THE APPLICATION OF THE NEW HUMANITARIAN LAW

by Shigeki Miyazaki

I. Bases of the new humanitarian law

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in Geneva from 1974 to 1977. During its fourth session, in 1977, the Conference finally adopted two Protocols additional to the Geneva Conventions of 12 August 1949 for the protection of victims of war— Protocol I relating to international armed conflicts and Protocol II relating to non-international conflicts.

Shortly after the conclusion of the Geneva Conventions in 1949, the International Committee of the Red Cross (ICRC) undertook to promote the development of those instruments. The Board of Governors of the League of Red Cross Societies, for its part, unanimously adopted at its XXIIIrd Session (Oslo, May 1954) a resolution stressing the need for effective legal protection for civilian populations and calling for action to draft an appropriate instrument. Subsequently, the experts convened by the ICRC drew up a set of rules limiting the risks incurred by civilian populations in war time; these rules were published by the ICRC in June 1955.

It must be admitted that, at the time, these calls for action fell on deaf ears. However, the realisation has gradually developed that every State has a duty to respect and safeguard human rights. Thus the Teheran Conference on Human Rights, held in 1968, adopted, on the protection of human rights during armed conflicts, a resolution which has achieved results.

The new humanitarian treaties adopted by the Diplomatic Conference of 1977 are in the form of two Protocols relating to the protection of victims of armed conflicts and reflect a new awareness of human rights in the world of today.

One of the most important changes in the world situation in recent years has been the emergence of "third world" countries.

II. Civil war and international law [1]

Article 2, paragraph 4, of the United Nations Charter provides that member States must all refrain, in their international relations, from recourse to threats or the use of force. However, since the Second World War, a number of armed conflicts which may be considered as wars have broken out.

In many of the armed conflicts of the last few years, elements of both international and non-international conflicts have been present; this has been the case, for example, in Korea, Viet Nam, the Congo, Bangladesh, etc. Hitherto, no precise definition of conflicts of this type has been found in international law. It has been asserted by some persons that the rules of war are applicable to the relations between a government and a revolutionary movement in the same way as they are to the relations between two or more States. In practice, no revolution or insurrection has been recognised since the War of Secession. However, human rights are disregarded during civil wars just as much as during wars between States—if not more.

For this reason the adoption of the Additional Protocol relating to the protection of victims of non-international armed conflicts should be considered as an improvement on the situation existing prior to its adoption.

Moreover, the application of this Additional Protocol comprises some special features which are not usually found in treaties.

III. Article 3 common to the Geneva Conventions

When dealing with the question of the applicability of the laws of war to non-international armed conflicts, the Geneva Diplomatic

[1] A Lombardi: *Bürgerkrieg und Völkerrecht*, Berlin, Duncker & Humblot, 1976, pp. 25 ff.

Conference of 1949 included in article 3 common to the Geneva Conventions minimum standards of protection in the event of civil war as follows: "*Article 3.* In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions (basic humanitarian principles)..." This article has been described as a "miniature convention"; it gives rise to special problems.

The parties to the conflict, within the meaning of article 3, are the government of a contracting party and the authority representing the party which has risen against the government—i.e. the *de facto* authority. The High Contracting Parties—or, to be more precise, their governments—are bound to apply the provisions of the Geneva Conventions, since they are themselves parties thereto (article 1).

The Convention of 23 May 1969 on the law of treaties contains, in its article 26, the following: "Every treaty in force is binding upon the Parties to it and must be performed by them in good faith". If the application of the Conventions is considered in the light of the principle *pacta sunt servanda*, it must be recognised that no *pactum* has been concluded between the two parties to a conflict within a single State, since a *de facto* authority cannot be a party to the Convention. It may then be asked what principles may be invoked in support of the thesis of the applicability of these provisions to a *de facto* authority which is directing dissidence against the government. If we consider the third paragraph of article 3, part or all of the provisions of the Convention could perfectly well be applied to the *de facto* authority provided that in that capacity it had concluded a special agreement with the other parties to the conflict. If that were the case, there would be an agreement, and a kind of *pactum* would have been conclude.

In the cases covered by article 3 other than those referred to in the third paragraph, no such agreement would exist.

This throws a different light on research into the applicability of article 3 of the Geneva Conventions, inasmuch as Additional Protocol II, relating to non-international conflicts, is intrinsically neither more nor less than a reaffirmation and development of the substance of article 3 of the Geneva Conventions. Its article 1 defines its material field of application as follows:

"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 Protocol I, and which take place

in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised 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."

IV. Basis for the application of article 3 or of Protocol II to a de facto authority

During the Geneva Diplomatic Conference in 1949 the question was raised of whether a revolutionary authority was bound by an agreement which it had not signed.[2]

Several different viewpoints exist on this subject.

1. The theory of succession.

According to this theory, the revolutionary authority succeeds the government and occupies the legal position of that government, since the latter signed the agreement as a Contracting Party and, in so doing, acted as the representative, at the international level, of the whole of the population under its authority, including the members of the *de facto* revolutionary authority. The theory of *tabula rasa* may be recalled in this connection.

2. The theory of customary law.

According to this theory, the contents of article 3 of the Geneva Conventions and of Protocol II have already become part of customary law. The 1969 Convention on the law of treaties, referred to earlier, contains the following provisions: *Article 34* (General rule regarding third States) "A treaty does not create either obligations or rights for a third State without its consent".

Article 38 of the same Convention, which deals with rules set forth in a treaty and becoming binding on third States as general rules of international law, provides that "nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding on a third State as a customary rule of international law recognised as such".

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[2] Jean Pictet: *Commentaire aux Conventions de Genève* (I), Geneva, ICRC, 1952, pp. 43-48.

It is true that customary law is binding on each of the States of the international community; but there remains the question of whether the population of each of these States—i.e. private individuals—is also bound. In other words, can the population as a whole be considered as a subject of international law?

3. The public law theory.

If the Geneva Conventions and the Additional Protocols had the nature of implementing agreements, Art. 3 of the Geneva Conventions could also be binding on private individuals. In other words, Art. 3 would be directly in force on the territory of each of the parties to the treaty.[3]

4. The theory of transnational humanitarian law.

It is argued in some circles that the ever-increasing volume of exchanges between human beings has given rise within the community of mankind to a transnational humanitarian law existing side by side with international and national law. All transnational humanitarian law would be directly applicable to private individuals and associations of individuals as well, both in peace time and during armed conflicts.

If this thesis were accepted, Art. 3 of the Geneva Conventions and Protocol II would be deemed to form a whole together with the Convention of 9 December 1948 on the Prevention and Repression of Genocide, the International Covenants on Human Rights dated 16 December 1966, etc.

Admittedly, standards of this kind relating to human rights are now codified in the form of international treaties, but they are in fact an expression of the universal conscience of mankind today.

J. Pictet considers that the standards laid down in this type of humanitarian law are of an absolute character, i.e. they are *jus cogens*.[4] Some of the members of the U.N. International Law Commission have argued that treaties which infringe human rights also infringe this *jus cogens*.[5]

I support this theory.

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[3] Report of the UN Secretary-General: *Respect for Human Rights in Armed Conflicts*, 1970, A/8052, para. 158: "... But, even in such cases, the Government concerned and/or the other parties had not infrequently denied the applicability of article 3, claiming that only national law applied to these situations."

[4] J. Pictet: *Humanitarian Law and the Protection of War Victims*, Leyden, Sijthof, 1975, p. 19.

[5] *Yearbook of the UN International Law Commission*, 1966, Vol. II, pp. 247-249.

V. Treatment of campaigns of national liberation

One of the most important questions examined by the recent Diplomatic Conference on the new international humanitarian law was the treatment to be accorded to national liberation movements.

During the first session, the Third World and Socialist countries asserted that liberation campaigns of this kind had the status of international conflicts within the meaning of Additional Protocol I and of Art. 2 of the Geneva Conventions. In the first draft of Protocol I, which had been drawn up by the International Committee of the Red Cross, the scope of application of Protocol I was defined as follows: "*Article 1* (Scope of the present agreement). 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".

In the text adopted by the Diplomatic Conference, this paragraph was incorporated in the third paragraph of the new Article 1 and the following paragraph was added as paragraph 4 of the same Article: "4. The situations referred to in the preceding paragraph include armed conflicts in which people 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."

Hitherto, Art. 2 common to the Geneva Conventions has been considered as a rule applying to conflicts between States. If national liberation movements were also to be considered as falling within the area covered by Art. 2, it would follow that the validity of that article is not restricted to conflicts between States.

It appears that the interpretation traditionally accepted hitherto is erroneous inasmuch as it treats international conflicts and conflicts between States as identical.

At the meeting of the Committee of Experts of the ICRC in 1969, the participants agreed that foreign military intervention on the side of one party to an armed conflict could transform an internal conflict into an international one.[6]

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[6] Report of the UN Secretary-General, *op. cit.*, 1970, A/8052, para 135: "At the 1969 meeting of a Committee of Experts of the International Committee of the Red Cross, it was generally agreed that foreign military intervention, on the side of either party, could transform an internal conflict into an international one, calling for the application of the laws and customs of war."

But it is conceivable that an international conflict may not at the same time be a conflict between States. Paragraph 1 of Art. 2 only applies to cases of war or of other armed conflicts which may arise between two or more contracting parties. Here again, application to any party other than a State is excluded, since, under the rules, only States can be contracting parties. The last part of paragraph 3 of Art. 2 might permit the application of the Geneva Convention to powers taking part in an armed conflict and which are not contracting parties; the phrase "one of the powers (which) may not be a party to the present Convention" generally applies to a State which has not yet become a contracting party, but at the same time does not exclude other authorities taking part in the conflict and which are not States. The fourth paragraph of Art. 1 of Protocol I may therefore be considered as a case of extension of the third paragraph of Art. 2 of the Geneva Conventions.

A unilateral declaration by a *de facto* authority undertaking to apply the Conventions (third paragraph of Art. 96 of Protocol I) corresponds to acceptance by a power which is not a contracting party within the meaning of the third paragraph of Art. 2 of the Geneva Conventions.

That article lays down the following rule: "They (i.e. the contracting parties) shall furthermore be bound by the Convention in relation to the said power, if the latter accepts and applies the provisions thereof".

VI. A gap in the law

Having said this, we come up against a new question: Which of the rules applicable to armed conflicts is applicable to a *de facto* authority which is in conflict with the government of a contracting party but has not deposited a declaration by which it undertakes to be bound by additional Protocol I and the Geneva Conventions in accordance with the third paragraph of Article 96 of Protocol I?

There are four possible answers:

1) additional Protocol II; or
2) article 3 of the Geneva Conventions; or
3) provisionally, additional Protocol I; or
4) there are other rules applicable.

I share the views of those who consider that Protocol II would be applicable.

Article 1 of Additional Protocol II reads as follows: "*Article 1*— Material field of application. 1. This Protocol... shall apply to all armed conflicts which are not covered by Art. 1 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)..."

In my view, conflicts which appear to fall within the scope of the fourth paragraph of Article 1 of Protocol I, but to which Protocol I is not applicable, are armed conflicts (i.e. "armed conflicts which are not covered by Article 1 of the Protocol"). Article 1 of Protocol I should certainly be applicable to a situation of this kind; such application may perhaps be made in the future, but for the moment it is not.

As was pointed out earlier, the fourth paragraph of article 1 of Protocol I is applicable only if a declaration of undertaking to apply it has previously been deposited in accordance with paragraph 2 of Article 96.

In present circumstances, armed conflicts may be classified as follows:

1) Armed conflict between parties to the Geneva Conventions and to the Protocols	Geneva Conventions, art. 2, para. 1; Protocol I, art. 1, para. 3.
2) Armed conflict between a contracting party (State) and a non-contracting party (a State or a *de facto* authority, for instance, an authority directing a national liberation campaign, which has accepted the Geneva Conventions and/or the Protocols)	Geneva Conventions, art. 2, para. 4; Protocol I, art. 1, para. 4; art. 96, para. 2.
3) Armed conflict between a contracting party (State) and a non contracting party (a State or *de facto* authority) which has not yet accepted either the Geneva Conventions or the Protocols	Geneva Conventions, art. 2, para. 4; Martens Clause; Protocole II (authority).
4) Armed conflict between two non-contracting parties	Geneva Conventions, art. 2, para. 4; Geneva Conventions, art. 3 (authority); Martens Clause; Protocol II (authority).

5) Serious armed conflict of a non-international character (rising, insurrection)	Geneva Conventions, art. 3; Protocol II; Public Law.
6) Other armed conflicts (riots, disorders, etc.)	International Covenants on Human Rights; Public Law (penal law).

Each step in this progression describes a situation not covered by previous steps and the rules applicable to it.

It should also be borne in mind that the International Covenants on Human Rights adopted in 1966, which came into force in 1976, are intended to ensure the protection of human rights in all circumstances. It is possible—and it should be considered—that the Additional Protocols and the Geneva Conventions form a whole with the International Covenants on Human Rights; for the two sets of instruments are directed to the same end—the affirmation of the principle of humanity.

Salus populi suprema lex esto !

Since the two Additional Protocols came into force in December 1978, it is to be hoped that as many States as possible will accede to the Additional Protocols and to the International Covenants on Human Rights.

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