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# INTERNATIONAL HUMANITARIAN LAW

AN INTRODUCTION

SEPARATE PRINT  
FROM

HANS HAUG, HUMANITY FOR ALL

THE INTERNATIONAL  
RED CROSS AND RED CRESCENT MOVEMENT

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HAUPT

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## INTERNATIONAL HUMANITARIAN LAW\*

### *1. 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.'

*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

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- translated from German by Sheila Fitzgerald and Susan Mutti.

<sup>1</sup> See Preamble to the Charter of the United Nations.

its judgment 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 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.<sup>2</sup> 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.<sup>3</sup> 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 does not, however, impair the right of a State to resort to force in the exercise of its right to self-defence.<sup>4</sup> The same holds true for third-party States who come to the aid of the State being attacked (right of

<sup>2</sup> For general information on the whys and wherefores of international humanitarian law see: Michael Walzer, *Just and Unjust Wars*, New York, 1977; Marie-Francoise Furet, JeanClaude 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.

<sup>3</sup> "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.

<sup>4</sup> Charter, Article 51.

collective self-defence). Finally, the United Nations may order military or non-military action to restore peace.'

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 armed conflicts and to supplement measures intended to reinforce their application,  
 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 other 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 does 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 selfdefence. 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," 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,

<sup>6</sup> See e.g. Emmanuel Bello, *African Customary Humanitarian Law*, Geneva, 1980.

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*<sup>7</sup> and *Francis Lieber*.<sup>8</sup> 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.

Dunant and Lieber both built on an idea put forward by Jean-Jacques 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."

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 civilians not participating in the conflict, on the other. The use of force is permitted only against the former, since the purpose of war is to overcome enemy armed forces, not to destroy an enemy nation. But force may be used against individual soldiers only so long as they put up resistance. Any soldier laying down his arms, or 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

<sup>7</sup> See Henry Dunant, *A Memory of Solferino*, 1862.

<sup>8</sup> See Richard Shelly Hartigan, *Lieber's Code and the Laws of War*, Chicago, 1983. <sup>9</sup> Jean-Jacques Rousseau, *A Treatise on the Social Contract*, Book I, Chap. IV.



any case pointless to take revenge on a 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 defenceless 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.<sup>10</sup> 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.<sup>11</sup> 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.

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.<sup>12</sup>

The 1864 Convention was accepted in an exceedingly short time by all

<sup>10</sup> On the history of humanitarian law see Best and Pictet (footnote 2); Pierre Boissier, *History of the International Committee of the Red Cross: from Solferino to Tsushima*, Geneva, 1985; Andre Durand, *History of the International Committee of the Red Cross: from Sarajevo to Hiroshima*, Geneva, 1984.

<sup>11</sup> For the text of the Convention, see Schindler/Toman, No. 36.

<sup>12</sup> See Shabtai Rosenne, "Codification of international law", in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (1992), p. 632.

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 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 "*Instructions for the Government of Armies of the United States in the Field*" (General Orders No. 100), today usually referred to as the "Lieber Code", were published in 1863:<sup>13</sup> 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.

<sup>13</sup> 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 a precedent for subsequent military handbooks and instructions on the law of war. Secondly, it marked the starting point for the second series of developments in modern international humanitarian law, which saw the emergence of rules 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 projectiles weighing less than 400 grammes.<sup>14</sup> The Conference convened by the Russian 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 aggravated 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 soldiers, 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 considerations which resulted in that prohibition. As is explained in the Preamble, "the only legitimate object which States should endeavour to accomplish during war is 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 are 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 century then attempted to set broader international legal limits to means and methods 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.<sup>15</sup> 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.

<sup>14</sup> Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, Schindler/Toman, No.9.

<sup>15</sup> For the texts see Schindler/Toman.

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 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 must be found.

The Regulations on 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." 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". 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".

We have examined the separate development of the laws of Geneva and

16 *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. XXII, p. 497.

17 The law of war at sea is not discussed here. See D. P. O'Connell, *The Influence of Law on Sea Power*, Manchester, 1975; Yoram Dinstein, "Sea Warfare", in Bernhardt (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

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.<sup>19</sup> These conventions were the result of lengthy consultation which the ICRC had undertaken on the strength of its experiences during the Second World War. They 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.<sup>20</sup> 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.<sup>21</sup>

In the ensuing years, the Geneva Conventions have become the most universal of international treaties: they are presently binding on 170 States - 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:

<sup>19</sup> See *Final Record of the Diplomatic Conference of Geneva of 1949*, 3 vols. <sup>20</sup> See Section 3 below.

<sup>21</sup> See Section 5 below.

<sup>22</sup> As at 31 December 1992.

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," the Convention on the Prevention and Punishment of the Crime of Genocide," the Refugee Convention," the 1966 United Nations Human Rights Covenants", and regional human rights treaties", 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 remembers that the 1949 Conventions almost completely pass over a very important point, 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." 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.<sup>29</sup> 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

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.

28 Since 1864, the ICRC has 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.

the Additional Protocols, international humanitarian law gained a foothold in the Third World.”?

Both Protocols strengthen the protection of the defenceless to a considerable degree. Protocol I has been ratified by 119 States, and Protocol II by 109<sup>31</sup>, 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 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

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 at 31 December 1992.

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.<sup>32</sup> 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 rules of humanitarian law applicable in armed conflicts"**

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 *materiel*. 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

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

<sup>33</sup> Drafted by a 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.



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.

## *2. 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.<sup>34</sup>

<sup>34</sup> 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 Konflikten: Zur Fortentwicklung des humanitären Völkerrechts*, Munich, 1979; Hilaire McCoubrey, *International Humanitarian Law. The Regulation of Armed Conflicts*, Dartmouth, 1990; Oppenheim/Lauterpacht, *International Law: a Treatise*. Vol. II, London, 1955; Jean Pictet, *Development and Principles of International Humanitarian Law*, Dordrecht/Geneva, 1985; Charles Rousseau, *Le droit des conflits armés*, Paris, 1983; Georg Schwarzenberger, *International 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.

## B. Sources of international humanitarian law<sup>35</sup>

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 June 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 all States (*jus cogens*).

Although the 1977 Protocols have not yet been universally adopted," 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).<sup>37</sup> 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 armed conflicts. *Jus in bello* deals with facts, with the fact

<sup>35</sup> See the list of major international treaties in the Appendix. <sup>36</sup>

See footnote 31.

<sup>37</sup> See footnote 4.

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 armed 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."

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

38 For a general discussion of this point, see Aristidis Calogeropoulos-Stratis, *Droit humanitaire et droits de l'homme: La protection de la personne en période de conflit armé*, Geneva, 1980.

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." This can 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

39 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.

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" 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.<sup>40</sup> 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."

<sup>40</sup> See Fourth Convention, Art. 44, and Protocol I, Art. 73.

<sup>41</sup> See Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCDAI*, Vol. 163 II, 1979, pp. 117-163.

<sup>42</sup> 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 noninternational 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 any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". **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.<sup>43</sup>

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

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," 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.

<sup>43</sup> 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.

<sup>44</sup> For further details, see Section 5 below.

<sup>45</sup> First, Second and Third Conventions, Art. 5; Fourth Convention, Art. 6.



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

International humanitarian law is based on two notions which require 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.

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 shipwrecked 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." 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." Children evacuated without their parents from a combat zone may be accommodated in neutral countries." The Conventions also refer to neutral States when it comes to organizing the evacuation or repatriation of protected persons. <sup>49</sup> Neutral parties shall also be authorized to run relief operations for needy civilians from their territory." 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. <sup>51</sup>

<sup>46</sup> 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.

<sup>47</sup> Third Convention, Art. 109, para. 2.

<sup>48</sup> Fourth Convention, Art. 24, and Protocol I, Art. 78.

<sup>49</sup> Third Convention, Art. 109 and 111; Fourth Convention, Art. 132, para. 2. <sup>50</sup>

Fourth Convention, Art. 23; Protocol I, Art. 70.

<sup>51</sup> See Section 6 below.

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

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

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

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

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

#### **A. The general obligation of humane treatment**

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

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

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

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

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

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

In order to close any possible loopholes, Additional Protocol I contains an extensive provision on the treatment of persons in the power of a party to the conflict. Article 75 of Section III, entitled "Fundamental guarantees", reads like a condensed version of the Declaration of Human Rights, framed for the special conditions of war. 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.<sup>52</sup>

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.<sup>53</sup>

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

<sup>52</sup> First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 147.

<sup>53</sup> Protocol I, Article 11.

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, namely, to take all necessary measures to ensure that protected persons in the power of that party suffer no injury and thus no injustice: the party concerned must protect them.

#### B. Wounded, sick and shipwrecked persons

The texts referring to this category of persons are to be found in the (First) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, the (Second) *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, the (Fourth) *Convention relative to the Protection of Civilian Persons in Time of War*, Part II (General protection of populations against certain consequences of war), and *Additional Protocol 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 armed forces or civilians. Protocol I did away with this distinction and created a single law for both categories, which greatly simplifies the practical application of the provisions.<sup>54</sup> There are now only "wounded" and "sick", whether military or civilian, and only "medical units", whether under military or civilian administration. Civilian wounded can therefore be treated in military hospitals, and combatants in civilian establishments. The protection is linked with the person or the unit, and not with their military or civilian nature.

Under the title "Protection and care", Article 10 of Protocol I states: "1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones".

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

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

<sup>54</sup> Protocol I, Article 8.

- *protection*: they must be shielded from injustice and danger, that is, the effects of hostilities, and against possible assaults on the integrity of their persons. Suitable measures must be taken to guarantee such protection;
- *medical care and attention*: these persons are entitled to medical care, and may not be neglected as enemy persons on account of their origin (general prohibition of discrimination). They need not, however, receive more than is actually possible: the wounded and sick of the 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." 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.<sup>56</sup> 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.

<sup>55</sup> First Convention, Articles 19 to 23; Protocol I, Articles 8 (e) and 12 to 14. <sup>56</sup> First Convention, Article 22; Protocol I, Article 13.

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

At sea, hospital ships perform the functions of hospitals on land.<sup>57</sup> 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." 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.<sup>58</sup> 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.<sup>59</sup> 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." 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.<sup>60</sup> 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

<sup>57</sup> Second Convention, Articles 22 to 35.

<sup>58</sup> First Convention, Articles 24 to 32; Second Convention. Articles 36 and 37; Protocol I. Articles 8(c) and 15.

<sup>59</sup> First Convention, Article 28.

<sup>60</sup> Protocol I, Article 16.

<sup>61</sup> First Convention, Article 24; Protocol I. Article 8(d). <sup>62</sup>

First Convention, Article 26.



shipwrecked. "No-one shall be harmed, prosecuted, convicted or punished for such humanitarian acts".<sup>63</sup>

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 hand, must not cause any harm to the wounded, sick and shipwrecked of the opposing side.>'

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.<sup>v</sup> 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,<sup>66</sup> which also keeps records of all information.

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

Another section of the chapter on the protection of wounded, sick and shipwrecked persons deals with the rules relating to *medical transports*.<sup>68</sup>

<sup>63</sup> Protocol I, Article 17.

<sup>64</sup> *Ibid.*

<sup>65</sup> Protocol I, Article 33.

<sup>66</sup> See Gradimir Djurovic, *The Central Tracing Agency of the International Committee of the Red Cross*, Geneva, 1986.

<sup>67</sup> Protocol I, Article 34.

<sup>68</sup> First Convention, Article 35; Protocol I, Articles 8(g) and (h), and 21.

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.<sup>69</sup>

The use of medical aircraft raises extremely difficult questions, given that at high speeds aircraft can no longer be distinguished as medical with the naked eye, and that therefore a medical aircraft, which is protected, cannot be distinguished from one with a military mission. The 1949 texts, assuming that nothing could be done to overcome these difficulties, provided protection only for medical aircraft following a flight plan previously agreed by both sides.<sup>70</sup> 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," over the "contact zone" (where military operations are taking place)," or over areas controlled by the adverse party.<sup>71</sup> 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).<sup>72</sup>

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

<sup>69</sup> Second Convention, Article 38; Protocol I, Articles 22 and 23.

<sup>70</sup> First Convention, Articles 36 and 37; Second Convention, Articles 39 and 40. <sup>71</sup> Protocol I, Article 25.

<sup>72</sup> Protocol I, Article 26.

<sup>73</sup> Protocol I, Article 27.

<sup>74</sup> Annex I to Protocol I: Regulations concerning identification.

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 b) 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, then 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." Since the revised Conventions of 1949, the red cross on a white ground designates all persons, buildings means of transport, etc. that are entitled to protection and respect under international law, irrespective of whether they are civilian or military in character. This was the first protective sign enabling those engaged in combat to identify an object or a person to be protected, to hold their fire or to take other measures, in order to respect and protect human beings seeking the protection of the Red Cross.

The effectiveness of the protection offered by the emblem depends on the trust that the parties to the conflict have in the correct use of the protective sign by the adverse party. For this reason, the use of the emblem must be strictly regulated, not only through international law<sup>76</sup> but also in domestic legislation." 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." 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.

<sup>75</sup> Convention of 27 July 1929, Article 19.

<sup>76</sup> First Convention. Articles 38 to 44, 53 and 54; Annex I to Protocol I. Articles 3 and 4. <sup>77</sup>

Through domestic laws for the protection of the emblem.

<sup>78</sup> Protocol I, Article 85.3(f).

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

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

The Diplomatic Conference of 1974-1977 paid special attention to the marking and identification of medical units and transports and, as already stated, worked out new solutions based on modern technology." 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, inasfar as they are conducted within the framework of the Fundamental Principles of the Red Cross.<sup>f</sup> 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 "*Comité 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.

<sup>79</sup> Annex I to Protocol 1.

<sup>80</sup> First Convention, Article 44.

### 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".<sup>81</sup> 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.<sup>v</sup> Being a prisoner of war is in no way a form of punishment.

A number of other categories of persons are listed in the Third Convention as having the same status as members of the armed forces. First come members of a resistance movement belonging to a party to the conflict who satisfy the following four requirements: they must be commanded by a person responsible for his subordinates; they must have a fixed distinctive sign which is recognizable at a distance (if they have no uniform of their own); they must carry arms openly; they must respect the law and customs of war.<sup>83</sup> 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).<sup>84</sup> Lastly, members of the population who spontaneously take up arms to resist approaching enemy forces (*levee en masse*) are entitled to be treated as prisoners of war.<sup>85</sup> 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." In general, any doubt as to the status of a captured person must be cleared up by a competent tribunal.<sup>87</sup>

<sup>81</sup> Third Convention, Article 13. <sup>82</sup> Article 12.

<sup>83</sup> Article 4.A(2).

<sup>84</sup> Article 4.A(4) and (5).

<sup>85</sup> Article 4.A(6).

<sup>86</sup> First Convention, Articles 30 and 31; Third Convention, Article 33. <sup>87</sup> Third Convention, Article 5, para. 2.

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." 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.<sup>88</sup> Also under the Third Convention, torture and other severe ill-treatment are considered war crimes.<sup>89</sup>
- Prisoners are entitled, immediately upon capture, to complete what is called a capture card," which is then sent, via the ICRC Central Tracing Agency, to the official information bureau in the prisoners' own country.<sup>90</sup> The latter has the task to inform the prisoners' relatives. In this way, links with home and family can be rapidly re-established.
- Prisoners of war must be transferred as soon as possible out of the danger zone and brought to a place of safety, in which the living conditions must be "as favourable as those for the forces of the Detaining Power who are billeted in the same area".<sup>91</sup> 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.<sup>92</sup>
- Prisoners of war in good health may be required to work," but may be employed in dangerous work only if they volunteer. Removal of mines is explicitly mentioned as dangerous work. <sup>93</sup> 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

<sup>88</sup> Third Convention, Article 7.

<sup>89</sup> Article 17.

<sup>90</sup> Article 130, and Protocol I, Article 85. 5.

<sup>91</sup> Article 70 and Annex IV.

<sup>92</sup> Article 122.

<sup>93</sup> Article 25

<sup>94</sup> *Ibid.*

<sup>95</sup> Articles 49 to 57.

<sup>96</sup> Article 52, para. 3.

and cards being exchanged usually through the ICRC Central Tracing Agency)." They may also receive aid in the form of individual parcels.<sup>97</sup>

- A prisoner of war is subject to the law in the country of the detaining power, especially the regulations applying to the armed forces." 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 POWs for offences committed before capture (e.g., alleged war crimes committed in an occupied territory or on the battlefield).
- However, prisoners being so prosecuted are entitled to a properly conducted trial and, even if convicted, retain their legal status as prisoners of war. Nevertheless, they may have their repatriation deferred until they have served their sentences.
- Measures of reprisal against prisoners of war are forbidden without exception.<sup>100</sup>

A very important group of provisions in the Third Convention is that dealing with the repatriation of prisoners of war.<sup>101</sup> 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.<sup>102</sup> This is a humane gesture towards combatants who will never again be involved in the war. Mixed medical commissions decide who will be repatriated.<sup>103</sup> 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".<sup>104</sup>
- 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

<sup>97</sup> Third Convention, Article 71. <sup>98</sup> Article 72.

<sup>99</sup> Articles 82 to 108.

<sup>100</sup> Article 13, para. 3.

<sup>101</sup> Articles 109 to 119.

<sup>102</sup> Article 109.

<sup>103</sup> Article 112.

<sup>104</sup> Article 118.

their country.<sup>105</sup> 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 *paws* 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 *paws* only if its delegates have really been able to verify that each prisoner's decision was freely made.

Unjustified delay in repatriating prisoners of war is a grave breach of Protocol 106

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

#### D. Civilians

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

A glance at the history of war shows that it is the civilian population that suffers most from the consequences of hostilities. This seems to have been especially true since the beginning of the 20th century. And yet, the law of war is based on the very simple idea that hostilities should take place exclusively between the armed forces of the conflicting parties. War must therefore keep out of the way of civilians. Military operations against

<sup>105</sup> Christiane Shield-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, 1977, pp.157 ft.

<sup>106</sup> Protocol I, Article 84.4(b).

<sup>107</sup> Third Convention, Article 21, para. 2.



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

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

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).<sup>112</sup> 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

<sup>108</sup> Protocol I, Article 50.

<sup>109</sup> Fourth Convention, Article 28, reinforced by Protocol I, Article 51(7). <sup>110</sup> Article 33, para.1.

<sup>111</sup> Articles 33, paras. 2 and 3, and 34.

<sup>112</sup> Articles 14 and 15; Protocol I, Articles 59 and 60.

work.<sup>113</sup> 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.<sup>114</sup> Special efforts must be made to reunite families.<sup>115</sup>

In addition to a comprehensive article on the protection of women.<sup>116</sup> Additional Protocol I contains new and important obligations for the treatment of children.<sup>117</sup> 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.<sup>118</sup> providing for a series of checks to prevent abusive and permanent evacuation of children from their own country. These rules are intended, above all, to act as a hindrance to abusive adoption. The new provisions are a welcome reinforcement of the protection to which children are entitled even in war.

The Protocol also deals with the situation of journalists engaged in dangerous professional missions. Article 79 makes it clear that journalists performing "dangerous missions", i.e., working in a 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

<sup>113</sup> See Section 3.B; Fourth Convention, Articles 16 to 22 and 24 to 26. <sup>114</sup> Protocol I, Article 73.

<sup>115</sup> Article 74.

<sup>116</sup> Article 76.

<sup>117</sup> Article 77.

<sup>118</sup> Article 78.

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".<sup>119</sup> 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.<sup>120</sup> 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.

<sup>119</sup> Fourth Convention, Articles 35 to 46.

<sup>120</sup> Article 42.

#### *h. 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.<sup>121</sup> 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

<sup>121</sup> Fourth Convention, Articles 47 to 78.

War, is not allowed. The occupying power may not settle part of its own population in the occupied territory, a prohibition aimed at preventing de facto annexation or colonization. The occupying power must likewise care for children, in cooperation with the local authorities, and schools must continue to function. Persons living in occupied territory may not be compelled to serve in the armed forces of the occupying power, and local police forces are to be employed to maintain public order in the territory.

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

The occupying power may take all measures, e.g., pass laws, that it considers indispensable for the administration of the occupied territory, in particular to ensure law and order. It may set up its own courts, for example, to judge offences against its own security. Protected persons may be convicted by a court set up by the occupying power only on the basis of a regular and fair trial. The Fourth Convention describes the rights of the accused. They may be condemned to death, but only for grave offences and if the death penalty is permitted by law. The Protecting Power or the JCRC 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 JCRC). This legalization of "incommunicado detention" should have no place in international humanitarian law.

The provisions relating to belligerent occupation of foreign territory apply for as long as the occupation continues, at least as far as the most important rules are concerned. On the other hand, Article 6 of the Fourth

Convention states that a number of provisions shall cease to apply one year after the end of military operations.

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

### *c. Treatment of internees*

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

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

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

<sup>122</sup> Fourth Convention, Articles 79 to 135.

*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.

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 largescale 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.<sup>123</sup> If this is beyond its possibilities, then that power is obliged to permit relief operations by third States or by an "impartial humanitarian organization" (usually the ICRe), and to facilitate such operations.<sup>124</sup> Distribution of the relief supplies must take place under the supervision of representatives of the Protecting Power or of JCRC 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.<sup>125</sup> Individual parcels

<sup>123</sup> Fourth Convention, Articles 55 and 56.

<sup>124</sup> Article 59; Protocol I, Article 69.

<sup>125</sup> Third Convention, Article 72, and Fourth Convention, Article 108.



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 nondiscrimination, 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<sup>126</sup> 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" <sup>127</sup> The tasks listed include warning, evacuation, collection of the injured and dead, first aid, firefighting, the provision of emergency accommodation, emergency repairs (of, for example, water supply systems), and many others, all aimed at enabling the civilian population to survive disasters brought about by war.

Civil defence organizations, which are purely civilian in character and subordinate to the civilian authorities, must not be placed under the orders of military forces. As civilian organizations they are fully protected. "They shall be entitled to perform their civil defence tasks except in case of imperative military necessity" <sup>128</sup> 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. <sup>129</sup>

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

<sup>126</sup> Protocol I, Articles 61 to 67.

<sup>127</sup> Article 61(a).

<sup>128</sup> Article 62.

<sup>129</sup> Article 66(4) and Annex I, Article 15.

<sup>130</sup> Article 67.

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

*e. Pro memoria*

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

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

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

International law relating to the limitation of warfare dates back to the Hague Conventions of 1899 and 1907 - the first codification of this area of law. For this reason it is still called "Hague law". It is also known, not without justification, as "the law of war" or, more accurately, "the law of the conduct of war".

<sup>131</sup> Protocol I, Article 64.

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 "*Kriegsraison*". This means that neither "*Kriegsraison*" 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. "*Kriegsraison*" 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 1864 Declaration of St. Petersburg, which presents in its preamble a complete programme for the law relating to the conduct of hostilities.<sup>132</sup> It runs as follows:

"Considering

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

<sup>132</sup> See footnote 14.

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.<sup>133</sup>

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 Time of War*,<sup>134</sup> 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 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".<sup>135</sup>

The resolution, following on one adopted by the Twentieth International Conference of the Red Cross in Vienna in 1965,<sup>136</sup> 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

<sup>133</sup> See footnote 16.

<sup>134</sup> Second version (1958), in Schindler/Toman, No. 28. <sup>135</sup> Schindler/Toman, No. 31.

<sup>136</sup> Resolution XXVIII, in *International Review of the Red Cross*, 1965, pp. 588-590.

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 noninternational 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.<sup>137</sup>

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 1, paragraph 2 of Protocol I:

"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.

<sup>137</sup> See below, Section 4.C.c.

## 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.<sup>138</sup> 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.<sup>139</sup> Lastly, persons not members of the armed forces are entitled, on the approach of the enemy, to take up arms on their own initiative (*levee en masse*), but must respect the laws and customs of war.<sup>140</sup> 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

<sup>138</sup> Third Convention, Article 4.A(2).

<sup>139</sup> Article 4.A(3).

<sup>140</sup> Article 4.A(6).

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.<sup>141</sup>"

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.<sup>142</sup> 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.<sup>143</sup> The combatants' 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.<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup> 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 from the effects of hostilities".<sup>147</sup> 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

141 Protocol I, Articles 46 and 47.

142 Article 43(2).

143 Article 44(2).

144 Articles 48, and 49 to 58.

145 The Hague Regulations on War on Land, Article 1; Third Convention, Article 4.A(2).

146 Protocol I, Article 44(7).

147 Article 44(3).

of hostilities an armed combatant cannot so distinguish himself" .<sup>148</sup> 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. <sup>149</sup> 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 , <sup>150</sup> 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. <sup>151</sup>

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. <sup>152</sup> 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 privileged combatant status. <sup>153</sup> 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.

<sup>148</sup> Protocol I, Article 44(3).

<sup>149</sup> See the commentaries on Protocol I, Article 44(3).

<sup>150</sup> 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.

<sup>151</sup> See Hans-Peter Gasser, "Prohibition of terrorist acts in international humanitarian law", *International Review of the Red Cross*, 1986, pp. 200-212.

<sup>152</sup> Third Convention, Article 85; Protocol I, Article 44(2).

<sup>153</sup> Protocol I, Article 44(4).



### C. Limits on the choice of methods and means of warfare

Article 35 of Protocol I reinforces a principle of the law of armed conflict: 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

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".<sup>154</sup> 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 rule forbidding the misuse, in military operations, of recognized distinctive emblems, in particular the red cross or red crescent.<sup>155</sup> 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.<sup>156</sup> 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 *quarterv.i*" 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.I" 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.P? 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., civilians or prisoners, or pro-

<sup>154</sup> Protocol I, Article 37.

<sup>155</sup> Article 38.

<sup>156</sup> Article 85.3( f).

<sup>157</sup> Article 40.

<sup>158</sup> Article 41.

<sup>159</sup> Article 42.

tected 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.<sup>160</sup> 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".<sup>161</sup> 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.<sup>162</sup> 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

<sup>160</sup> Protocol I, Article 51(4).

<sup>161</sup> Protocol I, Article 35(2).

<sup>162</sup> Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines.

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.

In this context it is worth mentioning Article 36 of Protocol 1. 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.<sup>163</sup> 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 Destruction*, of 10 April 1972, 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

<sup>163</sup> See footnote 18.

number of conventions that regulate some aspects of nuclear armament.<sup>164</sup> 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.<sup>165</sup> Replies have varied, and neither the 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.<sup>166</sup> 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.<sup>167</sup> 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

<sup>164</sup> See, for example, the Nuclear Weapons Non-Proliferation Treaty, of 1 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.

<sup>165</sup> From the abundant literature: Judge Nagendra Singh/Edward McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd ed., Dordrecht/Boston/London, 1989.

<sup>166</sup> 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 I. Zusatzprotokoll zu den Genfer Konventionen von 1949*, Berlin, 1985.

<sup>167</sup> Belgium, Canada, Federal Republic of Germany, Italy, Netherlands and Spain.

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 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 cannonballs, 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 one 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".<sup>168</sup> 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.<sup>169</sup> Civilian objects are all objects that cannot be considered as military objectives.

<sup>170</sup>

#### *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

<sup>168</sup> Protocol I, Article 52(2).

<sup>169</sup> Article 50(1).

<sup>170</sup> Article 52(1).

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.<sup>171</sup> 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".<sup>172</sup>

How is this rule to be understood in practice?

As is to be expected, the law of war takes into account that in (lawful) military operations in modern 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 modern 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".<sup>173</sup> 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,

<sup>171</sup> Protocol I, Article 51(4).

<sup>172</sup> Article 51.5(b).

<sup>173</sup> Article 57.



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 modern war, with its 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.<sup>174</sup> On the other hand, civilians may not be used to shield military objectives from enemy attack or to screen military operations.<sup>175</sup> Finally, the article prohibits attacks against the civilian population or individual civilians by way of reprisals.<sup>176</sup>

### *c. Civilian objects*

In the attempt to protect human beings as much as possible from the effects of war, Protocol I prohibits attacks on a number of civilian objects.<sup>177</sup> 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. All prohibitions of attacks on objects apply also to reprisals.

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 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<sup>178</sup> stipulating that "care shall be taken

<sup>174</sup> Protocol I, Article 51 (3).

<sup>175</sup> Article 51(7).

<sup>176</sup> Article 51(6); see below, Section 6 C.c.

<sup>177</sup> Article 52.

<sup>178</sup> See also Protocol I, Article 35(3).

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.<sup>179</sup> In the case of defensive action, care must be taken to ensure that there are no civilians in the neighbourhood of potential military objectives.<sup>180</sup> 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.<sup>181</sup> non-defended localities<sup>182</sup> - better known as "open cities" - and (permanently) demilitarized zones.<sup>183</sup> 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 belonging to the "law of Geneva". The "law of the Hague" became a real law on warfare only through Protocol 1. 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

<sup>179</sup> Protocol I, Article 57.

<sup>180</sup> Article 58.

<sup>181</sup> First Convention, Article 23; Fourth Convention, Article 14. <sup>182</sup>

Protocol I, Article 59.

<sup>183</sup> Article 60.

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.<sup>184</sup>

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.

### 5. *The special case of the law of non-international armed 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 other 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 noninternational 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.

<sup>184</sup> For the relationship between the Geneva Conventions and customary law, see MerOI (footnote 32) and particularly Marco Sassoli, *Die Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*. Basel/Frankfurt. 1990.

## 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,<sup>185</sup> 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 civilians. Today, almost 15 years after its adoption by the Diplomatic Conference, Protocol II has been ratified by the majority of States, <sup>186</sup> 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.<sup>P?</sup> The Conference then adopted that text by consensus.

The disappointment felt by many at the weakening of the draft text is

<sup>185</sup> International Court of Justice, Case concerning *Military and paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986 (merits), para. 218.

<sup>186</sup> 109 States (at 31 December 1992).

<sup>187</sup> See R. Abi-Saab (footnote 42), pp. 131 ff.

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.<sup>188</sup>

- *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 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.<sup>189</sup> 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.

188 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 NonInternational 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.

189 The judgment of the International Court of Justice mentioned in footnote 185 takes for granted that the "Contras" are bound by Article 3.

## 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.

### *a. Conditions for application*

Article 3 defines the scope of its own application only indirectly. It was left to State practice and legal literature to bring 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.<sup>190</sup> 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 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

<sup>190</sup> Commentary published under the general editorship of Jean Pictet, Fourth Convention, Article 3, pp. 35-36.

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.<sup>191</sup> 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, in 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.<sup>192</sup> 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.

<sup>191</sup> For an overview of the different types of conflicts, see Schindler (footnote 41).

<sup>192</sup> 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* <sup>193</sup>

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,<sup>194</sup> 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 States which are bound by Protocol II. It may be assumed that in future Protocol II will be taken increasingly by other States also as a guideline for assessing their 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

<sup>193</sup> From the abundant literature we mention only Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", *ReADI*, Vol. 165 IV, 1979, pp. 353-446; Heather A. Wilson, *International Law and the Use of Force by National im modernen humanitiden Völkerrecht*, Frankfurt, 1988.

<sup>194</sup> Protocol I, Article 96 (3).

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;
- 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.<sup>195</sup> 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.<sup>196</sup> 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

<sup>195</sup> First to Fourth Conventions, Article 3, para. 1.(1)(d), and Protocol II, Article 6.

<sup>196</sup> Protocol II, Article 6(4).

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 camp, 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 to be protected.<sup>197</sup> Medical duties must be exercised in accordance with professional ethics. Such activities are protected from penal prosecution, at least partly.<sup>198</sup> Another new rule protects the emblems of the red cross and the red crescent.<sup>199</sup>

#### *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.<sup>200</sup> Article 3 common to 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.<sup>201</sup> 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

<sup>197</sup> Protocol II, Article 9.

<sup>198</sup> Article 10.

<sup>199</sup> Article 12.

<sup>200</sup> See Gasser (footnote 188).

<sup>201</sup> See footnote 135.

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.<sup>202</sup> 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.

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.<sup>203</sup> 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.<sup>204</sup> It also provides protection for cultural objects and places of worship.<sup>205</sup> Lastly, it forbids the forced movement of civilians.<sup>206</sup>

#### *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,

<sup>202</sup> Protocol II, Article 13.

<sup>203</sup> Article 14.

<sup>204</sup> Article 15.

<sup>205</sup> Article 16.

<sup>206</sup> Article 17.

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.

#### *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.<sup>s</sup>

Civil wars that become "internationalized non-international armed conflicts" pose unusual problems for international humanitarian law.<sup>208</sup> 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

<sup>207</sup> See Michael B. Akehurst, "Civil War", in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, 1982, pp.88-93.

<sup>208</sup> See Hans-Peter Gasser, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon", in 33 *The American University Law Review* (1983), pp.145-161.

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 the insurgents, the law relating to international conflicts 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*

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.<sup>209</sup> Efforts have been made to encourage observance of non-

<sup>209</sup> See Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Cambridge, 1987.

binding codes of conduct as a means of ensuring respect for a minimum humanitarian standard."?

In its endeavour to safeguard human dignity in times of internal tensions and disturbances, the ICRC has taken an unusual route."! 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 JCRC 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.<sup>212</sup>

**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 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

210 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*.

211 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.

212 Statutes of the Red Cross and Red Crescent Movement, Article 5.2(d) and 5.3.

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.

#### *6. Implementation of international humanitarian law: aspects 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 1. 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 ful-

filled.s'? 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 I, <sup>214</sup> 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.

- *Training of armed forces*+> 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 armed 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 law 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 armed 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.s's

The same applies to those civilians who are in any way concerned with the application of international humanitarian law, for example, members

<sup>213</sup> Under the heading "Measures for execution", Article 80(1) of Protocol I 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."

<sup>214</sup> First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol I, Article 80.

<sup>215</sup> First Convention, Article 47; Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144; Protocol I, Article 83; Protocol II, Article 19. <sup>216</sup> Protocol I, Article 82.

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 or 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 by denouncing the humanitarian law conventions, since any denunciation would take effect only after the war was over.<sup>217</sup>

The first obligation of a party to the conflict after the outbreak of war is to appoint a Protecting Power.<sup>218</sup> 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.<sup>219</sup> The Geneva Conventions and Additional Protocol I

<sup>217</sup> First Convention, Article 63; Second Convention, Article 62; Third Convention, Article 142; Fourth Convention, Article 158; Protocol I, Article 99; Protocol II, Article 25. <sup>218</sup> First to Third Conventions, Article 8; Fourth Convention, Article 9.

<sup>219</sup> See Gerlinde Raub, "Protecting Power", in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 9, 1986, pp. 314-320.

attribute to the Protecting Power a number of tasks of a humanitarian nature, the most important of which are visits to prisoner-of-war" and internment- camps and work on behalf of civilians in the power of the enemy (especially in occupied territories).<sup>220</sup>

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.<sup>221</sup>

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.<sup>222</sup> 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 the rules relating to the designation of these powers and to their duties in wartime are incorporated into the Geneva Conventions.<sup>223</sup> Additional Protocol I has laid down rules of procedure intended to facilitate the appointment of a Protecting Power.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup>

In the various conflicts since 1945, it has always been the ICRC that has

<sup>220</sup> Third Convention, Article 126.

<sup>221</sup> Fourth Convention, Article 143.

<sup>222</sup> *Ibid.*

<sup>223</sup> Third Convention, Article 126(4); Fourth Convention, Article 143(5).

<sup>224</sup> See François Bugnion, "Le droit humanitaire applicable aux conflits armés internationaux, Le problème du contrôle", in *Annales d'études internationales*, Geneva, 1977, pp.29-61.

<sup>225</sup> See footnote 218.

<sup>226</sup> Protocol J, Article 5.

<sup>227</sup> First to Third Conventions, Article 10(2); Fourth Convention, Article 11(2).

<sup>228</sup> First to Third Conventions, Article 10(3); Fourth Convention, Article 11(3); Protocol J, Article 5(4).

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.<sup>229</sup> **In** any case, the Committee has a comprehensive right of initiative in humanitarian matters.<sup>230</sup>

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.<sup>231</sup> 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.

<sup>229</sup> See footnote 223.

<sup>230</sup> First to Third Conventions, Article 9; Fourth Convention, Article 10; on the duties of the ICRC in the event of conflict, see also Protocol I, Article BI.

<sup>231</sup> See Protocol I, Article 80(2): "The 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."

*a. Criminal proceedings before national courts*

The Geneva Conventions and Additional Protocol 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.<sup>232</sup> 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.<sup>233</sup>

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.<sup>234</sup>

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.<sup>235</sup> If a commander neglects to give the necessary instructions or permits shortcomings in the required supervision, then he must answer under criminal law if grave breaches occur in his area of command.<sup>236</sup>

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

<sup>232</sup> First Convention, Articles 49 and 50; Second Convention, Articles 50 and 51; Third Convention, Articles 129 and 130; Fourth Convention, Articles 146 and 147; Protocol I, Article 85.

<sup>233</sup> See Protocol I, Article 85(5).

<sup>234</sup> See above, Section 6.a.

<sup>235</sup> Protocol I, Article 87.

<sup>236</sup> Protocol I, Article 86(2).

International Military Tribunal to judge major war criminals, laid down, however, that even those persons who acted under orders were responsible for their acts.<sup>P?</sup>

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.<sup>P"</sup>

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.

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.<sup>239</sup> 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.<sup>>"</sup> Finally, reference should be made to the provisions relating to penal procedure.<sup>?"</sup> 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.

237 See Hans-Heinrich Jescheck, "War Crimes", in Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, 1982, p. 297.

238 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.

239 "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).

240 Protocol I, Article 88.

241 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.

*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.<sup>242</sup> The offending State must restore the legal situation and, possibly, pay damages to the injured State.>?

What means of redress are open to the injured State? It can issue a protest and demand of the other party to the conflict to refrain from further breaches. The Protecting Power can also take action in this sense.>" The injured State can in any case demand an inquiry.?" 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 I, 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.<sup>246</sup> 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 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 this 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 ICRe, requesting it, as part of its humanitarian work, to urge the adverse party to observe the rules of

<sup>242</sup> From the abundant literature, see, for example, Luigi Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *ReADI*, Vol. 189 VI, 1984, pp.145-149.

<sup>243</sup> Protocol I, Article 91.

<sup>244</sup> See footnote 218.

<sup>245</sup> First Convention, Article 52; Second Convention, Article 53; Third Convention, Article 132; Fourth Convention, Article 149.

<sup>246</sup> Position on 31 December 1992. After reception of the 20th declaration the Commission was established on 25 June 1991.



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.<sup>247</sup> 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.<sup>248</sup> It is of course not possible to denounce customary law rules which are part of *ius 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 guarantee 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.<sup>249</sup>

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 to 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,

<sup>247</sup> See Vienna Convention on the Law of Treaties, 23 May 1969, Article 60(5).

<sup>248</sup> First Convention, Article 63; Second Convention, Article 62; Third Convention, Article 142; Fourth Convention, Article 158.

<sup>249</sup> See Frits Kalshoven, *Belligerent Reprisals*, Leyden/Geneva, 1971, and *[CRC Commentary on the Additional Protocols]*, para. 3423-3459.

reprisals may be ordered only by the highest political authorities of the State concerned.

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<sup>250</sup> or the shipwrecked,<sup>251</sup> against prisoners of war,<sup>252</sup> against the civilian population in general,<sup>253</sup> or against hospitals or medical transports<sup>254</sup> 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.<sup>255</sup>

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.<sup>256</sup> 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

<sup>250</sup> First Convention, Article 46.

<sup>251</sup> Second Convention, Article 47. <sup>252</sup>

Third Convention, Article 13(3). <sup>253</sup>

Fourth Convention, Article 33(3). <sup>254</sup>

See footnotes 250 and 251.

<sup>255</sup> Protocol I, Articles 51(6) and 52(1).

<sup>256</sup> See *JCRC Commentary on the Additional Protocols*, para. 3423-3459.-

international humanitarian law and, in another respect, simply the expression of those principles.<sup>257</sup> 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 I 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.

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 thirdparty State is obliged to bring a suspect before its own court.<sup>258</sup> 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.<sup>259</sup> 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

<sup>257</sup> See footnote 185.

<sup>258</sup> See above, Section 6.C.a.

<sup>259</sup> Protocol I, 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.

worthwhile: the goal is human survival in war and the protection of human dignity.

## 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 1907
- 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 and Sick 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 and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. 10 April 1972
- Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques. 10 December 1976
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (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 II), 8 June 1977
- Convention on Prohibitions or Restrictions on the Use of Certain Con-

ventional 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

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