable; and
b) the substance of the applicable rules should be adequate for the realization of the underlying values.

It is the first question which has bedevilled the humanitarian law approach, whereas the second one has seriously hampered the human rights law approach.

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[2] Th. Meron, Human Rights in Internal Strife: Their International Protection 3 (1987).

THE HUMANITARIAN LAW APPROACH

The first clear reference to internal armed conflict in international humanitarian law is to be found in common Article 3 of the four Geneva Conventions of 1949. Its scope of application is formulated rather loosely: In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties , each Party to the conflict shall be ' bound to apply as a minimum. ..' (follow some substantive rules)..

Common Article 3 -rightly called the 'humanitarian convention in miniature'- evokes, however, more questions than it answers. First it should be noted that no definition is given of what is to be understood by an' armed conflict not of an international character' .Although the lower threshold seems to be the mutual use of armed force, no indication is given of the intensity of this armed force necessary to make the provision applicable.[1] This makes a satisfactory answer to the next question all the more urgent: Who is competent to decide whether common Article 3 is applicable? It is here that the difference in character between common Article 3 and the traditional rules of humanitarian law leaps to the eye. With regard to the latter, common Article 2 says that 'the convention(s) shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties even if a state of war is not recognized by one of them' .The applicability is objectively determined -the use of armed force- and the basis of obligation is the contractual relationship between the parties to the conflict. In the case of common Article 3, however, the basis of obligation is a contractual relation between one party to the conflict and other States Parties to the convention, whereas the other party to the conflict is considered to be bound by the relevant rules although it has no status in international law. Whereas the traditional rules of conventional humanitarian law become automatically applicable if there is a use of force, common Article 3 by implication must be declared applicable, either by the Contracting Party which is almost always also a party to the conflict or by the other Contracting Parties. The second alternative, however, seems to be ruled out -in the absense of a specific authorization to those other Contracting Parties, which does not exist- by the principle of non-interference, as the conflict occurs within the territory of another State. The only alternative left is that the Contracting Party, in whose territory the conflict occurs must declare common Article 3 applicable. Although in theory the conclusion drawn by a Commission of Experts convened by the ICRC in 1962, viz. that the decision whether common Article 3 is legally applicable 'should rest on objective conditions and not be the result of a discretionary appreciation by States Parties to the Geneva Conventions' must be called sound, these objective conditions have never been agreed upon and, consequently, the discretion of the State Party seems to remain the decisive element.

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[1] F. Kalshoven, 'Guerilla' and 'Terrorism' in Internal Armed Conflict, 33 American University Law Review 68 (1983). According to Kalshoven:
'While the term "armed conflict" was left undefined in common article 3 ...it was widely understood to exclude situations of political unrest accompanied by nothing more than sporadic acts of violence. ,ÎÏÐÑ

This State Party will, however, not easily be inclined to declare Article 3 applicable for various reasons. In spite of the fact that Article 3 states that its application shall not affect the legal status of the Parties to the conflict, an explicit statement by the State, that there are two parties to an armed conflict, equally bound to comply with certain international rules, will nearly invariably be interpreted as a raising of the status of the opponent.[2] Moreover, the State Party will not be in a position to ensure that the other party to the conflict will also comply with the applicable rules and that will make it less willing to accept restraints for its own conduct. This willingness may increase if the conflict is a protracted one and approaches a full-fledged civil war, but will nearly invariably be absent if the Government is of the (often ill-based) opinion that it can quell the insurgency rather speedily .[3]

These difficulties are not solved if one shares the position taken by the International Court of Justice that common Article 3 is a rule of customary law since' it reflects elementary considerations of humanity and constitutes the minimum yardstick for all kinds of armed conflict, whether international or non-international'.[4]

Apart from the fact that Judge Jennings in his Dissenting Opinion, not without reason, called this finding of the Court 'a matter not free from difficulty',[5] the fact remains that, even if common Article 3 must be considered to be customary law (which would not solve the problem of the contractual basis of obligation since the other party to the conflict has no formal international legal personality) the applicability of this customary rule in practice will still be left to the discretion of one of the parties to the conflict. A legal system under which the beneficiaries of the rules (i. e. , persons taking no active part in the hostilities) are completely dependent for the exercise of their 'rights' on the discretion of one of the parties to the conflict, can hardly be called an effective system.

It has been said that common Article 3 has the merit that it enables the International Committee of the Red Cross (ICRC) to playa role in internal armed conflicts, since it authorizes an impartial humanitarian body to offer its services to the parties .Theoretically this may be true, but two comments must be made: first, that the parties to the conflict are under no obligation to accept the offer, and secondly that in actual

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[2] See also Meron, op. cit. n. 2, at 38

[3] For a list of cases where Common Article 3 was declared or implicitly understood to be applicable, see D. Forsythe, *Legal Management of Internal War; The 1977 Protocol on Non- International Armed Conflicts* , 72 AJIL 275 (1978)

[4] ICJ Reports 1986, § 218, at 114.

[5] *Ibid.* , at 537. See also T. Meron, Human Rights and Humanitarian Norms as Customary Law 35 (1989). According to PMeron:

1 'The norms specified in Article 3 have an undisputable humanitarian character, but elementary considerations of humanity may not necessarily have attained the status of already crystallized customary law.'

practice the ICRC, when offering its services to Governments, rarely relies on the legal character of the conflict.[6]

The adoption of two Protocols to the 1949 Geneva Conventions in 1977 may truly be called a landmark in the development of international humanitarian law; for the subject under discussion, however, the situation became, if anything, more obfuscated. First of all, a number of armed conflicts which hitherto had been considered as internal conflicts were lifted to the international level. Article 1(4) of Protocol I states that the term 'international conflicts' also includes 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations' .By authorizing movements engaged in such fights (usually called national liberation movements) to deposit a unilateral statement with the Swiss Government (the depositary of the Protocols) declaring their intent to be bound by the Protocols and the Geneva Conventions, their status in international law is 'upgraded ' ; they have been granted a limited treaty-making capacity and therefore, international legal personality.

To a certain extent this was a confirmation of the position these liberation movements already enjoyed in the context of the United Nations and, therefore, in itself not very revolutionary; by obtaining observer-status with the United Nations their fight for self-determination had already been 'internationalized' .The applicability of the rules of international conflict (i. e. , of the Conventions of 1949 and Protocol I), is, however, not only dependent upon the deposit of the declaration with the depository by the liberation movement, but also upon the ratification of the Protocol by the State concerned: Article 96(3) explicitly requires that the war is against a High Contracting Party. It is, therefore, very easy for the Government concerned to evade the applicability of the Protocol by not ratifying it,[7] or, if it has done so, by denying that the situation is covered by the criteria of Article 1(4). It is, therefore, again left to the discretion of one of the parties to the conflict to determine the applicability of the rules of humanitarian law.

Protocol II deals with all armed conflicts not covered by Article 1 of Protocol I, consequently with all other non-international armed conflicts. Originally, its scope of application had been envisioned as virtually the same as that of common Article 3; the Protocol, therefore, was to be an expansion and development of the rather vague guidelines prescribed by that Article. In the draft submitted by the ICRC a lower

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[6] See, e.g., H.-P. Gasser, *International Non-International Armed Conflicts; Case Studies of Afghanistan, Kampuchea, and Lebanon,* 31 American University Law Review 911, 922-933(1982). See also I. Moreillon as quoted in Meron, op. cit. n. 2, at 115,116. According to Moreillon:
'I feel relatively confident that if we were to approach any of these governments and tell them: you must let us see these people (in places of detention} because they are covered by Protocol II or Article 3, they would be more reluctant to let us in than if we approach them by saying: we offer our humanitarian services on the basis of our internationally recognized right of humanitarian initiative, you are not obliged to accept it.'

[7] Neither Israel nor South-Africa has ratified Protocol I, although Article 1 (4} was drafted to benefit the PLO, respectively the ANC and PAC. Neither did these liberation movements deposit the declaration of Article 96(3}, although the ANC and PLO declared their intent to abide by the laws of armed conflicts to the extent possible. After the State of Palestine had been proclaimed in November 1988, the PLO requested, in June 1989, that Palestine become a Party to the Geneva Conventions.

threshold was indicated by the provision that the Protocol 'shall not apply to situations of internal disturbances and tensions, *inter alia*, riots, isolated and sporadic acts of violence and other acts of a similar nature' .During the Conference the threshold was considerably raised. Article 1 as it stands now requires that the dissident armed forces are under responsible command and exercise such control over a part of the territory (of the High Contracting Party) as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Although the threshold is put rather high, Article 1 seems to have the advantage that the criteria for its applicability are much more objective than the ones determining the applicability of Article 3. Forsythe, however, rightly points out that, although it seems clear that material conditions activate the law, *ad hoc* governmental assent seems to be necessary for the application of the law by the government forces.[8] Thus, in spite of the increased objectivity of the criteria for the applicability of the provisions of the Protocol, their operational value is still dependent upon the decision of one of the parties to the conflict. Although a number of internal armed conflicts seem to have met the conditions of Article 1 of Protocol II, in none of those cases was the Government concerned willing to recognize its applicability.[9] A number of insurgent movements have notified the ICRC that they intend to abide by the laws of armed conflict as far as possible,[10] although Protocol II has no provision comparable to that of Article 96(3) of Protocol I. In none of those cases , have the Governments concerned reacted to such notifications by declaring that they consider Protocol II applicable. In another case, that of the Philippines after the ousting of President Marcos the authorities did not seem averse to considering common Article 3 and Protocol II applicable; in December 1988 a Draft Code was adopted by a Conference, in which various parties and non-governmental organizations participated, requiring combatants to abide by Protocol II. In this case, however, it was one of the insurgent movements which hesitated to accept the Draft Code.[11] After cease-fire talks broke down in 1989, a 'total war strategy' (euphemistically called 'total approach strategy') against the insurgents was launched by the Government. During a visit the present author paid to the Philippines in October 1990 in his capacity as UN Special Rapporteur on Questions Relevant to Torture, the armed forces admitted that conditions 'short of war' indeed prevailed in certain areas and that, therefore, Protocol II, to which the Philippines is a Party, could be applicable.[12] It was not made clear what prevents the authorities from officially declaring that it should be applied but there may be a mixture of motives: uncertainty about the position of the main insurgent movement, the leftist New People's Army, with regard to the application of Protocol II, fear for political loss of prestige if it is implicitly admitted that part of the territory is under control of the insurgents (the authorities prefer to speak of 'insurgent-affected' regions), unwillingness to upgrade the status of the insurgent, a position which was easier to take when prospects for cease-fire

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[8] Forsythe, loc. cit. n. 5, at 285

[9] See Meron, op. cit. n. 2, at 48.

[10] R.S. Myren, *Applying International Laws of War to Non-international Armed Conflicts: Past Attempts, Future Strategies*, 37 NILR 353, n. 34 (1990).

[11] *Ibid*.,at 369

[12] See UN Doc. E/CN.4/1991/17, § 266.

talks were still favourable. In the meantime, it is the local population which is the main victim of an armed conflict to which none of the rules of humanitarian law seems to be applied.

PROVISIONAL EVALUATION OF THE HUMANITARIAN LAW APPROACH

I have given this example on purpose in order to show how extremely untraceable the shadowland between civil war and civil strife is if we approach it from the view-point of humanitarian law.[1] Formally, there seem to be four rather distinct situations, each with their own legal regime. First, there are the 'wars of liberation' in the sense of Article 1 (4) of Protocol I. In principle, all humanitarian laws regulating an international armed conflict are applicable provided the State Party to the conflict is Party to the Protocol and the other party to the conflict has deposited the declaration of Article 96(3). The basis of obligation, therefore, is quasi-contractual and obligations are reciprocal. This type of 'internal conflict' seems to correspond with the basic characteristics of humanitarian law.

Secondly, we have the internal armed conflicts which cannot be called wars of liberation in the sense just mentioned but which meet the fairly objective criteria of Article 1 of Protocol II. In this case the basis of obligation of the State Party to the conflict is contractual, but not *vis-a-vis* the other party to the conflict. In fact, Protocol II does not even mention the other party to the conflict.[2] Does that mean that the obligations of the State Party to the conflict are unilateral, irrespective of the position of the other party? Quite correctly Kalshoven draws attention to the fact that Article 1(1) makes it a condition for application of Protocol I that the armed groups of the' adverse party' exercise such control over a part of the territory of the State 'as to enable them. ..to implement this Protocol' which seems to presuppose an obligation to do so.[3] Reciprocity of obligations, therefore, seems to be an in-built element for the applicability of Protocol II. Third, we have situations which do not meet the requirements of Article 1(1) of Protocol II but which are clearly above the threshold of Article 1 (2) , viz. internal disturbances and tensions. Such situations necessarily remain covered by common Article 3.[4] Here the basis of obligation between the parties to the conflict neither is contractual nor seems it to be reciprocal. Finally, we have situations which are not considered to constitute an armed conflict and therefore are below the threshold of common Article 3. Seemingly such situations (which may be labelled 'internal disturbances and tensions') are covered by the 'slimmed down' de Martens Clause mentioned in the Preamble of Protocol II, viz. by the 'principles of humanity and the dictates of the public conscience' .

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[1] See also W .M .Reisman, J. Silk, *Which Law Applies to the Afghan Conflict ?* , 82 AJIL 459 et seq. (1988).

[2] F. Kalshoven, Constraints on the Waging of War 138 (1987). Kalshoven explains this 'utter silence' by the 'fear of many Governments that the mere reference to an adverse party might in concrete instances be interpreted as a form of recognition'

[3] Ibid., at 139

[4] Kalshoven correctly refers to Article 1(1) of Protocol n which explicitly states that the Protocol develops and supplements Article 3 *without modifying its existing conditions of application* (emphasis added, PHK).

The shadowland between civil war and civil strife seems to be mapped out quite neatly; nevertheless, even a bird's eye view of actual State practice teaches us that the dividing-Iines between the various sectors are extremely blurred. The explanation is simple: the decision to activate the rules governing each sector is left to one of the parties to the conflict which has a direct and immediate interest of its own in not making that decision. The weakness of the whole system is that, unlike the regime for international armed conflicts, there is no objective machinery to make authoritative characterizations as to which situation occurs and which regime consequently should apply if the material conditions have been fulfilled. On first sight this may be ascribed to the complete absence of a supervising or monitoring system like the one embodied in the Geneva Conventions in the case of international armed conflicts. The rather meagre role given to humanitarian organizations like the Red Cross in common Article 3 and in Article 18 of Protocol II can hardly be compared to the functions of the Protecting Powers or the ICRC in the case of international armed conflicts.

I strongly feel, however, that the reluctance of States to allow for a more convincing implementation system has deeper roots and is closely connected with the reciprocity character which is so typical for international humanitarian law. Kalshoven is right in pointing out that Protocol II is based upon the presupposition that both parties to the conflict are obliged to apply its provisions. But that does not answer the question what the legal basis for that presupposition is .

Meron opines that it is *desirable* (italics mine, PHK) that Article 3 should be construed as imposing direct obligations on the forces fighting the Government, but his wording seems to indicate that he himself doubts whether this is already *lex lata*. It cannot be denied that international law can directly confer rights and obligations on individuals since nowadays the fact that they have a limited international personality is generally recognized. But can international law confer obligations upon an 'adverse party' (and that is the basic philosophy of international humanitarian law) without vesting it at the same time with some form of legal international personality?

Are the rather reassuring words in common Article 3 that its application shall not affect the legal status of the parties to the conflict sufficient to prevent that effect? Meron continues by saying that the imposition of direct obligations on forces fighting the Government should not be understood as conferring on them a different legal status and should not be used by a Government as a pretext for refusal to apply the duties stated in Article 3. Are Governments reluctant to declare applicable common Article 3 and/or Protocol II because they fear the *political recognition* of dissident groups or because they fear their *legal recognition*? If they fear the latter these fears will not be allayed by Meron' s reminder that, according to the International Court of justice, , [t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights ' ,[5] since what they want to avoid at all costs is that such groups will be considered as subjects of international law in their own right for any purpose and to any extent.

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[5] Meron, op. cit. n. 2, at 39, 40

THE HUMAN RIGHTS LAW APPROACH

Before going further into this question, let us first approach the shadowland between civil war and civil strife from the view-point of human rights law. Immediately the landscape seems to become more recognizable, since irrespective of the intensity or the stage of the conflict we find ourselves within the jurisdiction of a State. And nowadays it is a generally recognized principle of customary law that each State has to protect the essential human rights of all those who find themselves within its jurisdiction. This principle is implicit in the famous *obiter dictum* of the ICJ in the Barcelona Traction Case in which it classifies under the obligations *erga omnes* the rules concerning the basic rights of the human person.[1] This does not mean that all human rights as they appear in the catalogue formed by the Universal Declaration and the various human rights treaties belong to customary law; [2] for the moment it suffices to state that each and every State is under an obligation to guarantee to all those within its jurisdiction the enjoyment of certain rights, irrespective of whether that State has become a party to a human rights convention. This obligation is a unilateral one; in most constitutional systems the fundamental freedoms of the individual are qualified as rights he has *vis-a-vis* the State; the basis of obligation for the State is not a contractual one (the construction of the social contract which lies at the base of the concept of human rights has always been seen as a hypothetical one) nor is it based upon reciprocity; if the individual does not comply with the norms established by the State for the general well-being he may be punished, but even then his fundamental rights have to be respected. When human rights passed into international law to better ensure their protection they were, as in constitutional law, formulated as rights of the individual *vis-a-vis* his own State. What was peculiar about this internationalization of human rights is that a State became accountable to the international community and to other States for the non-compliance with his obligations towards his own subjects. In. particular, if a State is a Party to a human rights treaty this accountability towards the other State Parties is clearly visible in the right of state-complaint. In such cases the basis of this *accountability* is contractual and reciprocal, but I strongly feel that this does not change the original basis of the 'obligation to respect' since this obligation is owed to the -individual and remains a unilateral one. Consequently, it is the relationship of State-subject (in the sense of subject to its jurisdiction) which determines the applicability of human rights law and not any material conditions.

A provisional conclusion, therefore, may be drawn: human rights law answers more satisfactorily the first condition for an effective legal system, mentioned in the introductory paragraph: viz. that it should be clear in which situations the rules are applicable. With human rights law that is the case whenever there is a relationship of State-subject.

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[1] ICJ Rep. 1970, § 34, at 32.

[2] See for the passage of human rights norms into customary law, T. Meron, op. cit. n. 7, at 79 *et seq.*

Now we have to see whether also the second condition is met, viz. that the substance of the applicable rules is adequate for the realization of the underlying values. It is exactly here that we find the weak spot of human rights law when we look at the shadowland between civil war and civil strife.

We have seen that in most national systems human rights are constitutional or constitution-based rights .In practice we have seen that during periods of serious civil unrest or insurgency the constitution or at least these constitutional guarantees were suspended and rendered inoperative. Evidently this reflects the idea that the preservation of public order prevails over the rights of the individual, since if public order collapses, respect for human rights will come to naught anyhow. Undoubtedly there is logic and truth in this reasoning; on the other hand it should be realized that in those circumstances the individual is exposed to authorities whose power is no longer bridled by the constitution and who feel threatened by forces from within, i. e. , by part of those individuals whose fundamental rights they are expected to protect. We are, therefore, confronted with a paradoxical situation: at the very same moment that the existence of the community which forms the basis of the State is threatened, the fundamental rights of the individual are at peril to a much greater extent than they are in normal times;[3] nevertheless the exercise of those rights is suspended 'with the aim of rectifying the situation, and indeed protecting the most fundamental rights '. [4]

This paradox also passed into international law when human rights became a matter of international concern after World War II. All general human rights conventions, whether universal or regional (with the exception of the 1981 African Charter on Human and People's Rights) contain derogation clauses which may be put into effect in times of emergency' in order to enable states, when confronted with such situations, to loosen the stranglehold of their obligations without running the risk of their membership of the community of States parties being called in question'.[5]

States which wish to make use of these derogatory powers can do so only under certain procedural and substantive conditions. Of the latter the most important for our subject is that there are certain rights which cannot be derogated under any circumstances. Although the list of these non-derogable rights is not identical in the relevant general conventions (the UN Covenant on Civil and Political Rights and the European and the American Conventions), four of them are listed in all three: the right to life, the prohibition of torture, the prohibition of slavery and the prohibition of retroactive penal measures. These rights, therefore, have to be respected and guaranteed under all circumstances to all persons within the derogating State's jurisdiction, including those who are seen by the authorities as the' adverse party' .

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[3] Meron, op. cit. n. 2, at 51. According to Meron: 'Experience shows that it is in times of emergency, when the life of the nation is threatened, that cruel abuse of human rights are at their worst.'

[4] N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc. E/CN.4/Sub. 2/1982/15, § 23, at 8.

[5] *Ibid*. , § 37, at II

In her important study on states of emergency submitted to the UN Subcommission on Prevention of Discrimination and Protection of Minorities, Questiaux draws a highly interesting conclusion:

> '[T]he idea of a basic minimum, from which no derogation is possible, is present in a sufficient number of instruments to justify our approaching the matter by reference to a general principle of law recognized in practice by the international community, which could, moreover, regard it as a peremptory norm of international law within the meaning of Article 53 of the 1969 Vienna Convention on the Law of Treaties It therefore seems to us that the peremptory nature of the principle of non-derogation should be binding on every State, whether or not it is a party and irrespective of the gravity of the circumstances.'[6]

The fact that there is a set of basic human rights to which each and every person is entitled under all circumstances and that this now seems to be generally recognized is in itself of inestimable importance for the realization of the values to which both humanitarian law and human rights law are committed. But at the same time it has to be admitted that there is an unacceptably deep gap between the professed legal theory and actual practice. Partly this is due to the semi-organized character of international society where a system of communal sanctions against a violator of the law is lacking; as important is the fact that one basic human right is conspicuously absent from the list of non-derogable rights, viz. the right to a fair trial. A common feature under states of emergency are arbitrary deprivations of liberty, whether they result in enforced or involuntary disappearances , incommunicado detention or administrative detention. In her report Questiaux draws attention to the fact that usually in such cases there is no place for judicial review, not even in the form of direct intervention through recourse to habeas corpus .This results in a total absence of guarantees, a situation which is conducive to the violation of those very rights which have been declared inalienable. The present author has stressed this point in all his reports on Questions Relevant to Torture and has called incommunicado detention the torturer's bosom-friend.[7]

Questiaux is right in concluding that' [f]ailure to respect the right to a fair trial generally accounts for the most frequent violations' (of the non-derogable rights). Of vital importance is her next remark: Although it has to be admitted 'that international law in no way prohibits derogation from that right. ..., the restrictions established should not modify that right to the point of making it non-existent'.[8] Governments should never restrict derogable rights in such a way that the enjoyment of non-derogable rights by the individual becomes futile.

The provisions of the human rights treaties and, consequently, also the customary rules on states of emergency, fall short of what is needed to realize the values they pretend to

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[6] *Ibid.*, § 68, at 19.

[7] UN Doc. E/CN.4/1991/17, § 291

[8] Questiaux, loc. cit. n. 23, § 181-193, at 40-42

guarantee.[9] A favourable exception in this respect is the American Convention which in Article 27(2) forbids suspension of the judicial guarantees essential for the protection of such (non-derogable) rights.

In 1988 the General Assembly adopted the so-called Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[10] Now it is interesting to note that the scope of this instrument is extremely broad: 'These principles apply for the protection of all persons under any form of detention or imprisonment' (including therefore administrative detention). Principle 4 states that 'any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to, the effective control of a judicial or other authority' ('other' to be understood as 'independent from the arresting authority') and Principle 11 gives the detainee the right to be heard *promptly* by such a judicial or other authority.

The most remarkable element, however, is that there is no reference to times of public emergency which would allow for derogation from these Principles. This is not the result of an oversight since an earlier Draft contained such an exception clause. May the fact that the General Assembly adopted this resolution by consensus and that it was drafted by its legal (sixth) Committee be seen as an indication that there is an emergent *opinio iuris* that the right to a fair trial, including the principle of *habeas corpus* , belongs to the core human rights and therefore must be deemed to be inalienable and non-derogable? That certainly would be a highly essential strengthening of the safety-net constructed to safeguard the basic human values. Even taking into account the fact that the Body of Principles is not a binding instrument, in my opinion one does not go too far in saying that it may be seen as an authoritative present-day interpretation of the relevant provisions of the Covenant on Civil and Political Rights , adopted by that same General Assembly twenty-two years earlier.

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[9] See on the insufficiency of the treaty provisions also Meron, op. cit. n. 2, at 50 *et seq*.

[10] GA Res. 43/173 of 9 December 1988

PROVISIONAL EVALUATION OF THE HUMAN RIGHTS LAW APPROACH

The human rights law approach is attractive because of its simplicity. The State is under a (national but also international) obligation to respect and guarantee the basic human rights of all those who are subject to its jurisdiction. No Government can evade that obligation by labeling certain groups of such subjects as 'enemies of the people'. If such dissident groups refuse to obey the law they are subject to the criminal jurisdiction of the State. The exercise of this jurisdiction finds its constraints in the rights of the individual. Just as the basis of the State's 'obligation to respect' is unilateral, so the basis of the individual's 'obligation to abide by the law' is unilateral. Failure on the one side can never be a justification for failure on the other side.

This essentially coherent set-up, however, becomes fragile as soon as the stability of the internal order is at stake. If authority itself is at stake because it is seriously challenged by (part of) the subjects , positive human rights law tips the balance in that confrontation in favour of the Government by authorizing it to suspend most of the rights of the individual. Although international human rights law has put some constraints on the Government by excepting from that authorization certain inalienable rights, the way in which this has been done can hardly be called well-considered. Some rights have been singled out which are indeed basic for man and his dignity, but what was overlooked is that the various human rights are not isolated specimens, which can be set apart in a laboratory , but that the enjoyment of each of them is completely dependent on the rule of law; and the rule of law is a complicated and highly interwoven fabric.

The conclusion, therefore, must be that in the shadowland between civil war and civil strife, human rights law has failed to meet the second of the conditions for an effective legal system, viz. that the substance of the applicable rules should be adequate for the realization of the underlying values.

COMPARISON OF THE HUMANITARIAN LAW APPROACH AND THE HUMAN RIGHTS LAW APPROACH

In referring to emergency situations resulting from a serious political crisis, Questiaux in her study distinguishes between four different hypotheses: a) international armed conflicts; b) wars of national liberation; c) non-international armed conflicts; d) situations of internal disorder or internal tension. In doing so, she follows closely the categories established in international humanitarian law, a) being covered by the Geneva Conventions and Protocol I; b) being assimilated to a) by means of Article 1(4) of Protocol I; c) being covered by Protocol III and common Article 3; and d) being still a vacuum in international humanitarian law. She continues by saying that the first two hypotheses, and, under certain conditions, the third constitute the area of application *par excellence* of the humanitarian law of war. And then follows a highly remarkable statement: 'They will therefore not come directly within the scope of the study' .She justifies this choice (for it is a choice) by her terms of reference which implied that' situations of war in the terms of humanitarian law are not envisaged' .She seems, however, not entirely convinced of the rationality of that decision from the view-point of human rights law for she recognizes that' humanitarian law is considered by a significant section of opinion as a branch of the international law of human rights, with the result that the latter, by its very basis, would cover the four hypotheses mentioned above'.[1]

Of course, it would not be very useful to split up the shadowland between civil war and civil strife in seperate sectors and to allow them either to humanitarian law or to human rights law. Why would the scope of application of human rights law end with the non-sporadic use of arms within the State?

In this respect it is not without interest that two endeavours have been made to cover also the still-vacant area of internal disturbances and tensions with humanitarian norms. I refer to the Code of Conduct in the Event of Internal Disturbances and Tensions, drafted by Gasser and to the Draft Model Declaration on Internal Strife by Meron.[2] The approach taken by Gasser is much more cautious than that of Meron. Gasser's first concern is not the state of the law, but it is purely humanitarian in the sense of' helping mankind' .His position can best be summarized by the following quotation: 'The humanitarian approach focuses on the actual situation of the victims which it strives to assist and protect, and not on redressing a legal wrong or on restoring the rule of law'.[3] His aim is to bring together a number of existing rules that will meet the specific requirements of internal disturbances and tensions, and he continues: 'The Code does not propose new rules, but it simply *recalls rules* generally considered as being part of customary law or appearing to express

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[1] Questiaux, loc .cit. n. 23 , § 28-30, at 9

[2] Both the Draft Code of Conduct (prepared by H.P. Gasser) and the Draft Model Declaration (prepared by T. Meron) have been published in IRRC 38-58, 59-76 (1988).

[3] *Ibid*., at 41 (Gasser).

general legal principles ' .He calls his code first and foremost didactic in character and addresses himself also to persons unconnected with the authorities.[4]

Meron' s Model Declaration is much more legalistic in character. It clearly is his intention to fill a vacuum: the declaration must contain 'an irreducible and non-derogable core of human and humanitarian norms that must be applied in situations of internal strife and violence' Why? Because humanitarian law is not applicable in cases of internal strife falling below the threshold of common Article 3 and human rights law is either not applicable because the states concerned have not ratified the conventions or is ineffective because of the frequency of de facto or de jure derogations and because of the' grave inadequacy of non-derogable rights relevant to situations of violent internal strife'.[5] Most illustrative of his intention is the following quotation: '[The declaration] should represent to denizens of a country suffering internal strife what the Universal Declaration of Human Rights represents to persons living in conditions of tranquility' .[6]

I feel that with these different approaches by Gasser and Meron we have reached the most crucial issue. Meron states that in the shadowland human rights law is either inapplicable or gravely inadequate and that, consequently, there is a legal vacuum; Gasser maintains that 'internal disturbances and tensions *automatically* (italics mine, PHK) fall within the scope of international human rights law'.[7]

It is certainly no coincidence that common Article 3 contains some of the rights which were later formulated as non-derogable rights under the human rights conventions. The Geneva Conventions were adopted one year after the General Assembly had proclaimed the Universal Declaration of Human Rights. The Universal Declaration had no binding force; in common Article 3 binding force was given to those provisions of the Declaration which were considered to be essential under all circumstances, in peace as well as in times of armed conflict, for the preservation of human life and integrity (Articles I, 5 and II) .To this extent common Article 3 can be called the first international legislation on human rights law.[8] On the other hand it also reflects the character of humanitarian law since it only guarantees these rights to persons taking no active part in the hostilities and not to combatants, although these are formally subject to the jurisdiction of the Contracting State and enjoy the article's protection as soon as they are placed *hors de combat*. In its substance, therefore, common Article 3 is human rights law, in its presentation it is humanitarian law.

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[4] *Ibid*., at 46

[5] *Ibid.* at at 60 (Meron).

[6] T. Meron, *Towards a Humanitarian Declaration on Internal Strife*, 79 AJIL 864 (1984).

[7] Gasser, loc. cit. n. 31, at 49

[8] Myren, loc. cit. n. 12t at 349. According to Myren:
'Human rights (which apply at all times) have often influenced humanitarian law (which applies only to situations of armed conflicts), and common article 3 offers a prime illustration of such influence. These provisions mirror those of the Universal Declaration which was negotiated at the same time.'

Protocol II to the Geneva Conventions is different since it is a mixture of human rights law and of humanitarian provisions. Although it does not contain many rules on methods and means of combat, the provisions of Parts I, III and IV are germane to situations of armed conflict. Part II, however, for the greater part, contains genuine human rights law.[9] The personal scope of application of these provisions, on the other hand, is typical for humanitarian law. Although the adverse party is not mentioned throughout the Protocol, protection is only guaranteed to 'all persons who do not take part or who have ceased to take part in hostilities ' (Article 4(1), first sentence; Article 2(1) refers to 'persons *affected* by an armed conflict as defined in Article 1 '). Strangely enough, the only protection given to combatants can be found in the same article that excludes them from the protection of the Protocol, viz. that it is prohibited to order that there shall be no survivors (Article 4(1), last sentence).[10]

Here we are confronted with a strange situation. In so far as it does not repeat them, Part II of Protocol II can be said to extend the scope of the provisions on non-derogable rights of the human rights conventions. In particular Article 6 guaranteeing the right to a fair trial, is of prime importance.

Beneficial as this may be, it has the curious effect that for a Party to Protocol II the right to a fair trial is a non-derogable right whenever an internal conflict has reached the stage where Protocol II should be declared applicable, whereas it lacks the non-derogable character during conflicts which are below the threshold of Protocol II. Moreover, since Protocol II is understood to bind both parties to the conflict, any insurgent or rebellion group is expected to apply the same human rights provisions,[11] whereas according to human rights law the obligation to protect and guarantee such basic human rights is a unilateral one for the Government only. In the case of Protocol II this dual obligation to a certain extent is understandable since the adverse party exercises factual control over part of the territory , but in cases below this threshold such a reciprocity of human rights obligations would certainly create serious problems.

What about the shadowland's third province: internal disturbances and tensions? In preparing his model declaration, Meron concluded that it should be applicable to the entire population. Quite correctly he says that 'in a low-intensity conflict, the traditional distinctions, such as between combatants and civilians. ..may not be meaningful and, moreover, may be abused by Governments so as to circumvent the objects and purposes of the declaration' .More relevant, however, seems to be his other argument in favor of a broad applicability, viz. the non-derogable provisions of the human rights instruments: 'It would. ..be inconceivable that all persons could benefit from such non-derogable provisions under applicable human rights instruments, but not under the declaration'.[12]

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[9] Kalshoven, op. cit. n. 16, at 139. In the opinion of Kalshoven: '... quite a few provisions in the Protocol have been taken almost verbatim from existing human rights conventions

[10] *Ibid*., at 140.

[11] For the difficulties an adverse party will have in meeting such human right requirements, see, Forsythe, loc. cit. n. 5, at 289-290_

[12] Meron, loc. cit. n. 35, at 863

But basically, the same argument holds true for situations covered by common Article 3 and Protocol II.

It would be a strange situation indeed if the State could exclude the adverse party from the protection it is obliged to give under the non-derogable provisions of the human rights instruments to all its subjects, by opting for the regime of common Article 3 and/or Protocol II. Conversely, it would be illogical that in a situation where the material conditions of Article 3 and/or Protocol II are met but their regime has not been declared applicable by the Government, this Government would be bound by the regime for internal disturbances and tensions which has a broader personal scope than the proper regime, specifically drawn up for that situation.

The difficulty is that, although in principle no gap between the field of applicability of the different regimes of humanitarian law should be possible, in actual fact the choice to decide which regime is applicable or not to decide at all is at the Government's discretion; unlike in international armed conflicts objective criteria activating the applicable regime playa much less decisive role in internal conflicts. As far as human rights are concerned, this is irreconcilable with the basic characteristic of human rights law, viz. that it is a comprehensive and self-contained system: as long as a person is subject to a State's jurisdiction (and jurisdiction is a formal concept) he is entitled to respect for his human rights (under a state of emergency that means the non-derogable rights) and the State is under an obligation to respect and guarantee these rights.

The second element in humanitarian law which seems to be at odds with human rights law is the concept of reciprocity. Partsch rightly has drawn attention to the fact that the proposition that also the adverse party is bound by the rules for non-international conflicts can only be made by means of a rather hazardous construction, viz. that the ratification by the Contracting State of the Geneva Conventions (common Article 3) or Protocol II not only binds the ratifying State, but also the adverse party. [13]

This may already be true for the rules of humanitarian law proper but with regard to its provisions on human rights such a construction is totally superfluous and may even be harmful, since it may lead to confusion in spite of the prohibition of reprisals .

Human rights law places unilateral obligations on the State. When an individual or a group of individuals violates the human rights of its co-citizens, this forms a criminal act under national law or may be even a crime under international law, e. g. , a crime against humanity. The concept of reciprocity which is so typical for humanitarian law, creates confusion where human rights are concerned;[14] the fact that the adverse party does not respect the basic human rights of others may be used -and is often used- as a (seemingly

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[13] K.J. Partsch, *Regein fur den Aufsland* (Rules for Insurgency), Neue Zeitschrift fur Wehrrecht 3 (1989).

[14] In the Philippines, where neither common article 3 nor Protocol II has been declared applicable, the Armed Forces regularly lodge complaints about human rights violations by the rebel forces with the independent Human Rights Commission, whereas the proper place to file them is the public prosecutor's office

convincingly) argument for the Government's lack of respect for the basic human rights of its disobedient subjects. But as the Government may continuously broaden the circle of disobedient citizens, even respect for the non-derogable rights will gradually evaporate.

CONCLUDING REMARKS

We started this exploration of the shadowland between civil war and civil strife with Meron' s proposition that in every situation there should either be a convergence of humanitarian and human rights norms, or one of these two systems of protection should clearly apply. I feel that now the stage has been reached that this question can be answered. First of all, one should keep in mind that humanitarian law for non-international armed conflict forms a *mixtum compositum.* Partly it contains rules which are typical for situations of armed conflict (care for the wounded and sick, protection of medical duties, ways and means of combat). Such rules should remain the domain of humanitarian law. Partly, however, it contains provisions on human rights and the lower on the ladder of violence the situation is the more so. It will be clear from what I have said before that in my opinion such rules do not belong to humanitarian law proper. If such rules are presented as humanitarian law norms, confusion may be the result whereas in the shadowland between civil war and civil strife it is clarity what is most needed since confusion contributes to normless behaviour. When the application of a certain regime of humanitarian law, containing also human rights norms, is rejected out of fear that this will raise the status of the adverse party, the human rights prevailing under that regime may be withheld whereas they have no direct relevance to that regime since they must be respected anyhow.

One sometimes does get the impression that standard-setting in the field of humanitarian law is used as a means to expand the catalogue of non- derogable human rights. Such an expansion is highly desirable, starting with the right to a fair trial, but the proper way to do so is the conclusion of additional protocols to the human rights instruments. The European human rights system has shown how effective such an 'incremental system' can work.

It would, therefore, be preferable that humanitarian law, when dealing with internal conflicts , would remind Governments of their obligations under human rights law instead of presenting such norms as independent norms of humanitarian law. I, therefore, prefer Gasser's approach to that of Meron. Both Gasser's Code of Conduct and Meron's Model Declaration contain nearly exclusively norms of human rights law. Whereas Gasser's approach is mainly didactic and moral by recalling rules which are already in force for Governments and appealing to non-governmental parties to act with moderation,[1] Meron's document pretends to have a legislative character: 'Because the applicability of humanitarian law is often denied, and the non-derogable human rights protections are inadequate and frequently ignored, there is a dire scarcity of governing norms'.[2] If human rights law is inadequate, it should be improved through its own procedures for standard-setting and not by an instrument which intends to establish a continuum from the highest step to the lowest step on the ladder of a legal system originally designed for armed conflict between States and, therefore, substantially different in character from human rights law.

In conclusion, I feel that the shadow land between civil war and civil strife is in need of both humanitarian law and human rights law and, that, consequently, not one, of the two systems can apply exclusively. An essential condition, however, is that the difference between the two systems is clearly distinguished in order to prevent a deleterious confusion. To that extent it can be said that there is a convergence of humanitarian and human rights norms, but it should

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[1] Gasser, loc .cit. n. 31, at 46-47

[2] Meron, loc .cit. n. 2, at 153

be realized that this convergence does -not imply confluence. It is precisely this assumed confluence that may hamper the effectiveness of both systems. In exploring the shadowland between civil war and civil strife one should constantly be guided by Professor Norgaard's sound counsel: 'The influence of theory and theoretical conceptions upon the creation of new rules of international law may not be overlooked as confusion in theory and concepts may lead to less adequate rules'.[3]

[3] C.A. Norgaard, The Position of the Individual in International Law 1 (1962).

INTERNAL STRIFE: APPLICABLE NORMS AND A PROPOSED INSTRUMENT

THEODOR MERON*

1. Introduction

2. Reservations as to the desirability of the adoption of a declaration

3. State of necessity

4. Some thoughts on the content of a declaration

4.1 Absence or abuse of judicial safeguards

4.2 Summary and arbitrary executions, capital punishment, and murder

4.3 Excessive use of force

4.4 Deportations, forced movement of population

4.5 Massive and prolonged administrative detentions without judicial revIew

4.6 Collective punishments

4.7 Protection of children

4.8 Protection of medical personnel; protection and care of sick and wounded; activities of humanitarian bodies and relief

5. Conclusions

1. INTRODUCTION

The tragedy of internal strife[1] is unfolding in a large and growing number of countries throughout the world. UN bodies , governmental agencies , non-governmental organizations and of course, the International Committee of the Red Cross (ICRC) have studied the situations in many of these countries. On the basis of their reports , it would be possible to describe the symptoms of internal strife in particular countries .However, this essay focuses on the general features of internal strife without reference to specific countries, since accounts of the situation in anyone country inevitably prompt debate over

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[1] For a definition of internal disturbance (internal strife) by the ICRC see T. Meron, Human Rights in Internal Strife: Their International Protection (Hersch Lauterpacht Memorial Lectures, Cambridge) 76 (1987). For a discussion of pathology of internal strife, see ibid., at 71-104.

factual allegations. Such debate would distract us from our task of developing an understanding of the nature of internal strife and suggesting the necessary remedies.

Internal strife frequently involves an aggregate of violent acts and human rights abuses which are interrelated rather than isolated phenomena. Despite the salutary efforts of the ICRC, the United Nations, and such non-governmental organizations as the Human Rights Watch and Amnesty International to humanize the behaviour of the principal actors in situations of internal strife, gross abuses of human dignity continue unabated. A systemic relationship often exists between various types of abuses, so that a given practice will create an environment in which other abuses are almost certain to occur. This essay focuses on the most serious and the most frequent of these abuses.

In preparing this essay, I have drawn on my published writings[2] regarding the increasingly common calamity of internal strife and on the working paper presented, on my own responsibility, to the ICRC in April 1984. In these writings I attempted to demonstrate the need to draft a declaration containing an irreducible and non-derogable core of human rights and humanitarian norms that must be applied in situations of internal strife and violence. Such normative progress should accompany efforts to strengthen the implementation of extant human rights and humanitarian norms. In addition, I explained both the conceptual context and the practical urgency of such an initiative, particularly for situations which can be regarded as a public emergency but as falling below thresholds of applicability of humanitarian instruments.

During the last few years, situations of internal strife have resulted in an escalating loss of human life and increasingly grave violations of human dignity. Although international efforts to promulgate a declaration on internal strife have not been successful as yet, the 1988 publication of a special issue of the International Review of the Red Cross on 'Internal Disturbances and Tensions'[3] demonstrates the continuing importance of humanizing internal strife.

A declaration on this subject rather than a formally binding instrument would stand a much better chance of adoption. Public opinion, Governments and international governmental and non-governmental organizations would encourage respect for the defined minimum standards of conduct. Hopefully it would affect the practice of Governments and other actors involved in situations of internal strife and shape rules of customary international law .[4]

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[2] T. Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law...' and the Need for a New Instrument*, 77 AJIL 589 (1983); T. Meron, Towards a Humanitarian Declaration on Internal Strife, 78 AJIL 859 (1984); Meron. op. cit. n. 1; Draft Model Declaration on Internal Strife, 3 Nordic Journal on Human Rights 12 (1987); T. Meron, Draft Model Declaration on Internal Strife, 262 Int'l Rev. Red Cross 29 (1988).

[3] 262 Int'l Rev. Red Cross (1988)

[4] Regarding the role of declarations in the development of international human rights law, see Meron, loc. cit. n. 1, at 141; T. Meron. Human Rights and Humanitarian Norms as Customary Law 82-84 (1989). Support for such a declaration was expressed by the Report of the Independent Commission on International Humanitarian Issues: Winning the Human Race73,74 (1988).

RESERVATIONS AS TO THE DESIRABILITY OF THE ADOPTION OF A DECLARATION

A number of reservations have been raised. I shall first consider and try to comment on these reservations and then outline the content of the minimum core of the declaration.

Various observers, and particularly participants in the Geneva Diplomatic Conferences, which culminated with the adoption of the two Additional Protocols of 1977, have raised some doubts as to the prospects of attempting, at the present time, to develop rules of humanitarian law. Naturally, the truncation of Protocol II during the Diplomatic Conference[1] in which it was adopted made them pessimistic about the prospects for further development of international humanitarian law. Without minimizing the difficulties , I feel that repeated efforts , against great odds , have always characterized the incremental growth of enlightened norms of humanitarian law. Moreover, the situation since 1977 has changed considerably .If in the seventies the struggle for national liberation in the Portuguese colonies together with the situation in South Africa and the occupation of the West Bank and Gaza, dominated international attention, internal violence is now among the greatest concerns of Governments and human rights organizations. These situations of protracted acts of political violence are characterized by substantial violations of human dignity.

Some observers have expressed the belief that the very absence of an instrument relating to internal strife has made Governments less concerned about possible intrusions upon their sovereignty and, thus, has made it easier for the ICRC to obtain access to detainees in countries involved in internal strife. The fact that in many cases the ICRC has been refused access to places of detention, and even altogether to the countries concerned, casts some doubts on the view espoused by these observers. However, even if it were true that the ICRC would sometimes benefit from the absence of a declaration, it must be remembered that the ICRC is only one of the important actors .Other actors , such as third Governments and such non-governmental organizations as the Human Rights Watch could effectively use a declaration on internal strife in trying to persuade Governments to abide by international standards and to focus public opinion.

Some human rights experts have followed a different "approach. Characteristically, they are reluctant to admit that international human rights instruments , such as the International Covenant on Civil and Political Rights , leave unsettled some important norms. They appear to believe that these instruments provide, either explicitly or implicitly, all the necessary norms and, that even if they do not, such norms can be developed through expansive interpretation and the rapid growth of customary law. They emphasize the need for improving implementation procedures and hope that through such improvement, e.g. further regulating the declaration of states of emergency, and

[1] Y. Sandoz, C. Swinarski, B. Zimmermann. eds., ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1319-1336 (1987); M. Bathe, K. Partsch, W.A. Solf, eds., New Rules for Victims of Armed Conflicts 604-617 (1982)

derogations on grounds of national emergencies , most of the normative difficulties can be resolved and abuses eliminated.

Of course, the failure to respect the existing law accounts for many, perhaps most, of the difficulties encountered. And, to be sure, experience accumulated over the years has shown that the means for scrutinizing states of emergency and derogations are in need of refinement. Nevertheless, improved implementation alone will not provide an adequate substitute for the absence of certain norms, particularly non-derogable norms which are essential for the protection of human lives and human dignity in situations of internal violence.

Professor Higgins has recently criticized the tendency to focus exclusively on implementation:

> '…there is a widely held view that the past forty years has seen an unparalleled elaboration of a multitude of human rights norms, and that what is now required is not a further expansion of the list of human rights but rather their enforcement. It is to the implementation of these rights, rather than to the enlargement of the list, that in the view of many attention should now be directed.
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> I believe this to be an oversimplified approach, because it assumes that there are two basic, and very different, activities -the articulation of human rights and their implementation. My own view is that there is rather a seamless web, and that the identification and invocation of human rights is a necessary integral element in implementation. ...
>
> Obviously a human right cannot be implemented until it has been identified and articulated ,[2]

I agree with Professor Higgins. It is, of course, true that enlightened interpretations of human rights ' instruments and practices can speed up the evolution of moral rules into customary law. However, basing protection of human dignity in internal strife on customary law presents many difficulties. Unfortunately, examples of States observing essential humanitarian rules in situations of internal strife are scarce. As a result, the scarcity of the required practice and of normative international declarations addressing such norms, specifically for situations of internal strife, makes the proof of customary law difficult. It is hard to persuade the actors involved in situations of internal strife about the content and the binding character of unwritten rules .

Moreover, one of the difficulties with regard to the usefulness in situations of internal strife of such human rights instruments as the International Covenant on Civil and Political Rights (political Covenant) is that the obligations which it states are addressed primarily to Governments (vertical applicability) .Unless some obligations are addressed

[2] R. Higgins, *Some Thoughts on the Implementation of Human Rights*, 89/1 UN Bulletin of Human Rights 60 (1990)

also to the groups fighting the Governments , and to the groups which are fighting each other, Governments are unlikely to accept a declaration on internal strife. The prospects for humanizing internal strife are greatly improved if the obligation to abide by essential humanitarian principles is addressed to the opposition as well as to the Government in such a way that the duties are reasonably balanced and the norms of behaviour are not unduly favourable to either side. Whether a particular obligation should be addressed exclusively to the Government or also to groups opposing the Government should depend on the content of the obligation. For example, only Governments and organizations possessing advanced elements of state-like structure can realistically implement judicial guarantees, while all parties should uphold the duty to respect principles of humanity and such prohibitions as those against torture or taking hostages .

Some situations of internal strife involve more complex conflicts in which, regardless of the role played by the *de jure* Government of the State, two or more ethnic or religious groups are involved in acts of violence against each other (horizontal applicability).[3] The declaration on internal strife should contain an appropriate statement of the policy that humanitarian obligations and norms protecting individual safety and human dignity apply as broadly as possible.

Such a declaration, or declarations, if available, would help generate and shape customary law. It is often assumed that customary law develops spontaneously. However, its advancement can be accelerated, directed and shaped through deliberate actions, such as the adoption of normative declarations. A declaration on internal strife would provide a clear focal point for moral pressure to respect humanitarian rules .

[3] See generally Meron, op. cit. n. 4, at 162-171

STATE OF NECESSITY

Another difficulty with the existing legal climate stems from the fact that in situations not governed by the derogation clauses of human rights instruments, deviation from customary law rules arguably may be justified by invoking exceptions recognized by general international law. In other words, even where a case can be made for a new norm of customary human rights , that norm might be displaced on grounds of emergency in situations of internal strife. I propose to elaborate on this proposition.

Customary law rules providing exceptions to the normally applicable obligations of States, such as those based on *force majeure*, state of necessity and self-defence, may preclude the wrongfulness of an act which does not conform to a State's international obligations.[1] The ILC
explained that:

> '...the term state of necessity. .denote[s] the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in confomity with what is required of it by an international obligation to another State'. [2]

Because States often invoke 'necessity' to justify deviations or derogations from the conduct required by human rights and humanitarian norms law, the applicability of this exception to these obligations requires close scrutiny.

It is now generally accepted that humanitarian instruments, having been adopted to govern situations of armed conflict,[3] are not subject to derogations on such grounds as public emergency except in the rather narrow context of Article 5 of the Fourth Geneva Convention[4] and Article 45(3) of Protocol 1.[5] These provisions parallel the limitation clauses of human rights instruments .Imperative military concerns , military necessity or security reasons are mentioned, for example, in Articles 49(2), 64(1) or 78(1) of the Fourth Geneva Convention, which grant States certain additional freedoms only when such freedoms are explicitly stated in the treaties concerned.[6] Invoking other necessity-related exceptions derived from customary law would clash with the purpose of

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[1] Draft Articles 31-34 of ILC's Draft Articles on State Responsibility (part One), (1980). n Yb. of the ILC 33 (1980); UN Doc. A/CN.4/SER.A/1980/Add.1, (part 2), (1981).
[2] Ibid., at 34
[3] Meron, op. cit. n. 1, at 156
[4] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 6 UST 3114, TIAS No.3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 6 UST 3217, TIAS No.3363, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 6 UST 3316, TIAS No.3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 6 UST 3516, TIAS No.3365, 75 UNTS 287.
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (protocol I) 16 ILM 1391 (1977).
[6] Meron, op. cit. n. 1, at 15.

humanitarian instruments. The principles both of effectiveness and of *expressio unius est exclusio alterius* preclude any other interpretation.[7]

This conception of humanitarian instruments is strongly supported by the ILC' s Conunentary on Draft Article 33 on the state of necessity .[8]

The ILC has adduced several reasons why a situation of necessity cannot excuse a State from compliance with rules of humanitarian law which, in order to attenuate the rigors of war , limit the belligerents ' choice of means and methods for conducting hostilities.[9] First, some humanitarian law rules constitute norms of *jus cogens* and are thus non-derogable. Second, even in regard to non-peremptory humanitarian law obligations , invoking a state of necessity to justify precluding the wrongfulness of State conduct conflicts directly with the purpose of humanitarian treaties, which seek to subordinate the immediate military objectives of belligerents to higher, humanitarian interests. Humanitarian law principles already reflect a certain equilibrium between military expediency and consideration of humanity. As such, they cannot yield to additional unilaterally perceived requirements of military necessity. Third, clauses which permit States to invoke such exceptions as urgent military necessity :

> '...apply only to the cases expressly provided for. Apart from these cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose. (...) The Commission took the view

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[7] Special Rapporteur R. Ago argued that the international law of war was not necessarily 'an absolutely closed area as regards any possible application of "state of necessity" as a circumstance precluding the wrongfulness of conduct...'. R. Ago, Addendum to the Eighth Report on State Responsibility, UN Doc. A/CN.4/318/Add.5-7, Yb. of the ll..C, I, 37 (1980). The ILC's *Commentary* did not follow Professor Ago's position on this question

[8] Article 33 of the ILC's Draft Articles on State Responsibility (part One) reads as follows: 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
b) the act did not seriously impair an essential interest of the State towards which the obligation existed,
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory nonn of general international law; or
b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
c) if the State in question has contributed to the occurrence of the state of necessity, Yb. of the ILC, II, 1980, loc. cit. n, 8. at 34.
For the ILC's discussion of humanitarian intervention. see *ibid.* , at 44-45; R. Ago, Addendum to the Eighth Report on State Responsibility. loc .cit. n. 14, at 43, See also N. Ronzitti, Rescuing Nationals Abroad through Militatary Coercion and Intervention on Grounds of Humanity (1985) .A paper prepared in 1984 by the staff of the British Foreign and Commonwealth Office doubts whether a State has the right to have recourse to a humanitarian intervention abroad on behalf of persons who are not that State's nationals, Foreign and Commonwealth Office, 148 Foreign Policy Document, repr. in 57 BYIL 614 (1986)

[9] Yb. of the ILC (1980), loc. cit. n. 8, at 46-47

> that a State cannot invoke a state of necessity if that is expressly or implicitly prohibited by a conventional instrument.[10]

Thus, in interpreting humanitarian instruments , it is appropriate to resort to the principle of non-derogability on the grounds of necessity. The drafters of humanitarian agreements did not intend to permit States to invoke the customary law exception of state of necessity regarding the norms stated in those agreements. By contrast, human rights instruments, which are subject to derogations in most cases, do not share this rule of non-derogability with humanitarian law instruments. However, the ILC's position, set forth in Article 33(2,b), that a State cannot invoke a state of necessity which is expressly or implicitly prohibited by a conventional instrument, applies as well to human rights instruments .This principle is especially applicable to those instruments which contain provisions on derogations, such as the International Covenant on Civil and Political Rights (Political Covenant) .The language of the Political Covenant prohibits any derogation not explicitly permitted by Article 4, thus excluding invocation of the customary law exception of state of necessity. Therefore, the Article 4 exceptions from the Covenant's obligations are both exclusive and comprehensive. Anything not expressly included among the already very broad freedoms which Article 4 grants to States Parties[11] is inherently incompatible with the primary goal of the Covenant, which is to ensure respect for human rights.[12]

An interesting question is whether, in the absence of a provision governing derogations on grounds of necessity, a State may invoke necessity to preclude the wrongfulness of its conduct which does not conform with norms stated in a human rights treaty. The answer differs with the treaty concerned. For example, did the drafters of the African Charter on Human and Peoples ' Rights , which contains no provisions on derogations, intend to exclude the right of States under customary law to invoke justifications such as state of necessity? It is far from clear that the Charter's *travaux preparatoires* would support such an interpretation, although it would undoubtedly serve the cause of the effective protection of human rights. Regrettably, there is a danger that the absence of a derogations clause in the Charter will be used to infer that the Charter implicitly allows States to invoke the customary law exception of state of necessity to derogate from the rights enumerated in the Charter, without the safeguards routinely built into such clauses.[13] Hopefully, however, the African Commission on Human and Peoples' Rights will balance the various interests implicated and not allow necessity and the 'preeminence

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[10] *Ibid*

[11] For a critique of derogation clauses, see T. Meron, Human Rights Law-Making in the United Nations: A Critique of Instruments and Process 86-100 (1986).

[12] This conclusion is supported by the *travaux preparatoires* of Article 4, which confirm that '...the main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the covenant which would not be open to abuse ...'. M. Bossuyt, Guide to the *'Travaux preparatoires'* of the International Covenant on Civil and Political Rights 85-86 (1987). It was essential 'to prevent States from derogating arbitrarily from their obligations where such an action was not warranted by events ' .*Ibid.* , at 87.

[13] See U. Umozurike, *The African Charter on Human and Peoples' Rights*, 77 AJIL 902,909-10 (1983). It is noteworthy that the African Charter contains a number of limitation clauses, e.g. Articles 6, 11, 12. See also B. Weston, R. Lukes, K. Hnatt, *Regional Human Rights Regimes: a Comparison and Appraisal*, 20 Vand. J. Transnat'l L. 585, 627-28 (1987)

of State interest'[14] to take precedence over the human rights which are stated in the Charter. The above discussion suggests that danger persists that States will try to invoke the exception of necessity in order to derogate, in times of internal strife, from some of their customary and even conventional obligations to respect human rights .A statement of a minimum core of non-derogable rights , which must be respected in all circumstances, including national emergencies triggered by internal strife, such as the proposed declaration, would, it is hoped, serve to deter States from invoking the state of necessity exception. It is important to note that normative declarations not infrequently contain explicit prohibitions of derogations .

[14] B. Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 Hum Rts. Quarterly 141, 143 (1984) .It may be noted that prior to the entry into force of the American Convention on Human Rights, the Inter-American Commission on Hul1".an Rights in its discussion of derogations resorted to the norms stated in Article 27 of the Convention as reflecting regional customary law:
'With respect to American international law -which is the normative system that the Commission must take primarily into account- it must be understood that, in the absence of conventional standards in force in this area, the "most accepted doctrine" is that which is set forth in the American Convention on Human Rights, ...which has been signed by twelve American countries (among them Chile), and whose ratification has already begun.
The Convention contains an express provision in Article 27…' Inter-American Commission on Human Rights, Report on the Status of Human Rights in Chile, OAS Doc. OEA/Ser.L./V/II 34 Doc. 21 corr. I, at 2-3 (1974). See T. Buergenthal, *The Revised OAS Charter and the Protection of Human Rights* , 69 AJIL 828, 835, at n. 37 (1975)

4 SOME THOUGHTS ON THE CONTENT OF A DECLARATION

I shall now discuss the content of the declaration that is needed to cover abuses which are inadequately addressed by existing norms. In the space available, I shall touch only upon some of the needed normative protections. Whenever possible, the declaration should confirm and develop already existing norms, rather than create new ones .In some respects the declaration will have, however, to articulate new norms. Of course, some, indeed, many norms such as the prohibition of murder, disappearances, torture, and hostage taking can be regarded as applicable in all situations, including situations of internal strife and are not susceptible to derogations. It has to be recognized, however, that the Political Covenant and other human rights instruments simply do not contain certain essential rules necessary to protect human rights in situations of state violence, such as those relating to means and methods of combat.

4.1 Absence or abuse of judicial safeguard

Experience indicates that widespread abuse of judicial guarantees is common in situations of internal strife. The important guarantees of due process are mostly derogable in human rights instruments, e.g. Articles 9 and 14 of the Political Covenant. These guarantees also appear in humanitarian instruments and are thereby non-derogable. It is essential that the new declaration prohibits derogation of essential judicial guarantees, relatively and unintrusive.

Providing due process guarantees presents a strategic question. The Geneva Conventions and the Protocols contain detailed and explicit provisions on due process, while a different approach is followed in common Article 3 (1 ,d) .This provision contains only the requirement that regularly constituted courts afford all the judicial guarantees which are recognized as indispensable by civilized peoples .' Which approach is the better one for a declaration on internal strife? Since States are sensitive to due process issues, a less intrusive approach may be preferable. Such an approach might be based on enumerating certain essential elements of due process, such as the right to counsel (as provided by the Fourth Geneva Convention, Article 72; the Third Geneva Convention, Article 105, and in provisions concerning prosecutions for grave breaches, e. g. the Third Geneva Convention, Article 129), or at least requiring the extension of 'all necessary rights and means of defence' (protocol I, Article 75(4,a), Protocol II, Article 6(2,a)) and such elementary safeguards as the right to appeal, the prohibition of retroactive penal measures , the presumption of innocence, and the right to be judged by an independent tribunal. If such a list would be difficult for States to accept, a short, general formula such as that of common Article 3(1,d) would be helpful if stated in a declaration on internal strife.

4.2 Summary and arbitrary executions, capital punishment, and murder

The question of judicial guarantees is clearly related to the protection of the right to life. Protecting the right to life from arbitrary deprivation is the first and most important of the non-derogable rights enumerated in Article 4(2) of the Political Covenant. However,

because the critically important due process guarantees stated in Article 14 of the Political Covenant are derogable and the protection of the right to life under Article 6 is not absolute, there is considerable danger that some States will argue that in times of emergency, death sentences may be imposed following summary procedures , provided that the more limited guarantees stated in Article 6 itself are observed. Despite salutary efforts to establish that the procedural safeguards of Article 14 are non-derogable for the hearing of a case where the death penalty may be imposed, even during public emergency, the frequent resort to arbitrary and summary .executions in situations of internal strife continues unabated.

Ways of strengthening the protection of the right to life are urgently needed. One possibility would be the 'freezing' or suspension of executions, to allow for appeal, reconsideration and foreign humanitarian intercession. It should be provided that the death penalty should not be carried out during internal strife, or at least (as provided in Article 75 of the Fourth Geneva Convention) , until a stated period of time has elapsed following the entering of the final judgment.

4.3 Excessive use of force

Abusive and excessive force is frequently used against civilians and innocent bystanders in situations of internal strife e. g. to suppress demonstrations, enforce curfews or to intimidate the population.

The problem is exacerbated by the absence in human rights instruments of provisions aimed at humanizing violent conflict situations, such as requiring 'proportionality' between a legitimate objective and the amount of force used to achieve the objective. Most importantly, rules are needed pertaining to the regulation of the use of means and methods of combat. Such provisions are contained in international humanitarian law instruments governing international armed conflicts. But only few provisions concerning permissible use of force can be found in international humanitarian instruments governing internal armed conflicts .While it is possible to maintain that certain general principles of customary law should govern the use of force even in internal strife, efforts to humanize behaviour by invoking general principles of customary law have not proven particularly successful.

Because of the lack of clarity characterizing the applicability of rules pertaining to means and methods of combat which have been developed for international armed conflicts to non-international armed conflicts , the International Institute of Humanitarian Law (San Remo Institute) has attempted, in its 1989 Session, to elaborate a declaration of rules of international humanitarian law governing the conduct of hostilities and restrictions on the use of certain weapons in non-international armed conflicts. These rules, regarded by the Institute as a confirmation of already received or at least emergent customary principles of humanitarian law, have been arrived at through an enlightened extrapolation of existing rules. They include the principle of a distinction between combatants and civilians, the immunity of the civilian population, a prohibition of superfluous injury or

unnecessary suffering, a prohibition of perfidy, a prohibition of certain weapons such as chemical and bacteriological weapons, dum dum bullets, and poison, and rules regulating use of mines, booby-traps, and incendiary weapons. Such a declaration will eventually help to generate and shape concordant practice of States .

A similar strategy is needed for internal strife, where both the lack of and the demand for rules concerning means and methods of combat is even clearer. The prohibition of the use of materials calculated to cause unnecessary or indiscriminate suffering stated in Article 23 (e) of the Regulations Annexed to Hague Convention IV concerning Laws and Customs of War on Land could be reaffirmed for situations of internal strife. And, most importantly, it should be stated, that the rules governing means and methods of combat in international armed conflict are recognized as applicable in internal strife as well.

The international community has already made important attempts to develop a system of rules regulating the use of violence in internal strife, as for instance in Article 3 of the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly on December 17, 1979 in Res. 34/169[1] and in the more recent Report, adopted at the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders, on Basic Principles on the use of Force and Firearms by Law Enforcement Officials.[2] In

[1] GA Res. 34/169 of 17 December 1979, 34 UN GAOR Supp.. at 185, UN Doc. A/34/46(1979).

[2] This report states, in part, as follows:

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review,

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms, These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms, They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

b) minimize damage and injury. and respect and preserve human life;

c) ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

d) ensure that relatives or close friends of the injured or affected persons are notified at the earliest possible moment,

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law,

accordance with the guiding ideas of these texts the declaration should attempt to curtail the use of firearms. The declaration should reflect the concept that the use of firearms constitutes an extreme measure that is simply not permitted in certain cases.

4.4 Deportations, forced movement of population .

Deportations and forced movements of the population which cause great suffering and often lead to the loss of life are common in situations of internal strife. Articles 12-13 of the Political Covenant addressing the liberty of movement and the expulsion of aliens are derogable and subject to limitation clauses. These Articles do not explicitly address, though they clearly implicate, the phenomenon of mass expulsions, but the major regional human rights instruments do expressly prohibit mass expulsions of aliens. Although the General Comments of the Human Right Committee on Article 13[3] are beneficial in fighting deportation abuses, it is important that the declaration should address these phenomena explicitly for situations of internal strife following the model of the provisions contained in humanitarian law instruments .

4.5 Massive and prolonged administrative detentions without judicial review

Among the phenomena endemic to internal strife, massive and prolonged administrative detentions merit special consideration because of their frequency and the Political Covenant's lack of non-derogable provisions guaranteeing judicial review.

A provision addressing the phenomenon of massive and prolonged detentions (often ostensibly for preventive purposes) would, therefore, be of great importance. Such a provision should contain minimum standards of treatment, the right to correspond with families and the right to family visits. A particularly difficult question concerns the extent to which the declaration should address the reasons for preventive detention. Minimally,

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8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles,

Special provisions

9. Law enforcement officials shall not use firearms against persons except in necessary self- defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life...

Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force, or, where that is not practicable, shall restrict such force to the minimum extent necessary .

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use fire-arms in such cases, except under the conditions stipulated in principle 9.

UN Doc. A/CONF.144/28, at 120-122 (1990).

[3] 41 UN GAOR Supp. (No.40), at 117-119, UN Doc. A/41/40 (1986).

ordering the preventive detention of an individual should be subject to at least some due process guarantees such as the right to appeal[4] and a periodic review.

In order to encourage Governments to respect the declaration without fear that its application might amount to recognition of, or grant of political status to dissidents or opposition groups it might specify that its application shall not affect the legal status of any authorities , groups, or persons involved in the situation of internal strife. Such a provision would follow the model of the last sentence of common Article 3.

The declaration might also explicitly prohibit derogation from its provisions on any grounds whatsoever, including public emergency which threatens the life of the nation.[5] The declaration would thus incorporate the principle of non-derogability on grounds of necessity or emergency, which is characteristic of humanitarian law instruments. Finally, the declaration might state that nothing in it shall be interpreted as impairing the provisions of the Geneva Conventions of 12 August 1949 for the Protection of War Victims and the Additional Protocols of 8 June 1977 and of any international human rights instruments.

4.6 Collective punishments

The prohibition of collective punishments is stated explicitly in humanitarian law instruments, but only implicitly in human rights conventions, such as the Political Covenant. Because of the relevance of this prohibition to situations of internal strife, it merits inclusion in the declaration.

4.7 Protection of children

In situations of internal strife, children are often mobilized and forced to participate in acts of violence. A prohibition against mobilizing children or otherwise forcing them to participate in violent activities should be included in the declaration.[6]

4.8 Protection of medical personnel; protection and care of sick

and wounded; activities of humanitarian bodies and relief In internal strife situations, medical personnel acting in accordance with the principles of medical ethics are often punished for treating guerrillas and dissidents. The Political Covenant does not provide these individuals with explicit protection, nor does the Covenant address the protection and care of the sick and wounded or the activities of humanitarian bodies and humanitarian relief. The declaration should contain provisions addressing these matters .

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[4] See Fourth Geneva Convention, Article 78.

[5] See Principle 6 of Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the UN General Assembly on 18 December, 1982 by Res. 37/194 and Article 4(1) of the Political Covenant. See also Report loc. cit. n. 23, at § 8.

[6] See Protocol I, Article 77(2,3); Protocol n, Article 4(3); 1989 UN Convention on the Rights of the Child, Article 38, §§ 2,3, GA Res. 44/25, 20 November, 1989, 44 UN GAOR Supp. (No.49) at 166; UN Doc. A/34/46 (1990).

5. CONCLUSIONS

The proliferation of situations of internal violence and human suffering that it entails together with the present improvement of the climate of international relations suggest that time has come to renew efforts for the adoption of a normative declaration stating the necessary norms for the protection of human rights in such situations .In this essay, I have tried to demonstrate the reasons for such a declaration and to outline its tentative content. I have not dealt with the scope of the material applicability of the declaration. The several possible approaches to material applicability were discussed in my earlier writings on the subject.[1]

One of the difficulties involved in limiting the scope of applicability of the future declaration to internal strife and violence is that it would create another layer and more thresholds of applicability , facilitating efforts at evasion. States may try to evade the norms stated in the declaration by claiming, for example, that the violence accompanying the internal strife in question is not of a collective character or is not intense enough. The focus may, therefore, have to be shifted from exclusive applicability to internal strife to applicability in all situations, including internal violence. Such a declaration would constitute a safety net of minimum humanitarian norms and an 'irreducible core of human rights that must be applied at a minimum at all times' .[2]

[1] See e.g. Meron, op. cit. n. 1, at 145-148
[2] Meron, On the Inadequate Reach, lac. cit. n. 2, at 604.

The Concept of Minimum Humanitarian Standards and the Turku Declaration

"Report of the International Workshop on Minimum Humanitarian Standards" (Cape Town, South Africa, 27-29 September 1996), UN doc. E/CN.4/1997/77/Add.1, 28 January 1997.

E/CN.4/1997/77/Add.1 28 January 1997

COMMISSION ON HUMAN RIGHTS
Fifty-third session
Item 16 of the provisional agenda

REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Minimum humanitarian standards

Report of the Secretary-General

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Introduction

I. COMMENTS RECEIVED FROM STATES

II. INTERNATIONAL WORKSHOP ON MINIMUM HUMANITARIAN STANDARDS

Annex: Report of the International Workshop on Minimum Humanitarian Standards

Introduction

1. The present report contains additional information received from Governments after the submission for processing and reproduction of the report of the Secretary-General on the subject (E/CN.4/1997/77).

2. As at 24 January 1997, comments had been received from the Governments of Ecuador, Switzerland and Yugoslavia. The Permanent Missions of Denmark, Finland, Iceland, Norway, South Africa and Sweden to the United Nations Office at Geneva sent the report of the International Workshop on Minimum Humanitarian Standards (Cape Town, South Africa, 27-29 September 1996), requesting that it be circulated as a document of the fifty-third session of the Commission on Human Rights.

3. Consequently, the present document contains the comments of the above-mentioned Governments and the report of the workshop referred to above.

I. COMMENTS RECEIVED FROM STATES

Ecuador

[Original: Spanish]
[17 January 1997]

The Government of Ecuador acknowledges the resolution of the United Nations Commission on Human Rights of 19 April 1996 and assures the Commission of its commitment to implementing the terms of paragraph 3 of the document "Minimum humanitarian standards".

Switzerland

[Original: French]
[27 December 1996]

1. Internationally, the Swiss Government attaches great importance to the "Minimum humanitarian standards", which it has suggested calling "minimum standards of humanity" for the reasons given in its comments addressed on 8 December 1995 to the United Nations Secretary-General (see E/CN.4/1996/80/Add.1 of 4 January 1996).

2. The participating States of the OSCE (Organization for Security and Cooperation in Europe) are also concerned by this matter. For instance, in the Budapest Summit Declaration, in December 1994, the 54 member States of OSCE emphasized the significance of a declaration on minimum humanitarian standards applicable in all situations and declared their willingness to actively participate in its preparation in the framework of the United Nations.

3. With this end in view, Switzerland, as the State presiding over OSCE in 1996, convened an informal open-ended ad hoc OSCE meeting on minimum standards of humanity in Vienna on 13 and 14 February 1996. The aim of the meeting was not to coordinate the positions of OSCE member States, but to provide an opportunity to discuss issues related to minimum standards of humanity. That substantial, constructive exchange of views did indeed provide the OSCE member States, intergovernmental organizations, the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs), as well as several invited experts, with an awareness of the question. The discussions begun in Vienna concentrated on two main themes, firstly, on the need to prepare a declaration on minimum standards of humanity, on relations between such standards and international law, and on relations between international humanitarian law and the international law of human rights in the framework of such a declaration; and secondly on the content and recipients of the declaration.

4. Following resolution 1996/26 adopted on 19 April 1996 by the United Nations Commission on Human Rights, which was jointly sponsored by Switzerland, a workshop, organized by the Nordic countries and by South Africa in cooperation with the ICRC, was held in Cape Town last September. The purpose of the workshop was once again to make the international community more aware of the very serious violations of human rights and humanitarian law which are committed by Government authorities, armed groups or individuals in situations of internal disturbances, crises and tensions, including

latent or low-intensity conflicts. In view of such violations, there is an urgent need to promote the universal adoption of a political declaration concerning minimum standards of humanity applicable in all circumstances and at all times.

5. Following the Cape Town workshop, Switzerland hopes that the United Nations Commission on Human Rights will mandate the Centre for Human Rights in Geneva to undertake an analytical study, jointly with the ICRC, of all matters relating to minimum standards of humanity. This study would be based on the contributions of the ICRC, governments, bodies in charge of supervising the application of human rights conventions, universal and regional organizations, as well as NGOs. Switzerland also hopes that the study may subsequently be discussed on the occasion of an open seminar, under the aegis of the Commission on Human Rights.

6. Swiss legislation relevant to situations of public emergency or crises meets the requirements of the rule of law and does not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

7. Under article 89 bis of the 1874 Federal Constitution, generally binding federal decrees whose entry into force ought not to be delayed may be put into effect immediately by a decision taken by the two chambers of the Federal Assembly. Their period of validity is limited. Federal decrees which have no constitutional basis must be approved by the people and the Cantons within one year after their adoption by the Federal Assembly; failing this, they lose their validity after the lapse of this year and may not be renewed.

8. In its article 102, moreover, the Federal Constitution contains provisions applicable to emergency or crisis situations (paras. 9 and 10). The Federal Council may act to prevent any serious direct threat to the legal exercise of public authority, or to the life, health and property of the citizens, for instance, in the event that the country's security or independence are seriously threatened from abroad. In principle, however, these powers may not depart from the Constitution or existing legislation.

9. Mention should also be made of the law of necessity. This comes into effect whenever the very existence of the State is threatened and when constitutional procedures are no longer sufficient to deal with the danger. In such situations, it is admitted that the competent authorities are vested with the power to take whatever measures are necessary to safeguard the existence and independence of the country. This power rests in the first instance with the Federal Assembly. If the Federal Assembly brings the law of necessity into effect, popular rights (by referendum) are suspended. The Parliament may also delegate its power to the Federal Council. This delegation of powers has occurred twice in the history of the country, during the two World Wars of 1914/18 and 1939/45. It has never occurred since. The power to bring the law of necessity into effect is vested in the Federal Council whenever Parliament is no longer legitimately able to take decisions and is therefore unable to use either its power of decision or its power of delegation with respect to the law of necessity. Such a case has so far never arisen.

10. The law of necessity, as referred to above, is governed by the following guiding principles:

(a) It is brought into effect only in the event of a real state of necessity, which may be expressed legally in terms of the principle of proportionality. According to this, any measures not absolutely required by the state of necessity have to be adopted following the normal constitutional procedure;

(b) The exercise of powers arising from the law of necessity must be subject to the political supervision of the Federal Assembly, which must be able to decide regularly whether the Federal Council's decisions are to be maintained. Such was the case in any event at the time of the two world wars. Such supervision may be waived only in the case where not even part of the Parliament may be convened for the purpose.
11. For more information, the initial report of Switzerland submitted in accordance with the International covenant on Civil and Political Rights may be consulted (CCPR/C/81/Add.8, of 26 May 1995).

Yugoslavia

[Original: English]
[27 December 1996]

1. The Constitution of the the Federal Republic of Yugoslavia (Official Gazette, No. 1/1992), article 78, paragraph 1, item 3, reads as follows:

"The Federal Assembly shall: decide on alterations to the frontiers of the Federal Republic of Yugoslavia; decide on war and peace; declare a state of war, a state of imminent threat of war, and state of emergency."

2. Article 85, paragraphs 1 and 2 of the Constitution:

"The Federal Assembly may not be dissolved in the first or last six months of its term, during a state of war, imminent threat of war, or state of emergency.

"In the event of a state of war, imminent threat of war, or state of emergency, the Federal Assembly may decide to prolong the terms of the federal deputies, so long as such a state of emergency lasts, or until conditions are created for the election of federal deputies."

3. Article 99, paragraph 1, items 10 and 11 of the Constitution:

"The Federal Government shall, when the Federal Assembly is not able to convene, proclaim an imminent threat of war, state of war, or emergency.

"The Federal Government shall, when the Federal Assembly is not able to meet during a state of war, imminent threat of war, or state of emergency, after having sought the opinion of the presidents of the Federal Assembly chambers, adopt measures regulating matters within the jurisdiction of the Federal Assembly."

4. The Constitution of the Republic of Serbia:

"Article 72

"The Following shall be regulated and provided by the Republic of Serbia:

"...
"3) defense and security of the Republic of Serbia and of its citizens; measures to cope with emergencies;"
"Article 79
"The National Assembly shall convene without being called in case of declaring a state of emergency in any part of the territory of the Republic of Serbia."
"Article 83
"The President of the Republic shall:
"...
"8) at the proposal of the Government, if the security of the Republic of Serbia, the freedoms and rights of man and citizen or the work of State bodies and agencies are threatened in a part of the territory of the Republic of Serbia, proclaim the state of emergency, and issue acts for taking measures required by such circumstances, in accordance with the Constitution and law;"
"Article 89
"The National Assembly may not be dissolved during a state of war, an immediate threat of war or a state of emergency."

5. The Constitution of the Republic of Montenegro:

"Article 48

"RESTRICTION OF OWNERSHIP AND EARNING

"The right to own property and the freedom of earning may be restricted by law, i.e. legal regulations with the force of law, for the duration of a state of emergency, in times of immediate threat of war or a state of war."
"Article 84
"DISSOLUTION OF THE ASSEMBLY
"The Assembly may not be dissolved during the state of war, in case of an imminent danger of war or a state of emergency."
"Article 94
"COMPETENCIES
"The Government shall:
"...
"7) enact decrees and enactments during a state of emergency, in the event of imminent war danger or in the event of a state of war, if the Assembly shall not be able to convene, and shall submit to the Assembly the said enactments for its approval as soon as the Assembly shall be in session;
"8) perform all other tasks as prescribed by the Constitution and law".

II. INTERNATIONAL WORKSHOP ON MINIMUM HUMANITARIAN STANDARDS

1. The Permanent Missions of Denmark, Finland, Iceland, Norway, South Africa and Sweden to the United Nations Office at Geneva sent, on 16 January 1997 to the Centre for Human Rights, a letter which reads as follows:

"In its resolution 1996/26 entitled 'Minimum humanitarian standards', adopted on 19 April 1996, the Commission on Human Rights welcomed the offer by the five Nordic countries to organize, in cooperation with the International Committee of the Red Cross, a workshop to which governmental and non-governmental experts from all regions would be invited to consider issues related to minimum humanitarian standards and to make the outcome of the workshop available for dissemination to Governments and intergovernmental and non-governmental organizations.

"At the invitation of South Africa, the workshop was convened in Cape Town on 27-29 September 1996 in order to address minimum humanitarian standards applicable in all situations.
"We would therefore be grateful if you could arrange for the attached report of the workshop to be circulated as a document of the Commission on Human Rights, under item 16 of the provisional agenda at its fifty-third session."

2. In compliance with that request, the report of the workshop is reproduced at annex.

ANNEX
Report of the International Workshop on Minimum Humanitarian Standards

(Cape Town, South Africa, 27-29 September l996)
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I. INTRODUCTION

A. Background and basic facts

1. In its resolution 1996/26 entitled "Minimum humanitarian standards", adopted on 19 April 1996, the Commission on Human Rights recognized the need to address principles applicable to situations of internal violence and disturbance of all kinds in a manner consistent with international law; acknowledged the vital importance of appropriate national legislation for dealing with such situations in ways consistent with the rule of law; and invited States to consider reviewing their national legislation relevant to situations of public emergency with a view to ensuring that it did not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

2. The Commission also welcomed the offer by the five Nordic countries, Denmark, Iceland, Finland, Norway and Sweden, to organize, in cooperation with the International Committee of the Red Cross (ICRC), a workshop to which governmental and non-governmental experts from all regions would be invited, to consider issues related to minimum humanitarian standards. The sponsors had stressed the importance they attached to ensuring that all opinions - as diverse as they might be - would be represented at the workshop.

3. At the invitation of the Government of South Africa, the Workshop was convened in Cape Town on 27-29 September 1996 in order to address minimum humanitarian standards applicable in all situations. The Workshop was formally opened by Dr. A.M. Omar, MP, South African Minister of Justice. The co-Chairpersons of the Workshop were Justice Richard J. Goldstone (South Africa) and Professor M.R K. Rwelamira (South Africa). The Rapporteur was Ambassador Nils Eliasson (Sweden) and the Coordinator was Ambassador Per Haugestad (Norway).

4. The Workshop discussed in conceptual terms the issue of minimum humanitarian standards applicable in all situations and was not based on the drafting of the so-called Turku Declaration, although several speakers referred to that text in their interventions (see chap. C, Documentation and reference material, below).

5. On the proposal of the Rapporteur, the general debate focused, in sequence, on seven specific issues or questions which had come up during the prepared statements. The formulation of these seven issues, as they were gradually amended or expanded during the discussion, are as follows:

Issues for discussion in the general debate

Issue 1. What are the characteristics of the situations, i.e. contemporary conflicts, to be discussed?

Issue 2. Who are the actors (Governments, non-governmental armed groups, United Nations machinery including United Nations-appointed experts, the ICRC, the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international humanitarian organizations, parties to the Geneva Conventions, the Red Cross Conferences, neighbouring countries, regional organizations, ad hoc tribunals, etc.)?

Issue 3. Are there lacunae or deficiencies in the legal regimes of protection?

Issue 4. Is there a need for a common reference base and yardstick, applicable in all situations, against which situations should be assessed?

Issue 5. What would be the implications of a new basic document setting out or reaffirming or developing standards/safeguards/codes of conduct for the actors, considering that some of these standards/safeguards/ codes of conduct would already be customary international law?

Issue 6. How can the risk of setting standards that fall short of existing obligations be avoided, thus
ensuring the consistency of new standards with existing ones?

Issue 7. What conclusions for the future of this issue should be drawn from the present Workshop?

B. Participants and special guest speaker

6. Representatives of the following States attended the Workshop, to which participants from all regions of the world had been invited: Angola, Azerbaijan, Botswana, Brazil, Cameroon, Cuba, China, Denmark, Egypt, Ethiopia, Finland, France, Gabon, Germany, Iceland, Ireland, Mexico, Mozambique, Namibia, Norway, Pakistan, Poland, Russian Federation, South Africa, Sweden, Switzerland, Uganda, United States of America, Zimbabwe.

7. The following United Nations entities, international organizations and intergovernmental and other organizations were represented: Department of Humanitarian Affairs of the United Nations Secretariat, European Commission, International Committee of the Red Cross, Organization for Security and Cooperation in Europe, Organization of African Unity, Representative of the United Nations Secretary-General on internally displaced persons, United Nations High Commissioner for Human Rights, United Nations High Commissioner for Refugees.

8. The following non-governmental organizations were represented: Amnesty International, Friends World Committee for Consultation (Quakers), Human Rights Watch, International Commission of Jurists.

9. The following five Nordic human rights institutes were represented:

Danish Centre for Human Rights, Copenhagen (Denmark); Human Rights Institute of Åbo Akademi University, Turku (Finland); Icelandic Human Rights Centre, Reykjavik (Iceland); Norwegian Institute of Human Rights at the University of Oslo (Norway); Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University (Sweden).

10. A special guest speaker, Justice A. Chaskalson, President of the South African Constitutional Court, addressed the Workshop. He discussed the role of the Constitutional Court in the transformation of South African society, including its examination of a legal challenge to the constitutionality of the Truth and Reconciliation Commission.

11. With regard to the subject of the Workshop, minimum humanitarian standards or standards of humanity applicable in all situations, the speaker also referred to the concept of ubuntu, a South African value system characterized by humanity and humaneness.

C. Documentation and reference material

12. The Workshop had before it numerous reference documents, inter alia, the following:

Issue Paper for the Cape Town Workshop on Minimum Humanitarian Standards, based on papers prepared by Asbjørn Eide, Göran Melander and Theodor Meron with additional input from Gudmundur Alfredsson and Allan Rosas

Paper for the Workshop on Minimum Humanitarian Standards by Rachel Brett, Friends World Committee for Consultation (Quakers), Geneva

Declaration of Minimum Humanitarian Standards. Working paper submitted by Theo van Boven and Asbjørn Eide (United Nations document E/CN.4/Sub.2/1991/55 dated 12 August 1991)

Revised version of the Turku Declaration on Minimum Humanitarian Standards (United Nations document E/CN.4/1995/116 dated 31 January 1995)

Compilation and analysis of legal norms concerning internally displaced persons, submitted by Francis M. Deng, Representative of the Secretary-General (United Nations document E/CN.4/1996/52/Add.2 dated 5 December 1995)

Draft Master's thesis by Eva Tojzner, Lund University, entitled "Minimum humanitarian standards - An attempt to restrain internal strife"

Updated eighth annual report on human rights and states of emergency by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations document E/CN.4/Sub.2/1995/20 and Corr.1).

13. The texts of the so-called "Martens clause" and article 3 common to the Geneva Conventions of 12 August 1949, both of which were repeatedly referred to during the Workshop, are reproduced in appendix
2.

II. PREPARED AND OTHER SCHEDULED ADDRESSES AND STATEMENTS

14. At the opening ceremony and the subsequent substantive session, the Workshop heard prepared and other scheduled addresses and statements.

15. Co-Chairman Justice Goldstone recalled that, despite all the treaties and standards that had already been adopted, serious difficulties continued to arise in the following circumstances:

(a) Where the violence and strife had not reached the threshold of applicability required by international humanitarian law treaties;

(b) Where the State in question was not a party to the relevant treaties or instruments;

(c) Where derogation from the standards established under international human rights treaties and national laws had been invoked; and

(d) Where, as happened often and increasingly, the actor was not a Government, but another group which considered itself immune from obligations of humanity.

16. The task of the Workshop was not to draft any text but to consider conceptually how to improve the situation of victims without eroding existing commitments. In that context he noted his distress, as the Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, with the endless attention devoted to the formal, legal characterization of conflicts - international, internal, armed, not armed and so on. It would be a real humanitarian advance if a fresh approach could help us move on faster from sterile disputes about characterization of conflicts to the protection of victims.

17. Dr. A.M. Omar, MP, South African Minister of Justice, who formally opened the Workshop, emphasized the widespread interest in South Africa for human rights and humanitarian law. He underlined the importance of the Workshop at a time when many countries in the world were experiencing some of the most brutal and traumatizing internal conflicts. The last two decades had seen many significant changes in the scale, scope and complexity of both international and internal armed conflicts.

18. While in recent years the frequency of inter-State wars had been decreasing, the number of intra-State wars, particularly in the developing countries, had been

increasing. Millions of people had been forced to abandon their homes as a result of political terror, ethnic cleansing, armed conflict and social violence.
These events emphasized the need for the international community to tackle internal conflicts more seriously. States could no longer continue to hide behind the mantle of sovereignty and argue that these were matters essentially within domestic jurisdiction and therefore outside the ambit of international law.

19. The Minister pointed out that Protocol II Additional to the Geneva Conventions did not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Those situations represented a "twilight zone" in which some of the most gruesome atrocities had been committed and which were likely to go unpunished. The question to be considered was: What is the nature and scope of protection accorded by international humanitarian law and international law generally for victims of internal disturbances and tension?

20. He suggested for consideration two possible approaches. Firstly, Common article 3 to the Geneva Conventions and Additional Protocol II could well provide a basis on which a flexible and comprehensive framework of regulation could start to emerge. A second approach would be to look at the general law of human rights. It was in this twilight zone that international humanitarian law and the general law on human rights could complement each other.

21. In conclusion, the Minister emphasized that, while we must continue to seek minimum standards of conduct for and treatment of internal disturbances, we must not lose sight of the necessity to establish long-term solutions. Any strategy must intend to avert or limit mass population displacement and also seek to reduce the scale of violence committed by warring parties and to safeguard civilian populations from the effects of the conflict. This should be coupled with a sustained effort to address the root causes.

22. Dr. N. Barney Pityana, Chairman of the South African Human Rights Commission, referred to the development in South Africa and explained how the perspective of minimum humanitarian standards would be relevant for South Africa today. Additional Protocol II only covered a conflict once it had reached the intensity of "armed conflict".

23. As regards states of emergency, the speaker recalled that the Council of Europe had clearly spelt out the conditions under which States could declare a state of emergency:

(a) The emergency should be clearly defined and delimited by the constitution; that is, the existence of a real and imminent danger should be clearly spelt out;

(b) De facto states of emergency should be avoided and emergency rule should be specifically declared; there was a corresponding duty of notification wherein other States parties should be notified of any recourse to such measures;

(c) The constitution should clearly specify which rights could be suspended and which ones did not permit derogation and should be respected in all circumstances;

(d) The emergency measures and derogations from fundamental rights and liberties should be proportionate to the danger; and

(e) Even in a state of emergency, the fundamental principle of the rule of law should prevail.

24. The speaker noted the South African Constitution's limits on the imposition of states of emergency and its table of non-derogable rights. He recalled that the Constitutional Court had ruled the death penalty to be unconstitutional.

25. Dr. Asbjørn Eide, Director of the Norwegian Institute of Human Rights, examined the nature of contemporary conflicts, noting that in 1995 a total of 30 wars were waged at 25 locations around the world, all of them internal, and the pattern was continuing. Prior to their escalation into an open armed conflict, there were internal tensions, unrest and disturbances of various kinds, sometimes leading to the collapse of civil order and institutions and also affecting courts and the administration of justice.

26. Many different actors were involved in these processes of tension and unrest which unfortunately all too often escalated into open armed conflicts. He noted that humanitarian law initially had been developed in response to "ordinary" international armed conflicts wherein organized regular armies faced each other, and the content of humanitarian law clearly reflected its origin. The disturbances, tensions and low-intensity conflicts which sometimes erupted into massive violence had an entirely different character, due partly to the asymmetry between the parties and partly to the lack of discipline and coherence within some of the parties.

27. While ideally Governments should maintain law and order and thereby ensure compliance by all inhabitants with domestic laws aimed at the protection against murder, rape, arson, assault and other brutalities, the problem was that under conditions of severe internal unrest the rule of law broke down or was manipulated in ways which undermined its legitimacy. Human rights law was also insufficient under such circumstances, for reasons which Dr. Eide reviewed in his presentation.

28. For these and other reasons, there was a need to clarify and recognize minimum humanitarian standards of global validity. The traditional distinctions between international humanitarian law and human rights law must not become a barrier preventing the recognition of such standards and their applicability to all parties involved in conflict.

29. The speaker reviewed the lacunae in conventional law and noted that there was a twilight zone between peace and war which was not fully covered in a satisfactory way either by human rights law or by international humanitarian law. Summing up, he observed that there were many existing treaties and identifiable standards, but significant problems remained in four areas:

(a) Where the threshold of applicability of international humanitarian law was not reached or disputed;

(b) Where the State in question was not a party to the relevant treaty or instrument;

(c) Where derogation from the specified standard was invoked; and

(d) Where the actor was not a Government, but some other group.

30. He reviewed some of the doubts that had been expressed and concluded that through a proper drafting of a declaration the difficulties could be averted. He emphasized the need for clear rules applicable in all situations to all actors and

concluded that the benefits of respecting such rules should be self-evident to all responsible actors.

31. Dr Yves Sandoz, Director of International Law and Policy, International Committee of the Red Cross, noted that the starting point of the Workshop was the recognition that protection afforded to the victims of internal violence covered by international humanitarian law was inadequate; the Workshop was an attempt to escape from the endless debate on the applicability of international law and of human rights instruments in clarifying rules applicable in all situations.

32. The work towards establishing minimum humanitarian standards had to meet four major challenges:

(a) It must be a truly unifying force and therefore broadly accepted;

(b) Further thought must be given to the scope of those standards which could either apply in all situations of violence or be limited to those not covered by international humanitarian law;

(c) It must not be the hostage of political negotiation with the risk of becoming devoid of all substance;

(d) States should not use it as a substitute for their more detailed treaty obligations.

33. The four challenges were difficult to meet and could prove to be in contradiction with each other. It was therefore wise to take a step-by-step and sectoral approach in examining in depth the real problems and questions of the different actors faced with concrete situations. Such an approach could consolidate the different aspects of the problem and diminish the fear of some Governments.

34. The ICRC could contribute to some aspects, for example through the dialogue it had started with armed forces to better define their possible role in internal violence not covered by international humanitarian law and through the study it would undertake on the identification of the norms of international humanitarian law which were recognized as part of international customary law.

35. The speaker concluded by recalling that the interest of the people whose fate was at stake had always to be kept in mind in the work ahead.

36. Mr. Zdzislav Kedzia, the representative of the United Nations High Commissioner for Human Rights, in a message from the High Commissioner, underlined that the international community could not escape from its responsibility of reacting adequately to gross violations of human rights and humanitarian crises. The end of the cold war and the debate on the Secretary-General's "Agenda for Peace" had led to the recognition that economic disparities and underdevelopment, together with the lack of respect for human dignity and violations of human rights, alienation and discrimination lay at the source of conflicts. The post-cold war era had created new opportunities but also new threats. In many cases, long-simmering problems, including ethnic ones, had erupted into bitter hostility and even civil wars.

37. These new challenges, including to the United Nations, must go beyond military interventions. The human rights programme of the United Nations had a great potential in this regard. The High Commissioner hoped that this potential would grow in response to the evolving needs. During his first years in office, he had given priority to establishing, in several instances, a human rights field presence in order to

prevent human right violations from occurring or continuing. He had also developed other means, including through dialogue with Governments and country visits.

38. The idea of minimum humanitarian standards, formally born in Turku, Finland, presented, in his opinion, an attempt to integrate existing human rights and humanitarian norms into one set of principles relevant to situations of internal violence. This was an attempt, at the same time, to improve the protection of people affected by such situations; to bridge the gap between international humanitarian law and human rights; and to raise questions related to the methodology of the protection of individuals and the reponsibility for the violations of the protection to which individuals were entitled.

39. Whatever could be said theoretically about the relationship between human rights and international humanitarian law, the decisive factor in drafting international instruments had to be the effectiveness of the protection in the field. Such a relationship also implied the need to look more closely at ways and means to coordinate more effectively the work of bodies and organizations whose mandates encompassed the objectives of the two sources of law.

40. Like all new legislative proposals, the idea of minimum humanitarian standards could be responded to with the argument - and the widely shared opinion - that, after a period of standard-setting, the international community should focus on implementation. The World Conference on Human Rights attached great importance to this subject, including by setting the goal of universal ratification of the basic human rights treaties. So, although nobody denied that, if necessary, new standards should be elaborated, the preference for implementation prevailed.

41. In its resolution 41/120 entitled "Setting international standards in the field of human rights", the General Assembly had provided an important guideline for the development of new legislative proposals. Maintaining the high level of existing human rights standards should be the preoccupation of the international community. Situations should be avoided which could allow an opportunity to misinterpret or lower existing human rights standards or obligations deriving from them. The High Commissioner proposed that a meeting of the treaty monitoring bodies could be advisable to analyse the proposal of minimum humanitarian standards in the light of their experience.

42. Dr. Francis Deng, Representative of the Secretary-General on internally displaced persons, emphasized that while the focus and scope of the proposed Declaration on Minimum Humanitarian Standards and the work of his mandate on developing a framework for protecting and assisting the internally displaced were different, he saw them as closely related, overlapping and inherently interdependent. He explained that the mandate on the internally displaced had been created with several objectives in mind: to evaluate existing standards in international law with a view to determining the extent to which they provided protection and assistance to internally displaced persons; to conduct a similar evaluation of existing international institutional arrangements relevant to the internally displaced; to undertake country missions and enter into dialogue with Governments on behalf of the internally displaced; and to make recommendations for improved international protection and assistance for them.

43. With respect to the law, Dr. Deng explained that while controversy persisted on the extent to which existing standards provided adequate coverage, restating the law with reforms, as needed, would have the effect of bringing into focus and consolidating standards that were otherwise dispersed and diffused into a multiplicity

of instruments; the result could also have an educational value, and the overall effect would be improved protection and assistance for the internally displaced. It was with that objective in mind that he, with the help of legal experts from leading universities, research institutions, relevant organizations and specialized agencies within the United Nations system and in the international community, had embarked on preparing the Compilation and Analysis of Legal Norms, which was submitted to the Commission on Human Rights at its fifty-second session.

44. The compilation and analysis demonstrated that while existing provisions provided a basis for substantial protection and assistance to the internally displaced, there were significant grey areas and gaps which needed to be remedied. Both the General Assembly and the Commission on Human Rights had requested the Representative to work on developing a "framework" for improved protection and assistance for the internally displaced. Accordingly, in collaboration with legal experts, the Representative had embarked on the development of "guiding principles" which basically restated existing standards, but also aimed at clarifying grey areas and filling the gaps in protection.

45. In that regard, the Representative reiterated that he saw the initiative on minimum humanitarian standards as complementing and mutually reinforcing his efforts on behalf of the internally displaced, the only difference being that while one was general and ostensibly comprehensive, applying to all persons in all situations, the other was specifically focused on one section of the community: the internally displaced. Both projects stood to benefit from close coordination and cooperation.

46. Mr. Adama Dieng, Secretary-General of the International Commission of Jurists, called for the early establishment of an International Criminal Court. The elaboration of minimum humanitarian standards should not overshadow the speedy establishment of such a court. Nor should it overshadow the importance of addressing the root causes of violent conflicts, which were causing tremendous human suffering. In Africa alone over 10 civil wars were taking place at the present time.

47. Mr. Dieng questioned whether the concept of "minimum" in the development of a body of humanitarian standards applicable in all situations would not be misleading. It might be used by a Government to escape from its obligations. He referred to the proposal by the Government of Sweden to rename the instrument "Humanitarian Standards applicable in all situations". Such a title would better reflect the notion that the standards would actually raise the level of protection in violent conflicts rather than the opposite, which the use of the word "minimum" would imply. However, the key question remained: was there a need for a new declaration? Was not the problem confronting the world a political problem rather than a legal one?

48. He reminded the participants that human rights law was also to be respected in situations of armed conflict, be they international or internal. In relation to humanitarian law, he found the situation in Guatemala an interesting case of illustration. There, both parties involved in the armed conflict had agreed on the enforcement of some provisions of the Geneva Conventions and of Additional Protocol II, although by definition the situation as such was outside the scope of application of Additional Protocol II. MINUGUA had in its reports emphasized this acceptance of the parties. El Salvador was another situation where the applicability of rules and principles of international humanitiarian law had been recognized. Furthermore, in the case of Nicaragua versus the United States of America about military and paramilitary activity, the International Court of Justice had recognized the customary character of international humanitarian law. Such an approach aimed at

the recognition of the absolute character of international humanitarian law principles and to ensure that they are respected in all circumstances.

49. Another important question related to the responsibility of non-governmental entities, a complex issue. Mr. Dieng pointed to the ongoing efforts by some Governments to achieve agreement within the international community on a condemnation of "gross violations of human rights" committed by terrorist groups. With reference to the struggle by the African National Congress in the past, the speaker pointed to the difficulty in some situations on agreeing on who was a "terrorist" and who a "freedom fighter".

50. In the opinion of Mr. Dieng, the first priority should be further promoting the existing norms and providing legal and technical assistance to Governments, but also to opposition groups. In the African context, the OAU should receive assistance with a view to establishing an African Court of Human Rights and to strengthening the OAU mechanism on conflict prevention.

51. Mr. Dieng suggested that the issue of minimum humanitarian standards should continue to be researched. Governments and NGOs from all regions should submit their comments so that in a few years' time an authoritative opinion could be expressed as to which road to take.

52. In addition to the prepared and scheduled addresses, Mrs. Rachel Brett of the Friends World Committee for Consultation (Quakers), Geneva, orally introduced a written contribution to the Workshop. The contribution stressed the need to avoid setting new standards that fell short of existing ones. It specified the problems under discussion as falling into the following categories:

(a) A Government will not formally recognize that an armed conflict exists, and the correct legal regime cannot therefore be applied to the situation;

(b) The derogation provisions and non-derogable rights under the human rights treaties are inadequately formulated; and

(c) The factual position is questionable and none of the existing legal regimes fit neatly.

53. The contribution stressed that it was essential that Governments should not be able to deny or contest the applicability of international humanitarian law to situations to which it clearly applied based on the facts. A Government which derogated from its obligations under a human rights treaty because of a public emergency threatening the life of the nation should not be able to deny the applicability of at least article 3 of the Geneva Conventions.

III. GENERAL DEBATE ON THE ISSUES

54. The Rapporteur summarized several comments and suggestions made during the discussion as follows:

(a) It was necessary to explore in depth some issues one at a time, gradually building up knowledge, to examine all situations and to dialogue with all actors;

(b) A meeting of the treaty bodies should be held to study the issue of minimum humanitarian standards;

(c) The Workshop should develop guidelines rather than draft text at this stage;

(d) It was necessary to move away from the notion of "minimum" in the development of standards, and to continue research on the issues involved;

(e) Relevant norms of international humanitarian law and human rights law which are recognized as part of international customary law should be identified;

(f) There was support for the ongoing ICRC study on norms of international humanitarian law which are recognized as part of international customary law;

(g) The human rights bodies should be strengthened;

(h) An analytical report on the concept of minimum humanitarian standards applicable in all circumstances was needed;

(i) Universal ratification of relevant international instruments and acceptance of individual complaints were called for, as was universal ratification of Additional Protocol II to the 1949 Geneva Conventions;

(j) The applicability of article 3 common to the Geneva Conventions and of Additional Protocol II should not be denied when a state of emergency has been declared.

55. The Rapporteur indicated that the organizers of the Workshop were of the opinion that it would be useful to obtain, at the 1997 session of the Commission on Human Rights, a decision or resolution by which the Secretary-General would be requested to undertake an analytical study of the issues involved, including those raised at the Cape Town Workshop.

A. Issue 1 (Characteristics of the situation) and Issue 2 (The actors)

56. In order for the focus to be on the victims, it was argued that all situations must be covered by any new document. There was, therefore, no need to specify what these situations were; this would in any case be an impossible task if a new document really were to cover all potential situations. It was also argued that the drafters of the Turku Declaration implicitly had in mind certain conflict situations; they wished to fill lacunae or deficiencies in the protective systems but they also wished to avoid defining situations.

57. Others argued that any new rules should only address situations not covered by other regulations. It was questioned whether the work would be concentrated on the lowest common denominator, or whether the debate was about "the way the law is" or about "how it ought to be". A distinction had to be made between what was desirable and what was possible.

58. It was argued that rules in this regard must be understandable by the general public, and that the wording of the Martens clause might need to be illustrated and clarified by wording along the lines of the Turku Declaration. The Martens clause itself would give little guidance to the public at large.

59. In the light of the choice concerning the characterization of situations, the Turku Declaration would need redrafting.

60. One participant expressed the opinion that the object should be establishing minimum safeguards in a state of emergency; any new rule must avoid unintended consequences such as allowing scrutiny of prison conditions where a state of

emergency had been declared whereas prison conditions could not be scrutinized where a state of emergency had not been declared, even if they were known to have become worse.

61. As regards coverage, it was pointed out that all conventions constituted "minimum" commitments, but if this word were to be deleted from the phrase "minimum humanitarian standards", some other specification or phrasing would be needed, such as "guidelines for" or "recommendations concerning". It was stressed that States which had not ratified any international instrument had obligations under international customary law.

62. It was questioned who would decide and at what stage a situation warranted international attention.

B. Issue 5 (Implications of a new basic document)

63. The implications of a new basic document setting out, reaffirming or developing protective regimes were discussed.

64. It was mentioned that in international circumstances inaction could sometimes occur and be tolerated where in similar national situations inaction would be unacceptable. One example of international inaction that would be unacceptable on a national level was United Nations troops not being mandated to intervene in atrocities even if they were committed in front of their eyes; another was the possible "slow trigger" mechanism for a prosecutor system under the planned International Criminal Court.

65. It was argued that a document on minimum humanitarian standards would create a powerful tool for use, inter alia, by grass-roots organizations as it would give jus cogens and the Martens clause a meaning which would be understandable to the public at large, young and old alike. A document or declaration of some kind would have an important promotional value and international humanitarian organizations could benefit greatly from common rules/standards.

66. On the other hand, it was questioned whether a document on minimum humanitarian standards could become a tool for fostering understanding of human rights or whether it would become a tool for criticizing certain countries. The Charter of the United Nations contained important provisions governing the conduct between States as well as between States and the United Nations, for instance in Article 2, which any new document must bear in mind. However, this line of thinking was questioned by others, as the focus of attention of a document on humanitarian standards was the individual, not the State. It was also argued that the rights of individuals and the duties of States had been stressed while the duties of the individual had been given less attention.

67. It was hoped that a document on minimum humanitarian standards would not have any negative effect on adherence to Additional Protocol II and the application of article 3 common to the Geneva Conventions.

68. Several participants discussed the effect of minimum standards and their implementation on other international norms: Would they be abused because they

existed in parallel with other international rules? Would they become a hindrance to other efforts to establish international norms? Would they provoke a chain reaction of calls for similar standards in fields other than the humanitarian field? How could a monitoring mechanism be implemented?

69. In response to the fear expressed by one participant, it was pointed out, and examples were given from the experience of the OSCE, that a declaration would not necessarily be a step towards a treaty, but it would help interpret international obligations. One participant questioned the need to reaffirm what had already been codified if the declaration were not to go beyond existing obligations.

70. It was stressed that the discussion had shown that there was a need for an analytical study of all the issues involved, the implications of a new document and the choice between "soft law" or "hard law" solutions to the problems acknowledged.

C. Relaunching the debate

71. Prof. Göran Melander, Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, relaunched the debate at the beginning of the second day of the Workshop. He commented on the debate of the first day and on the issues facing the Workshop the second day.

72. As regards Issue 3 (Lacunae or deficiencies in the legal regimes of protection), he argued that there were victims of abuse in almost every armed conflict, be it civil war or internal disturbance. It could be that such abuses were contrary to international customary law, but this uncertainty would sometimes make it difficult to implement international customary law. Accordingly, lacunae and deficiencies had to be discussed against the background of existing treaties in the field.

73. Within human rights law, lacunae existed concerning rules relating to the administration of justice. He referred to articles 9 and 14 of the International Covenant on Civil and Political Rights, which contained derogable rights, i.e. a State party was entitled to derogate from those rights in time of public emergency, although the fundamental guarantees as prescribed both in article 75 of Additional Protocol I and article 4 of Additional Protocol II were applicable. Besides, the articles on fundamental guarantees were not as far-reaching as articles 9 and 14. Of course, this lacunae could be filled by the adoption of an additional protocol to the Covenant making articles 9 and 14 non-derogable. Such a solution was, however, not in sight.

74. More important lacunae and deficiencies existed, however, within humanitarian law treaties. Regarding the question of how to qualify an armed conflict, Prof. Melander argued that an authoritative ruling was needed which parties to the armed conflict would be legally obliged to respect. One possibility was for the United Nations Security Council, acting under Chapter VII, to undertake to qualify any armed conflict.

75. However, even when common article 3 and Additional Protocol I were applicable, several lacunae still existed, viz.:

(a) Inadequate protection of the civilian population;

(b) Unclear rules concerning the use of certain weapons in non-international armed conflicts, although such weapons were outlawed in international armed conflicts;

(c) Insufficient rules relating to persons hors de combat;

(d) Inadequate provisions relating to humanitarian assistance;

(e) No protection extended to internally displaced persons; and

(f) No universal treaty applicable with respect to refugees from an armed conflict.

76. As regards Issue 4 (Reference base and yardstick), Prof. Melander made reference to the so-called Martens clause. Without any doubt, that clause was of importance. However, to the general public the immediate meaning and consequence of the clause was unclear, because it has been drafted in such a general way.

77. Prof. Melander drew a parallel with provisions of human rights which were mentioned in a general way in the Charter of the United Nations and which in 1948 had been given a more precise content by the adoption of the Universal Declaration of Human Rights. He argued for the adoption of a similar document relating to humanitarian law, a "Universal Declaration of Humanitarian Law" or of "Minimum Humanitarian Standards", which would have the advantage of being a simple document which could be used for educational purposes; in the same way that human rights must be known to the public in order to be applied and respected, humanitarian law must be known to be applied and respected.

78. As regards Issue 6 (Risk of lowering standards), Prof. Melander referred to the existence of "minimum" rules in other areas as, for instance, the Standard Minimum Rules for the Treatment of Prisoners. The adoption of such rules had not led to the lowering of any standards and in many States prisoners were accorded treatment far above the minimum standard. Treaties within the field of human rights could be seen as "minimum standards" but that had not prevented States from granting individuals more favourable treatment. He doubted that "soft law" would have a negative influence on "hard law" provisions.

D. Issue 3 (Lacunae or deficiencies), Issue 4 (Need for a common reference base and yardstick) and Issue 6 (Avoiding setting standards falling short of existing obligations)

79. It was stressed that people coming from areas where State structures were collapsing had the greatest need of protection. Therefore, any new document should confirm grounds for asylum, as flight was the only form of protection in such cases. Experience showed the need for convergence between the two forms of law. Discussion of a "grey zone" would not go very far; rather, one should look at the "common stock" of human rights law and international humanitarian law. This "common stock" would reaffirm the principle of humanity.

80. One delegation referred to the limits on the proclamation of a state of emergency contained in the International Covenant on Civil and Political Rights, and the comments by the Human Rights Committee concerning derogations from articles 9 and 14 of the Covenant. "The law must be known" by the general public, by the young and the old, by the civilians as well as by the military. Perhaps it would be an incentive for States to ratify international instruments if the States knew that opposing actors in a conflict would also be bound by the same rules.

81. Another participant reiterated the view that there existed lacunae in cases of a state of emergency, thereby contradicting a previous speaker who had argued that protection of human rights in situations of internal disturbance were fully covered.

82. One delegate referred to the three elements of the Martens clause, namely established custom, principles of humanity, dictates of public conscience, and asked where one could find codified the most basic of the basic rules applicable to all persons. He characterized the present exercise as a "distillation of existing law".

83. Another participant warned against exaggerating the scope of derogation, and also warned against including non-governmental groups. Such applicability might indirectly serve as an incentive for the creation of new groups. This delegate saw some merit in ambiguity of terminology. As regards derogation, "soft law" could progressively affect "hard law". In this context, a succession of reservations and objections to the reservations made it difficult to identify core obligations.

84. Some participants were concerned about the possibility of clarifying obligations to non-governmental groups, and argued in favour of texts applicable to all persons in all situations. It was argued that the development of rules applicable in all situations might be achieved by developing the Martens clause. On the other hand, it was argued that one must not look only at part of the problem and ignore the root causes of suffering: conflicts, arms transfer problems and denial of the right to development.

85. One participant illustrated the question of intentional or non-intentional lacunae in the protective regimes by recalling that in 1972 a couple of dozen of articles were deleted from the draft Additional Protocol II during the last days of negotiation in order to make the text acceptable. The conclusion was that one would be better off with simple texts that could be understood by all. Another participant noted that existing lacunae might well be intentional, but that circumstances might have changed.

86. The lack of precision and the ambiguities in the Martens clause could be overcome in the same way as courts had to take into account ambiguities in national laws. In general terms, a legal problem was presented by those entities which were not States Members of the United Nations.

87. In this context, one participant stressed that the focus should be on awareness-building rather than on legalistic definitions. Lacunae and ambiguities could be delicacies for lawyers, but the example of the Document of the Copenhagen Meeting on the Human Dimension of the CSCE certainly illustrated that the distinction between "soft law" and "hard law" was considerably overstated.

88. Another participant stressed that overwhelming evidence from contemporary conflicts had shown that there was a lacuna in protection. For the victims it was not very interesting to dwell on whether this lacuna was a shortcoming of the rules or not. The development of a tool that could be of relevance and help to the victims was necessary. In this context, several speakers declared their preference for possible new rules that would apply to "all situations of internal violence not covered by international humanitarian law" rather than to "all situations". It was stressed that most wars were preceded by human rights violations on a massive scale, and a possible new document would be more effective if it were clear in its objectives.

89. In this context, it was stressed that less attention should be focused on distinctions between human rights law and international humanitarian law, as in practice these two forms of law were closely related and interactive. When considering the options of "soft" or "hard" law, it must be remembered that the development of "hard law" was extremely time-consuming. Further study of "gaps" was needed. Killings of civilians in armed conflicts were taken as "natural", not as a violation of international humanitarian law.

90. In this discussion, one participant recalled that States acted on the basis of their interests, and that this fact must be borne in mind when trying to develop rules in a new document. Whatever was produced must be accepted by States. The only way was to draft provisions that would apply in "all situations not covered by international humanitarian law or national law".

91. It was argued that "soft law" had more impact in countries with a well-developed civil society. However, "soft law" provisions could have important effects on any country as was shown by the "1503 procedure" of the Commission on Human Rights which was based on the Universal Declaration and not on a treaty. One participant stressed that the "1503 procedure" operated on the basis of mutual agreement.

92. One participant felt that the debate shifted towards seeing a new document as an educational tool. In such a case, the best road might be to establish a governmental task force to develop a handbook. National laws could achieve things international law could not, which was illustrated when, in the Chiapas conflict, national law based on common article 3 was sufficient to enable the ICRC to begin operations within seven days.

E. Renewed focus on Issue 4

93. The need for a common yardstick "applicable in all situations" was stressed, but it was uncertain how to ensure that non-State actors would feel bound by such provisions. One participant recalled that all non-governmental groups wished some recognition and could therefore be encouraged to follow universal rules. Others warned against directly or indirectly giving undue recognition to non-governmental armed groups. It was stressed that abuses were committed not only by Governments, and rebels/guerrillas should also be held accountable. This fact was now receiving more attention. In this context it was recalled that the Special Rapporteur on El Salvador in one of his reports had devoted a chapter to the non-State actors.

94. It was stressed that the Turku Declaration in article 17 explicitly addressed the problem of non-recognition of non-State actors. It was further stressed that rights also entailed responsibilities. One specific problem of enforcement applied in cases where a State could not exercise control over its territory.

F. Issue 7 (Conclusions for the future)

95. See part IV, Conclusions, below.

IV. CONCLUSIONS

96. At the Workshop, which was held in the form of a free discussion, the participants agreed on the urgent need to protect those who were exposed to extreme suffering resulting from a lack of sufficient protection. However, the participants did not attempt to define the method to be used: whether in the form of "hard law" or "soft law" provisions or whether in the form of a declaration similar to the Turku Declaration.

A. Outcome of the Workshop

97. At the concluding session of the Workshop, which incorporated the general debate on Issue 7, the participants adopted as the outcome of the Workshop the following text:

"Outcome of the Workshop

"1. The United Nations Commission on Human Rights should request the United Nations Secretary-General to undertake, in coordination with the International Committee of the Red Cross, an analytical study of the issues addressed at the Cape Town Workshop on Minimum Humanitarian Standards. Governments, treaty bodies, international organizations, particularly UNHCR, as well as all regional organizations and non-governmental organizations should be invited to contribute to the study as appropriate.

"2. The analytical study should be guided by the urgent need to protect those who are exposed to extreme suffering resulting from lack of sufficient protection. The study should, in the light of the prevailing experience during recent years, look into all the issues discussed at the Cape Town Workshop, including from the perspective of the various actors, assess the need for a United Nations document setting out and promoting minimum humanitarian standards or standards of humanity applicable in all circumstances, and consider the options for making use of the study within the United Nations system including, for example, at an open-ended seminar under the aegis of the Commission on Human Rights.

"3. The Cape Town Workshop encourages Governments, international and regional organizations as well as non-governmental organizations and civil society to promote a debate on the need for and use of minimum humanitarian standards or standards of humanity applicable in all circumstances as well as on practical measures aimed at the improvement of the situation of those affected."

B. Ideas advanced during the Workshop

98. At the concluding session it was agreed to record in the report a certain number of ideas advanced during the Workshop on how to improve the situation of those exposed to extreme suffering owing to the lack of sufficient protection. These ideas included the following:

1. The transfer of weapons, weapons technology and weapons expertise should be constrained in cases where it can be suspected that the recipient may make use thereof in contravention of international humanitarian law.

2. States parties to Additional Protocol I should make use of the procedure provided for in article 90 to refer questions of compliance with international humanitarian law to the International Fact-Finding Commission established under that provision.

3. All States Members of the United Nations must support the rapid establishment of an effective International Criminal Court (including supporting provisions for an independent prosecutor).

4. Parties to an armed conflict should be in contact with each other to clarify the international rules applicable in the given situation.

5. Warring parties should be encouraged to agree on at least a minimum of decent behaviour.

6. Conflicting parties should be encouraged to undertake joint monitoring of specific issues to hinder agents provocateurs from alleging that one or the other side is in breach of commitments it has undertaken.

Appendix 2

TEXT OF THE MARTENS CLAUSE AND ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949

The so called "Martens clause" is included in the preambular part of the Hague Convention No. IV of 18 October 1907 concerning the Laws and Customs of War on Land. It is also included as article 1, paragraph 2 in Protocol I Additional to the 1949 Geneva Conventions with the following wording:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

Article 3 common to the 1949 Geneva Conventions has the following wording:

"Article 3

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

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

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

"(b) Taking of hostages;

"(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

"(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

"2. The wounded and sick shall be collected and cared for.

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

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

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