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Author(s): Olivier Durr

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Humanitarian Law of Armed Conflict: Problems of Applicability*

OLIVIER DÜRR

Legal Division, International Committee of the Red Cross, Geneva

The Four Geneva Conventions of 12 August 1949 and their two additional Protocols of 1977 are treaties aiming to protect victims in time of armed conflict. To ensure they should benefit these victims, the drafters defined simple conditions of application resting on facts, and they provided for an automatic application of these treaties rather than letting their application depend on the free interpretation of the parties to an armed conflict. The level of protection provided depends on whether it is a conflict of an internal, high-intensity internal or international nature. A certain margin of interpretation will subsist for the determination of an internal conflict because of the difficulties of fixing exact criteria. As the outbreak of a conflict normally takes place in a very sensitive political context, States may be inclined to deny the existence of situations leading to the applicability of these treaties and as a consequence not apply them as such. Although States may pragmatically respect and apply the content of these treaties in part or in whole, the origin of many of these violations can be found in this denial of applicability. As there is no supranational jurisdiction, respect for these fundamental rules protecting the human being must be implemented through a stronger sense of responsibility on the part of the international community.

1. Introduction

International humanitarian law (hereafter 'IHL') is applicable in times of armed conflict and is intended to protect the victims. The extent to which it provides that protection varies according to whether the conflict is international or internal. IHL contains clear definitions of the situations which it covers. States at war with each other, however, will often have differing interpretations of the facts. What one describes as occupation, the other will regard as liberation. Thus, States may deny the applicability of IHL or restrict its application. In the absence of compulsory international jurisdiction, the States themselves are competent to interpret the law. The United Nations and the ICRC, by some of their functions, each have a contribution to make on the subject. The purpose of IHL being to protect the victims, it is necessary to go beyond the political obstacles relating to its applicability and concentrate on respect in practice for its provisions. Finally even if human rights law falls out of the scope of this article, it should nevertheless be kept in

mind that at least its fundamental provisions are applicable and are to be respected concurrently with humanitarian law in time of armed conflict.

2. Applicability

2.1 *The Concept of Applicability*

A legal rule contains a series of conditions defining the specific situations for which the rule has been created. When all of the required, stated conditions are present, only then does the rule apply. As soon as a person gets behind the steering wheel of a car, he is subject to the rules of the road. The same is true of a pedestrian who wants to cross a street. For the rules of the road, the general conditions for application are simple and objective — the fact that the person intends to join the traffic in the streets is what makes that body of law applicable. There are rules within it whose application depends on more complex factors involving conditions or criteria which may be medical (e.g. intoxication), psychological (e.g. self-control) or subjective (e.g. error). One begins to see the difficulties sometimes involved in determining whether certain of the required conditions are present. Following an accident,

* The views expressed in this article are personal and do not necessarily reflect the views of the International Committee of the Red Cross.

the motorists may reach an amicable agreement as to what occurred, and the insurers often settle in a similar manner. In case of disagreement, it is always possible to take the matter to court where a judge will pronounce on the law and determine which rules are applicable, that is, he will determine for which rules the conditions of application are present. And the judge will be able, if need be, to enforce the application of the rules violated.

2.2 *The Absence of Binding Jurisdiction in Public International Law*

Applicability is determined in much the same way in international law inasmuch as there are conditions which must be present for a rule or body of law to be applicable. On the other hand, it is not always possible in public international law to have recourse to a judicial authority. This body of law governs relations between States and there is no binding supranational jurisdiction to settle differences between States except in cases where there is prior acceptance by the States of such an authority's competence. This is true of international humanitarian law, which forms part of public international law. For example, the Diplomatic Conference which was convened in Geneva in 1949 and resulted in the four Geneva Conventions (hereafter the Conventions), adopted the following resolution (Resolution 1):

The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the International Court of Justice.

Unless States to an armed conflict have made a previous declaration of acceptance of the competence of the International Court of Justice, recourse to it is not obligatory.

In spite of the many conflicts which have broken out since 1945 and the numerous disputes about the applicability of IHL which have resulted, this resolution has never been complied with.¹

Laudable though the wish of the Diplomatic Conference was, in practice one can-

not postpone humanitarian aid while waiting for a verdict which may be long in coming.

If, in addition to the problems involved in making an objective analysis of the conditions for application, there is also no supranational legal authority, the Parties to a conflict will tend to interpret the facts and even the law from their own point of view, and the subjective conclusion that IHL is not applicable will often in practice correspond to a violation of IHL. The extent and frequency of such violations will depend in part on the means available to ensure respect for this body of law.

3. *Applicability of International Humanitarian Law*

A distinction is traditionally made in public international law between the law of peace and the law of war. This simple distinction emphasizes the existence of a special body of law to be applied to war and indicates the general conditions required for its application — the existence of a war.

3.1 *International Armed Conflict*

Whereas in the past the application of IHL required that there be recognition by the States involved that a state of war existed, and that recognition be manifested through a declaration of war (Hague Convention relative to the Opening of Hostilities 1907, art. 1,2), the drafters of the Conventions relaxed this condition, which had allowed States to refuse to implement the rules of IHL on the pretext that there was no war because there was no declaration of war, and retained only objective and simple conditions.

In order to restrict the scope which the States had for defining what was war, the drafters of the 1949 Geneva Conventions added to the concept of war that of armed conflict. It must be remembered that these Conventions were drawn up just after the 1945 United Nations Charter, the primary purpose of which is the maintenance of peace and therefore the peaceful settlement of disputes. It reaffirmed the illegality for a State to commit armed aggression (Recourse to war was declared illegal by the Kellogg-Briand Pact 1928). Although by 1949 the

conviction that there would be no more war had disappeared, hope, as expressed in Resolution 8 of the 1949 Conference, remained:

The Conference wishes to affirm before all nations: that, its work having been inspired solely by humanitarian aims, its earnest hope is that, in the future, Governments may never have to apply the Geneva Conventions for the Protection of War Victims; that its strongest desire is that the Powers, great and small, may always reach a friendly settlement of their differences through cooperation and understanding between nations, so that peace shall reign on earth for ever.

Hope nevertheless yielded to a certain degree of realism dictated by humanitarian concerns. Article 2 common to the four Conventions reads as follows (paragraph 1 and 2):

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

For example, the First Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, applies from the moment a soldier is wounded. The Third Geneva Convention, which relates to the treatment of prisoners of war, applies from the moment a soldier falls into the hands of the enemy. There must be of course an armed conflict. Therefore, for example, the crossing of the border by a soldier or the capture of a spy will not automatically make the Conventions applicable. According to the Commentary (Pictet 1958):

Any differences arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.

Paragraph 1 states that the Conventions

shall apply 'even if the state of war is not recognized by one of them'. As a matter of fact it should be understood that the Conventions are applicable even if both parties or all the parties to an armed conflict do not recognize a state of war. In the preparatory works of the Diplomatic Conference, the Conference of Government Experts recommended that the Conventions should be applicable to 'any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned' (Pictet 1958). The Diplomatic Conference decided to have the express term 'armed conflict' in the article dealing with the application of the Conventions because this notion is an objective one which does not require the subjective opinion of States involved in such a situation.

The second paragraph of Article 2 applies to situations in which there are no armed hostilities, for those would be covered by the first paragraph. The level of hostilities required for the first paragraph to take effect is so low that the second paragraph covers situations which are more theoretical than real and may appear almost superfluous. As the occupation of a foreign territory implies the use of force, meeting resistance or not, it corresponds to an armed conflict. Thus, as soon as civilians are submitted to the occupying authority, they will be protected by the Fourth Convention. The reason for this second paragraph may be due to a desire to cover all possible situations. It is also possible that the concept of armed conflict was so new, even to the drafters of the Conventions, that they had not grasped all that it can cover. This observation is meant to underline the fact that when a new set of laws is adopted, thinking, mentalities and practices continue to be formed by the mould of the previous law and the new rules are sometimes difficult to impose. States which are, for example, involved in an armed conflict — this is a question of fact — will try, however, to demonstrate with false legal arguments the absence of war or the non-existence of humanitarian obligations by describing their move as a liberation of a territory or invoking an invitation made to them to occupy a territory.

In this connection, the States Parties to

the Geneva Conventions judged it necessary in 1974 to reaffirm and develop IHL, and a diplomatic conference was therefore held in Geneva from 1974 to 1977. It ended with the adoption of two Protocols additional to the Geneva Conventions. The first relates to international armed conflicts, the other to non-international armed conflicts. Article 1 (3) of Protocol I reads as follows:

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

This article therefore does not change the conditions for application contained in the 1949 Geneva Conventions.

Thus we see that the conditions required for the Conventions to be applied to an international armed conflict are simple and easily discernable. That is all the more desirable as this body of law seeks to protect the victims and is the result of striking a balance between military necessity and the needs of humanity. It would therefore be unacceptable if it enabled a party to a conflict to refuse to implement the Conventions and the Protocols due to the complexity of the conditions for its application.

For these treaties to be applicable, those to whom they are addressed must be subjects of international law bound by them. They must be one of the following:

- a State party to the Conventions and possibly also to Protocol I, in accordance with Art. 2, para. 1, common to those Conventions, and Art. 1 (3) of Protocol I;
- a State not party to those instruments, if that State accepts and applies the provisions of the Conventions and the Protocol (Art. 2, para. 3, common to the four Conventions and Art. 96 (2) of Protocol I). A declaration to this effect by the State not formally party to those instruments is not necessary; it is enough if it acts accordingly;
- a people if it is engaged in armed conflict in the exercise of its right to self-determination and if it meets the conditions laid down in Article 1 (4) of Protocol I. Its wording is as follows:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

As stated in the Commentary of Article 1 there is no definition of what constitutes a people, in international law:

The essential factor is a common sentiment of forming a people, and a political will to live together as such . . . This means simultaneously that there is a bond between the persons belonging to this people and something that separates them from other peoples: there is a common element and a distinctive element.

However most authors believe that a people needs a certain recognition by the international community in order to fall within the definition of Article 1 (4).

In order for the Protocol to be applicable, a unilateral declaration must be addressed to the depositary in which the people indicates its wish to respect the Protocol (Protocol I, art. 96 (3)). The consequence of this declaration is that the Conventions and Protocol I become immediately applicable between the Contracting State and the authority which made the declaration. This authority bears the same rights and obligations as a State party to the Conventions and the Protocol.

3.2 *Non-international Armed Conflict*

While it is a relatively simple matter to determine the existence of an international armed conflict, determining the existence of a non-international armed conflict presents several difficulties. In the 1949 Geneva Conventions, there is only one article referring to this type of situation. This is Article 3 common to the four Conventions, the first sentence of which is as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

The drafting of this article gave rise to lengthy debates at the Diplomatic Conference, largely on the question as to the point at which an armed entity, other than governmental, could be considered as a 'Party to the conflict'.

Another question was what degree of intensity armed clashes had to reach before they could be termed armed conflicts. The Convention required only a very low intensity in armed clashes for the rules relating to international armed conflicts to be applied. Could this 'minimum' degree of intensity also be used *mutatis mutandis* for non-international armed conflicts?

The Commentary gives the following reply to this question:

Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities (Pictet 1958, p. 36).

But, as the Commentary emphasizes, Article 3 must be implemented as widely as possible because, according to it, it calls for the observance of only a few rules which were recognized by the international community as essential long before the adoption of the 1949 Conventions.

This interpretation is reinforced by Art. 1 of Protocol II of 8 June 1977 (thus drafted after the above-quoted Commentary) additional to the 1949 Conventions, which states that:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The wording of this article creates conditions for application which are not present in Arti-

cle 3 common to the 1949 Conventions, i.e., responsible command and a certain degree of control of the territory by a party. Unlike Article 3 of the Conventions, it expressly excludes situations of internal disturbances and tensions. The scope of its application is therefore smaller. Protocol II, the threshold of which is higher, would not cover, for example, a situation of urban guerilla in which insurgents are neither in a position to take care of wounded and sick nor to detain prisoners in decent conditions. Neither Protocol II nor Article 3 would apply, for example, in cases of the use of armed forces to quell sporadic demonstrations or to remove strikers from their place of work.

Finally, it must be remembered that failure by one party to a conflict to respect IHL does not relieve an adversary of the obligation to respect it; it must at least observe the rules relating to the protection of the human person (Vienna Convention on the Law of Treaties 1969, art. 60, para. 5). As it is the protection of the victims which interests us, it can be considered that there is no general condition in which the application of IHL could be suspended. Thus, a State might not subordinate, for example, the repatriation of prisoners of war which it holds to a political condition such as the recognition of a State, as in the Indo-Pakistanese conflict 1971 (Forsythe 1975, p. 26).

A further provision should be mentioned which does not directly affect the conditions for the application of Article 3 common to the Conventions or of Protocol II. This is to be found in the final paragraph of Article 3 and also applies to Protocol II:

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

This rule is an implicit reminder that the essential purpose of the Conventions is to protect the victims and that efforts to ensure respect for the Conventions can never in themselves imply the attribution of a certain status to a Party to a conflict. This rule was intended to soothe the fears of the States that rebels could use the implementation of Article 3 to claim the status of subject of public international law, (i.e. having the same rights as States).

3.3 *Mixed Conflict*

International relations have developed to the point where that which affects one State also affects the other. The fabric of alliances and sympathies within each bloc has grown to the extent that there are many States which cannot engage in a conflict without taking with them a whole series of allied or friendly States, or at least putting those States in an awkward position, to say nothing of States which may find themselves bound by the same type of mutual defence treaty with two States who suddenly enter into armed conflict with each other. Moreover, as a direct confrontation between the great powers would bring with it the danger of global war, their differences tend to find expression through conflicts between small States or within States.

As the United Nations Charter (art. 2 (4)) reaffirmed the illegality of the use of force in international relations for most situations, the only type of armed intervention which remains possible is in situations not covered by the rules of the Charter, that is, those falling within the competence of the States — internal tensions and disturbances approaching civil war and often exacerbated by foreign intervention. When such interventions take the form of direct military interference in the internal conflict, for example through the sending of troops, the conflict becomes internationalized. It is then said that there is a mixed conflict or an internationalized internal conflict. Thus in Angola the conflict between UNITA and the government is also an international conflict between Angola and South Africa. In Kampuchea, the conflict between the armed forces of the government of Democratic Kampuchea and Vietnamese troops is also a conflict between the forces of Democratic Kampuchea and the forces of the government of the Peoples' Republic of Kampuchea (Phnom Penh).

States whose armed forces take part in a conflict must respect the rules of IHL, but there must also be agreement on the type of conflict involved — an international armed conflict requiring the implementation of IHL in its entirety, an internal conflict entailing the application only of Article 3 common to

the Conventions and possibly of Protocol II, or a combination of the two types of conflict, with the selective application of IHL (Schindler 1979). The simple fact is that, since States which intervene in such a way are reluctant to admit that they are directly involved in an armed conflict, their attitude further complicates the questions of applicability.

4. *Problems of Applicability*

4.1 *IHL Has Evolved more Rapidly than our Way of Thinking*

It is said that armies are always well prepared to fight the previous war. That is also true of governments with regard to international humanitarian law. IHL above all protects the victims of international conflicts (classic conflicts and the rare cases of wars of liberation); it provides only a minimum of protection for the victims of internal conflicts. In the years since the Second World War, traditional international wars have been rare but internal conflicts innumerable. The latter are complicated by foreign intervention, a situation for which humanitarian law has not established sufficiently clear rules. IHL develops only by fits and starts — following disastrous experiences such as the Second World War which resulted in the adoption of the four Geneva Conventions — and, paradoxically, when IHL develops, general thinking does not follow suit. It might perhaps also be said that, once the trauma of the last World War had passed, people reverted to the old reflexes.

Although the Geneva Conventions lay down objective conditions for their application, many Parties to conflicts have nevertheless raised objections based on old, outdated law such as the absence of a declaration of war, failure by the adversary to respect the rules (reciprocity) and the exclusive sovereignty of the State in internal conflicts. In addition, it must be admitted that humanitarian law is still insufficiently well known and that the authorities sometimes forget to implement it, or do so incorrectly.

4.2 *Prohibition of the Use of Force*

The use of force by a State — apart from self-

defence and concerted action by the United Nations — is prohibited by the UN Charter.

When a conflict breaks out, there is, in principle, normally an aggressor and a victim of aggression. But the distinction is often difficult and superficial because armed conflicts are rarely spontaneous. They usually follow a slow deterioration of peaceful relations between States. No State readily accepts being called an aggressor. It might be said that, in practice, this question does not affect IHL because the question of who is the aggressor is not taken into consideration when the conditions for application are being studied. But prohibiting the use of force has made States wary of any action on their part which could have the appearance of aggression. The prohibition of the use of force can thus constitute an obstacle to the proper application of IHL. A State will naturally seek to preserve its network of international relations which might be endangered by the interpretation given to its military action. Thus, in the eyes of the government of the Republic of South Africa, their armed intrusion in Southern Angola was not an armed attack against Angola but a so-called justified hot pursuit 'on land' against SWAPO guerillas, constituting merely an incident of non-international armed conflict, or of internal troubles.

4.3 *When the Belligerents' Interpretations Agree*

The Parties to an armed conflict may all feel that they are not taking part in such a conflict. There exists confusion, voluntary and otherwise, about the concept of armed conflict under IHL. Parties to a conflict speak of a 'police action' or the existence of 'differences' and seek to settle those differences among themselves without the intrusion of public international law or international organizations. For instance, an intrusion of armed forces on the territory of a third State in pursuing insurgents might be presented as an operation of police forces against brigands having neither the character nor the aim of an attack of armed forces and therefore not implicating the existence of an armed conflict. These same Parties often have no compunction about publicly denouncing

their adversary as an aggressor in United Nations fora. Article 2, paragraph 1 common to the four Conventions states, however, that the Conventions apply to a conflict even if a state of war is not recognized by one of the belligerents. But the purpose of these Conventions is to protect the victims, and the Parties to the conflict cannot prevent that protection by tacit agreement (Pictet 1958, p. 21).

4.4 *The Argument that Diplomatic Relations are Continuing*

Recalling Clausewitz' theory that war is only the continuation of diplomacy by other means, it is a fact that many States do not sever diplomatic relations with each other when they engage in armed conflict. The 'dialogue' between them continues on several levels: by turns with the iron fist and the velvet glove. The maintenance of diplomatic relations has been given as an excuse for not observing humanitarian law on the pretext that diplomatic representatives will be able to ensure the protection of their compatriots while, in reality, each Party to the conflict denies the facts and no one deals with the victims' plight. Further, a Party to the conflict may have different interests than those of the victims. An example of this tendency was the attitude of China towards its own soldiers held by India in the 1962 Indo-Chinese border war (Forsythe D. 1976, notes p. 55).

4.5 *The Neutrality Argument*

It can happen that a party to an internal or mixed conflict makes a military incursion into the territory of a third State in order to attack troops who have sought refuge there or to make a demonstration of force. The third State may consider itself neutral and refuse to apply IHL on the grounds that it is not engaged in armed conflict with the State making the incursion but merely defending its territory. That is certainly an erroneous interpretation or an abuse of IHL.

4.6 *The Sovereignty Argument*

Sovereignty here is meant internally, 'in matters which are essentially within the domestic jurisdiction of any state' (UN Charter, art. 2

(7)). Sovereignty is quite regularly flourished when it comes to the question of whether to apply the provisions of Article 3, applicable to non-international armed conflict, that is, when the legitimacy of a government is contested by another party. The sovereignty argument often means that the State wishes to affirm its sovereignty at all costs because it is being challenged, is shaky or simply non-existent. When a State signs a treaty, it does so as a sovereign entity. From that point on, it cannot refuse to observe the provisions of the treaty on the grounds that they impair its sovereignty. In addition, internally, sovereignty implies respect for the confidence which the people have placed in its rulers, but confusion is often created by the overlapping of the concepts of sovereignty and legitimacy when applied internally.

It is true that the rules which constitute the minimum of IHL to be applied to internal conflicts make up part of an article which is included in all four of the Geneva Conventions and that the application of those rules may appear, in the eyes of the government, to be an admission that the country is split; in other words, that the government has failed to restore order and that the rebels have won. It should, however, be remembered that the last paragraph of Article 3 states that the application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

It is an interesting fact, moreover, that no State, no government, denies the legitimacy of Article 3's provisions which constitute a minimum of IHL to be applied. Nevertheless, when an internal conflict breaks out, governments tend to deny the applicability of those rules while at the same time swearing that, although the rules are not applicable, the authorities are abiding by their spirit. What the authorities are, in fact, denying is the existence of an internal conflict. They will accept, for example, that there are bandits, agitators, possibly even internal tension and disturbances, but rarely the existence of an internal conflict.

The absence of a clear legal definition of what an internal conflict is leaves a certain amount of room for interpretation. However, as we have already seen, the draf-

ters of Article 3 intended it to be applied as widely as possible despite the fact that, in the discussions which preceded its adoption, there was a strong current of opinion against the intrusion of humanitarian law into internal affairs. It is tempting to point out that the minimum implementation of humanitarian rules which Article 3 requires would be obligatory even if the article did not exist, since it is based on customary rules.

It is difficult to imagine a government ordering, for example, that murder, torture or hostage-taking be committed.

The preceding list of arguments denying the applicability of IHL is, of course, not complete. That is not, however, a reason for despair, for States do not always deny the applicability of IHL and it can happen that, when a State does so for particular reasons, it nevertheless implements it and respects all or part of its provisions. Thus, for example, Israel denies the applicability of the Fourth Geneva Convention, relative to the protection of civilian persons in time of war, to the occupied territories. It has nevertheless undertaken to respect certain of its provisions. In non-international armed conflict, States often deny such a situation but accept however that the ICRC visits persons held in connection with the prevailing situation on the basis of its statutory right of initiative and not on the basis of Article 3 common to the Geneva Conventions (Forsythe D. 1976, p. 46).

When there is a refusal to apply IHL to a situation objectively covered by it, the result is often a failure to respect obligations under it. When the applicability of IHL is not in dispute, violations raise the question of how effectively the law is applied; denying its applicability raises the additional problem of classifying the situation.

5. Competence to Classify a Conflict

When the victims of conflict receive no protection because there is a refusal to apply IHL, classifying the situation becomes an issue of some importance and it is therefore necessary to determine who is competent to classify it.

5.1 *An International Court*

As we have seen, IHL does not contain a provision for appealing to a legal authority to classify a situation and determine the body of law applicable to it. The Diplomatic Conference of 1949 nevertheless recommended in Resolution 1 that differences over interpretation or application of the Conventions be submitted to the International Court of Justice (ICJ). Two States in conflict would each have to make a declaration accepting without reservation the ICJ's competence. But there is rarely dispute between the parties as to the existence of a conflict when it is of the traditional international type. It may be that both parties accept the existence of the conflict, or that neither accepts it, or that they have differing interpretations, but they respect the provisions of IHL. It is also conceivable that none of the parties sees a political advantage in the ICJ ruling on the case. In fact, the vast majority of conflicts are either internal or mixed. In the first case, there is the fact that the ICJ is open only to States;² a rebel group would therefore not be able to call upon it to recognize the existence of a conflict. In the other cases, States taking military action against other States will obviously be unlikely to accept the competence of an international court.

5.2 *The States*

At this point, it is the States themselves which decide how a conflict is to be categorized. It is conceivable that third States party to the Conventions could appeal to the ICJ to rule on whether there is an international armed conflict or not. Indeed, the States Parties to the Conventions have undertaken not only to respect them but to ensure respect for them, thus proving that there is a legal interest worthy of protection. But one may wonder whether States would be willing to do this.

5.3 *The Governing Bodies of the United Nations*

In its early years, the UN concentrated on maintaining peace and respect for human rights, especially as the possibilities for using force had been vastly restricted by the UN Charter. Since 1968,³ it has been turning its

attention to respect for IHL. The General Assembly, the Security Council and the Commission on Human Rights regularly mention conflicts and ask that IHL be respected in them. This change of attitude better reflects the goals of the Charter when it comes to finding a negotiated settlement to a conflict.

In all likelihood, the major UN meetings will only reflect the armed dispute between given States. On the other hand, if the UN were to go beyond the political quarrels over classification, and prove that it was capable of ensuring respect for IHL in armed conflicts, it could be given new life.

5.4 *The ICRC*

A judge not only pronounces on the law; he can also convict someone who has committed an illegal act. It is clear that the ICRC has no formal competence to classify conflicts and even less to pronounce on guilt. Nowhere do the Geneva Conventions assign such a function to the ICRC and the institution would not wish it because it does not correspond to its role as a purely humanitarian organization. However, the Geneva Conventions give the ICRC a right of initiative in the area of humanitarian assistance (Sandoz 1979), and, in addition, the specific right to inspect the implementation of rules relating to the protection of prisoners of war and civilian internees. Moreover, the Statutes of the International Red Cross and Red Crescent Movement⁴ give the ICRC the mandate of working for the faithful application of the humanitarian Conventions (Art. 5, 4 ch. 2, lit. c). When the ICRC judges that the needs justify it to take action, it offers its services.

If there are prisoners of war, for example, it will ask the Detaining Power for permission to visit them. It will generally adopt a pragmatic attitude, basing its approach on the fact that there are victims in need. If a State refuses to allow the ICRC to carry out its mandates under the Conventions, the ICRC must justify its action on legal grounds. To do so is an implicit classification of the conflict, as the ICRC feels that the conditions for the application of the Geneva Conventions are present.

In adopting a law-based approach, the ICRC is very careful to remain strictly neutral. This is made easier in that the applicability of IHL depends on objective conditions and the ICRC's dealings with governments generally remain confidential.

The ICRC has often been criticized for its great discretion. It is discreet about what it sees, but it announces what it does and what it is prevented from doing. As the ICRC has received a mandate from the International Conference of the Red Cross to ensure the faithful application of humanitarian Conventions, it must also report to the Conference on what it has done to discharge that mandate. Thus, at the last Conference, which was held in Geneva in October 1986, the President of the ICRC singled out 15 conflicts in which IHL either received *de jure* or *de facto* application but was violated, or in which application was refused and the law violated.

In his report, the President stressed that he was mentioning only those situations where there were problems in the application of IHL (Annex). In addition, in its Annual Reports, the ICRC has classified certain conflicts: 14 conflicts were mentioned in 1985, 13 in 1984 and 12 in 1983. They were described as international armed conflicts, internal armed conflicts or, where there is disagreement (as in Kampuchea and Afghanistan), simply armed conflict.

6. Conclusion

In the absence of an effective international police force, the subjects of international law are always tempted to neglect their obligations and respect for the law has to depend on the risk of real penalties.

It is possible to conceive a specialized and standing forum made up of the States Parties to the Conventions which would be competent to classify conflicts and enjoin the parties to those conflicts to respect IHL. As we have seen, this is the type of objective set out in the UN Charter (Bierzanek R., 1984, p. 289). The Charter and the Geneva Conventions are treaties which more or less the entire international community has signed. By becoming party to the latter, States undertake the twofold obligation of

respecting and ensuring respect for these treaties.

The first impulse of someone imbued with the humanitarian spirit is, of course, to rescue and protect. But this act must be made possible. States in conflict automatically deny having committed aggression, either justifying or refusing to acknowledge their military involvement and denying any suggestion of atrocities — a stance which implies that the norms themselves are recognized as just and necessary. When, in addition, there are clear-cut pronouncements on the classification of conflicts, the possibilities for violating IHL will dwindle, because interpreting the situation will no longer be the prerogative of the belligerents themselves. Transgressions will then be affronts to the community of States as a whole.

This goal can be reached only in a community of States which has found unity through a universal ideal, a community in which each State is profoundly convinced of the necessity for the fundamental norms to be respected in their entirety, whether they are part of IHL, human rights or other bodies of law.

NOTES

1. The Court recently had to rule on the applicability of IHL but in different circumstances, the ruling by the International Court of Justice of 27 June 1986, *Nicaragua vs. United States (on the merits)*.
2. Statute of the ICJ, art. 34 (1): 'Only States may be parties in cases before the Court'.
3. International Conference on Human Rights, held in Teheran in 1968. It described IHL as human rights applicable in armed conflicts.
4. The Movement's members were, as of October 1986, 165 States Parties to the Geneva Conventions, 144 National Red Cross or Red Crescent Societies, the League of Red Cross and Red Crescent Societies and the ICRC. Each member has one vote.

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ANNEX

Report of Mr Alexander Hay, President of the International Committee of the Red Cross. 'Respect for International Humanitarian Law — ICRC Report on its Activities' presented under item 2.1 of the Agenda for Commission I, Twenty-fifth International Conference of the Red Cross, Geneva, October 1986.

'... there are certain situations which we think this Conference should concentrate on in the coming days. Those situations all have in common the fact that they are *armed conflicts*, that is situations in which the Geneva Conventions apply. Some of them are international armed conflicts in which the Conventions are applicable in full. Others are non-international armed conflicts in which only Article 3

common to the four 1949 Conventions, and also possible Protocol II of 1977, applies. Still others are armed conflicts, the international or internal character of which is contested by one of the parties: these are often "mixed" situations: internal conflicts which have been "internationalized" by the presence of foreign troops, considered as occupation by one side and as military assistance by the other. Finally, there are situations of occupation to which the Fourth Geneva Conventions applies, in the ICRC's opinion at least.

In any case, considering that these conflicts are covered by the Geneva Conventions and bearing in mind the obligation which all States party to the Geneva Conventions have to "ensure respect" for those Conventions, it is natural for this Conference to concern itself with the ICRC's possibilities of taking action in all of these armed conflicts. This concern is especially justified with regard to armed conflicts during which the ICRC has had no access at all to the captured combatants, such as in Iran for the last two years and in Afghanistan, Kampuchea, northern Chad, Angola and Mozambique. This has been the case despite the fact that the ICRC is currently carrying out major relief operations in several of these countries.

It would also be useful for this Conference, however, to give its attention to situations in which the ICRC is present and does have access to captured combatants, prisoners of war or civilian internees, but in conditions which could and should be improved: this is so in Iraq and Iran, in Lebanon, in the Western Sahara, in Morocco, in Algeria, in the Ogaden, in Ethiopia, in southern Chad, in Namibia, in Israel and in the occupied territories.

There are other armed conflicts in this troubled world of ours in which the ICRC is able to act without major restrictions and for which we do not have to request the particular attention of this Conference. Likewise, in the situations we are about to describe, the picture is not as black as could be, and the ICRC's efforts have sometimes met with positive results . . .'