THE 1977 GENEVA PROTOCOL ON INTERNATIONAL ARMED CONFLICTS — AN APPRAISAL OF THE LAW RELATING TO PRISONERS OF WAR

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CHAPTER I

IDEAS AND ISSUES

In the history of mankind, war has always held a central place. Of the recorded 3,400 years, 3,150 years have been of war.[1] In fact, the history of most nations reveals the importance of wars, so much so that it can be completely narrated in terms of wars won and wars lost. War is a manifestation of the basic, animal instinct in man which, at times, tends to get out of control and degenerate into the rule of jungle. Though in national societies, brute force or violent self-help has been replaced by organised force of the society in the form of police, the international community of states has not yet attained that sophistication. Despite innumerable efforts to outlaw war and other illegal uses of force, the stronger states have always subdued the weaker ones by force.

What exactly is war? "War", according to a standard treatise of international law, "is a contention between two or more states, through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases".[2] This definition

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1 Jean S. Pictet, The Laws of War (Geneva: International Committee of the Red Cross, 1961), p.3.

2 L. Oppenheim, International Law, vol. 2, edited by Hersch Lauterpacht, 7th edition (London: Longman Green, 1952), p.202.

truly reflects the objective of war which has been true for all times, ancient and modern. So, once the vanquished state submits to the victor and accepts its terms and conditions, no animosity and hatred is expected to remain between the contenders. This "ideal situation" is expected of the human beings because the term "human" here denotes all that is good in man, i.e., a man who is good to his fellow beings in terms of being just, useful, reasonable and generous. But, as Thomas Hobbes emphasized, man is, by nature, cunning, brute, nasty and deceitful. And more so, under the actual conditions of warfare. To curb all these negative traits obtaining in human nature, there evolved certain basic norms. These norms, in the international sphere, came to be regarded as the principles of humanitarian law.

Humanitarian law, in the wider sense, is that system of legal rules which ensures protection of human beings in times of great distress, as a being enduring suffering, devoid of defences and seeking shelter and comfort under the law. But interpreted restrictively, humanitarian law implies "the collection of rules of international law which protect persons exposed to the misfortune of war".[3] It is the latter definition which is employed in this study.

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3 Adolfo Maresca, "The General Concept and the Sources of Humanitarian Law", Seminar on the Teaching of Humanitarian Law in Military Institutions (Sanremo, 1972), p. 39.

Subjects of Humanitarian Law

Some of the subjects of international law are also the subjects of humanitarian law. The foremost being belligerent States, neutral States like the Protecting Powers and certain International Humanitarian Organizations like the International Committee of the Red Cross Committee, the Order of the Knights of Malta, etc. But the most important aspect of the humanitarian law is in the personal sphere of the application of its rules, i.e., the persons who are protected as a whole for reasons of being legitimate belligerents. The definition of "legitimate belligerent" has been subject to change from time to time resulting in the variance of the scope of the concept of prisoners of war.

The Concept of Prisoner of War under Humanitarian Law

After the wounded and the sick, those that Henry Dunant, the founder of the Red Cross, thought required help and protection in the battlefield and thereafter, were the prisoners of war. A prisoner of war is one of the most helpless and vulnerable creature who could be subjected to the extreme licenses of war.[4] His has been a most precarious and humiliating situation during wars of all

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4 Richard Baxter, "So-called 'Unprivileged Belligerency: Spies, Guerrillas and Saboteurs", British Yearbook of International Law, vol.28 (1951), p.326.

ages all over the world. Passion and fury run high during combat, and there is a maddening frenzy to kill as many enemy personnel as possible, thus wrecking the enemy's resistance. And, who could be an easier prey than an enemy personnel in your very hands, or who, in other words is called a prisoner of war. However, this was not to be, because the emergence and gradual development of humanitarian law changed the whole concept of captivity. It strived to avoid the 'unnecessary' and 'unjust' personal suffering to the human-tools. It has been stated that "/W/ar captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in war".[5] The concern for humane treatment in war stems from the fact that the combatants, too, are human beings. This very fact entitles them to an irreducible minimum standard of treatment even at the hands of their enemy. A prisoner is first a human being and then only a national of a country or a member of some organisation. Since combatants from the side of any of the belligerents can be captured or wounded or shipwrecked, there is a common concern with this aspect of humane treatment of the 'human tools'.

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5 Judgement (1946) Cmd. 6969, at 48. Cf. Julius Stone, Legal Controls of International Conflict (Sydney: Maitland Publishers, 1954), p.651.

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Included in the category of prisoners of war are the wounded and the sick soldiers fallen into enemy hands, or those combatants who have laid down their arms and surrendered or captured. Also included are the members of the staff and of the auxiliary services who habitually accompany armies in the field. Members of militias and other volunteer corps belonging to a party to the conflict, operating in their own territory, outside or in an occupied territory are regarded as prisoners of war.

In common parlance, a prisoner of war is any person who has fallen in the hands of the enemy whether a combatant or a civilian, whether captured lawfully or unlawfully. In a restricted legal parlance it can be said that a person, when captured during an armed conflict is entitled to certain rights, privileges and immunities only if he satisfies a few basic conditions of the laws of war. Because of the preferential treatment, each captured enemy personnel initially claims to be treated as a prisoner of war. Humanitarian law endeavours to grant this privileged status to more and more persons involved in authorised combatancy. This is because he was engaged in doing something legal. Once he is recognised as a person legally entitled to such status then, while under detention, whatever else is done to him, his right to life and security of person cannot be tampered with. On the other hand, terrorists, brigands and pirates are treated as ordinary criminals because they indulge in ab-initio illegal acts.

In the laws of war the position of prisoners of war is unique because all through their captivity, which is a temporary phase, the prisoners remain citizens of the state of their origin and receive all such protections that their state provides. However far they may be from their state of origin, both the captor and the captives would be required to account for their acts of omission and commission. While on the one hand, a prisoner of war is required to respect the rules of his captor, on the other, he continues to owe allegiance to his state of origin.[6]

There are two kinds of captivity. One is based on the quarantine theory and the other on the principle of continuation of hostility even after captivity.[7] The quarantine theory rests, to some extent, on reciprocity. The captor takes a captive out of the battle, accords him prisoner of war status, treats him humanely and protects him. The captive continues to owe allegiance to his state of origin, refrains from taking part in the battle and becomes temporarily passive. During this time he is expected to obey certain rules, regulations and orders in force in the armies of the detaining power.

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6 Michael Walzer, "Prisoners of War : Does the Fight Continue After the Battle?", The American Political Science Review, vol.63 (1969), p.777.

7 George S. Prugh, "Prisoners of War : The P.O.W. Battleground", Dickenson Law Review, vol.60, (1956), pp.123-38.

It is evident that Articles 3-5 of the 1949 Geneva Conventions accept this theory.[8] The other theory treats captivity of prisoners of war as the termination of one kind of combat. Both the captor and the captive continue to fight in their own ways. The detaining power subjects its prisoners of war to all kinds of hardships, who in turn ignore the obligations imposed on them. This theory is contrary to the principles of humanitarian law according to which the sole purpose of taking prisoners of war is to prevent those persons from reengaging in active hostilities.

The treatment meted out to the prisoners of war has always, with the changing circumstances of different times, changed. And so has its scope. The categories of prisoners that are granted protection under humanitarian law have been gradually increasing and the recent 1977 Protocol on International Armed Conflicts Additional to the 1949 Geneva Conventions has broadened the scope of its application.

Prisoners of war and an Assessment of the Scope of the Protocol

The relationship between the scope of applicability of the humanitarian law and the prisoners of war is too obvious. The protagonists of human rights advocate widest possible application of protective measures to prisoners of war. This is a natural corollary to the developments

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8 George S. Prugh, "The Code of Conduct of the Armed Forces", Columbia Law Review, vol.56 (1956), p.682.

taking place in the sphere of human rights. After all, as stated by President Woodrow Wilson, "/W/hat difference does party make when mankind is involved"?[9] In the field of human rights, the individual, not the state or the Government is regarded as the foundation of freedom, justice and peace in the world,[10] and as such every individual is equal in dignity and rights. An individual's inherent right to life is endorsed and that he cannot be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[11] Recognising the importance of individual, Hersch Lauterpacht has said: "International law, which has excelled in punctilious insistence on the respect owed by one sovereign state to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign state".[12]

Deriving the importance of an individual from human rights there started efforts in making captivity bearable for prisoners of war and bringing more and more categories

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9 James A. Joyce, The New Politics of Human Rights (London: The Macmillan Press, 1978), p.179.

10 Preamble of the Universal Declaration of Human Rights, General Assembly Resolution 217A(III) of 10 December 1948.

11 Articles 6 and 7 of International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966.

12 H. Lauterpacht, International Law and Human Rights (London: Stevens and Sons Ltd., 1957)

of people under the purview of the status of prisoner of war. The efforts found their culmination in the 1977 Protocol on International Armed Conflicts. Earlier, the law extended only to cases of declared wars, even if the state of war was not recognised by one of the parties and in the case of occupied territories. Extension of the scope, by means of Article 1 of the Protocol, implies that the peoples fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination would be granted prisoner of war status. This is of crucial importance in the present day international relations when hostilities of this nature have been going around in West Asia, South Africa and Namibia, and at the time when the Protocol was in the process of being framed, in Angola and Rhodesia. The problem can be best understood by two instances before the Diplomatic Conference, where the International Committee of the Red Cross (ICRC) appealed to the parties concerned to apply the law. The instance was in the case of Zimbabwe (Rhodesia) and another in Israel. In the former case the ICRC appealed in February 1977 to the leaders of all the factions in the conflict to respect and apply humanitarian law in their treatment of the prisoners of war, wounded and sick. It appealed to Joshua Nkomo and Robert Mugabe of the Patriotic Front, to Bishop Muzorewa, the Reverend

Ndubaninghi Sithole and to Prime Minister Ian Smith to grant it facilities to visit the prisoners and grant them humanitarian assistance. It sought special permission to visit the nationalist fighters captured while bearing arms.

Another instance is that of Israel vis-a-vis its occupied territories in Palestine, Jordan, Egypt and Syria. In March 1977, there was a hunger strike by Arab civilian detainees in the Ashkelon prison.[13] The ICRC visited the prison to listen to the strikers and to see the humanitarian measures taken. Most of them were condemned to spend their lives in limbo because the Israelis regarded them simply as terrorists and murderers who were worse than ordinary criminals. The prisoners considered that their fight was for a noble cause and that they deserved prisoner of war status. The Israelis, on the other hand, thought that accordance of prisoner of war status would tantamount to the recognition of the Palestinian organisations. These two cases highlight a fact that where majority of the civilian population take up arms to fight a colonial power, a racist regime, or an enemy in an occupied territory then these civilians are no longer regarded as civilians, i.e., their capture by the enemy would not render them mere common criminals but

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13 Joyce, n.9, pp.69-72.

something above it which concerns the international society as a whole. Now, how are these peoples to be treated - by civilian standards or the belligerent standards? Article 1 of the Protocol has now internationalised such conflicts - a phenomenon which had been gathering momentum ever since the adoption of the Charter of the United Nations and came to climax in the 1960s decolonisation process. This elevation of the national liberation movements from the municipal to the international level has cut short the otherwise frustrating bottleneck of "domestic jurisdiction" which had hitherto always hindered taking any action regarding these movements.

The extension of the prisoner of war status to the above mentioned categories has widened the scope of the humanitarian law to the much-deserving category of guerrillas. Since the opponent in all cases is invariably far more strong, an open contest between the two belligerents becomes impossible. The earlier law required certain preconditions to be fulfilled before granting the prisoner of war status, which was impossible for the guerrillas of these movements to do, and thus to get such status. They were treated, incredibly, like ordinary criminals.

Kindered to the guerrillas has been the problem of spies and merceneries, under humanitarian law. None of these two has been accorded the status of prisoner of war even under the Protocol, but under the impact of

"liberal wave" from the protagonists of human rights now the term "spy" has been defined in such a way that certain acts of the members of armed forces or the residents of the occupied territory are not regarded as equivalent to espionage. But still no mercy has been shown to mercenaries as such. The Protocol advocates a more liberal treatment to the enemy personnel hors de combat and to those persons parachuting from an aircraft in distress.

Apart from these provisions, having a direct bearing on the prisoner of war status, the Protocol deals with many indirect, but equally important provisions with regard to prisoners of war.[14] The institution of Protecting Power has been elaborately dealt with. Similarly, provision has been made to disseminate the knowledge of the Protocol and the Conventions among the members of armed forces and civilian population. And lastly the irreducible minimum guarantees - the fundamental guarantees - to all those persons in the power of the enemy, whether those persons are entitled to the prisoner of war status or not, has been addressed. Violations of these provisions have been declared as grave breaches of the Protocol and the Conventions, and consequently punishable as war crimes.

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14 See Chapter IV of this study.

Thus it can be observed that today this part of humanitarian law is in transition due to the newly awakened consciousness among the members of world community to mould the existing laws into more equitable laws. A contributing factor has been the increased destructive capacities and potentials of present day weapons of warfare. The movement for further liberalising the humanitarian law seems to go on.

CHAPTER II

HISTORICAL EVOLUTION OF THE HUMANITARIAN LAW RELATING TO THE PRISONERS OF WAR

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The status of the prisoner of war has always been central to the humanitarian law of armed conflict. All through the ages this status has remained important, though the rights and privileges accorded to the captured enemy personnel may have differed in different times and at different place. As has been observed in Chapter I, while defining prisoner of war[1], the "status of the POW" is different from the "POW as a person" and it is to the former that reference is made here. For a proper understanding of the concept of the status of prisoner of war, a historical review is called for.

The subject has been divided into three parts. The first part traces the origin of this concept upto 1864; the second covers the period from 1864 to 1949; and the last dwells on the period after 1949. In the last part, attention is also focussed on the initiative taken by the International Committee of the Red Cross (ICRC) in drafting the 1977 Protocols Additional to the Geneva Conventions of 1949 (referred hereafter as the 1977 Protocol).

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1 See Chapter I, p.5.

A. THE PERIOD PRIOR TO 1864

In the earliest recorded history, the concept of prisoner of war was virtually non-existent, having no rules and customs protecting combatants and non-combatants who were taken captive during the course of a battle.[2] Their objective used to be to kill as many enemy personnel as possible and not to take them captive. But this was the practice of the 'uncivilized man'.

Gradually, man started becoming aware of the fruitful uses of prisoners of war. The Egyptian and Mesopotamian civilisations needed manpower to develop and extend their agricultural economy. Hence they started treating their prisoners of war as slaves. This practice of captives being treated as slaves thus began for economic reasons. However, conditions worsened during the period of Greek civilisation. The Greeks did have some lawful customs, like the prohibition on the use of poisoned-arrows, and the practice of releasing prisoners of war for ransom. Though these minimal laws were observed among the warring members of Greek city-states, they were woefully forgotten when it concerned the "barbarians", non-Greeks with whom Greeks were almost perennially at war.[3]

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2 Howard S. Levie, Prisoners of War in International Armed Conflict, International Law Studies, vol.59 (Rhode Island: US Naval War College, 1977), p.2.

3 John Westlake, "Chapters on the Principles of International Law (Cambridge: Cambridge University Press, 1894), p.18.

After a lapse of little more than 2000 years, Romans once again realized the economic value of the prisoners of war. As the practice of slavery was recognized and practiced openly in Rome, the captives were sold publicly. Though the captives belonged to the captor personally they were accorded a legal status now. The earlier uncivilized practice of putting the captives to death was abandoned by the Romans realising their economic utility. Naturally, all this involved certain rules regulating the treatment meted out to captives.

Nearer home, rules on treating the war captives existed in ancient India. These were adequately codified in the Manu Smriti (200 BC) and also find a mention in Kautilya's Arthashastra. By comparison, the treatment given to the prisoners of war in India was much more humane than that accorded by contemporary Greeks and Romans.[4] In India, no prisoner of war was killed nor was he reduced to slavery. They were rarely ransomed and were mostly set free after the conclusion of war. Even medical care was provided to the wounded soldiers and they were released when cured.[5] Also, there are instances in Mahabharata where mutual exchange of wounded soldiers took place in the evenings when the day's battle ceased.

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4 H.S. Bhatia, ed., International Law and Practice in Ancient India (New Delhi: Deep and Deep Publications, 1977), p.106.

5 Nagendra Singh, India and International Law, vol.I, (New Delhi: Chand & Co., 1973), p.76.

Religion played its own positive role in humanising the treatment of prisoners of war. The advent of Christianity softened the cruelty associated with the war-captives, though its main drawback was that it remained limited only to those of the prisoners as were catholics. The practice of ransom, for the captured knights and nobles, became prevalent in this period whereby money or money's worth in kind, was paid over to the captor who alone benefited. But, to the ordinary man, this privilege was denied and they continued to be treated cruelly and ruthlessly. The impact of Islam, later on, was on similar lines. The proseletising zeal of Islam brought in its wake many wars with the infidels, in which many prisoners were captured. The humanistic principles of Islam inevitably helped in developing humanistic treatment to these captives. But there are conflicting interpretations of the relevant Koranic provisions. One school of thought holds the view that the idolaters should be killed and the prisoners regarded as part of the spoils. Diametrically opposed to it, is the school of thought which maintains that after the war is over, the prisoner should either be freed out of mercy or be released for ransom. The latter interpretation seems to be more in consonance with the Islamic practice.[6]

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6 For a detailed study of the Islamic practice in this regard, refer Yadh Ben Ashoor, "Islam and International Humanitarian Law", International Review of the Red Cross, no.215 (1980), pp.59-69.

Despite the advent of Christianity and Islam, the laws of war did not become quite humane. Prisoners of war were still, during the middle ages, enslaved and either put to death or ransomed. The reason for this can be sought in the character of warfare during the middle ages.[7] The reigning princes used to fight for personal and selfish interests, wanting to incur minimum expenses. There were no national armies and they used to engage the wandering armed bands - the merceneries - who could be hired by anyone for a sum of money. Set in this perspective, princes, who could hardly maintain their mercenaries, were hardly expected to well maintain and well feed their captives. These captives were best left to the individual captors who dealt with them arbitrarily - enslaving, ransoming or killing them. Besides this economic aspect, the religious-philosophical creeds made a distinction between a just war and an unjust war. Captives could be killed in a just war, and of course, each warring side always subjectively determined its cause to be a just one.

During the sixteenth and the seventeenth centuries, there came a gradual change in the treatment and status given to the war captives. Nation-states were emerging

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7 Geo B. Davis, "The Prisoner of War", American Journal of International Law, vol.7 (1913), p.525.

and the arbitrary division of a people by different reigning princes was fast vanishing. These nation-states made use of war only to settle differences between themselves and not just to ensure the triumph of justice because none of the parties could take law unto it.[8] Previously, soldiers were mere agents of a particular prince but now they belonged to a particular 'Nation' which slowly changed the attitude towards the war-captives. This was now to be the base on which the superstructure of humanitarian treatment of prisoners of war was built. The Treaty of Westphalia, 1648, provided many humanitarian measures for the treatment of prisoners of war, inter alia, the release of the captives without ransom, mutual repatriation of prisoners of war after the cessation of hostilities, etc.[9]

Grotius did not take a particularly happy note of prisoners of war and he assimilated them to the category of slaves. He broadened this category by including in its fold all persons who were captured at the sudden outbreak of war. As against this, Vattel held progressive views on the subject writing, as he was, after more than a century of 'enlightenment'. He was opposed to the practice of reducing the prisoners of war to the status of slaves. Surprisingly for his age, Montesquieu asserted[10]

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8 International Review of the Red Cross, no.203 (1978), p.119.

9 See Howard S. Levie, Documents on Prisoners of War, International Law Studies, vol.60 (Rhode Island: US Naval War College, 1979).

10 Montesquieu, "Esprit des Lois" (1748). Cited in Levie, n.2, p.5.

that the only right which a captor state had over its captives was to prevent him from further participating in war. Later, Rousseau advocated in his Social Contract that war was a relationship between states and individuals, and individuals were enemies merely due to the fact that they were soldiers - the fighting tools in the hands of states. These novel, liberal ideas were vaguely advocated and practised during the American Revolution. But it was the Treaty of Amity and Commerce between Prussia and the United States which, probably for the first time, stipulated proper treatment of prisoners of war.[11] Article XXIV of this treaty specially dealt with the prisoners of war - defining various privileges as regards their treatment, confinement, food and release - thus giving an importance to them unheard of at that time. Moreover, this treaty brought the subject of treating prisoners of war from the municipal to the international plane.

During the French Revolution in 1792, the National Assembly established a unilateral code of humanitarian rules governing the prisoners of war.[12] The captives were declared to be under the protection of the French Nation as a whole, and a special responsibility was imposed

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11 Oppenheim, International Law, vol.2, edited by H. Lauterpacht, 7th edition (London: Longman Green, 1952), p.368.

12 "Decree of 4 May 1792 of the French National Assembly Concerning Prisoners of War", Levie, n.9, p.10.

on the commanding general for their safe transport and treatment. All cruel acts, violence and insults committed against a prisoner of war were deemed to be against a French citizen and liable to be dealt with accordingly. These rules were ahead of their time but as time passed, they were incorporated into various conventions. It also drew home the view that human civilization had reached a point where inhuman treatment of human beings in general, and of enemy prisoners in particular, was uncalled for, and ought to be avoided.

The American Civil war (1861-65) brought up many peculiar problems of concern, the problem of proper treatment of prisoners of war being one of these. This required a substantial body of regulations on the subject which was entrusted by President Abraham Lincoln to Dr Francis Lieber in 1863. The body of rules thus produced, were known as "The Rules for the Government of Armies in the Field".[13] These rules dealt with the problems of definition of a prisoner of war, his status, applicability and practical problems of treatment that is to be meted out to prisoners of war. The Lieber Code defines a prisoner of war as a "public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the

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13 'General Order 100, 24 April 1863' reprinted in D. Schindler and J. Toman, The Laws of Armed Conflict (Geneva, Henry Dunant Institute, 1973), p.3.

field or in the hospital by individual surrender or by capitulation".[14] It also sought to end the practice of giving ransom to individual captor because a prisoner is the prisoner of the state. The Lieber Code may not appear to be humane enough to someone familiar with today's laws, but for its time it certainly was a great leap forward. However, neither of the parties to the Civil War gave their prisoners even the minimal treatment provided for in the Code.

Thus by the beginning of 1860s, public attention was successfully drawn to prisoners of war who were normally forgotten once the war was over. By this time the principle that prisoners of war should be treated by their captor state in a manner analogus to that which is meted out to its own troops, became generally recognised.[14] This awareness and active concern for the humane treatment of the prisoners of war set the stage for more rapid and organised rules to be made on the subject. Thus the year 1864 can be regarded as a watershed in the development of humanitarian laws of war in general and of the prisoners of war in particular.

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14 Also see Article 49 of the Lieber Code.

15 Oppenheim, n.11, p.368.

B. DEVELOPMENT DURING THE PERIOD 1864-1949

The period between 1864 and 1949 was one of great turmoil and unrest. During the last quarter of nineteenth century, European Powers spread out into the so-called "uncivilised" world as never before and many colonial wars were ruthlessly fought, both between the European and the "uncivilised" colonial people and between the European nations themselves. The twentieth century saw two greatly devastating world wars, many other local and colonial wars, uprisings and revolutions and confrontations of ideologies. Simultaneously there also occurred almost a revolution in the techniques of warfare - from the hand thrown bombs to the atomic explosion.[16] Naturally, all these developments brought in their wake more and more misery and suffering to the mankind in general and the defence personnel, the combatants in particular.

But not all human beings are cruel. Holding the belief that humanity stands above national boundaries[17] and that if wars cannot be avoided, at least the avoidable misery and suffering to the human beings ought to be avoided, a group of conscienable persons worked to ameliorate the cruelties of war.

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16 Andre Durand, "Histoire du CICR, II : De Serajevo a Hiroshima", Institut Henry Dunant, Geneva, 1978). Book Review in International Review of the Red Cross, no. 206 (1978), p. 303.

17 James A. Joyce, Red Cross International and the Strategy of Peace (New York: Oceana Publications Inc., 1959), p. 18.

Florence Nightingale worked diligently and untiringly in the Crimean war of European nations and won the greatest fame for her deserved humanitarian work. The famous Red Cross movement was initiated by Henri Dunant, a Swiss national, "/w/hose story is fraught with deep pathos, individual tragedy and mankind's incredible inhumanity to man, yet one strangely illuminated with the light of noble deeds: a story of the unexpected mercy over violence, of magnanimity over hatred, of life over death".[18] It was mainly due to the efforts of Dunant that the First Geneva Conference was convened in 1863. The concluding convention did not directly deal with the prisoners of war but with wounded soldiers in the field.[19] This Geneva Convention contained the seeds which later flowered into a binding obligation on the contracting states to take care of the wounded irrespective of the nation they belonged to.[20] It provided that wounded and other soldiers can be sent back to their country if they refrain from bearing arms till the continuance of war.

It was the first of the series of humanitarian conventions drawn up at Geneva. This law, now known as the Law of Geneva, focussed its attention on the victims

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18 Ibid., p.6.

19 "Convention for the Amelioration of the Wounded of the Armies in the Field, 22 August 1864" reprinted in Schindler and Toman, n.13, p.203.

20 Geza Herczegh, "Recent Problems of International Humanitarian Law", in Questions of International Law, Gyorgy Haraszti, ed. (Leiden: Sijthoff, 1977), p.88.

of armed conflict in an attempt to reduce the suffering of the sick, wounded and shipwrecked civilians and prisoners of war. It provided a foundation on which later on the scope of legal protections to cover other fields affected by combat operations, was widened. The other theoretical line along which the international law of armed conflict developed, is the law of The Hague. It regulates the employment of force in armed conflict, and is embodied in the Hague Conventions of 1899 and 1907. But the Geneva Conventions of 1949 and the 1977 Protocol, now fuse these two parallel lines of the law of armed conflict; their ultimate objective being humanitarian in nature.[21]

In 1874 the first multilateral conference was held in Brussels at the invitation of the Czar of Russia. The resulting Declaration[22] can be regarded as the foundation upon which the modern law of land warfare has been built. Although this Declaration remained unratified, the First Hague Convention, framed 25 years later, adopted almost similar provisions. Before it, the consensus of the Brussels Conference was widely accepted as the authoritative statement of the customary law on the subject.

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21 J.R. Erickson, "Protocol I : A Merging of the Hague and Geneva Law of Armed Conflict", Virginia Journal of International Law, vol.19 (1979), p.557. Also see, Frits Kalshoven, The Law of Warefare : A Summary of its Recent History and Trends in Development (Geneva: Henri Dunant Institute, 1973), p.26.

22 Declaration of Brussels, 27 August 1874. See Schindler and Toman, n.13, p.25.

A new juridical concept was evolved in Article 9 of the Brussels Declaration which provided similar rights and obligations to militia and volunteers as to the regular army. These irregular troops had to satisfy some conditions to become eligible to prisoner of war treatment, namely, that they are commanded by a person responsible for his subordinates; that they wear some settled distinctive badge recognisable from a distance; that they carry arms openly; and that they conform to the laws and customs of war in their operations. Mere marauders or bandits would not get the status of prisoners of war. The novel aspect of this provision was that it did not require prior state authorisation for certain irregular militia.[23] It also accorded the prisoner of war status to levee en masse provided they respect the laws and customs of war. A spy, if acting secretly or under false pretences to collect or communicate information, was to be treated according to the laws of the army of the capturing state and hence, was not given prisoner of war status.

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23 W. Thomas Mallison and Sally V. Mallison, "The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict", Case Western Reserve Journal of International Law, vol.9 (1977), p.44.

Regrettably, the 1874 Brussels Convention remained unratified but the consolation was that the following Hague Convention of 1899 took this Declaration as the starting point for laws of land warfare.[24] This Convention for the first time codified the law relating to the prisoners of war which was further updated and improved by the 1907 Hague Convention.[25] Article 1 of both the Hague Conventions embodied, in substance, Article 9 of the unratified Brussels Declaration. Article 2 of both these Hague Conventions dealt with levee en masse, the first one requiring that such inhabitants respect the laws and customs of war, whereas the second one required that they also carry arms openly.

The famous 'De Martens Clause' - known after its Russian author - in the preamble stated that those inhabitants and belligerants who do not qualify as privileged combatants under either Article 1 or Article 2, remain under the protection of the principles of the Law of Nations. Thus they become lawful, though unprivileged, belligerents.[26]

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24 "Hague Convention with Respect to the Laws and Customs of War on Land, 1899", reprinted in Schindler & Toman, n.13, p.57.

25 'Hague Convention respecting the Laws and Customs on Land, 1907". Ibid., p.57.

26 Richard Baxter, "So-called Unprivileged Belligerency, Spies, Guerrillas and Saboteurs", British Yearbook of International Law, vol.28 (1951), p.325.

The 1899 Hague Convention provided for quarter, food, work, parole etc. for the prisoners of war. However it did not provide other details. The 1907 Hague Convention attempted to fill the details in the skeleton structure. For example there was a provision for the utilization of labour of prisoners of war by the detaining power but the details regarding wages were only provided by the 1907 Convention.

The 1899 Hague Convention set up a bureau of information relative to prisoners of war, which later on played a vital role during both the world wars by acting as a link between prisoners of war and their families. The 1907 Hague Convention further elaborated provisions regarding this bureau.

The effectiveness of the 1907 Hague Convention was impaired greatly by incorporation of the so-called "General Participation Clause", which provided that the Convention shall be binding only if all the belligerents were parties to it. This clause marred the effective application of the Convention either from the beginning or in the course of war as soon as a non-signatory state, however insignificant, joined the ranks of belligerents.[27]

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27 Oppenheim, n.11, p.234.

The Hague codification of the laws of war was done in peace time but their practical test came during the ensuing World War I. Many shortcomings of the law relating to prisoners of war were brought to light. The problem of prisoners during a war and their treatment even after the war was so crucial that a brief enumeration of the privileges could not serve the purpose. An exhaustive and separate convention was required for the maximum welfare of prisoners of war. Hence, after World War I, the International Committee of the Red Cross (hereinafter referred to as the ICRC) was successful in convening a Diplomatic Conference at Geneva in 1929 which drafted the first ever convention dealing exclusively with the prisoners of war.[28] It defined its relation to the Hague Conventions in Article 89, which stated that the Convention shall complete Chapter II of the regulations annexed to the Hague Conventions. It was implied that in case of a conflict between the Hague Regulations and the Convention, the latter would apply without prejudice to the otherwise continuing force of the Hague Regulations and the Convention.[29]

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28 "The 1929 Geneva Convention relative to the Treatment of Prisoners of War", reprinted in Schindler & Toman, n.13, p.289.

29 Richard I. Miller, ed., The Law of War (Massachusetts and London: Harbridge House Inc, 1975), p.7.

This 1929 Geneva Convention came under a gruelling test during World War II. Some of the most important belligerents were not parties to this Convention,[30] and many difficulties were encountered.

However, the bitter experiences of World War II highlighted the need for further elaboration and revision of the law. Even before World War II, the ICRC had started studying the need for revision in view of the experience gained in the Ethiopian-Italian war and the Spanish civil war.[31] Now, at the initiative of the Swiss government, a Diplomatic Conference was convened from 21 April to 12 August 1949.[32] Of the four Conventions signed,[33] the third one was the 'Convention relative to the Treatment

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30 The 1929 Geneva Convention was not in force between the USSR and Germany and between Japan and all the allied powers.

31 Joseph L. Kunz, "The Geneva Conventions of 12 August 1949", Law and Politics in the World Community in George A. Lipsky, ed. (Berkeley and Los Angeles: University of California Press, 1953), p.280.

32 Shortly before this, the International Law Commission had decided against including the Laws of War on its agenda, in the belief that Article 2(4) of the Charter of the United Nations has already prohibited all wars, hence there was no need to legally regulate the conduct of war.

33 The four Conventions are: The 1949 Geneva Convention for the Wounded and Sick in Armed Forces in the Field; the 1949 Geneva Convention for the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the 1949 Geneva Convention relative to the Treatment of Prisoners of War; and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, reprinted in Schindler and Toman, n.13, pp.295, 323, 345 and 417.

of Prisoners of War' which marked an improvement over its predecessor, the 1929 Geneva Convention. It specifically listed the categories of persons to be accorded the prisoner of war status.[34] The problem of repatriation of prisoners of war from one high contracting party to another was dealt with for the first time. Some of the financial, judicial, and disciplinary provisions were further developed. It provided that prisoners of war may not be engaged in operation having a direct bearing on the conduct of war.[35] It specifically listed six categories of work, unconnected with the war operations on which alone the prisoners of war could be compulsorily employed. The provision of 'punishment diet' for disciplinary action, as provided in the 1929 Geneva Convention, was scrapped under this Convention,[36] as it was an inhuman practice, prone to be misused by the revengeful officials of the captor state.[37]

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34 Ibid., Third Convention, Article 4.

35 Ibid., Article 51.

36 Ibid., Article 96.

37 For a detailed study of the new improvements and developments in the 1949 Conventions over the then existing law, see J.A.C. Cutteridge, "The Geneva Conventions of 1949", British Yearbook of International Law, vol.26 (1949), pp.311-18.

Though originally in crude form, the humanitarian law (particularly the Geneva Conventions of 1949) has gradually become a highly refined and sophisticated body of rules. Richard Baxter stated that they have produced a body of laws which in its depth and sophistication resembles a developed system of municipal law. "/T/o the lawyer's eye, it appears to be a body of law which is real, hard and effective. And yet the facts are otherwise".[38] Its two important features, of complexity and of refinement, make its applicability all the more difficult under strained circumstances. The persons who are expected to apply the various provisions, most often do not even know or understand the highly complex body of laws.[39]

Shortcomings of Geneva Conventions and the Need to Update the Law

There can never be any dearth of instances whereby the suitability of laws of war can be tested, for there have been innumerable wars. Some of the more important deficiencies can be pointed out whereby the need to update the law of armed conflict was felt.

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38 Richard R. Baxter, "The Law of War", in The Present State of International Law and Other Essays, Maarten Bos. ed (The Netherlands: Kluwer, 1973), p.109.

39 Ibid., p.110.

a) Nature of Armed Conflict: Whether International or Internal

This is the problem of application of the 1949 Geneva Conventions. States contend that a particular armed conflict is purely an internal matter, thus debarring the application of the Geneva Conventions. These Conventions did not clearly categorize whether a particular outbreak of violence was to be regarded as international. The case of Vietnam classically demonstrated this point. All the three participants - the Republic of Vietnam, the Democratic Republic of Vietnam, and the United States of America, were parties to the 1949 Geneva Conventions. However, the provisional revolutionary Government of the Republic of South Vietnam was not a party to the Conventions. It was not clear whether the conflict was internal or, due to the open intervention of the USA, had become an international one, in which case the 1949 Geneva Conventions would apply. It was doubtful whether relations between the forces of the government of the Republic of Vietnam and of the provisional revolutionary Government of the Republic of South Vietnam were governed by Article 3 of the 1949 Geneva Conventions relative to non-international armed conflict or by the entirety of the Conventions.[40] Article 3 of the 1949 Geneva Conventions

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40 Ibid., p.110.

contains a declaration of minimum rights of all captives in any war. It prohibits murder, mutilation, torture, taking of hostages, degrading treatment, sentences without a fair trial and all sorts of distinctions based on race, religion, sex, class or economic status. But under this article prisoners of war are not likely to gain as much as under the Conventions as a whole. Therefore, in order to give maximum benefits to a maximum number of people, it was found essential to have laws that clearly distinguish the nature of conflict.

b) Declaration of War and the Application of the Geneva Conventions

Article 2 of the 1949 Geneva Conventions provides for their applicability in an armed conflict, which is not a declared war, only if the state of war is recognized by one of them. But in case, none of the parties resort to formal declaration, then these Conventions do not come into force. How the prisoners of war are to be treated, repatriated, etc., stays out of the purview of the laws of war, even though a fierce war is being waged. This cruel anomaly is due to the technical commission of properly categorising the types of armed conflict.

c) United Nations Emergency Forces and the 1949 Geneva Conventions

There is no provision in the 1949 Geneva Conventions which makes it applicable to the United Nations emergency

forces, as the United Nations itself was not a party to the Conventions.[41] The ICRC took the position that each state, while providing its contingent for United Nations forces alone, was responsible for the application of the Conventions. In case United Nations forces take prisoners of war, then which law would be applicable and who will be responsible for its application, is not clear. Generally, United Nations forces have been reluctant to hold prisoners in the sense contemplated by the laws of war.[42]

d) Guerrillas and Applicability of the 1949 Geneva Conventions

Since World War II, most of the wars began as internal conflicts and only later on, at the intervention of outside powers under one pretext or another, turned into international ones. Guerrillas, supported by the civilian population, resisted the intervention. By the very nature of their resistance tactics, guerrillas are not properly commanded, do not carry weapons openly, etc.,[43] and thus they do not conform to the conditions laid down

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41 For further details, see Yves Sandoz, "Application of Humanitarian Law by the Armed Forces of the United Nations Organisation", International Review of the Red Cross, no.206 (1978), pp.274-84.

42 Miller, n.29,p.278.

43 Article 4, paragraphs A(2)(a), (c) and (d) of the 1949 Prisoners of War Convention.

under the 1949 Geneva Conventions. As more and more use of this tactic is being made, there is a consistent demand by the Third World and Socialist countries, to accord the prisoner of war status to the guerrillas, the so-called "unprivileged belligerents".

According to many writers on guerrilla warfare, the nature of warfare is such that it is very difficult for them to satisfy all the four requirements and thus get prisoner of war status.[44] Therefore, the conditions need to be relaxed in such cases, and along with guerrillas, people fighting for self-determination and against colonial powers for their national liberation, ought to be accorded maximum benefits of the humanitarian laws of war.

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44 Of many authors, more important ones are:
Baxter, n.26, pp.323-345; G.I.A. Draper, "The Status of Combatants and the Question of Guerrilla Warfare", British Yearbook of International Law, vol.45 (1971), pp.173-218; Charles H. King, "Revolutionary War, Guerrilla Warfare and International Law", Case Western Reserve Journal of International Law, vol.4 (1972), p.91; Rahmatullah Khan, "Guerrilla Warfare and International Law", International Studies, vol.9 (1967), pp.103-27; Mallison and Mallison, n.23, pp.39-78.

e) Mercenaries and the 1949 Geneva Conventions

The 1949 Conventions provided that mercenaries would be entitled to prisoner of war status and treatment without any distinction if they form part of the armed forces, militia or other volunteer forces whose members are otherwise entitled to such treatment. During the last two decades, an increasing use of mercenaries is being made as has been evident in Congo, in the Nigerian Civil War, and in Angola, where the fight was in favour of colonialism and racial oppression. This has led the Third World countries to oppose mercenaries and a need is, thus, felt to have a precise definition of mercenary and to deny prisoner of war status to a mercenary.[45]

f) Protecting Powers under the 1949 Geneva Conventions

In the scheme of the 1949 Geneva Conventions, the role of the protecting power is extremely important.[46] The protecting power is a link between the detaining power and the power whose personnel are captured as prisoners of war. The snag is that the appointment of such a protecting power can be made only by common agreement of

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45 For detailed study, see H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts", American Journal of International Law, vol.72 (1978), pp.37-56. On Angolan Mercenaries, see Mike J. Hoover, "The Laws of War and the Angolan Trial of Mercenaries ; Death to the Dogs of War", Case Western Reserve Journal of International Law, vol.9 (1977), pp.525-406.

46 Articles 8888889 of the Four Geneva Conventions of 1949.

both the parties. Agreements being rare, this supervising mechanism has not proved to be very effective since World War II. Moreover, some states regard the mere initiative by the protecting powers as an encroachment upon their sovereignty. These reasons naturally have rendered the protecting power mechanism impotent, and prisoners of war have been, comparatively, placed at the disadvantage. This required to be updated and modified so as to change the provisions regarding protecting powers.[47]

g) Inadequate Dissemination of the Knowledge of Humanitarian Laws

Members of the armed forces, who are supposed to ultimately implement the laws regarding the treatment of prisoners of war, often show a shocking lack of knowledge, or at any rate, show an unpardonable indifference towards these laws. Provisions made in the 1949 Prisoners of War Convention, for the dissemination of its knowledge were inadequate, and the need was felt to make suitable amendments and changes.

h) Representation of the Newly Emergent Countries

In 1949 only three African states participated in the Diplomatic Conference but in 1960s, many Afro-Asian states gained their freedom. These countries could be expected to respect, comply and implement the 1949 Geneva Conventions only if they felt that their interests were adequately protected and represented.

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47 n.36, p.112.

Taking into consideration all these inadequacies and shortcomings, the ICRC and the UN took initiative to update the law relative to the treatment of prisoners of war. A Diplomatic Conference was convened in 1977 to reaffirm and develop the 1949 Geneva Conventions.

C. EFFORTS SINCE 1949

The International Committee of the Red Cross

On an average, laws of warfare on land have been revised every twenty years. Beginning with the 1907 Hague Conventions to the 1929 Geneva Prisoners of War Convention, and the 1949 Geneva Conventions, the law, according to the law of averages, was to be updated by the time the Diplomatic Conference was actually called. The interest was rekindled mainly by the Vietnam war which exposed the gaps in the 1949 Geneva Conventions. However, it was left to the ICRC to take the initiative and start a fresh study of the Conventions with a view to amending and overcoming the existing shortcomings. Under the aegis of the ICRC were held the 1965 Vienna Conference, and the 1969 Istanbul Conference of the Red Cross, and the 1968 Tehran Conference on Human Rights. This trend of reaffirmation and development of humanitarian law started first with the awareness of the need for protection of civilian population but gradually there came about an apparent shift towards the humanitarian

treatment of prisoners of war. By a resolution,[48] the 1969 Istanbul Conference of the ICRC requested the parties to the 1949 Geneva Conventions, to take all appropriate measures to ensure humane treatment of prisoners of war and prevent violations of the Prisoners of War Conventions. It also called upon all the parties to give the protecting power and the ICRC free access to prisoners of war and to all places of their detention, as the ICRC was not being permitted to perform its normal humanitarian functions relating to prisoners of war.

The United Nations:

The 1968 Teheran Conference on Human Rights (22 April to 13 May) recommended to the General Assembly that it undertake a study of the existing law and investigate the need for new instruments for the better protection of civilians, prisoners and combatants in all armed conflicts.[49] The General Assembly, at its 23rd session, requested the Secretary General to undertake, in consultation with the ICRC, the studies recommended by the Teheran Conference.[50] Consequently, the Secretary General

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48 "Protection of Prisoners of War", adopted by the XXI International Conference of the Red Cross, at the 1969 Istanbul Conference. See text in Levie, n.9, p.781.

49 Resolution XXII, "Human Rights in Armed Conflicts", 12 May 1968 (UN Doc. A/CINF.32/10), 1968, p.18.

50 The General Assembly Resolution, "Respect for Human Rights in Armed Conflicts", GAOR (XXII), Supp.no.18 (A/7218), 19 December 1968, p.50.

produced two reports, one in 1969 and the second in 1970, giving a clear expose of a number of problems concerning protection of human beings in armed conflicts.

The ICRC convened a Conference of Government Experts to deal simultaneously with two issues: firstly, to propose additions to the 1949 Geneva Conventions, and secondly, to update and further develop the old Hague law regulating the laws and customs of war on land. The objective of the conference was stated to be: "On Re-affirmation and Development of International Humanitarian Law" - the "reaffirmation" was aimed at restating the basic humanitarian principles adopted under earlier conventions which had become dated in view of the new means of warfare and therefore required updating, and the"development" suggested the adoption of special rules applying to modern situations, methods and means of combat,. and their consequences which were unknown in the past.[51]

The Conference of Government Experts was held in two sessions. The first session, 24 May-12 June 1971, attended by 40 nations and the representatives of the Secretary General, developed the idea of evolving two draft protocols. The second session 3 May-3 June 1972, attended by 76 nations and representatives not only of

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51 Herczegh, n.20, p.89.

the Secretary General but also of the Holy See. It further elaborated the idea of two draft protocols: the first, a Draft Additional Protocol to the Four Geneva Conventions 1949, applicable to international armed conflicts and the second a Draft Protocol Additional to the Geneva Conventions 1949, applicable to non-international armed conflicts, mainly relating to common Article 3 of these Conventions.[52]

The Conference was divided into four Commissions.[53] Commission III dealt with the combatants and civilian population. This Commission debated the problem of prisoners of war in detail and went further than merely reaffirming the law. Specially, it debated the fate of occupants of aircrafts in distress and the position of guerrilla fighters. The emerging, revised draft was thought to be important enough to be submitted to the Diplomatic Conference.[54]

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52 For details see Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts : The Conference of Government Experts (Second Session), 3 May-2 June 1972", Netherlands Yearbook of International Law, vol.3, (1972), pp.18-61.

53 Commission I - wounded, Sick and Shipwrecked.
Commission II - Non-International Armed Conflict.
Commission III - Combatants and Civilian Population.
Commission IV - Implementation, General and Final Provisions.

54 Kalshoven, n.52, p.60.

The General Assembly referred this matter to the Sixth (legal) Committee, instead of the Third (social) Committee. Concern was shown[55] at the lack of agreement on definition among government experts over such basic issues like combatants, protected persons and guerrilla warfare. It was stated that governments should ensure that the Diplomatic Conference would "mark substantial progress on fundamental legal issues connected with modern armed conflicts" and should "contribute significantly to the alleviation of the suffering brought about by such conflicts".[56]

On the basis of the report of the Government Experts, the ICRC held preparatory, expert discussion, closely scrutinising and modifying the provisions of the draft protocols. Finally it arrived at the definitive text in June 1973 which was sent to states which were parties to the 1949 Geneva Conventions, and to all members of the United Nations, along with all the National Red Cross Societies.

Modalities of the Diplomatic Conference:

Two draft protocols, one relating to International Armed Conflicts and the other, to Non-International Armed Conflicts, were presented to the "Diplomatic Conference

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55 General Assembly Resolution 3032 (XXVII) of 12 December 1972.

56 Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts : The First Session of the Diplomatic Conference, Geneva, 20 February-29 March 1974", Netherlands Yearbook of International Law, vol.5 (1977), p.4.

for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts". The Conference set up four Committees[57] dealing with different aspects, and in all, four sessions[58] were held. It was Committee III which dealt with the rules relating to warfare, combatants and prisoner of war status and the protection of the civilian population.

Apart from over one hundred nations present, fifty non-governmental organizations and eleven national liberation movements also participated in the Diplomatic Conference. At the very first session objections were raised over the participation of national liberation movements. While the United States did not favour the participation of certain parties, the Soviet Union maintained that only states could participate. In contradiction to this stand, some African states wanted even

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57 Other three committees were:

Committee I - General Provisions, Execution and Final Provisions; Committee II - Matters relating to Sick, Wounded and Shipwrecked, and Civil Defence; Committee IV - (Ad-Hoc Committee) - Possible Limitations on the Use of Specified Conventional Weapons.

58 The four sessions were held as under:

I Session - 20 February-29 March 1974; II Session - 3 February-18 April 1975; III Session - 21 April-11 June 1976; IV Session - 17 March-10 June 1977.

voting rights for national liberation movements. Ultimately a consensus emerged in favour of inviting those liberation movements which were recognised by regional inter-governmental organisations, but for mere participation without a right of vote.[59]

Finally, the Diplomatic Conference produced the Protocols. The final act comprised of two Protocols, now known as "Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of the Victims of International Armed Conflicts", and the "Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of the Victims of Non-International Armed Conflicts". Together, these protocols contain 130 articles. Rightly emphasizing the importance of these updated protocols, the Vice-President of the ICRC, Mr Jean Pictet, commented:

> "On 10 June 1977, an event of far reaching importance took place : the plenipotentiaries of a hundred states approved and initialled the text of two protocols additional to the Geneva Conventions. This was a memorable date, for the representatives of a majority of nations from all corners of the earth, men who in our troubled times do not often find it easy to come to agreement, set their stamp to a document which I would not hesitate to call a Charter of Mankind. This Charter constitutes a

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59 CDDH/22; Plenary Seventh Meeting, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Berne: Federal Political Department, 1978), vol. 5. (Hereafter cited as Official Records).

> significant step forward in the evolution of a movement whose aims, from its inception, have been to ensure respect, protection and humane treatment of all those who are not able to fight".60 (emphasis added)

These protocols were opened for governmental signatures on 12 December 1977. Though more than sixty states have signed, very few, especially important ones, have ratified it so far.[61]

Not all the articles in these protocols deal with the prisoners of war. Converaly, the prisoners of war benefit, not only from the provisions directly dealing with them but also from other articles in these protocols. These articles include more vigorous procedure for appointing protecting powers, the provision extending the application of the 1949 Geneva Conventions and the 1977 protocols to the national liberation movements, appointment of legal advisors to states. The provisions relating to the treatment of prisoners of war are scattered all over these two protocols and mark a distinct advance and improvement over the 1949 Geneva Conventions.

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60 Pictet Jean, "New Aspects of International Humanitarian Law", International Review of the Red Cross, no.199 (1977), p.399.

61 By 18 November 1980, the 17 states which deposited their ratifications with the Swiss Federal Council are: Botswana, Cyprus (Protocol I only), Ecuador, El Salvador, Ghana, Jordan, Libya, Niger, Sweden, Tunisia, Yougoslavia, Mauritania, Gabon, Bahamas, Finland, Bangladesh and Laos.

CHAPTER III

AN ANALYSIS OF THE PROVISIONS OF THE 1977 PROTOCOL RELATING TO PRISONERS OF WAR

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AN ANALYSIS OF THE PROVISIONS OF THE 1977 PROTOCOL RELATING TO PRISONERS OF WAR

The 1977 Protocols And the Development of the Law of War:

The laws of war include a wide variety of rules relating to various aspects of warfare. The provisions relating to the prisoners of war form a small, though a very important, segment of this corpus of rules. The 1977 Protocols too, naturally, deal with many topics concerning warfare but one of the most important progress registered by the Diplomatic Conference has been regarding the methods and means of warfare, and combatants and prisoner of war status.[1] In fact, the titles of these two Protocols are misleading inasmuch as they convey the meaning that they are solely "additional to the Geneva Conventions of 1949". They are much wider in scope, specially Protocol I. This has merged the two separate lines of humanitarian laws of armed conflict, viz., the Hague and the Geneva law,[2] updating these to make them more relevant under the present conditions of conventional warfare.

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1 Part III, Sections I and II, Articles 35 to 47 of the 1977 Protocol relating to the Protection of Victims of International Armed Conflict (Protocol I). This is the relevant part of the Protocol, under discussion in this chapter.

2 Richard John Erickson, "Protocol I : A Merging of the Hague and Geneva Law of Armed Conflict", Virginia Journal of International Law, vol.19 (1979), p.558.

Scheme of Protocol I:

Protocol I has been divided into six parts,[3] but only part III is directly relevant to the present study. This part is further divided into two sections: section 1 (articles 35-42) deals with "Methods and Means of Warfare", and section II (articles 43-47) with "Combatants and Prisoner of War Status". Section I reaffirms and develops the Hague law and incorporates it in the Geneva law. But the present chapter deals only with section II in its entirety because it contains the most directly relevant provisions relating to the prisoners of war. Certain articles of section I that deal with the prisoner of war status accorded to combatants have also been analysed.

Prisoners of war under the Protocol:

As can be seen from the preceding chapter, the concept of the prisoner of war kept on changing with time because it needed to develop in consonance with the methods and means of warfare as well as the political and economic structure of the combating states.

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3 These are: Part I: General Provisions; Part II: Wounded, Sick and Shipwrecked; Part III: Methods and Means of Warfare, Combatants and Prisoner of War Status; Part IV: Civilian Population; Part V: Execution of the Conventions and of this Protocol; Part VI: Final Provisions.

Not all persons captured during the course of war are accorded the prisoner of war status. This Protocol provides that all the combatants, falling into the power of adversary, shall be prisoners of war.[4] Now, who are combatants? Protocol I defines, in Article 43, the classes of armed forces which shall be regarded as combatants, and in enumerating these classes, the Protocol has stepped out of the traditional bounds of international law and even grouped "organized armed force ... not recognized by an adversary party"[5] under armed forces. Thus, under the Protocol the concept of combatant is given a broader meaning so as to benefit the maximum possible number of participants in war.

Members of National Liberation Movements and Prisoner of war Status

a) General: The concept of sovereignty, it is well-known, is zealously safeguarded under the Charter of the United Nations. Colonized and oppressed peoples fighting for freedom and liberation, sometimes treated and hanged as common criminals. But in 1960s the process of decolonization gradually raised the status of these National Liberation Movements (NLMs) from the municipal to the international level.

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4 Article 44, paragraph 1 of the Protocol I.

5 Article 43, paragraph 1 of the Protocol I.

In the Diplomatic Conference there were many champions of the NLMs, specially among the Third World countries[6] who, in their support for the oppressed and colonized peoples, sought to bring these movements to the international plane,[7] thus extending to them the protection afforded by international law. This had caused, in the Diplomatic Conference, and in the debates preceding it, a re-examination of the concept of combatants who were to be accorded prisoner of war status.

b) Under the 1949 Prisoners of War Convention:

Article 4 of the 1949 Prisoners of War Convention relative to prisoners of war accords prisoner of war status to members of the armed forces of a party to the conflict, as well as members of militia or volunteer corps forming part of such armed forces. The organized resistence movements belonging to a party to the conflict and operating in or outside their own territory, even if the territory is occupied, were to benefit under it. The problem arises in cases where the organized resistence movement belongs

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6 The countries being Ghana, India, Ivory Coast, Nigeria, the USSR. CDDH/III/SR.30, Official Records of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977), (Berne; Federal Political Department, 1978), (hereinafter referred to as Official Records), vol.14.

7 CDDH/SR.41, Official Records, vol.6, p.141. See Annex p.9 : written explanation of vote on the part of the delegation of Mauretania.

to a party which is not recognized by the other party. The other problem is that such movement also had to fulfil the four conditions set out in Article 4, paragraph A(2) of the said Convention and in Article 1 of the 1907 Hague Regulations. It is not always possible to fulfil all the four conditions for members of national liberation movements; hence the protection sought to be bestowed by the 1949 Prisoners of War Convention largely remained unpatronized. The need was felt to revamp these conditions so as to make this part of humanitarian law more relevant and directly applicable to one of the most important forms of armed conflicts in the contemporary world.

c) The 1977 Protocol: Paragraph 1 of Article 43 of Protocol I states:

> "The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command, responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".

The reliance on the disciplinary and organizational aspects of the armed forces placed in this provision is in accordance with the modern view.[8] When compared to

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8 Erickson, n.2, p.576.

Article 4 of the 1949 Geneva Conventions, this article makes concession to such organized groups not recognized by its adversary; the only requirement being that they be subject to a system of internal discipline so as to ensure proper compliance with the laws of war. Some states might misinterpret this emphasis on internal discipline of the organized forces as an interference in their domestic affairs but, in fact, such a self-disciplinary system ensures better compliance with the rules of armed conflict, which is of crucial importance to the international society.

In the Diplomatic Conference, Ghana moved an amendment seeking to make a specific reference to "liberation movements" after the words "resistance movements" in the proposed draft.[9] Similarly, Norway's[10] draft included the words "organized resistance or liberation movements". But both these amendments were abandoned later on and the final provision was adopted without a specific reference to resistance and liberation movements.

Legal recognition to these organized national liberation movements and the guerrillas has been

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9 CDDH/III/324, Official Records, vol.3, p.176.

10 CDDH/III/259, Official Records, vol.3, p.176.

accorded by Article 43, paragraph 2[11] by recognizing their right to participate directly in the hostilities as members of the armed forces. This provision thus defines all those categories that are to be included in the category of combatants and then, in Article 44, paragraph 1, it is declared that all the combatants will be accorded prisoner of war status. Article 43, paragraph 3 merely states that if parties to a conflict, include the members of their paramilitary forces or of armed law enforcement agencies in the regular armed forces, they are under an obligation to inform the adverse party so that the benefits of the present Protocol could be extended to them. So long as they are disciplined, organized and follow the rules of armed conflict, they are entitled to prisoner of war status.

Two seemingly contradictory ideals were most widely debated in the Conference of the Government Experts, and in the Diplomatic Conference. These were: (i) broadening the categories of combatants who are entitled to prisoner of war status, so that maximum number of participants in the armed conflict could benefit from it, and (ii) distinguishing the civilian population from the combatants, as a blind attempt to broaden the categories of combatants

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11 L.C. Green, "The New Law of Armed Conflict", The Canadian Yearbook of International Law, vol.15, (1977), p.15.

might adversely affect civilian population. The first concern is embodied in Article 43 and the second, in Article 44. Read together, these two articles represent the compromise acceptable to most of the states.[12]

More than a century ago, the Brussels Conference of 1874 attempted to draw up a criteria for combatants aspiring for prisoner of war treatment. The 1907 Hague Convention on Land Warfare, in Article 1, enumerated certain conditions. Any member of militia or volunteer corps could qualify as combatants by fulfilling these conditions: (i) commanded by a person responsible for his subordinates; having a fixed, distinctive sign recognizable at a distance; carrying the arms openly; and aoiding by the laws of war.

These conditions were such that "more or less regular armies would qualify as combatants".[13] No separate provision was made about armed resistance movements fighting in occupied territory. However, this form of armed struggle could not be overlooked after World War II. Therefore the 1949 Prisoners of War Convention had to

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12 73 votes in favour, 1 against, 21 abstentions at the Fourth Plenary meeting. CDDH/401, Official Records, vol.6, p.119.

13 Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts : The Diplomatic Conference, Geneva, 1974-77", Netherlands Yearbook of International Law, vol.8 (1977), p.119.

incorporate in Article 4, paragraph 2, a reference to the "organized resistance movements belonging to a party to the conflict and operating in or outside their own territory, even if the territory is occupied". But such movements had to fulfil the above mentioned conditions of the Hague Regulations.[14]

Guerrilla warfare and Combatants

The word guerrilla is most usefully applied, in a legal context, to armed hostilities by private persons or groups of persons who do not meet all the qualifications laid down in Article 4 of the 1949 Prisoners of War Convention, or the corresponding provisions of the earlier conventions. Then how can guerrillas to benefit from the 1949 Convention? Writers like Mahmatullah Khan[15] and the Soviet expert, I.P. Trainin,[16] have pleaded for prisoner of war status to guerrillas even under Article 4 of the 1949 Prisoners of War Convention. On the contrary, Richard Baxter maintained that since guerrillas

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14 Ibid., p.120.

15 Mahmatullah Khan, "Guerrilla Warfare and International Law", International Studies, vol.9 (1967), pp.103-27.

16 I.P. Trainin, "Question of Guerrilla warfar in the Law of War", American Journal of International Law, vol.40 (1946), pp.555-60. Also see W.T. Mallison, and S.V. Mallison, "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict", Case Western Reserve Journal of International Law, vol.9 (1977), pp.39-78.

were unable to meet the four conditions, they will not be granted prisoner of war status under the 1949 Convention.[17] These conditions are not "adoptable to the new conditions of warfare, specially in guerrilla and liberation wars ... there is a general consensus that in the century that has elapsed since these conditions were first formulated in Brussels, the radical changes which have occurred in military technology and in political and strategic conditions and ideas, have rendered these conditions obsolete".[18]

This issue was discussed at the Diplomatic Conference in two stages: first, in Committee I while dealing with the scope of application of Protocol I, and second, when draft article 42 entitled "New Category of Prisoners of War", was considered. The first session of the Conference of Government Experts in 1971 was bogged down in the controversy of relaxing rules for guerrillas.[19] The Norwegian expert suggested that the only criterion for the guerrilla should be membership of a guerrilla

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17 Richard R. Baxter, "So-called 'Unprivileged Belligerency : Spies, Guerrillas and Saboteurs", British Yearbook of International Law, vol. 28 (1951), p.333.

18 Georges Abi-Saab, "Wars of National Liberation and the Laws of War", Annals of International Studies, vol.3 (1972), p.111.

19 Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts : The Conference of Government Experts, 24 May-12 June 1971", Netherlands Yearbook of International Law, vol.2 (1971), p.82.

organization, whose orders were generally executed and which, as far as possible, respected the laws and customs of war.[20] Besides being subjective, this proposal overlooks the importance of distinguishing guerrillas from the civilian population. Undaunted, the Norwegian expert again, in the second session held in 1972 put forth the suggestion that the party to the conflict, to which the guerrillas are attached, should need only declare "its commitment to the Geneva Conventions and the Protocols and need be under a responsible command".[21] As against this generous gesture of Norway was the contention of the United Kingdom that no relaxation of conditions with regard to guerrillas was possible.[22]

The ICRC worked out a compromise between these two opposing views, which was incorporated in a draft article 42 - relaxing some of the traditional conditions for the so-called "unprivileged belligerents". Guerrillas, according to the suggested compromise, need not have a distinguishable insignia at all the times but were required to distinguish themselves from the civilian population in military operations.

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20 Ibid., The Report, para 378, p.83.

21 See Report of the Conference of Government Experts, published by the ICRC, Geneva, July 1972. Norwegian amendment (CE/COM.III/C.15), cited in Kalshoven, Netherlands Yearbook of International Law, vol.3 (1972), p.32.

22 Ibid., CE/COM.III/C.42, p.32.

The final Article 44 of Protocol I provides for all captured combatants to be prisoners of war even if they violate the laws of armed conflict, subject to certain conditions.[23] Earlier, in the 1949 Geneva Conventions, conducting of operations according to the laws of armed conflict was made a determinant for prisoner of war status. This provision, in theory, is very sound, being in the interest of all the parties. But experience of the Korean and Vietnam wars had shown that this pre-condition was often subject to misinterpretation. In the absence of an international body which can objectively determine the compliance or non-compliance with the laws and customs of armed conflict, auto-determination by the adverse party is often a forgone conclusion, depriving the combatant of prisoner of war status. "If prisoner of war status is linked to such contentions, the possibility exists that parties will impose substantial hardships on captives, justifying their behaviour only with unsubstantiated allegations against an opponent.

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23 W.J. Ford, "Members of Resistance Movements" in Essays on International Law and Relations in Honour of A.J.P. Tammes, eds. H. Meijers, and E.W. Vierdag (Leiden: The Hague, Sijthoff, 1977), pp.92-108.

Denial of prisoner of war status might be premised on individual as well as group violations of the laws of armed conflict".[24] Now, Article 44, paragraph 2 provides that violation of these laws shall not disentitle the prisoners to the prisoner of war status - thus much of the arbitrary discretion has been taken away from the hands of the detaining power.

Distinguishability from Civilians:

At the Diplomatic Conference, the Vietnamese delegate Mr Van Huang,[25] agreeing in principle to the proposition of distinguishability of combatants from civilian population, gave an ideological tinge to it. He expressed the view that most of the members of the national liberation armies being weak and ill-armed, exploited and oppressed by the imperialists, and poised against a powerfully-armed enemy, cannot separate their activities and lives from the civilian population. On the other hand, the obligation to distinguish, he maintained, ought to be applicable to such war criminals, who are members of the capitalist, colonial and racist regimes and as such were

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24 Erickson, n.2, p.580.

25 CDDH/III/SR.33-6, Annex, Official Records, vol.14, p.464. For fuller view, see pp.464-70; 517.

committing crimes against peace and humanity. The Vietnamese delegate even submitted a draft article 42 ter - "Persons Not Entitled to Prisoner of War Status", though, of course, in vain. Norway too expressed the view that in case a combatant is unable to distinguish himself, he should not be deprived of prisoner of war status.[26] Ultimately Article 44, paragraph 3 emerged from Committee III as a compromise:

"...Recognizing, however, that there are situations in armed conflicts where owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations he carries his arms openly:

(a) during each military engagement; and

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c), which lays down that feigning civilian non-combatant status constitutes perfidy.

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26 Statement made by Mr. Longva (Norway), Ibid., p.381.

As regards "special situations" mentioned in this article, interpretations differ. For some, it meant wars of national liberation and wars waged by the inhabitants of occupied territories.[27] For others,[28] who abstained from voting on the article in Committee III, "special situations" cannot include any situation that would jeopardize the security of the civilian population. They maintained that by such a clause the civilian population of countries in which wars of liberation were or would be taking place, was not ensured adequate protection.

Of the two conditions of Article 44, paragraph 3 the first one, that of carrying arms openly during a military engagement, is not only natural but even inevitable. But the second condition, regarding visibility, poses problems. Does it mean visible to the naked eyes or with the help of optical aids?[29] The Palestinian delegation restricted the visibility to the naked eyes only because extending it to the electronically operated optical aids would only mean diluting

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27 Countries holding such view were: Egypt, Federal Republic of Germany, India, Norway, Mexico, Syria, Yugoslavia, the PLO, Socialist Republic of Vietnam, etc. For detailed debate on the draft article 42 in Committee III see, CDDH/III/SR.55-56, Official Records, vol.15, pp.155-87.

28 Ibid. See explanations of vote by the delegates of the United Kingdom, Uruguay, Spain, Australia and Argentina, pp.156-66.

29 Green, n.11, p.14.

the impact of this "liberalized" provision.[30] On the other extreme, the United Kingdom argued that since electronic devices were so much in use in modern armed conflicts that it must be left to combatants to be mindful of being under visual observation,[31] while carrying their arms openly. Now, which interpretation will come to be generally accepted, time alone will tell.

The word "deployment" used in Article 44, paragraph 3 is of crucial but controversial nature. 'Crucial' because only by distinguishing himself from civilians can a combatant acquire prisoner of war status,[32] and 'controversial' because the term has been subjected to varying interpretations by states. The Federal Republic of Germany, Japan, etc. interpreted it broadly to mean any military movement towards a place from which attack is to be launched.[33] On the other hand, Egypt interpreted it narrowly to mean "the last step in the immediate and direct preparation for an attack, when combatants were taking up their firing positions".[34] The narrow

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30 See, Statement made by PLO representative, CDDH/III/SR.56, n.27, pp.183-84.

31 n.27, CDDH/III/SR.55, p.157.

32 Erickson, n.2, p.582.

33 n.27, CDDH/III/SR.55. See p.142 for statement made by S.H. Bloembergen (Netherlands); p.150 for statement made by George Aldrich (USA); pp.151-52 for statement made by Terwjuki Sawai (Japan).

34 Ibid., p.160.

interpretation, like that of Egypt, makes the distinction between civilians and combatants too thin because the two are differentiated only at the last stage of action. But according to the broader interpretation, since the combatants are required to distinguish themselves from the very first stage of action, it is liable to be misused by states denying prisoner of war status.

Under the Protocol members of national liberation movements get a better deal than members of the regular armed forces. Failure to fulfil some of the essential, traditional conditions in the case of guerrillas, like exemption from wearing distinctive uniforms, exemption from carrying arms openly except under two, earlier mentioned situations, etc., is not considered to be a perfidious act and therefore does not deprive them of the prisoner of war status, whereas members of regular armed forces would lose this status under like conditions.

An ambiguously worded,[35] though potentially a progressive, measure is stated in paragraph 4 of this article: "/a/ combatant who falls into the power of an adverse party, while failing to meet the requirements set forth in the second sentence of paragraph 3, shall forefiet his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all

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35 See n.27, CDDH/III/SR.56, for Israel and Italy's stand, pp.177-78.

respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed". If it is so, then what difference remains between a prisoner of war and a prisoner not accorded prisoner of war status? This provision is supplemented by Article 75 of Protocol I, which provides "Fundamental Guarantees" to all the captured personnel without any distinction. Thus, this provision, broadly interpreted, can be a great leap forward in according humane treatment to as many categories of combatants as possible.

Paragraphs 5,6,7 of Article 44 merely reaffirm the existing law as regards combatants. Paragraph 5 forbids the detaining power from forfeiting the prisoner of war status on the grounds of the past activities of the captured prisoner even when he is captured while not engaged in an attack or in a military operation preparatory to an attack. This article states that paragraph 6 is without prejudice to the rights of those who have been accorded prisoner of war status, under Article 4 of the 1949 Prisoners of War Convention. The traditional condition of wearing uniforms by combatants, assigned to

the regular, uniformed armed units of a party to the conflict, remains unchanged.[36] The last paragraph of Article 44 specifically mentions that apart from those categories of persons provided for in Article 13 of the first and second 1949 Geneva Conventions, those combatants who come under the new definition of armed forces under Article 43 of the Protocol shall also get the benefit of the protection in case they are wounded, sick or shipwrecked, under the first two 1949 Conventions.

Earlier, international law did not recognise guerrillas and members of national liberation movements as combatants. But now under the Protocol, these combatants are accorded prisoner of war status provided they distinguish themselves from the civilians at particular stages. Thus it benefits such combatants as well the civilian population.[37]

Article 44 grants prisoner of war status to combatants fighting for national liberation either against a colonial power or against an occupying power. Yet it is not exhaustive in its scope. What about guerrillas who fight their own government but where such a government has come to power with the help of a foreign power on

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36 Paragraph 7 of Article 44 of Protocol I.

37 Statement of the Vietnamese delegate, Mr. Nguyen Van Luv, CDDH/SR.41, Official Records, vol.6, p.153.

ideological grounds? Here, guerrillas fight against a government, which is not of the choice of the majority of the people but is strongly backed by the military might of a foreign power. Will this be regarded merely as "internal insurgency", thus denying it the international status,[38] or will it be raised to such international level because a foreign power is intervening? Here, neither the "whole people" are fighting nor are they fighting against a "foreign government". Such a peculiar, though currently a recurrent, phenomenon regrettably does not find an express mention in Protocol I. It is submitted that the benefits of the 1949 Geneva Conventions and the 1977 Protocol must be extended to such situations which appear to have become a common phenomenon in the contemporary world provided, of course, they too satisfy the conditions

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38 A case for such a situation can be made out under Article 1, paragraph 1 of Protocol II. It says, "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 Addition 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 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".

laid down in Article 44, paragraph 3. Champions of humanitarian law support such a broad interpretation of the Protocol.

Protection of Persons not Immediately Entitled to Prisoner of War Status

Sometimes the status of the captured combatant is not immediately clear and a judicial tribunal has to determine it. Therefore, what protection ought to be afforded to these captured persons? The diplomatic conference debated this problem[39] and ultimately it merely reaffirmed the law as it obtains under the 1949 Prisoners of War Convention.

Under the Convention,[40] a captured combatant is presumed to be a prisoner of war if he himself claims the status of prisoner of war or if he appears to be entitled to such a status. This might bring in the subjective element with regard to the grant of temporary

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39 See, draft article 42 bis, "Protection of Persons taking part in hostilities", CDDH/000/260, Official Records, vol.3, pp.189-90.

40 Article 5 of the 1949 Prisoners of War Convention provided: "should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal". Almost the same provision is made in Protocol I, Article 45, paragraph 1. See Appendix

prisoner of war status, for the capturing state may deny the possibility of such a status. To some extent this subjective element has been assuaged by a further insistence that such prisoner of war status should be granted "if the Party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power". And, always in case of doubt, favourable treatment is to be given to the captured combatant,[41] unless a competent judicial tribunal decides otherwise.

Adjudication on Prisoner of War Status to be Prior to Trial on Criminal Charges:

Some of the hostile activities on the part of combatants are exempted from the purview of criminal law, as these activities are regarded sine-qua non of modern warfare. Therefore, when the prisoner of war status of a captured combatant is in dispute, a provision is made that this dispute be settled before his trial on criminal charges. To inject some objectivity in such determination, a quasi-obligatory provision has been made that the representatives of the protecting power shall be entitled to attend the proceedings. But this provision is unduly diluted by providing that when such

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41 Israel, in the plenary meeting declared that the obligation to determine the status by a competent tribunal arises "only where an objective doubt exists", otherwise this presumption is to be "invalidated ab-initio", see CDDH/SR.41, Official Records, vol.6, p.189.

proceedings are held in-camera in the interest of state security, the representative of protecting power will not attend it.[42]

If the trial for determining prisoner of war status is held before trying the captured combatant for any alleged criminal activity, then the criminal charges will not remain sustainable.[43] Hence there was general consensus for imposing this obligation in Committee III but this provision could not be pressed too far as judicial procedures differed from nation to nation.[44] Hence a quasi-obligatory provision was adopted. Syria proposed deletion of the second part of Article 45, paragraph 2 because it was only an expectation and not an obligation on the captor,[45] a sound proposal which was surprisingly not heeded.

The provision regarding in-camera proceedings is adopted from the 1949 Prisoners of War Convention.[46] This provision is prone to be misused, introducing as it does, subjective elements in the proceedings. To reduce the possibility of holding a trial in which no representative of protecting power is allowed, an amendment was

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42 See, Text of Article 45, paragraph 2, Appendix B.

43 Green, n.11, p.15.

44 CDDH/3R.41, n.41, p.155.

45 CDDH/III/3R.48, Official Records, vol.15, p.103.

46 See Article 105 of the 1949 Prisoners of War Convention.

moved that in such instances, the ICRC be allowed to attend the proceedings[47] in camera. Regrettably, no consensus could be arrived at. Had the amendment been accepted, it would have marked an improvement over the existing law. It would have obviated the much resented presence of the protecting powers at the proceedings, replacing it by an objective international body, the ICRC. In such a cases, then, there would have been no infringement, real or imagined, of national sovereignty.

Sometimes, when a captured combatant is not entitled to prisoner of war status and, he shall have the right at all times to the protection of Article 75 of the Protocol. Article 75 provides, inter alia, that the detaining power shall respect the person, honour convictions and religious practices of such persons and shall not indulge in murder or maltreatment of the captured person in its custody. Hence an all embracing, comprehensive concern is incorporated in the Protocol to cover all categories of combatants. Earlier, the right of communication was denied to a number of categories of combatants like spies, saboteurs, persons suspected of indulging in activities hostile to the state's security etc.,[48] which

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47 Amendment was supported by Belgium, Canada, Egypt, Federal Republic of Germany, Ghana, Greece, Ireland, Italy, Netherlands, New Zealand, Norway, Spain, Sudan, Sweden, U.A. and Northern Ireland and USA. See, CDDH/III/260, Official Records, vol.3, add.1, p.189.

48 See Article 5 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

naturally entailed avoidable hardships to these categories of persons. But now, Article 45, paragraph 3 accords the right of communication to all the categories of persons except spies held in occupied territory. This is definitely a step forward in ameliorating the hardships of captured combatants.

Spies

Espionage is an indispensable feature of warfare from time immemorial; the modern techniques of warfare have only provided ultra-powerful methods of military reconnaissance. Belligerents try to apprehend each other's future moves and try to render the opponents' offensive power ineffective. Espionage was rampant in World War II, when famous spies like Mata Hari and Dusko Popov rendered invaluable service to the fighting forces. But then, who is to be regarded a spy? "A spy is a person who, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy."[49] On similar lines was the definition adopted under Article 29 of the 1907 Hague Regulations on Land warfare; "[N] person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone

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49 See, "Instructions for the Government of the Armies of the United States in the Field, General Orders No.100, 24 April 1863" reprinted in D. Schindler and J. Toman, The Laws of Armed Conflict (Geneva: Henri Dunant Institute, 1975), p.3.

of operations of a belligerent, with the intention of communicating it to the hostile party". Thus the clandestine manner of obtaining information, in the zone of operation of the opponent, with a view to communicating such information to one's own armed forces so as to wreck the enemy from within, characterise the spies.

International law offers no value-judgement on espionage, but a spy, when captured, can be punished for the act because of the inherent danger posed to the opponent state's security.[50] But, the 1907 Hague Regulations provided that when a spy was captured while indulging in the act of espionage he could not be punished without previous trial,[51] nor could he be held responsible for acts of espionage that he committed, after rejoining the army to which he belongs. Also, he cannot be denied prisoner of war status when captured on charges of espionage committed by him before rejoining his army.[52]

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50 For further information, see Baxter, n.12, pp.329-33; McDougal and Feliciano, Law and Minimum World Public Order (London: & New Haven: Yale University Press, 1961), pp.559-60; Oppenheim, International Law, Lauterpatcht ed. 7 edition (London; Longman Green, 1952), pp.421-28.

51 Article 30, 1907 Hague Regulations on Land Warfare.

52 Ibid., Article 31.

There was no explicit mention of espionage in the 1949 Prisoners of War Convention. Even the categories of individuals who fall within Article 4 of the Convention are denied prisoner of war status if at the time of capture they are dressed in civilian clothes and engaged in the task of espionage in a hostile belligerents' zone of operation. The ICRC wanted to reaffirm this part of law of war relating to spies and consequently incorporated it in Protocol I. Article 40 of the draft Protocol I dealt with combatants who, recognisable as such, enter the enemy controlled territory and either "gather or attempt to gather military information for further transmission or, destroy or attempt to destroy military objectives".[53] Thus, it is obvious that the ICRC draft dealt not only with espionage but also with sabotage. However the final text dropped the latter and exclusively dealt with espionage.

Paragraph 1 of Article 46 provides "/n/otwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy".

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53 Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts : The First Session of the Diplomatic Conference, Geneva, 20 February-29 March 1974", Netherlands Yearbook of International Law, vol.5 (1974), p.15.

Two clarifications need to be made. First, the words "notwithstanding any other provision of the Conventions" imply a reference to Article 4 of the 1949 Prisoners of War Convention which lays down certain preconditions entitling the complier thereof to prisoner of war status. But apart from this, now the members of "armed forces" falling into the category of spies, include those fighting for national liberation, guerrillas, resistance fighters etc. All these are not entitled to the prisoner of war status, if captured while being engaged in espionage. They will be treated under the ordinary law of the land. But even these spies will enjoy certain fundamental guarantees under Article 75. The second clarification relates to the question as to who may be called a spy. The Protocol is silent on this point. The remaining paragraphs of Article 46 only clarify as to who may not be considered a spy. Consequently, the word "spy" is used in the sense attributed to it in Article 29 of the 1907 Hague Regulations on Land Warfare.[54]

What difference does the wearing of regular military uniform make on the status of a spy? If a member of the armed forces of a belligerent, while gathering or attempting to gather information, is in the uniform of his armed

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54 See pp.71-72 of this chapter.

forces, then he is not considered "as engaging in espionage"[55], and consequently is not regarded as a spy. Thus retaining his prisoner of war status under Articles 43 and 44 of the Protocol. Resenting this rather misplaced emphasis on the wearing of uniforms, certain countries like Spain,[56] Vietnam,[57] wanted the requirement to be deleted and, instead, wanted a requirement of distinguishing themselves from civilian population by putting on a clearly visible badge. In such cases, spies were to retain prisoner of war status. This proposition was supported by Algeria and Romania. The Vietnamese delegate maintained: "what distinguishes espionage from the legitimate quest for military information is its clandestine nature",[58] but since in most of present day wars waged by the peoples fighting for self-determination, it is difficult to delink the activities of the liberation armies from that of the life of the civilian population, there is no need to make a requirement of wearing uniforms because it would deprive a greater number of people, seeking to collect information from the enemy, of their otherwise legitimate status of prisoner of war. Instead of

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55 See the text of Article 46, paragraph 2 in Appendix B.

56 See CDDH/III/213, Official Records, vol.3, p.174.

57 CDDH/III/245, Ibid., p.175.

58 CDDH/III/SR.30, Official Records, p.293.

emphasising on the wearing of uniforms, the requirements of belonging to a military organization and under a responsible military command could be used to establish non-clandestine activities. But despite widespread dissatisfaction, the word 'uniform' could not be deleted from the final text. Its retention was supported on the ground that "the intention was not to alter the law so far as classical cases of espionage were concerned but to afford protection against accusations of espionage for residents of the occupied territory".[59]

Espionage and Residents of Occupied Territory:

International law affords no protection to those engaged in espionage. But if such collection of information is done openly, then the members of armed forces, resident in the occupied territory, are protected in as much as they are accorded prisoner of war status under the Protocol. If the members of armed forces employ any false pretention or engage in clandestine activities, they lose the privileged status. Thus collection of information under a different name or by using forged documents, carrying of objectionable article, etc., render the espionage activities as clandestine. It is but natural that all espionage is clandestine in nature, but what is attempted here is to extend the protection

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59 CDDH/III/Sr.47, Official Records, vol.15, p.90.

in those instances where they have been carried out openly, so as to bring at least a handful of combatants under the purview of the Protocol. But in all the cases a fundamental condition has been imposed that to be treated as a spy, the person concerned must be apprehended while actually engaged in espionage. He cannot be deprived of his prisoner of war status for any of the activities he might have engaged in before his apprehension. This article applies to the members of armed forces, civilians in occupied territory being excluded from its purview.[60] Therefore, if civilians are apprehended while engaging in espionage, they will not be given prisoner of war status by the captor state.

But what is the legal status of a member of armed forces who is engaged in espionage but is not a resident of the occupied territory? Article 46, paragraph 4, which addresses this problem, provides a logical extension to Article 31 of the 1907 Hague Regulations on Land Warfare, to the occupied territory. Under it, such persons cannot be denied prisoner of war status on account of acts of espionage committed before they rejoined their armed forces. Only if they are caught while still engaged in espionage and before they rejoined their armed forces, can they be treated as spies, thus depriving them of prisoner of war status.

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60 This is so because the part 3 section 2 of the Protocol deals only with "Combatant and Prisoner of War Status".

Under these circumstances, two problems crop up; who is to be considered a resident of the occupied territory, and when can he be said to have rejoined his armed forces? The Rapporteur of Committee III noted in his report[61] that the "resident" should connote only 'usual or ordinary resident' who is not expressly sent into occupied territory for spying. Such a meaning seems to have been attached to the word 'resident' in Article 46 paragraph 3 where he comes across information valuable to his own armed forces. But if he is specially sent from outside area to the occupied territory for the purpose of spying, then he is not to be regarded as a "resident", and consequently loses the protection afforded to prisoner of war. As to the second problem of 'rejoining the armed force', the Report suggested that when the spy ceases to engage in espionage, he would be considered to have rejoined his armed forces even if he continues to reside in the occupied territory. The engagement ceases when the information gathered has been communicated to the armed forces to which the spy belongs. Any other interpretation would subject the members of armed forces, over staying in the occupied territory, to the charge of engaging in espionage and disentitle him to the prisoner of war status, because otherwise the captor state can always maintain that such a resident has not yet rejoined his armed forces.

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61 CDDH/III/338, Official Records, vol.15, pp.430-31.

Mercenaries and Prisoner of War Status

A radical change has been brought about by the 1977 Protocol with regard to the legal status of mercenaries. It is well-known, mercenaries are those persons who are actuated by the desire for private gain, unlike spies, who are motivated by patriotic zeal. But international law does not distinguish between the two and both of these categories are denied the much coveted prisoner of war status. Article 47,[62] dealing with mercenaries, along with the article on spies, were the most debated articles at the Diplomatic Conference. The Socialist countries and the Third World countries (specially, African states) were arrayed against European countries and the United States, both determined to have their way in Committee III.

For a proper appreciation of this interesting debate a brief word on the role of mercenaries in a historical perspective may not be out of place. Mercenaries have existed since time immemorial; from Roman times[63] to well into the present age. In the 1970s they came under severe criticism because of the dubious role played by them; the Angolan War of Independence providing the telling example.[64]

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62 While under discussion in Committee III, this article was titled, Article 42 "Quarter".

63 George Schwarzenberger, "Terrorists, Hijackers, Guerrillas and Mercenaries", Current Legal Problems, vol.24 (1971), p.279.

64 New York Times, 8 June 1976, p.2, col.4, and 29 June, 1976, p.1, col.6.

Nearer home, mercenaries are reported to be actively considering the possibility of participating in the Afghanistan with the guerrillas fighting the Russian forces.[65] The case of Spanish Civil War has become almost classical in which "volunteers" from many European countries[66] participated, mostly on ideological lines. But then who is to be regarded as 'mercenary'? One definition is: "A volunteer who, for monetary reward enters into an agreement to fight for the armed forces belonging to a foreign state or an entity purporting to exercise authority over a country or people or a part thereof".[67] Quite often mercenaries are referred to as "soldiers of fortune" whose main aim is merely and purely monetary gain. But at times they do fight for political, ideological or religious causes. Some authorities view the private, non-governmental nature of these participants as crucial.[68] But according to

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65 See statement made by Mr. John Pilgrin, in The Times of India, 24 March 1981, p.12, col.5.

66 Some of the famous mercenaries in the Spanish Civil War are named in George Orwell's writings.

67 H.C. Burmester, "The Recruitment and the Use of Mercenaries in Armed Conflicts", American Journal of International Law, vol.72 (1978), p.37. Also see, generally, R.E. Cesner Jr. and J.W. Brant, "Law of the Mercenary : An International Dilemma", Capital University Law Review, vol.6 (1977), pp.339-70.

68 Burmester, Ibid., p.38.

Anthony Mockler, the real mark of the mercenary is "a devotion to war for its own sake".[69] Nobody would plead that persons motivated by monetary gains or by a mad obsession for war and killing should be given the privileged status of prisoner of war.[70] Moreover, their participation in war naturally tends to perpetuate war, which has, of course, been outlawed. Hence the prisoner of war status ought not to be accorded to mercenaries, the argument runs. This was reflected in the legal status accorded to all the captured combatants prior to the 1977 Protocol.

Referring indirectly to mercenaries, the 1907 Hague Convention Regarding the Rights and Duties of Neutral Powers and Persons in case of War on Land provided in Article 17 that a neutral national in the armed forces of a belligerent no longer remains neutral. He is so identified with the fighting forces that he is accorded the same treatment when captured by the opponent. Thus no special classification of mercenaries was made. Following the same line of rationale, the 1949 Prisoners of War Convention, too, maintained a discrete silence as regards mercenaries. Like guerrillas, they were also regulated by Article 4, paragraph 2 which provided for the entitlement of prisoner of war status on fulfilling the four conditions already alluded to.

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69 Anthony Mockler, Mercenaries, 1970.

70 J.R. Cotton, "Rights of Mercenaries as Prisoners of War", Military Law Review, vol.77 (1977), pp.143-66.

However, the 1960s saw a change in the attitude of the world in general and the Third World in particular towards mercenaries. The role of mercenaries was condemned and deplored by the United Nations Security Council in Congo in 1961.[71] In 1976 mercenaries were not only captured but were also put on trial by the Peoples' Revolutionary Court of Angola.[72] In South Africa again, the racist regime is making use of mercenaries.[73] Naturally the Third World, vehemently opposed to all this, joined together in the United Nations General Assembly and adopted a number of resolutions. In the Declaration on the Granting of Independence to Colonial Countries and Peoples (1968), the General Assembly condemned mercenarism as a criminal act and mercenaries as outlaws, and called upon states to enact legislation prohibiting mercenarism.[74]

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71 The Encyclopaedia of Military History (London: Mac Dougal, 1970), p.1266. Also see, generally, R.Martin, "Mercenaries and the Rule of Law", The Review of International Commission of Jurists, vol.17 (1976), pp.51-57.

72 The Court tried and convicted thirteen white soldiers on the charge of being mercenaries. Nine were sentenced to prison and four to death. See, Mike J. Hoover, "The Law of War and the Angolan Trial of Mercenaries : Death to the Dogs of War", Case Western Reserve Journal of International Law, vol.9 (1977), pp.323-406.

73 See, The Times of India, 31 July 1981, p.1, cols.2&3.

74 Resolution 2465, GAOR Supp. (No.18)5, UN Doc.A/7218 (1968), paragraphs 8.23.

In another resolution (1973), the General Assembly declared the use of mercenaries against national liberation movements as a criminal act and urged states to punish mercenaries as criminals.[75]

Thus the growing legal trend has been towards depriving the mercenaries of the privileged prisoner of war status and treat them like ordinary criminals. They can be tried not only for killing and causing physical harm but also for unlawfully taking part in hostilities itself. Feeling against mercenaries ran so high that they were even sought to be denied the very basic "Fundamental Guarantees" of Article 75 of the Protocol.[76]

At the Diplomatic Conference Nigeria proposed a separate Article (42 quarter) to be incorporated which, though not according prisoner of war status to a mercenary, defined him as "not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or take part in armed conflicts essentially for monetary payment, reward or other private gain".[77] The Nigerian proposal was much applauded in the Working Group of Committee III but at the time of drafting the final text, no consensus could arise. Failure to do so

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75 Resolution 3103, "Basic Principles on the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes", 28(1), G.O.R. Supp. (No.30), 142, UN Doc. A/9030 (1973).

76 Henry W. Van Deventer, "Mercenaries at Geneva", American Journal of International Law, vol.70 (1976), p.814.

77 CDDH/III/GT/82, Official Records, vol.3, p.192.

was mainly attributed to the lack of discretion given in the proposed article to the detaining power. Moreover, even as regards definition, there remained much difference of opinion in Committee III.

The scope of the term 'mercenary' too led to debate. Some delegations wanted persons like technicians and military advisers of foreign nationality, who are paid considerably higher amounts than the nationals of the same state, not to be included in the term 'mercenary'. Some delegates did not want to support an express mention that such persons are not to be treated as mercenaries,[78] thus deliberately leaving its scope ambiguous.[79] True, such technicians and military advisers may not directly participate in the process of war but nevertheless they have an indirect hand in killing the enemy soldiers because their support enhances manifold the destructive capacity of the state they support. Under the present Protocol, it has been left to the individual state's discretion to determine the exact scope of the term 'mercenary'.

While Article 47 declares that "/a/ mercenary shall not have the right to be a combatant or a prisoner of war", it goes on to ensure that regular combatants do not suffer in any way by being declared mercenaries. Paragraph 2 of the article thus provides six characteristics, three

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78 Van Deventer, n.76, p.814.

79 In the final text, no such express mention as regards scope, has been incorporated. See Appendix,B. Article 47.

of which are negative, which a person must possess before being treated as a mercenary. Such a person need not necessarily fight for a colonial or imperial power but for any belligerent irrespective of the reason of the conflict. A mercenary needs to be specially recruited locally or abroad for a particular conflict; he must also be taking direct part in hostilities and must be motivated essentially by the desire for private gain and must be paid substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party. The onerous obligation of proving, that a person was fighting "essentially" for private gain, is cast upon the detaining power. If it cannot be so established then the person cannot be treated as a mercenary. And more often than not, it is quite difficult to establish the motivation in the case of combatants. These safeguards protect the article from being misused by curtailing the subjective discretion of the detaining power and thus ensures that those rightfully deserving prisoner of war status would not be deprived of their just claim.

The article further provides that a mercenary should neither be a citizen nor a resident of the territory of the state being served by him. This alien character of a mercenary is undisputably important, about which there was no difference of opinion. But the provision in paragraph 2(e) is that the mercenary should

not be a member of the armed forces of a party to the conflict, was criticized on many grounds.[80] It is quite easy for the government of the belligerent state to integrate the mercenary into the ranks of its armed forces by an act of appropriate authority, or for a mercenary to enrol himself in the armed forces and thus evade this provision legally. How will this provision be used in future and how far the investigations will be allowed to examine the genuine links of nationality, remains to be seen. The last provision, paragraph 2(f), embodies the principle that any state is free to seek help. In such cases, the members of the armed forces of a foreign state will not be regarded as mercenaries. Mercenaries have to be "private armed forces" for which the state, of which they are nationals, owes no responsibility. This nexus of governmental responsibility for the private individuals taking part in the war, is an essential element determining the status of mercenaries. Thus the troops sent by Cuba to fight in favour of the Popular Movement for the Liberation of Angola (MPLA) could not be considered as mercenaries while the self-styled

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80 This means that mercenaries, although organised, will not be under the command of a party to the conflict which is responsible for their activities as required under Article 43 of the Protocol.

"soldiers of fortune", recruited to fight for the National Union for the Total Independence of Angola (UNITA) were punished for being mercenaries because, in their case, there was no government officially responsible, recruited they were by an English Organization - "Security Advisory Services".[81]

Are the "Fundamental Guarantees" of Protocol I (Article 75) applicable to mercenaries? To presume that since there is no express mention in Article 47 to this effect, all the mercenaries will not be accorded the benefit of fundamental guarantees, is to misinterpret the Protocol as a whole. This would be tantamount to placing the mercenaries in a position worse than even the ordinary war criminals, and would thus defeat the spirit of the Protocol. As even mercenaries are human beings, the humane conditions of treatment envisaged in the Protocol should be extended to them. It was observed that the countries who have been the victims of mercenary operations[82] opposed the extension of fundamental guarantees to mercenaries whereas the Western nations pleaded for a liberal and more humane treatment to mercenaries,

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81 Hoover, n.72, pp.324-26.

82 Zaire opposed it whereas Canada, Italy, Switzerland, Holy See etc. were more liberal with mercenaries. See, CDDH/SR.41, Official Records, vol.6, pp.158-60.

perhaps because of their nationals' involvement in such wars. The argument in support of some consideration for mercenaries is quite convincing: "at the same time that one is extending protection under the laws of war to guerrillas, it seems inconsistent to be taking it away from other combatants".[83] These protagonists favour states taking appropriate actions so as to restrict the freedom of their nationals to enlist as mercenaries abroad.

The root cause of the opposition of Third World countries to mercenaries is obvious. They have been victims of colonialism and imperialism in the past; and now mercenaries are frequently used to curb national liberation movements, specially in Africa, against colonial oppression. They, therefore, are continuously engaged in efforts both at national and international level, to end mercenarism. They believe that stringent legislation at national level making it impossible for their nationals to enlist themselves as mercenaries must be accompanied by efforts at the international level to curb it in a concerted manner. The consensus at the Diplomatic Conference emerged only to the extent that mercenaries be denied prisoner of war status but not beyond. Superficially there seems to be contradiction in the objectives of the

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83 Burmester, n.67, p.55.
Schwarzenberger, n.63 too has noted that "denying prisoner of war status to mercenaries while extending it to guerrillas is another milestone on the highroad to violence unlimited", p.282.

Protocol, that of extending the humanitarian treatment of the laws of war to a maximum number of people, and at the same time denying it to mercenaries. But, since mercenaries constitute an obstacle to people fighting for just causes, an end to the mercenaries would prove to be only humanitarian in the long run. Any step towards discouraging mercenarism is welcome; and Article 47 of Protocol I is one of the most important steps towards abolishing mercenarism. The problem is both political and legal and the Protocol attempts to give a legal solution to it.

Protection Required before According Prisoner of War Status ; Quarter, Hors de Combatant Paratroopers in Distress

The ordeal of prisoners begins right from the moment they are captured by the enemy. From that moment to the time they are finally evacuated from the fighting zone, prisoners run a risk to their personal safety and lives.[84] During this period, the individual captors are so charged with fury and are so blind with vindictive emotions that they can maltreat or even kill their captives with impunity. Hence there is an urgent need to enforce the very basic principle of protecting hors de combat so that the superstructure of the humanitarian law relating to prisoners of war

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84 This holds good to a great extent in the Korean and Vietnam conflicts. See, Howard S. Levie, Prisoners of War in International Armed Conflict, International Law Studies, vol.59 (Rhode Islands: US Naval War College, 1977), p.100.

can be established. Articles 40-42 deal with the situations where combatants have not yet been given proper prisoner of war status. All these provisions are applicable to the actual conduct of hostilities, right on the fighting front, and make a contribution to the development and reaffirmation of the Hague law.

Article 40 states: "/I/t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis". All those enemy personnel seeking to surrender shall not be denied help and be given quarter. The practice originated in the Middle Ages when the vanquished were granted sanctuary in his castle by the victor, and then taken prisoners.[85] Generally, it came to be accepted that a belligerent was obliged to take prisoners a surrendering enemy. This was first recognised in Article 28 of the 1899 Hague War on Land Convention and then again in Article 23 paragraph (d) of the 1907 Hague Regulations on Land Warfare.

Before the surrendering personnel are given quarter, they are regarded as hors de combat. After giving the quarter, they acquire the prisoner of war status. Since both the terms, quarter and hors de combat are inextricably

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85 For the right of quarter in the ancient times and the records in the Old Testament, see Erickson, n.2, p.571.

linked together, they were initially considered in one article, Article 38, in Committee III. But later on at the Third Session, it was split into two parts: Article 38 on quarter, and Article 38 bis on safeguarding enemy hors de combat. The first part on quarter presented no difficulty in adoption but not so with the second part, Article 38 bis. Though the concept is more than a century old,[86] its definition is not yet precise mainly owing to the changes in the methods of warfare. A hors de combat has been generally considered to be "a combatant who, having laid down his arms, no longer has any means of defence or has surrendered, and thereafter abstains from any hostile act, is not attempting to escape and who is unable to express himself or clearly expresses an intention to surrender".[87] However, difficulties arise when a combatant is unable to express himself due to injury or being unconscious or simply because of ignorance of the language of the captor.

The first paragraph of Article 41 reaffirms the principle laid down in Article 23 paragraph (c) of the 1907 Hague Regulations on Land Warfare that "a person who is recognised or who, in the circumstances, should be recognised to be hors de combat shall not be made the

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86 See, The St. Petersburg Declaration of 1868 reprinted in Schindler and Toman, n.49, pp.95-97.

87 International Law : The Conduct of Armed Conflicts and Air Operations (Washington, D.C.: Department of the Air Force, 1976), pp.1-2.

object of attack". Initially, it could not be decided whether a combatant hors de combat ought to be protected only against "attack" or whether the protection should extend to death, injury and torture, as provided in the ICRC draft. This was mainly due to disagreement between countries as to when exactly did a combatant hors de combat change into a prisoner of war. Those in favour of the latter proposition argued that at times a combatant might be in the hands of the adversary without being a prisoner of war and it should be explicitly mentioned that on such an occasion also an enemy personnel should not be killed, injured or tortured.[88]

However the other group, by means of an amendment[89] submitted that in case a combatant hors de combat is not in the hands of the adversary the question of ill-treating or torturing them does not arise and therefore those words are uncalled for. The working group of Committee III did not provide any specific formulation, for it explained that matters such as protection of enemy hors de combat from mistreatment are still governed by the 1949 Prisoners of War Convention and Article 75 on Fundamental Guarantees of Protocol I.

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88 See views of the delegates of Algeria and the Soviet Union. CDDH/III/SR.29, Official Records, vol.14, pp.279, 283.

89 For views of the United Kingdom and Northern Ireland, Ireland and Belgium, see, CDDH/III/242, Official Records, vol.3, p.170.

The following paragraph defines the categories of personnel that shall be regarded as hors de combat. Any person who is within the control of an adversary or has expressed his intention to surrender, i.e. who may not have been taken into custody but has indicated his desire to surrender,[90] automatically becomes a prisoner of war and should be treated accordingly. Yet another category of persons hors de combat mentioned in Article 41 is of those persons who are unable to defend themselves either because of being unconscious or sick or wounded. However these persons would be considered hors de combat only if they refrain from hostile activities or do not make an effort to escape, for otherwise they would no longer be hors de combat but active combatants engaging in a hostile act.

A problem which might arise under abnormal circumstances is that at times a long distance patrol takes prisoners of war but is unable to safely evacuate them and take them to the nearest post without any risk of being attacked by a hostile civilian population. In such a case what can the capturing unit do? The Hague Regulations are silent on this matter. In practice it would either

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90 For example a combatant who has laid down his arms or is standing with his hands up at a slightly distant place but within firing range, has not yet been taken into custody by the adversary but has indicated his intention to surrender, should not be killed or wounded.

kill the prisoners[91] or refuse to take prisoners at all or adopt a third course set forth in the third paragraph of Article 41, i.e. to release the prisoners whom it cannot evacuate safely.[92] It is also expected of the captor to take all feasible precautions to ensure the safety of the prisoners released.

Aerial Warfare and the Protocol:

As the object of the Protocol was to extend the protection of humanitarian laws of war to maximum possible categories of combatants, should it extend to those persons parachuting from an aircraft in distress? Naturally such an idea could not have been conceived at the Hague Conventions (1899 and 1907) as the aerial mode of warfare was non-existent then. But Article 20 of the Hague Rules of Air Warfare, 1923[93] did provide that the airmen

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91 However, under the 1949 Prisoners of War Convention a prisoner of war cannot be killed but treated humanely at all times. (Article 13). Therefore, according to law, killing is prohibited. See, Kalshoven, "Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts : The Diplomatic Conference, Geneva, 1975-1977", (Part II), Netherlands Yearbook of International Law, vol.9 (1978), p.164.

92 The idea is drawn from Article2(4) of the 1906 Convention of Geneva for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. It provides for the release of those wounded who were considered a burden by their captors. See, introduction of draft Article 38 by the ICRC representative Mr. De Preux, CDDH/III/SR.29, Official Records, vol.14, p.276.

93 Schindler and Toman, n.49, p.139. Also see, generally, Spaight, Air Power and War Rights (London: Longmans, Green and Co. Ltd, 1947), p.154; Green Spaan, The Modern Law of Land Warfare (Berkeley and Los Angeles: University of California Press, 1959), p.318; n.87, pp.2-4.

descending by parachutes from an aircraft in distress were hors de combat and should not be attacked in the course of their descent. But in World War II, the Germans totally disregarded all such norms of humanitarian law and shot the descending airmen before they touched the ground.[94]

This provision has become important today in view of the increased importance of air warfare. States did not arrive at any consensus on this question at the Diplomatic Conference but kept debating it till the very last session when it was put to vote.[95] The final text provides that "/N/o person parachuting from an aircraft in distress shall be made the object of attack during his descent".[96] If such persons surrender then they are not to be attacked but if it becomes apparent that they will engage in hostile acts, they may be engaged in battle. But this is not to say that all airborne troops are to be spared, especially if they have an unmistakable intention to engage in hostile acts.

The ambit of this final text is narrower than that envisaged in the ICRC draft. The latter had covered persons even inside the aircraft, descending in distress.

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94 Institute of World Polity, Prisoners of War (Washington, D.C.,1948), p.25.

95 Article 42 was adopted by 47 votes in favour and 6 votes against with 15 abstensions in Committee III.

96 Article 42, paragraph 1. See Appendix B for the full text.

This was found out acceptable mainly to avoid difficulties such as protecting an aircraft which might or might not crash.[97]

The most debatable question was whether a person parachuting from an aircraft in distress can ever be attacked, except in case of his showing hostile intention. The Western countries which have more sophisticated air forces and whose stakes are greater, favoured a liberal treatment of such descending airmen. They are not to be attacked whether they land in the enemy territory or in their own or their ally's territory. As opposed to this was the group of Arab countries which maintained that where it is certain that the descending airmen will land in their own or their ally's territory, they may be made an object of attack.[98] Both sides advanced cogent and convincing arguments. The Western countries maintained that descending persons are hors de combat, helpless to defend themselves. They can be likened to the unconscious, wounded soldiers in the field evincing an intention to surrender. Hence they ought not to be made the object of attack. But the other contending group, having in view the vital strategic importance of the air force and of airmen in the conduct of modern warfare, maintained that it would be almost suicidal to let the airmen rejoin the airforces of their countries. This would be the

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97 CDDH/III/338, Official Records, vol.15, p.429.

98 For various arguments, see CDDH/III/SR.30, Official Records, vol.14, p.287.

inevitable result when such descending persons land in their own territory and are not, in the meanwhile, attacked by the enemy even though they may be within shooting range. Hence the Arab countries moved an amendment[99] qualifying the article with "unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party". An idea of the hard bargaining and the near-equal division on the issue can be had from the fact that though the working group had adopted draft Article 39[100] with the qualifying phrase, and regarded them as temporary hors de combat,[101] the qualifying phrase was finally dropped, at the fourth session of Committee III. The ICRC representative Jean Pictet's anguished statement was a telling commentary on the dispute: "[T]he ICRC would be dismayed to see a provision, making it lawful to kill an unarmed enemy who was not himself in a position to kill, introduced into law which had hitherto been purely humanitarian".[102] The article as finally adopted, to which Arab countries opposed till the end,[103] was a clear victory for the Western states and for their sophisticated means of aerial warfar.

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99 CDDH/414, Official Records, vol.3, p.173.

100 For text, see CDDH/236/Rev.1, Official Records, vol.15, p.412.

101 Report of the Committee III, CDDH/407/Rev.1, Official Records, vol.15, p.450.

102 CDDH/SR.39, Official Records, vol.6, p.107.

103 The article was adopted by 71 votes to 12, with 11 abstentions.

Despite many differences, the Diplomatic Conference successfully produced this document of humanitarian law through the process of "consensus". But as the name of the Protocol suggests it is "additional to the 1949 Geneva Conventions", and mostly "reaffirms and develops" the erstwhile law. Hence the provisions relating to the prisoners of war, in the Protocol, cannot be viewed in isolation but only in conjunction with the provisions of the Geneva Conventions especially the Prisoners of War Convention. Viewed as a whole, the Protocol has succeeded in further ameliorating the lot of new categories of combatants like the guerrillas and the members of national liberation movements by according them the privileged status of prisoner of war. At the same time, some harmful and universally despised categories of combatants, like mercenaries and spies have been deprived of such status. This is good so far as it goes. But greater attention needs to be focussed on the proper and effective implementation of these pious undertakings.

CHAPTER IV

ARTICLES INDIRECTLY APPLICABLE TO PRISONERS OF WAR

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Unlike the 1949 Prisoners of War Convention, the 1977 Protocol deals not only with prisoners of war but also with the protection of victims of international armed conflict in general. Hence a fuller perspective of the status of prisoner of war can be had through a study of those provisions of the Protocol that have an indirect bearing on them.

Scope

The most important provision in this connection is contained in Article 1, paragraph 4 relating to the increased scope of the term "war victims". The Protocol has greatly broadened the categories of war victims who are now required to be protected, including members of the forces fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. Such a liberal view is a direct corollary to the elevation of national liberation movements from the municipal level of "domestic jurisdiction" to the international level.[1] The other provision, or set of provisions, that enhances the categories of combatants entitled to prisoners of war status relates to the institution of Protecting Power.

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1 For a fuller discussion, see Chapter I, pp.7-11 and also Chapter III, pp.52-55.

The Protecting Power - The Linchpin of the Protective Mechanism of the Conventions and the Protocol

What is a Protecting Power? It is "any neutral state entrusted by the belligerent with the protection, in the territory of the other belligerent or the territory occupied by him, of the interests of its nationals."[2] But most of the times a neutral state, named as Protecting Power would not be acceptable to the opposing belligerent, thus rendering the whole mechanism ineffective. Hence the Protocol strives to improve the situation by a better definition of a Protecting Power as "[a] neutral or other state not a party to the conflict which has been designated by a party to the conflict and accepted by the adverse party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and the Protocol".[3] (emphasis added).

The nature of duties of a Protecting Power are similarly clarified in order to make it more effective both under the Conventions and the Protocol.[4] These

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2 Oppenheim, International Law, Lauterpacht ed., vol.2, (London: Longmans, Green and Co., 1952), p.374.

3 Article 2, paragraph c. See, Appendix B.

4 See K.C. Hingorani, Prisoners of War (Bombay: N.M. Tripathi, 1965), pp.184-86. For a detailed analysis see Howard S. Levie, Prisoners of War in International Armed Conflict, International Law Studies, vol.59 (Rhode Island: US Naval War College, 1977), pp.255-307.

range from visiting the prisoner of war camps and other places of internment, delivering the correspondence and transmitting the lists of prisoners of war. They are even empowered to attend the proceedings of a judicial tribunal adjudicating the legal status of a doubtful captive.[5] The importance attached to the Protecting Power is evident from the fact that it is even made obligatory for the belligerents to appoint a Protecting Power: "the present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty is to safeguard the interests of the parties to the conflict".[6] (emphasis added)

Unhappily, however, no Protecting Power had ever been appointed since the coming into force of the 1949 Geneva Conventions. Often it was the International Committee of the Red Cross (ICRC) which performed that function.[7] This practice, perhaps, may be attributed to the fear that by appointing a Protecting Power, a

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5 Article 45 of the 1977 Protocol. See Appendix B.

6 Article 8, paragraph 1 of 1949 Geneva Convention relating to Prisoners of War.

7 For example, in the Korean and Vietnamese armed conflicts and Indo-Pak wars of 1965 and 1971. For appointment of Protecting Powers, see David Forsythe, "Who Guards the Guardians : Third Parties and the Law of Armed Conflict", American Journal of International Law, vol.70 (1976), pp.46-47.

state would be impliedly acknowledging the existence of the opposing belligerent and thus of the existence of the state of war, which is prohibited by Article 2, paragraph 4 of the Charter of the United Nations.[8] Moreover, the Korean and Vietnamese experience amply demonstrated the hostility of the communist states to the appointment of the Protecting Powers, as they regarded such appointments as an encroachment on their national sovereignty.[9] This practice has provoked one commentator to a bitter attack that "/t/o talk of the regular application of international humanitarian law without the effective functioning of some Protecting Power system ... is idle charter".[10] Consequently, even the General Assembly of the United Nations was moved to endorse the need to have recourse to the institution of the Protecting Power.[11]

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8 Statement made by H.S. Levie, Proceedings of the 69th Annual Meeting of the American Society of International Law, 1975, p.252.

9 R.I. Miller, The Law of War (Massachusetts and London: Harbridge House Inc., 1975), pp.171, 241-42. For reservations to Article 10 of 1949 Prisoners of War Convention see D. Schindler and S.Toman, The Laws of Armed Conflict (Geneva: Henri Dunant Institute, 1973), pp.483-511.

10 G.I.A.D. Draper, "Implementation of International Law in Armed Conflicts", International Relations, vol.48 (1972), p.47.

11 General Assembly Resolution 2852, 20 December 1971. "Respect for Human Rights in Armed Conflicts", GAOR, XXVI, Supp.29, at 90, UN Doc. A/8429.

The ICRC draft article 5 [12] required the belligerents not only to designate a Protecting Power without delay but also to facilitate the activities of Protecting Power, appointed by its opponent, in its territory. In case of disagreement the belligerents were to prefer one of the two proposed alternatives before the Diplomatic Conference: (a) The ICRC may assume the functions of a substitute within the meaning of Article 2, paragraph e provided the parties to the conflict agree, and in so far as those functions are compatible with its own activities. (b) The parties to the conflict shall accept the offer made by the ICRC, if it deems necessary, to act as a substitute within the meaning of Article 2, paragraph c".

Obviously, the second alternative is preferable as it does not leave any scope to any belligerent to stall the appointment of Protecting Power, by making it imperative for the Parties to accept the ICRC as a "substitute". Thus the second proposal had the semblence of a stricter alternative, but as the ICRC would never, in reality, offer to act as substitute without their prior consent, [13] this alternative is difficult only in appearance.

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12 For text, see Official Records, vol.1.

13 ICRC Draft Additional Protocols to the Geneva Conventions of 12 August 1949 at 13 (1973) cited in Forsythe, n.7, p.51.

As the Australian delegate pointed out, the provision is effective "not because it made it more obligatory for the party concerned to accept the offer of the ICRC but because it appeared to do so..."[14] Ultimately, however, the opposition of some states required a number of informal compromises before the draft proposal could be adopted through consensus.[15] The ICRC draft also mentioned specifically that the continuation of diplomatic relations between the two belligerents should not hinder the designation of Protecting Powers.[16] Though there was agreement in principle to strengthen and make more effective the whole mechanism of Protecting Power, the controversy centred round the issue of automaticity of substitute on the failure of the appointment of Protecting Powers.[17] Should the substitute automatically

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14 CDDH/I/SR.19, Official Records, vol.8, p.173.

15 See George S. Prugh Jr., "Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflict", International Lawyer, vol.8 (1974), pp.262-67.

16 During Sino-American War of 1962, China refused to designate a Protecting Power, maintaining that the diplomatic relations between India and itself were not snapped. This provision sought to curtail such excuses. See J.A. Cohen and H. Chiu, People's China and International Law, vol.2 (New Jersey: Princeton University Press, Princeton, 1974), pp.1570-75. Also see Article 5, paragraph 6 of the 1977 Protocol.

17 For text of proposed amendment see, Official Records, vol.3, pp.23-24; and for relevant debates in Committee I, see CDDH/I/SR.11, Official Records, vol.8, pp.77-85.

assume the role and discharge the functions of a Protecting Power or only when it is asked to do so by a belligerent?

In case of disagreement between the contending parties on the designation of Protecting Power, the earlier law provided no means of identifying a mutually acceptable Protecting Power.[18] Under the Protocol, if belligerents could not designate or accept Protecting Powers from the beginning of a conflict, the ICRC "without prejudice to the right of any other impartial humanitarian organization to do likewise will offer its good offices and assist the conflicting parties in the designation of a Protecting Power".[19] The ICRC is to ask each party, inter alia, to give a list of at least five states which each would want to act as its Protecting Power. Also, the ICRC is to ask each adverse party to provide a list of at least five states which it would accept as the Protecting Power of the first party. After comparing both the lists the ICRC is to identify a mutually acceptable state.

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18 Article 10, 1949 Prisoners of War Convention.

19 G.I.A.D. Draper, the United Kingdom delegate wanted the ICRC to start mediation "immediately after a conflict had begun for which there was no Protecting Power". CDDH/I/SR.12, Official Records, vol.8, p.94.

If, despite this procedure, no Protecting Power is determined, then the ICRC or any other impartial and efficient humanitarian organization, is to act as a substitude. "The functioning of such a substitute is subject to the consent of the parties to the conflict".[20] When compared to the earlier law, this provision of the Protocol seems to be retrogressive[21] but of what use is an ambitious enactment of legislation if it cannot be implemented in practice? If states are to formally consent to the appointment of such substitutes, then at least this fundamental supervisory mechanism would not remain a dead letter, as had been the case till then. The concern of the protagonists of humanitarian law to resurrect and revive this unused system of Protecting Power is apparent from the fact that the Protocol has explicitly mentioned the training of personnel in applying 1949 Conventions and the Protocol and in particular discharging the duties of Protecting Power. Such personnel could then be made available by the ICRC while offering its good offices[22] or when a neutral state acts as a Protecting Power.

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20 Article 5, paragraph 4 of 1977 Protocol I. See

21 The corresponding provision in 1949 Prisoners of War Convention was Article 10, paragraph 3: "/I/f protection cannot be arranged accordingly, the detaining power shall request or shall accept subject to the provisions of this Article, the offer of the services of a humanitarian organisation, such as the ICRC, to assume the humanitarian functions performed by Protecting Powers under the present Convention". (emphasis added) See the comment made by the Egyptian delegate, CDDH/I/SR.28, Official Records, vol.8, p.272.

22 Article 6 "Qualified Persons"of the 1977 Protocol.

Considering the comprehensive and effective role of the ICRC as Protecting Power, it is submitted that a provision ought to have been made for the automatic choice of the ICRC to perform the duties of Protecting Power from the time the hostilities break out till the time belligerents agree upon some Protecting Power. The law of war, combined with the human rights movement is bound to develop in this direction.

Protection of Persons Under Enemy Control

(i) Civil Defence Organizations:

Not only military personnel but more and more civilians are now protected under the Conventions and the Protocol.[23] The case of the civil defence organization (CDO) is of great relevance in this connection. In some countries civil defence organisations are composed of civilians alone.[24] However, members of armed forces and certain military units may also be assigned the job of civil defence. While the civilian members, if captured, would undoubtedly be treated according to the fourth 1949 Geneva Convention relating to civilians and Part IV of Protocol I, how are the members of armed forces to be treated? Should they be regarded as part of the armed forces as defined in Article 43 or should they be treated as civilians?

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23 For details see Part IV "Civilian Population", Articles 48-79 of the 1977 Protocol.

24 E.g. in Australia. Other countries endorsing this view are Japan and Denmark. See Committee II of Diplomatic Conference. CDDH/II/SR.97, Official Records, vol.12, pp.447-48 and 450.

Article 67 which deals with this problem[25] like so many other articles in the Protocol, seeks to maintain a balance between maximum safety to the civilians and the greatest possible safeguards to military personnel of civil defence organisations.

If certain preconditions are fulfilled, then the Protocol provides for respect and protection of the members of armed forces and military units assigned to civil defence organisations. These preconditions are that such personnel should solely engage themselves in the task of civil defence as defined in the Protocol, i.e., in one of the fifteen humanitarian tasks mentioned in Article 61, and should not engage themselves in any other military duties during the conflict. Moreover, such personnel and such units should be permanently assigned the task of civil defence.[26] "Permanently assigned" means that such personnel cannot be transferred back either to their own parent units or any other military units so as to take active part in hostilities.[27] However, this provision fails to take into consideration

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25 There being no such Article in the ICRC draft, it was prepared by the Working Sub-Group of Committee II.

26 See Article 67, paragraphs 1(a) and 1(b) of the 1977 Protocol.

27 See the clarification made by Chairman of the Working Sub-Group, CDDH/II/SR.96, Official Records, vol.12, p.431.

the practical conditions of a war. As the Ghana delegate stated that for a developing country, like his, which did not have sufficient number of trained civilians, it was not feasible to immobilise its trained soldiers, specially during the height of hostilities just because earlier they were assigned civil defence duties.[28] Even the USSR delegate maintained that in conflicts that continue for a long time and affect large areas and where a number of military personnel are engaged in civil defence, there might be a need to reassign them back to participate directly in hostilities.[29] It is submitted that by unnecessarily restricting the scope of such military personnel in Article 67, paragraph 1(a) and (b), the object of providing maximum benefits to the various types of persons engaged in warfare, has suffered a slight setback. The practical conditions of the modern "total war" might make it imperative even to transfer military members assigned to civil defence organizations back to active hostilities. Hence a broader view of such possibilities would have been welcome in the Protocol.

The other important precondition requires that such personnel are clearly distinguishable from other members

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28 CDDH/SR.43, Official Records, vol.6, p.270.

29 Ibid., p.277.

of the armed forces by prominently displaying the international distinctive sign of civil defence and they should also carry the required identity cards. Such personnel would carry only light weapons for self-defence and that no heavy weapons would be transported with the help of civil defence organizations.[30]

Civil defence organizations perform preventive and protective functions but do not form part of armed forces. What status should, then, be given to these members of armed forces and military units? Switzerland sought to place them on the same footing as military medical personnel and chaplains who are protected but not given prisoner of war status as combatants.[31] Civil defence involves preventive and protective measures and is hence more humane than the post-casualty medical assistance where harm has already been done. The Swiss proposal fell through and a general consensus emerged out of the Diplomatic Conference that the prisoner of war status be accorded to such members of civil defence organizations.

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30 n.27, p.437.

31 CDDH/II/SR.97, Official Records, vol.12, p.442. Also see the view expressed by Switzerland in the Plenary meetings, CDDH/SR.43, Official Records, vol.6, p.276.

Belligerents tend to flout all laws of war by resort to the "doctrine of military necessity". Can such members of civil defence organizations be compelled to work for the captor state under this doctrine? Article 50 of the 1949 Prisoners of War Convention had provided: "/P/risoners of war can be compelled to do such work as ... public utility services having no military character or purpose". But, if on the same analogy, the members of civil defence organizations are permitted to be compelled to work, then such a provision is liable to be misused. The occupying power can then induct such prisoners in its own civil defence organization and thus expose them to dangers. To avoid such an eventuality certain countries like Yugoslavia, Indonesia and Egypt, wanted no reference at all to be added in the text for inclusion of such prisoners into the occupying powers' civil defence organizations.[32] But having in view the practical conditions and necessities of warfare, a consensus was reached to provide for an express safeguard to be embodied therein, "but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks".[33] (emphasis added)

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32 CDDH/II/SR.97, Official Records, vol.12, p.442.

33 See Ibid., p.444, and Article 67, paragraph 2 of the 1977 Protocol.

This additional safeguard of volunteering for dangerous tasks was required because once in the hands of an adverse party, the captured military personnel may be compelled to do inherently dangerous tasks under the garb of voluntary service - like bomb disposal.[34] There are no objective means by which it can be determined whether a prisoner of war has volunteered for a dangerous job or he has been forced to do so. Such cases of coercion, when detected, ought to be expressly declared war crimes because once in the hands of the adverse party, they are also hors de combat and as such should be regarded as protected persons.

(ii) Medical or Scientific Experimentation:

Broader application of the humanitarian law entails the prevention of torture of the prisoners even by way of medical or scientific experimentation on them. Medical torture can occur in two ways: prisoners requiring medical treatment may be subjected to medical experimentation of different kinds, and healthy prisoners of war may be made guinea pigs for experiments or may be forced to donate blood or other organs at the cost of their own

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34 However, the military personnel possessing special skills in bomb disposal might engage in such work on a voluntary basis. See the statement made by the Chairman, Ibid., p.443.

life which need not always be used for their comrades allegedly in need but for enemy personnel. For the prevention of torture and other such practices on enemy personnel hors de combat, a step was taken in the 1949 Prisoners of War Convention stating categorically that "/a/ny unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest".[35] This provision should apply to instances where prisoners are forcibly made to donate blood or other organs for transplantations and graftings to such an extent that their lives may be endangered. But, in practice, it was not. The ICRC sought to plug the loophole by its draft article 11.[36] Though this draft article did not embody any new principle,[37] it did mention the prohibitions contained in Article 13 of

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35 Article 13, the 1949 Prisoners of War Convention.

36 For draft article 11 of the ICRC, see, Official Records, vol.1.

37 Introduction to the draft article 11 by the ICRC representative, Jean Pictet in Committee II, CDDH/II/SR.10, Official Records, vol.11, p.79.

the 1949 Prisoners of War Convention with an additional clause that such prohibitions would hold good even if an individual gives his consent otherwise. This clause was necessiated because at times these prohibitions are brushed aside or disguised by taking the consent of a prisoner under coercion. It prohibited physical mutilation, medical or scientific experiments, and unjustified acts of grafting and transplanting. However, certain, states felt that the ICRC draft article did not go far enough on such an important matter. While, on the one hand, Australia introduced an amendment,[38] framing an entirely new article by which it sought to prohibit any "unjustified" acts or omissions endangering the health and integrity of a captured person. It also clearly prohibited the removal or transplantation of organs or tissues, including blood donation except when required medically. It specified that an individual may donate blood voluntarily and without coercion and inducement according to the generally accepted medical standards and for the benefit of both the donor and the recipient. On the other hand was the amendment moved by the Arab countries[39] requiring a written declaration of refusal by

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38 For views of the Australian delegate see Ibid.,p.80. For the text of the amendment see, CDDH/II/43, Official Records, vol.3, p.60. Austria, Hungary, Netherlands, Poland, Sweden, Switzerland, the USSR, the UK and Northern Ireland, the United States of America were co-sponsors of this amendment.

39 CDDH/II/70 and CDDH/II/207, Official Records, vol.3, p.61.

a person in case he so feels even if a surgical operation on his body is necessary according to the common medical practices. Both the amendments being very important were referred back to the Drafting Committee.[40]

The first two paragraphs of Article 11 - the negative injunctions - are based mainly on the Australian amendment. Paragraph 1 prohibits any unjustified act or omission against the physical or mental health and integrity of persons hors de combat. Thus it prohibits any medical treatment which is not required by the state of health of a person and would not be given to the nationals of that party under similar medical circumstances. The latter provision is an improvement over the position obtaining in the 1949 Prisoners of War Convention. Despite initial Arab opposition, the exception clause was adopted by using the word "unjustified".[41] Only those acts or omissions are prohibited that are wilful and thus unjustified. Otherwise, the generally accepted category of justified acts continue to have force - like the use of force by a nurse in self-defence when attacked by a detained person.[42] Even the amputating of a leg of a

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40 CDDH/II/SR.14, Official Records, vol.11, p.126.

41 The Arab amendment CDDH/II/70 in effect stated: "In paragraph 1, omit the word "unjustified", n.39.

42 Example given by the American delegate while extending his delegate's support to amendment, CDDH/II/43 and CDDH/II/SR.14, n.40, p.123.

wounded soldier, to prevent the poison from spreading over to other parts of body, is medically essential and hence a justified act under the Protocol.

The clause upholding "justified acts or omissions" is capable of being misused in certain cases but such relaxation is considered necessary not only for the integrity of the medical profession but also for the safety of such patients who are physically not in a position to give their consent. Moreover, the chances of misuse have been minimised by incorporating in paragraph 4 that any wilful, i.e. unjustified act or omission, "shall be a grave breach of this Protocol" and which, as Article 85 of the Protocol provides, "shall be regarded as war crimes".

Although the removal of tissues and organs for transplantation is prohibited, donation of blood and skin for grafting was not disallowed in the Australian amendment as well as in the drafting committee report, though the blood donation was to be only for therapeutic purposes and "under conditions consistent with generally accepted medical standards and controls for the benefit of both the donor and the recipient".[43] However, the Bangladesh delegate feared the flouting of such a provision as had happened in the past in which forcible extraction of blood from the prisoners had led to their death.[44] Although

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43 n.38. For similar Polish views, see CDDH/II/SR.29, Official Records, vol.11, p.296.

44 CDDH/II/23, Official Records, vol.11, p.223.

many countries[45] shared the concern shown by the Bangladesh delegate, it was felt that absence of such a provision might have undesirable consequences when a wounded or sick would not get blood in time because it is not expressly provided for under the law. At the same time, there was apprehension that an express prohibition might give the captor state a chance to justify its denial to a prisoner of war a blood donation for saving the life of his own comrade.

In order to remove all the doubts as regards coercion or inducement, a suggestion was made by one delegate[46] that written consent be obtained from the prisoner to signify voluntary consent. This statement was to be made in the presence of two co-prisoners. However, the proposal was considered impractical. But medical personnel may endeavour to obtain a written statement from the patient who, requiring to undergo a surgical operation, may refuse to do so.[47] Such a provision is made to protect the integrity of the medical profession as well as to enable the prisoners to escape from the caprices of the captor state.

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45 Countries are Australia, Denmark, Netherlands, Soviet Union, Switzerland and Sweden, Ibid., pp.223-25.

46 Suggestion made by the Indonesian delegate, CDDH/II/SR.29, Official Records, vol.11, p.30.

47 Paragraph 5 of Article 11 of the 1977 Protocol.

A further safeguard to the now very common cases of blood-transfusion and skin-grafting is contained in the provision for maintaining medical records of certain categories of prisoners.[48] Some of the developing countries like Nigeria and Iraq[49] expressed doubts whether all the parties would be in a position to maintain elaborate medical records of each and every person that is in its power. Hence under the Protocol two categories were made keeping in view the objective of the medical treatment; (a) cases for donation of blood for transfusion or skin for grafting only; and (b) all other medical procedures undertaken. The Protocol makes it obligatory for the detaining power to maintain a medical record of the former category of objectives, whereas for the latter category, it is only advisable or desirable to maintain records. This insistence on keeping medical records is an improvement of law over Article 30 of the 1949 Prisoners of War Convention. Such records shall be available at all times for inspection by the Protecting Power. Thus, the humanitarian law has endeavoured to build various safeguards and protections to the prisoners of war. Obviously, it is in the mutual interest of the belligerents to follow these provisions.

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48 Ibid., paragraph 6 and CDDH/II/SR.32, Official Records, vol.11, p.327.

49 Ibid., p.331.

Fundamental Guarantees : The Saving Clause of Humanism

Persons detained but not entitled to prisoner of war status are nevertheless protected and certain minimum guarantees are assured to them. This is because every individual has a right to his life, integrity - both physical and moral - and of the attributes inseparable from his personality and "each person shall benefit from guarantees recognised by civilised peoples".[50] These two principles form the substance of fundamental guarantees which may be regarded as the cornerstone of the 1977 Protocol. Article 75 not only fills the gap and covers the grey area between combatants and civilians but also reiterates the fundamental minimum assurances inherently available to every human being regardless of the circumstances in which he is captured. It was deservedly applauded by the Belgian delegate De Breucker as having "produced a summary of the development of human rights since 1949".[51]

Certain loopholes were discovered in the working of the 1949 Geneva Conventions. It encouraged arbitrary treatment to the captured enemy personnel whose status

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50 Jean Pictet, The Principles of International Humanitarian Law (Geneva: International Committee of the Red Cross, 1960), pp.34 and 46.

51 CDDH/III/SR.43, Official Records, vol.15, p.31.

was not clearly determined. To limit and control this, the ICRC submitted its draft article 65 which provoked as many as thirteen amendments.[52] It sought to limit the categories of beneficiary. Though it included (a) nationals of states not bound by the 1949 Geneva Conventions, and also (b) its own nations,[53] still many important categories of captured personnel were excluded from its purview, such as mercenaries, persons indulging in espionage, combatants accused of grave breaches of the Conventions, etc. Finland wanted to include nationals of a neutral or co-belligerent state with which normal diplomatic relations were not broken. Since any attempt at being exhaustive was found inexpedient, such a proposal was dropped. Instead it provided a general provision to the effect: "In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol, shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction..."[54] It thus refers to persons in the power of a party to the

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52 For amendments on draft article 65, see Official Records, vol.3, pp.289-95.

53 See Article 5 of the 1949 Geneva Convention Relating to Civilians.

54 Article 75, paragraph 1 of the 1977 Protocol.

conflict, whether adverse or their own or one of their allies.

This Article, being in the didactic nature of dos and donts to the captor state, is directly based on the International Covenants on Civil and Political Rights of 1966,[55] which affirms the basic equality of every human being and as such are entitled to enjoy certain fundamental, inalienable rights. In the same vein, Article 75 accords certain fundamental guarantees to all enemy personnel irrespective of their status. These guarantees are accorded to all the captured persons irrespective of their race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other criterion. Further, each party is to respect the person, honour, convictions and religious practices of all such persons. All these are the established norms of the Geneva law but confusion arose as to the interpretation of the word "convictions".[56] Convictions could be political, social or religious; the

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55 Adopted and opened for ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966. Also see, Schwelb, "Civil and Political Rights : The International Measures of Implementation", American Journal of International Law, vol.62 (1968), p.827. And, "Entry into Force of the International Covenants of Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights", American Journal of International Law, vol.70, (1976), p.511.

56 L.C. Green, "The New Law of Armed Conflict", Canadian Yearbook of International Law, vol.15 (1977), p.24.

last one was mentioned expressly. By far the most important is a political conviction or ideological differences. The captured enemy personnel may subscribe to the opposing political ideology or he may hold different views even though he may be its own national, then this provision guarantees him protection from humiliation or torture merely on the ground of heretical political convictions.

In order to achieve these aims, the Protocol prescribed certain acts on the part of the agents of the captor state whether civilians or military. They are enjoined upon to refrain from indulging in violence against the life, health, or physical or mental well-being of the persons. This provision is very general and all-embracing and still the Protocol specifies some of the more heinous types of acts that are proscribed such as, inter alia, murder, mutilation, corporal punishment, or physical or mental torture. The personal integrity, dignity and honour of the poor 'victims' is respected by not allowing them to any humiliating and degrading treatment, by not compelling them into enforced prostitution or any other form of indecent physical assault. These fundamental guarantees extend to the not taking of hostages and not imposing collective punishments. Though the Protocol prohibits even the threats to commit any of the foregoing acts.

It was impossible to include in Article 75 all the possible guarantees that should be granted to the victims of international conflicts, for example, the giving of treatment to the captured civilians at least equal to that of the prisoners of war, as was argued by the delegate of the Democratic Republic of Vietnam.[57] The combatants already have this privilege under Article 44 of the Protocol where even if they forfeit their right to be a prisoner of war, they will enjoy protection equal to the prisoners of war. Though the Vietnamese proposal was not incorporated to the extent desired, it was given effect to in the form of safeguards against unlawful prosecution, apart from the various prohibitions contained in this article. It enumerates certain basic principles of judicial procedure which are recognised by the civilized nations and which have to be followed by the regularly constituted court while dealing with persons accused of penal offences. There are ten principles listed in paragraph 4 of Article 75 which every court has to take into account and which represent the minimum guarantees for conducting an objective judicial trial. These principles include promptly furnishing of grounds of trial, presumption of

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57 CDDH/III/305, Official Records, vol.3, p.290.

innocence until proved guilty according to law; protection against being compelled to testify against himself or to confess guilt; the right to examine witnesses, the right not to be punished for something which was not a crime at the time of its commission (ex post facto law) or for a penalty heavier than the one in currency; the right to be informed, on conviction, of remedies available to the accused, etc.

Paragraph 7 mentions two general principles that are applicable to the prosecution and trial of persons accused of war crimes or crimes against humanity[58] - that the prosecution and trial of such persons shall be in accordance with the "applicable rules of international law and that the treatment provided by this article shall be the minimum whether or not the alleged offences constitute grave breaches of the Conventions or the Protocol. Regrettably, the Protocol does not explicitly mention the principles, i.e. the applicable rules of international law; hence much scope for subjective determination of such rules by various nations exists. Had the substantive principles of international law also been expressly mentioned, like the

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58 See amendment moved by Socialist countries, CDDH/III/315 and add.1, n.57, p.293. Also see, the statement made by the representatives of Soviet Union, Rylorussia and Hungary, CDDH/III/SR.14, Official Records, vol.15, pp.48, 50 and 51, respectively.

principles on procedural aspects of paragraph 4, no controversy would have ever arisen. But learning from past experience, where Soviet Union and most other Socialist countries[59] had made reservations to a similar Article 85 of the 1949 Prisoners of War Convention, it was thought more advisable to arrive at some consensus rather than to enumerate "objective" principles of international law which are bound to attract innumerable reservations. These fundamental guarantees have to be, by their very nature, general and not specific guarantees for as wide an application as possible.

Article 25 of the 1949 Prisoners of War Convention had provided for special treatment to women held as prisoners. They were to be accommodated in quarters separated from men's. However, as pointed out by many countries,[60] as each human being has a right to live with his family, it was generally accepted, and consequently embodied in paragraph 5, that "in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units".

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59 Schindler and Toman, n.9, pp.483-511.

60 Australia, Canada, Egypt, Ireland, Jordan, Saudi Arabia, Thailand, USA and Yugoslavia, CDDH/III/311, Official Records, vol.3, p.292.

Measures for Effective Application of the Conventions and the Protocol

(i) The International Committee of Red Cross and Other Humanitarian Organisations:

The institution of Protecting Power, which is in the nature of *post facto* control, can be made use of only after hostilities break out. Though its proper implementation will ensure compliance with the prescribed rules for properly treating prisoners of war, the institution of Protecting Power has not become popular. Hence, as a preventive measure, the dissemination of the knowledge of the principles of humanitarian law in the members of the armed forces in particular, and in the civilian population in general, will help the effective application of the Conventions and the Protocol. Such an awareness will help them in treating their prisoners more humanely and will make them demand such treatment at the hands of captor state, should they themselves become prisoners. It will also help reduce instances where combatants commit breaches even without being aware of such violation.[61] Such dissemination can be carried out in two ways: (a) by humanitarian organisations, like the ICRC, and (b) by legal advisers,

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61 G.I.A.D. Draper, "Collective and Individual Responsibility for the Application of Humanitarian Law in Armed Conflicts", Humanitarian Rules and Military Institutions (Milan: International Institute of Humanitarian Law, 1973), p.47.

advising military commanders, at various levels and by holding lectures and special lessons at the grassroot level.[62]

Even Article 125 of the 1949 Prisoners of War Convention had assigned an important role to the ICRC and other international humanitarian organizations with tasks such as visiting the prisoners, distributing relief material, etc. But this crucial provision was made subject to the detaining power's will, lest it may consider such activities as threats to its security. National Red Cross Societies and the League of the Red Cross were not given any role. But in view of the increased powers and obligations of these organizations, the law needed to be developed and reaffirmed.[63] The initial ICRC draft contained no provision to this effect but as many as thirty-three delegations proposed inclusion of the activities of these organizations.[64] The proposal read: "The parties to the conflict shall grant to the ICRC all facilities within their power so as to enable it to carry

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62 On application and implementation of the humanitarian law, see Shigeki Miyasaki, "The Application of the New Humanitarian Law", International Review of the Red Cross, no.217 (1980), p.184; and "Implementation of the Protocols", Ibid., p.198.

63 Statement made by the delegate of the Democratic Republic of Vietnam, CDDH/I/SR.37, Official Records, vol.8, p.388.

64 CDDH/I/263 and add.1, Official Records, vol.3, p.311.

out the humanitarian functions assigned to it by the Conventions and the Protocol in order to ensure protection and assistance to the victims of conflicts".[65] Thus, the article makes it obligatory for the parties to facilitate the work of the ICRC, and the detaining power now cannot use any pretext to hamper the ICRC from carrying out its minimum duties as elaborated in Article 125 of the 1949 Prisoners of War Convention and the Protocol. But this waiver of the consent does not extend to the carrying out of any other humanitarian activities not expressly provided under the Conventions and the Protocol.

There are national red cross societies working within their own national territories and abiding by the fundamental principles of the Red Cross.[66] Thus they can not only take care of their own disabled combatants, wounded and sick but also of the organisations irrespective of their state of origin. These national red cross societies can also effectively impart the basic tenets of humanitarian law to the soldiers and civilians by organising short term courses or

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65 Article 81 of the 1977 Protocol.

66 These are: Humanity, Impartiality, Neutrality, Independence, Voluntary Service, Unity and Universality, International Red Cross Handbook (Geneva, 1971).

through visual medium during peace time.[67] The high contracting parties and the parties to the conflicts are required to "facilitate in every possible way" the assistance which they extend to the victims of armed hostilities irrespective of the party they belong to.[68] These functions can also be performed by other humanitarian organisations provided they are authorised to do so by the contending parties and carry on their activities in accordance with the Humanitarian Law. This is a logical corollary to Article 5, whereunder humanitarian organisations have been authorised to work as Protecting Power or its substitute. These organisations can be like the Order of Malta or the United Nations High Commission for Refugees.

(ii) Legal Advisers in Armed Forces:

During an armed conflict, the humanitarian rules of war tend to be relegated to the background, more so by the combatants who hardly have had any awareness of the

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67 At one place it has been observed that "at virtually any point on the globe there are Red Cross Societies. ICRC delegations and other persons of goodwill, working independently and free of any official ties to spread knowledge of Geneva Conventions and the Principles of the Red Cross, aware of the fact that they are thus helping to establish an atmosphere of better understanding among men", "Dissemination of the Geneva Conventions", International Review of the Red Cross, no.196 (1977), p.382.

68 Paragraph 3 of Article 81, 1977 Protocol.

existence of such a body of rules. "So difficult has been the implementation of the law of war that the devices designed to that end must be multiform and not exclusive, i.e., they must interact and support each other as their individual efficacy is undoubtedly weak".[69] Hence, to make implementation more effective, a novel proposal to emply legal advisers to advise military commanders on the application of the Conventions and the Protocol was made in Article 82. This and the more general provision on dissemination contained in Article 83 were initially sought to be made more stringent and mandatory by the Conference of Government Experts but some of the rigidity was relaxed in the Diplomatic Conference as states considered these obligations to be too unrealistic. When once the fighting is on, military commanders may not pay much heed to the advice of legal advisers nor are the members of armed forces likely to comply with the spirit of laws of warfare when instructed on the field. Hence, it was proposed to associate legal advisers at the strategic planning stage. It is hard to conceive of a situation in which an armed personnel mistreating the prisoners under his charge or otherwise flouting the laws of war can be stopped by a legal adviser by exhortations to abide

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69 G.I.A.D. Draper, "Role of Legal Advisers in Armed Forces", International Review of the Red Cross, no.202 (1978), p.11.

by the law. He can perhaps be more effective if allowed to have his say in the top echelons of military who are required to formulate military policies consistent with obligations of the 1949 Conventions and the Protocol.[70]

The proposal of compulsory employment of legal advisers was relaxed at the instance of Brazil.[71] Accordingly, the high contracting parties are to ensure the availability of legal advisers to military commanders, when necessary. As the scope of the Protocol was extended to national liberation movements, it was thought doubtful whether such movements can compulsorily employ legal advisers. Many Third World countries also had doubts regarding their ability to employ legal advisers at all times.[72] Military personnel, having legal background, were considered to be the most suitable persons for appointment as legal advisers because it would be easier for them to go as far as the combat zone and also because they would have better rapport with military commanders.

(iii) Dissemination of Knowledge of the Conventions and the Protocol:

The importance of disseminating the knowledge of the laws of war cannot be over emphasized. There was a feeble provision for disseminating such knowledge in the

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70 G.I.A.D. Draper, Ibid., p.13.

71 CDDH/I/265, Official Records, vol.3, p.314.

72 For example, Nigeria and the Democratic Republic of Vietnam, CDDH/I/SR.37, Official Records, vol.8, pp.391-92.

1949 Prisoners of War Convention,[73] because it was too voluntary in nature. Dismayed at this flexibility, the ICRC proposed in its draft article 72 a stringent provision which states found difficult to comply with. This ICRC draft article required the high contracting parties to disseminate at all times the provisions of the 1949 Conventions and the Protocol in their respective countries and to make them part of the educational programmes of the military and civilian population. They were also required to report to the ICRC and Switzerland, the depository of the 1949 Conventions, every four years on the measures they have taken to disseminate the 1949 Conventions and the Protocol amongst their military and civilian population. Such dissemination was also to be among the members of national liberation movements and peoples fighting against racist regimes. Even the conference of Government Experts favoured a compulsory inclusion of the teaching of humanitarian law as part of civil instruction programmes.[74] But at the Diplomatic Conference states voiced their inability, lamenting the

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73 Article 127 of this Convention states: "The high contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population". (emphasis added).

74 Explanation by Antoine Martin, the ICRC representative at the Diplomatic Conference in connection with the framing of draft article 72. See, n.72, p.396.

impracticability of compulsorily disseminating the humanitarian law among civilian population. The United States representative considered it difficult in federal states where the programme of study is decided by the state governments and not by the federal government.[75] Keeping the huge, illiterate population of his country in mind, the Indian delegate expressed the problems of such countries in effectively and compulsorily disseminating such knowledge.[76]

Therefore, under paragraph 1 of Article 83, the high contracting parties were required to include the study of the 1949 Conventions and the Protocol in their programmes of military instruction but are required only "to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to civilian population". The previous condition of reporting to the depository - Switzerland - and to the ICRC every four years regarding the measures they have taken to disseminate the law was considered by some states to be an encroachment on their sovereignty.[77]

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75 Ibid., p.393. However, Draper counter argues that it is no answer for states to claim that "academic freedom" debars them from legitimately interfering with the contents of educational curricula, specially in the military institutions' curricula. In the case of civilian channels of persuasion are open to governments, along with the services of the trained educational psychologists, See, n.61, p.50.

76 Ibid., p.396.

77 Ukranian Soviet Socialist Republic's delegate, Ibid., p.394.

But where any military or civilian authorities are to assume any responsibility for the application of the Conventions and the Protocol, specially during armed conflict, then a thorough knowledge of the above texts is peremptorily required now. Its advantage is obvious; the commands originating from persons well-versed in these humanitarian laws, will invariably take account of the various aspects of compliance with the Conventions and this Protocol and thus minimise breaches of the law.

Minimisation of the Breaches of the Law : The Sanction Behind the Humanitarian Law

Whatever law is enacted for safeguarding the interests of prisoners of war, their breaches ought to be minimised, eliminated totally, if possible. The Protocol strives towards this aim by first declaring what are regarded as "breaches" and "grave breaches" of the Conventions and the Protocol, and then outlining the procedure to remedy them when such breaches do occur. "A system for the repression of grave breaches of humanitarian law could only work if it took account both of humanitarian aspirations and of harsh realities. To those who claimed that Protocol I would remain a dead letter if a firm system of repression was not set up, he would reply that to go too far in that direction would have the same effect ..."[78] i.e. too firm

78 See the statement made by the delegate of the Netherlands, CDDH/I/SR.45, Official Records, vol.9, p.46.

a system of repression, which would not be acceptable to many states, would also remain a dead letter. Hence, a practicable and realistic system of repression of the breaches was considered desirable.

Breaches and Grave Breaches : Article 85:

The article is not exhaustive in its nature. Though it enumerates some new categories of offences as grave breaches, it also includes all those breaches and grave breaches as were defined by the 1949 Geneva Convensions. Article 130 of the 1949 Prisoners of War Convention defined breaches as: "wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing of great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention". But now as the definition of prisoner of war has been broadened under Article 44 and a greater protection has been provided to those who take part in the hostilities and in the case of refugees and stateless persons under Article 73 of the Protocol, the acts enumerated in Article 85 amount to grave breaches. Other persons protected this way are the wounded, sick and shipwrecked of the adverse party, medical and religious personnel, medical units, and medical transports which are

under the control of adverse party. Among the grave breaches now covered by the Protocol, inter alia, are the wilful attack on civilian population, undefended civilian installations and localities, perfidious use of the distinctive emblem of the red cross, red crescent, etc., attacking a person with the knowledge that he is hors de combat, even unjustified delay in the repatriation of prisoners of war or civilians, attack on historic monuments, works of art or place of worship, transfer by the occupying power of parts of its own civilian population into the territory it occupies, deportation of the parts of population of the occupied territory, etc. A breakthrough has been made for the first time by including apartheid in the list of grave breaches.[79]

All these degrading practices expressed as grave breaches are declared to be war crimes.[80] In fact, a serious view is to be taken of these war crimes, as the Philippine delegate stated in anguish: "The world today, shaken by individual ambitions, a prey to fear and sometime hatred, was threatened with disintegration of its social and political structure if international problems of the

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79 Paragraph 4(c) of Article 85, of 1977 Protocol Based on the International Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly Resolution, 3068) (XXVIII).

80 Paragraph 5 of Article 85.

first magnitude, among them the question of war crimes, could not be resolved".[81] This may the grave breaches of laws of war raise the criminal culpability from the municipal to the international level and hopefully act as a deterrent force on the potential transgressors of law.[82]

International Fact-Finding Commission : The "Humanely Inquisive" Body

Prior to the 1977 Protocol, many a breaches of the laws of war used to go unpunished either because there was no objective machinery to determine these breaches or because the guilty states used to protect their members of armed forces alleged to be guilty of war crimes by suppressing some vital information or by not pursuing the investigation diligently. The mere appointment of Protecting Power and providing for enquiry and conciliation could not suffice to curb the breaches; a machinery for actively pursuing these breaches was called for. The proposal for such a standing body - which would act as Ombudsman institution or as an inspector of possible violations of laws of war - had been put forth several times earlier in the form of the United Nations and the ICRC.[83]

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81 CDDH/I/SR.45, Official Records, vol.9, p.50.

82 For penal sanctions, see Waldemar A. Solf, and Edward R. Cummings, "A Survey of Penal Sanctions Under Protocol I, Additional to the Geneva Conventions of 12 August 1949", Case Western Reserve Journal of International Law, vol.9 (1977), pp.205-51.

83 See the statement made by Hans Blix, Proceedings of American Society of International Law (1973), p.168.

In the Diplomatic Conference, the initiative in the direction of such an institution was taken jointly by Denmark, Norway, Sweden and New Zealand.[84] It was opposed by the USSR[85] and other Socialist countries on the ground that such a commission would derogate from the sovereignty of states and that it would be tantamount to some supra-national body. The Indian delegate, too, did not support the establishment of such commission, maintaining "why set up a new body which would probably arouse opposition in some countries? Co-operation between the parties was the way to ensure that the rules were kept rather than confrontation in any inquiry commission".[86] But the proposal did find general support of various nations and was finally adopted as Article 90 of the Protocol. The earlier law required the consent of both the parties to the conflict for the constitution of any inquiry commission, which remained a dead letter from its inception.[87] To avoid this shortcoming, the Protocol divides the subjects of inquiry into two categories depending upon the degree of culpability attached to the violator. It provides that[88]

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84 CDDH/I/241 and add.1, Official Records, Vol.3, p.338.

85 CDDH/I/SR.57, Official Records, Vol.9, p.212.

86 Ibid., p.220.

87 Article 132 of 1949 Geneva Prisoners of War Convention.

88 Paragraph 2(c) of Article 90 of the 1977 Protocol.

the Commission shall be competent to inquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol and any other "serious violation" of the Conventions and the Protocol. In such cases an enquiry may be initiated by the Commission sou moto and it could also offer its good offices to the parties to a conflict in order to restore respect for the law. The other category is of those cases which are neither grave nor serious breaches and which require the consent of both the parties to the conflict for conducting an inquiry by the Commission.[89] Many other views were also expressed at the Diplomatic Conference, the most striking being that of Japan.[90] Maintaining that "prevention is better than cure", it wanted the Commission to be competent to inquire even into the alleged "apprehensions" of the violation of the law, i.e. for those breaches about to be committed. The Pakistani delegate too expressed the progressive view which was considered to be far ahead of our time.[91] Hence both these views could not be finally accommodated in Article 90.

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89 Ibid., paragraph 2(d).

90 CDDH/I/316, Official Records, vol.3, p.342.

91 CDDH/I/SR.56, Official Records, vol.9, p.192.

The rest of the debate in the Diplomatic Conference centred round the constitution of the Commission and the procedure to be followed. The Protocol even provides an "optional clause jurisdiction" for the operation of the Commission[92] which says: "... parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognise ipso facto and without special agreement, in relation to any other high contracting party accepting the same obligation, the competence of the Commission to inquire into allegations by such other party, as authorised by this article". What fate this optional clause jurisdiction would meet, like the clause in the statute of the International Court of Justice, time alone will tell.

Extension in the fixing of Responsibility - Duty of Commanders

During a conflict, the military commanders have all the powers but seem to owe no duty to international law. The Protocol tries to remedy this anomalous situation by requiring "military commanders, with respect to members of the armed forces under their command, and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of the Protocol".[93] This special

92 Paragraph 2(a) of Article 90 of 1977 Protocol.

93 Article 87, paragraph 1 of the 1977 Protocol.

role of the commanders was first highlighted by the American delegate who proposed a new article 76 bis, to the Diplomatic Conference on the ground that without the conscientious supervision of the commanders, general legal requirements are unlikely to be effective.[94] The 1949 Conventions were silent regarding the authorities who tolerated violations or who did nothing to suppress such violations - such suppression being within their power. But now, an international duty has been cast on the commanders not only not to tolerate such violations but "to initiate such steps as are necessary to prevent such violations of the Conventions or the Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof".[95] Thus the article makes the repression and prevention of simple breaches more effective by holding a commander responsible. However, the word "commander" has not been clearly defined, thereby the officers' position in the military heirarchy, who can take penal and disciplinary action, is not known. But it is submitted that a broad interpretation of the word "commander" which would include all responsible military officers would be in consonance with the progressive, humanitarian spirit of the Protocol.

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94 CDDH/I/SR.50, Official Records, vol.9, p.120.

95 Article 87, paragraph 3 of the 1977 Protocol I.

Mutual Assistance in Criminal Matters

The parties are required to assist each other in connection with criminal proceedings brought in respect of grave breaches of the law.[96] They are also to co-operate in the matter of extradition where the law of the party requested would apply. This idea of universal jurisdiction and extradition for war crimes was drawn from Article 10 of the International Civil Aviation Organization's Convention for the Suppression of Unlawful Seizure of Aircraft,[97] signed at the Hague in 1970. The words "in respect of grave breaches" rather unnecessarily limit the scope of effective application of the Conventions and of the Protocol in criminal matters. It should be the endeavour of the protagonists of human rights to inculcate the feeling that breach of any provision of the laws of war is unlawful and all culprits ought to be brought to book so that exemplary action would deter potential violators of law.

Of course, the ultimate objective of the laws of war ought to be to eliminate the scourge of war from this planet;[98] which may rather seem to be an utopia. But, as

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96 Article 88, paragraph 1 of the 1977 Protocol [illegible] the Suppre

97 For text of the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft (1970) see, American Journal of International Law, vol.5 (1971), pp.440-45.

98 The preamble of the Charter of the United Nations.

a short term goal, efforts ought to be made to humanise the inhuman, and presently unavoidable institution of war, irrespective of the ethics and morality of a particular war.

All the provisions of the 1977 Protocol, discussed in this chapter though relate to the prisoners of war only indirectly and not directly, nevertheless have an important bearing on the ultimate treatment accorded to prisoners of war. Let the unscrupulous politicians wage wars for narrow ends, let the callous scientists help them make such wars more and more destructive, the aim of humanitarian law should never be lost sight of, that is, "humanity to human beings".

CHAPTER V

CONCLUSIONS

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The importance of the status of prisoner of war cannot be overemphasized. True, the means of modern warfare have invented more lethal weapons of mass, instant destruction; but undaunted by this disturbing trend, the advocates of humanitarian law have successfully negotiated a better deal for the prisoners. In fact, the rate of change in the concept of prisoner of war status in the last three decades has been so much that it far exceeds the total erstwhile development. And the change has been for the better.

In case of a large-scale war waged between the super powers by means of nuclear weapons (let alone neutron bomb) any law relating to the prisoners of war would be of no relevance. But the fact that conventional wars continue to be waged and with even greater fury should encourage efforts to develop and reaffirm the humanitarian laws. Efforts have to be made to reduce the unnecessary suffering of the 'human tools'that states use for waging wars. Though not exactly an ideal achievement, the 1977 Protocol has perceptibly ameliorated the existing humanitarian laws of war, specially the part relating to the prisoners of war. But many shortcomings, mainly those with regard to the status of prisoners of war continue to exist. The Third World countries scored a major

victory by extending the scope of the humanitarian law to national liberation movements, to struggles against racist regimes and against colonial rule. But the Western world is still not able to accommodate itself to this inevitable change, as is evident from the restrictive interpretation of the scope of the Protocol given by the representative of the United Kingdom[1] (Gl. A.D. Draper) at the Diplomatic Conference. He stated that widening the ambit of humanitarian law to cover the peoples struggling for self-determination has created "a new just-war concept" thus "threatening the equal application of the jus in bello". Under the Charter of the United Nations and the general principles of international law, Draper argued, a legitimate war could be waged only under two circumstances: firstly, by way of collective enforcement action, and secondly, in exercise of the right of individual or collective self-defence. Draper therefore maintained that the Protocol provisions on "/o/ccupation of enemy territories, the conduct of hostilities, the appointment and functioning of Protecting Powers, the penal repression of grave breaches and other topics governed by the Conventions and Protocol I present major difficulties when

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1 G.I.A.D. Draper, "Wars of National Liberation and War Criminality" in Restraints on War : Studies in the Limitation of Armed Conflict, Michael Norward, ed., (Oxford: Oxford University Press, 1979), cited in Michigan Law Review, vol.79 (1981), pp.997-1002.

applicable to national liberation movements".[2] He held further that there was apparently a double standard in law whereby the developed countries were expected to comply with an exhaustive body of international law while their adversaries in revolutionary and counter-insurgency wars were required only a reduced expectation of compliance.

Draper's criticism can be easily met. Now, after three and half decades of adoption of the Charter of the United Nations, and after a series of the General Assembly resolutions, it is naive to pretend that there is no right of peoples to self-determination. The charge that the Protocol throws unequal obligations on the conflicting parties in the case of national liberation movements is erroneous, as both belligerents are expected equally to apply the relevant laws of warfare.[3] Even the prisoners of war of the colonial power, who otherwise generally are the victims of reprisals and vengeance, are to be treated humanely by their opponents.

Not all the shortcomings have been removed.[4] How will the extent of armed conflict be determined? When and

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2 Draper, Ibid., pp.47-8.

3 See Article 96, paragraph 3 of the Protocol which requires of the authorities representing the struggling people to make a unilateral declaration to abide by the laws.

4 For the shortcomings and the need to reform law as it was before the conclusion of 1977 Protocol, see Chapter II, pp.32-38.

how "minor" skirmishes catapult into "major" wars? How is it to be determined that people are genuinely fighting for self-determination and that they are not a mere group of rebels? Does "colonial domination" mean only a direct foreign rule or does it include a puppet government? The Protocol provides no explicit answer to these. But most of these and other problems, *ejusdem generis*, could be objectively solved by a standing International Commission which, after studying each problem, would pronounce only on the applicability of the Conventions and the Protocol. Of course, enough guidelines would be required to be given to this Commission.[5]

Nor is there any provision either in the Conventions or in the Protocol for international organizations to become a party to it. This is a serious lacuna as should be evident from the increasing importance and frequent uses of the United Nations forces. Even if a single state, contributing to the United Nations contingent, is not a party to the Conventions and the Protocol, it will render the whole elaborate and protective mechanism nugatory. Hence, a provision should be made which would make it imperative for all the contingent forces to apply the

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5 R.I. Miller, The Law of War (ed.) (Massachusetts and London, 1975: Harbridge House, Inc. 1975), p.275.

relevant humanitarian law irrespective of the fact whether their parent state is or is not a party to the Conventions and the Protocol.

Despite these deficiencies, the 1977 Protocol has gone a long way in meeting the expectations and in extenuating the sufferings of prisoners of war, while no enterprise of this nature may achieve perfection, it is argued that the 1977 Protocol has made considerable progress in conferring the force of law on the principles contained in humanitarian law recognised by all peoples. The Protocol contains a timely restatement of the respect due to an enemy who has been disarmed and to persons taking no part in hostilities. It also provides the Red Cross with stronger grounds on which to base its necessary action.[6] The strengthening of the ICRC with more powers was a very timely and welcome step. Generally, the governments of conflicting parties do not allow the ICRC to operate in their territories but if an adequate law exists it would induce governments to allow such operations in future. Such provisions would also become part of customary law in due course, making future compliance easier. The present intransigence of governments is

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6 Appeal on the occasion of the entry into force of the 1977 Additional Protocols, International Review of the Red Cross, no.207 (1978), p.357.

evident from the fact that from July 1980 onwards the ICRC was not allowed its operations in Afghanistan, which therefore would only appeal to the parties engaged in the conflict to respect international humanitarian law. It has been playing a much more active role in the Iraq-Iran armed conflict.[7] Since both parties have not yet ratified the 1977 Protocol, they are obliged to abide by the 1949 Geneva Conventions. The ICRC has been visiting the wounded, sick and prisoners of war in both the countries and inspecting their detention conditions. It has been interviewing prisoners and sending reports and lists of detained persons to both the countries.

There is no gainsaying the fact that laws of war have immense significance and they have been progressively mitigating the sufferings and increasing the importance of human dignity. The humanitarian laws of war have kept pace with the broader and general aims of human rights. Given the political determination in implementing the 1977 Protocol, the condition of prisoners can be greatly improved. The need, therefore, is for the major powers,

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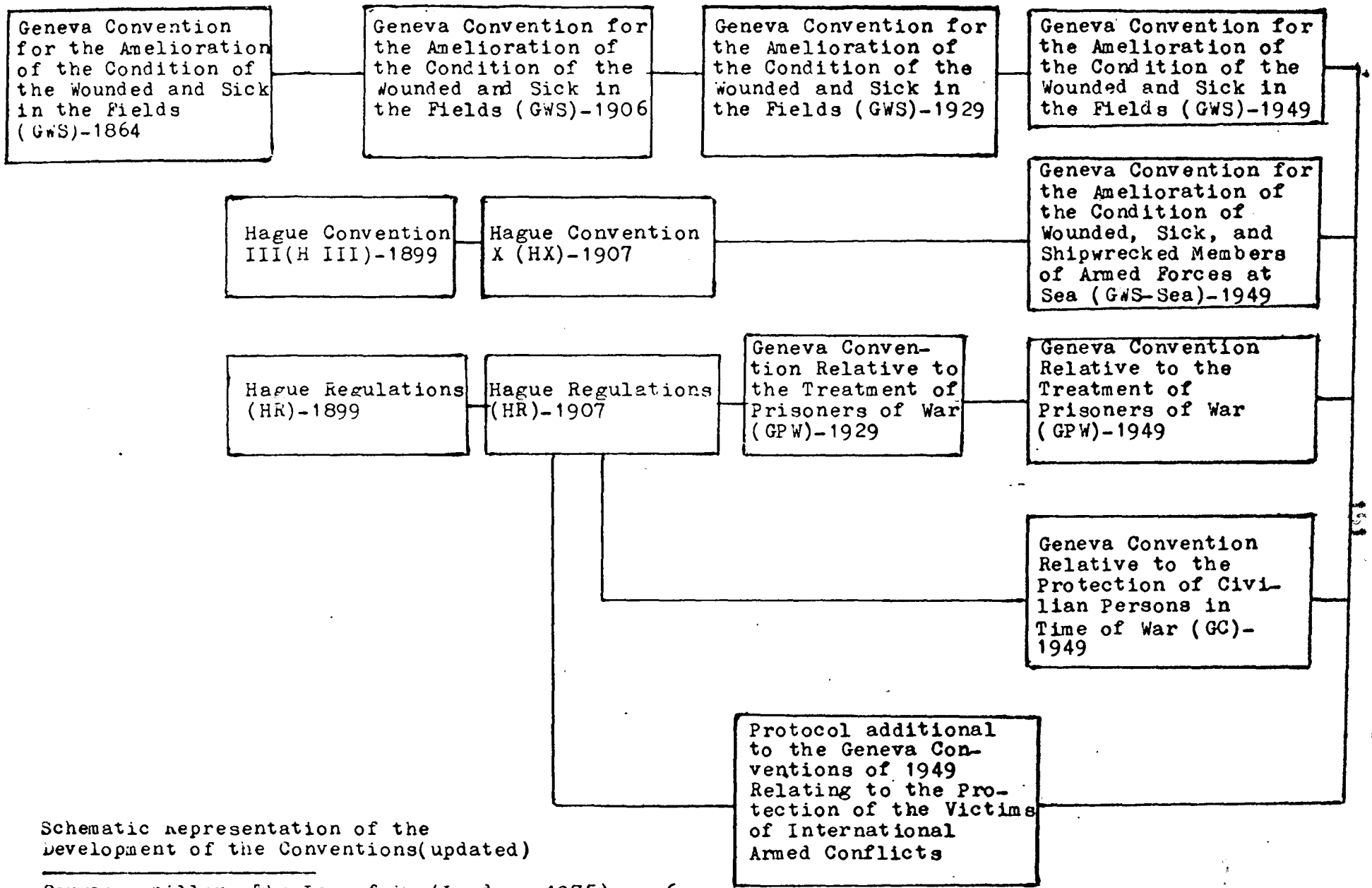
7 Activities of the Red Cross, International Review of the Red Cross, no.219 (1980), pp.332-33.

who so very actively participated in the Diplomatic Conference, to come forward, ratify and then implement these pledges for the overall betterment of the mankind. It is in the hands of governments to make the sufferings of human tools less or more. If the governments cannot stop the scourge of war, certainly they can co-operate in ameliorating the sufferings in their own interests.

APPENDICES



Schematic representation of the development of the Conventions(updated)

Source: Miller, The Law of war(London, 1975), p.6.

APPENDIX B

AN EXTRACT OF PROVISIONS FROM THE 1977 GENEVA PROTOCOL* RELEVANT TO THE SUBJECT OF ENQUIRY

Article 1 - General Principles and Scope of Application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. 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 dictates of public conscience.

3. 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.

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

*The official title of the Protocol is: Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts.

Article 3 - Beginning and End of Application

Without prejudice to the provisions which are applicable at all times:

(a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;

(b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstances, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.

Article 4 - Legal Status of the Parties to the Conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Article 5 - Appointment of Protecting Powers and of their Substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organisation to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may inter alia ask each Party to provide it

with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

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

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. A subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Article 6 - Qualified Persons

1. The High Contracting Parties shall, also in peace time, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 11 - Protection of Persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2(c) may be made only in the case of donations of blood for transfusion or of skin for grafting; provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 40 - Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41 - Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:

(a) he is in the power of an adverse Party;

(b) he clearly expresses an intention to surrender; of

(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42 - Occupants of Aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

Article 43 - Armed Forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, troups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. 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.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 - Combatants and Prisoners of War

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

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant

of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

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

(a) during each military engagement, and

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those

accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Article 45 - Protection of Persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question

is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46 - Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Article 47 - Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict,

material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 67 - Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that;

(a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;

(b) if so assigned, such personnel do not perform any other military duties during the conflict;

(c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;

(d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;

(e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;

(f) such personnel and such units perform their civil defence tasks only within the national territory of their Party;

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organisations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

3. The buildings and major items of equipment and transports of military units assigned to civil defence organisations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

4. The material and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

Article 75 - Fundamental Guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this 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. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited

at any time in any place whatsoever, whether committed by civilians or by military agents:

(a) violence to the life; health, or physical or mental well-being of persons, in particular;

(i) murder;

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences; such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court,

respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Article 81 - Activities of the Red Cross and other humanitarian organizations

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

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organisations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organisations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conference of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organisations referred to in the Conventions and this Protocol which are duly authorised by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Article 82 - Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate inst uction to be given to the armed forces on this subject.

Article 83 - Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries, and in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party, protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special

protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(c) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Article 86 - Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Convention or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit

such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 - Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 88 - Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Article 90 - International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of 15 members of high moral standing and acknowledged impartiality shall be established;

(b) when not less than 20 High Contracting Parties have agreed to accept the competence of the Commission pursuant

to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of these High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person;

(c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting;

(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured;

(e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs;

(f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognise ipso facto and without special agreement, in relation to

any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article;

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties;

(c) The Commission shall be competent to:

(i) inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol;

(d) In other situations, the Commission shall institute an inquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned;

(e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (a) Unless otherwise agreed by the Parties concerned, all inquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) two ad hoc members, not nationals of any Party to the conflict, one to be appointed by each side;

(b) Upon receipt of the request for an inquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any ad hoc member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under paragraph 3 to undertake an inquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation in loco;

(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission;

(c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate;

(b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability;

(c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an inquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an inquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of 50 per cent of the costs of the Chamber. Where

there are counter-allegations before the Chamber each side shall advance 50 per cent of the necessary funds.

Article 91 - Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

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