

THE RED CROSS AND NON-INTERNATIONAL CONFLICTS

by M. Veuthey

Whilst from the outset the Red Cross was founded essentially to help the victims of conflicts between States, and the various Geneva Conventions since 1863 were relevant to conflicts of that kind, it must be recognized that internal conflicts have given rise to hundreds of thousands of victims who, all too often, could not effectively be helped due to legal or political barriers to Red Cross action.

The Red Cross could not be true to its mission and at the same time indifferent to the plight of victims of such conflicts, the horror and ferocity of which frequently exceeded those of the usual international wars.

Even before the 1949 Diplomatic Conference adopted provisions dealing with conflicts of that type, the Red Cross was concerned with what were still known as civil wars.

As early as 1912 one National Society suggested the drawing up of an international law to enable National Red Cross Societies to help the victims of internal conflicts. This project was ahead of its time and was rejected.

Five years later, however, after the Russian Revolution, an ICRC delegate, after a personal interview with Lenin, obtained agreement for a group of neutral Red Cross Societies, in concert with the Russian Red Cross, to create a "Political Red Cross" as it was known because it was assigned the mission of visiting political prisoners to provide them with relief and transmit news on their behalf.

This very important example was not an isolated case and the trend was to find clear expression in 1921 at the Xth International Conference of the Red Cross which adopted the following principles:

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The Red Cross, transcending all political, social, religious, racial, class and national competition, affirms its right and duty to take action to provide relief in civil war, social disturbances and revolutions.

The Red Cross recognizes that all victims of civil war or conflicts of the type mentioned are without exception entitled to assistance, pursuant to the general principles of the Red Cross.

Stressing the important role of the National Red Cross Society, in any country where civil war breaks out, in assisting impartially the victims, the Conference entrusted the ICRC with the “mandate of intervening in the work of relief in the event of civil war”.¹

In addition that same Conference “motivated by the grievous experience acquired by the Red Cross in countries where civil war had raged” launched a stirring appeal for the law of nations to be respected even in time of civil war.

Thus it is almost fifty years since expression was given to principles which may be considered basic for Red Cross action for the benefit of victims of conflicts which are not international.

The adoption of these principles, it is interesting to note, followed closely on the Hungarian Revolution in 1919 during which ICRC delegates intervened first to obtain authorization from the new government to enable the National Red Cross Society to carry out its humanitarian work without hindrance and secondly to give attention to the plight of political prisoners and foreigners. Only two months after its adoption, the 1921 Resolution went through a trial by fire in Upper Silesia. Later the war in Spain was also to entail intervention by the Red Cross (described by one of its delegates, Dr. Junod, in his book “Warrior without Weapons”) to such effect, indeed, that in 1937 a Commission of governmental experts convened by the ICRC unanimously recognized that the Red Cross principles should be respected in all circumstances even when the Geneva Conventions were not applicable. This opinion was reiterated by the XVIth International Conference of the Red Cross in 1938.

The Red Cross Conference in Geneva in 1946 (“Pre-Conference Meeting of National Red Cross Societies for the Study of the

¹ Agenda item XIV “Civil War”, IIIrd Commission, meetings of April 6 and 7, 1921.

Conventions and the various problems related to the Red Cross”) voted the following recommendation: “In the event of armed conflict within a State, the Convention shall be applied equally by each of the opposing parties, unless one of them expressly refuses to do so”.

Other resolutions were adopted later by governmental experts and by the Stockholm Conference in August 1948. At the Diplomatic Conference to adopt the Geneva Conventions in 1949, the addition of one clause relating to internal conflict gave rise to very lengthy discussions.² It was only after three months that agreement was reached on the text of article 3 which is common to all four Conventions:

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

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.

² See *inter alia* J. Pictet, *The Geneva Conventions of 12 August 1949—Commentary published under the general editorship of J. S. Pictet*, ICRC, Geneva, 1952.

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An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

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

This article 3 was a triumph for the Red Cross because it no longer left to the arbitrary decision of parties to an internal conflict the respect and securing of respect for humanitarian principles; it gave official confirmation to certain basic rules and at the same time authorized the International Committee of the Red Cross to take action.

Since the adoption of this article 3—sometimes called the “mini-convention”, because it summarizes the essential principles of the Geneva Conventions—the Red Cross in general and the ICRC in particular have endeavoured to secure application of its provisions which, often with other articles of the Conventions, have been accepted in such conflicts as those of Algeria, Cuba, the Lebanon and the Yemen.

However, experience has shown this article 3 to be inadequate. Consequently three meetings of experts were convened in Geneva to consider the question in 1953, 1955 and 1962,³ whilst International Conferences of the Red Cross since 1957 have stressed how topical is the problem and how necessary it is to exert constant efforts to improve the application of humanitarian law in internal conflicts.

At the Istanbul Conference in 1969 the ICRC submitted a special report on “Protection of Victims of Non-International Conflicts ”.⁴ It also dealt with this problem in one chapter of its

³ Commission of Experts for the Examination of the Question of Assistance to Political Detainees, Geneva, June 9-11, 1953. (Printed publication of the ICRC No. 453, 8 pages).

Commission of Experts for the Study of the Question of the Application of Humanitarian Principles in the Event of Internal Disturbances, Geneva, October 3-8, 1955. (Printed publication of the ICRC No. 481, 8 pages).

Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts, Geneva, October 25-30, 1962. (Printed publication of the ICRC No. 577, 11 pages).

⁴ XXIst International Conference of the Red Cross, Istanbul, September 1969—Report submitted by the ICRC, 1969.

report on "The Reaffirmation and Development of Law and Customs Applicable in Armed Conflicts".⁵ The fact that the main ICRC conclusions on non-international conflicts were endorsed in the UN Secretary-General's report on "Respect for Human Rights in Time of Armed Conflict"⁶ shows clearly that Red Cross action in this field is in keeping with concern more widely felt.

The advisability of developing article 3 has been the subject of several reports and resolutions. The XXIst International Conference of the Red Cross (Istanbul, 1969) adopted several resolutions implicitly in favour of such development. For instance, Resolution XIII ("Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts") "underlines the necessity and the urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the effective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949"; Resolution XVII ("Protection of Victims of Non-International Armed Conflicts") states that "experience has brought out certain points on the basis of which this article (article 3) could be made more specific or supplemented" and "asks the ICRC to devote special attention to this problem within the framework of the more general studies it has started to develop humanitarian law, in particular with the co-operation of government experts".

All this development may be carried out without impairing the rule, considered essential, in the last paragraph of article 3, that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

As is clear from these above-quoted reports, the experience of the twenty years following the adoption of article 3 seems to show the following shortcomings:

More Extensive Protection of the Wounded and the Sick

The present version of article 3 does no more than restate, in general terms, the principle underlying the first 1864 Geneva

⁵ XXIst International Conference of the Red Cross, Istanbul, 1969. See especially pp. 97 to 121 and Bibliography (annex pp. 077 and 078).

⁶ A/7720, November 1969. See especially paragraphs 104 and 168 to 177.

Convention, namely: "The wounded and sick shall be collected and cared for".

Article 3 makes no specific provision for respect of the Red Cross sign, of hospitals, military and civilian personnel, or the personnel of National Societies. The report submitted to Istanbul on "the Protection of Victims of Non-International Conflicts" refers to situations in which Red Cross or medical personnel contingents have hesitated to intervene for fear of not being protected against hostilities or of being subsequently reproached for relief activity on behalf of enemy wounded or sick.

As a result, the bombing of hospitals clearly marked with the red cross and the molesting of doctors for having treated or given medicines to an enemy have been too frequent for the omission from positive law of safeguards against such events to be allowed to continue.⁷

Combatants taken prisoner in internal conflict are hardly better protected; although provision is made for their "humane treatment" (forbidding murder, torture, humiliation and degrading treatment) and for at least minimum legal guarantees, there is nothing to prevent the execution of such combatants merely for having borne arms against the enemy. It can readily be understood that the slaughter of prisoners with or without legal proceedings can hardly satisfy humanitarian conscience. . .

In that respect it is proposed to grant captured enemy combatants impunity and a status approaching that of prisoners of war under the IIIrd Convention.

⁷ See also Resolution XVII ("Medical Care"), which was adopted by the XIXth International Conference of the Red Cross, New Delhi, 1957:

The XIXth International Conference of the Red Cross,

considering the efforts already made by the International Committee of the Red Cross to minimise the suffering caused by armed conflicts of all types, expresses the wish that a new provision be added to the existing Geneva Conventions of 1949, extending the provisions of Article 3 thereof so that :

- (a) *the wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,*
 - (b) *the inviolable principle of medical professional secrecy may be respected,*
 - (c) *there may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes,*
- furthermore, makes an urgent appeal to all Governments to repeal any measures which might be contrary to the present Resolution.*

Deferment or Even Annulment of Capital Punishment during Hostilities

This is a wider proposition than the previous one but, as recent conflicts have shown, the two are closely connected. Any capital punishment in time of conflict, in relation with the conflict, cannot fail to bring about an increase in tension, vigorous reaction from the enemy and even reprisals.

Family News and Relief to Detainees

People have been deprived for long periods of all contact with their family, of all moral comfort and all material relief. Whatever is granted to a captured enemy, consistent with international law—the IIIrd Geneva Convention, in the case in point—should not be denied to detained nationals. Security requirements and repression can never justify such severe measures, which are more likely to arouse high feeling. Experience with prisoners of war and the many political prisoners visited by the ICRC has shown that, in this field as in others, State security and humanity are not incompatible.

Relief to Non-Combatants

The blockade is a legitimate method of warfare. As stated in the “Commentary on the IVth Geneva Convention relative to the protection of civilians in time of war”: “The blockade has become a most effective weapon. A ban on all trade with the enemy or with any country occupied by the enemy, strict regulations governing trade with neutral countries, and an extension of the idea of ‘war contraband’ are measures whose object is to place the adverse party in a state of complete economic and financial isolation; such measures cause suffering to the population as a whole as they affect combatants and non-combatants indiscriminately.”

Provision has been made to allow in international conflicts “the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians. . .” (article 23 of the IVth Convention). It has been suggested

that that provision should be inserted—or at least expressly referred to—in a supplemented article 3.⁸

Penal Prosecutions against War Criminals

Just as the Geneva Conventions (and other international laws) have defined the legal framework for the repression of breaches of the laws and customs of war in international conflicts, so, it has been thought, would it be useful in non-international conflicts to have a specific provision or reference to other legal instruments.

That provision—or reference—should cover both the punishment of offenders and the requisite judicial guarantees.

Included in the methods proposed—apart from any hypothetical international jurisdiction—was the appointment of international observers.

General Amnesty at the end of Hostilities

This was discontinued, by implication, at the 1949 Diplomatic Conference. Several delegates went so far as to say that article 3 would not prevent the taking of proceedings against captured or defeated insurgents. However, several non-international conflicts have since demonstrated that the proposition is topical. Although several victorious governments have taken severe repressive actions against insurgents reduced to their mercy by force of arms (insurrectionist or secessionist movements), others have been wise in declaring general amnesties to restore national unity through an appeal to feelings and reason.⁹

⁸ It may be of some interest to quote Resolution XIX (“Relief in the Event of Internal Disturbances”), which was adopted by the XIXth International Conference of the Red Cross:

The XIXth International Conference of the Red Cross, considering it necessary to ensure maximum efficiency and equity in the distribution of relief supplies in the event of internal disturbances,

declares that relief supplies of all types must be distributed equitably among the victims by the National Red Cross Society, without hindrance on the part of the local authorities ;

considers that, in the event of the National Red Cross Society being unable to come to the assistance of the victims, or whenever it may be deemed necessary or urgent, the International Committee of the Red Cross should take the initiative for the distribution of relief supplies, in agreement with the authorities concerned ;

requests authorities to grant the Red Cross every facility in carrying out relief actions.

⁹ See e.g. the recent examples of Iraq (after the end of the Kurds' insurrection) and Nigeria (after the defeat of the secessionist movement).

Assistance by a neutral body to help parties to an internal conflict to apply the humanitarian principles and provisions. The ICRC under article 3 may do no more than offer its services. Fortunately, in several internal conflicts both the government and the insurgents have recognized the usefulness of such co-operation which in no way affects the legal status of parties to a conflict but does greatly improve the application of the humanitarian principles and provisions and hence the chances of restoring peace.

The question arises whether it would not be useful to give this tradition the force of law in a supplemented article 3. The experts meeting in February 1969 expressed the hope that governments would thereby be bound to accept ICRC intervention with a view to the implementation of humanitarian regulations¹⁰.

Article 126 of the IIIrd Convention lays down the prerogatives of delegates of the Protecting Powers, including the right to visit places of their choice; it grants the same prerogatives to delegates of the ICRC. Those prerogatives which are by no means too far-reaching, are designed only to ensure genuine protection for victims and they are a guarantee for both Parties to the conflict that the ICRC is enabled to carry out its essential humanitarian duties. Several governments have admitted them during non-international conflicts, and experts have expressed the desire to see them recognized in any new regulations which might be adopted.

A further problem which we did not mention at the beginning of this paper because its solution in 1970 will differ from what it would have been at the beginning of the century, and even at the time the 1949 Geneva Conventions were signed, is the applicability of humanitarian law in non-international conflicts. The idea is by no means new, since already in the XVIIIth century a well-known European legal expert, Vattel, advocated the application of humanitarian principles to the treatment of rebels. Article 3 itself states that parties to a conflict "should endeavour to bring into force, by means of special agreements, all or part of the other provisions" of the 1949 Geneva Conventions.

¹⁰ See *Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts*, Report submitted by the ICRC to the XXIst International Conference of the Red Cross, p. 107.

a) Application of the IIIrd Convention in Non-International Conflicts:

It is true that article 3 protects “ members of armed forces who have laid down their arms and those placed *hors de combat* . . . ”; it guarantees them certain minimum fundamental rights, but as we have seen earlier, it does not forbid the passing of sentences and the carrying out of executions of combatants (subject, it is true, to certain preliminary guarantees).

It will be recalled that the XXIst International Conference of the Red Cross at Istanbul, in Resolution No. XVIII (“ Status of Combatants in Non-International Armed Conflicts ”) considered “ that combatants . . . who conform to the provisions of article 4 of the IIIrd Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war ”.

That resolution thus advocates:

- 1) that the provisions of article 4 apply equally in internal conflicts;
- 2) that captured combatants complying with the requirements of those provisions be entitled to treatment similar to that afforded to prisoners of war.

However, the Conference itself was well aware that it had not resolved all problems by that statement which, for the Conference, was but a provisional solution pending more thorough study, since, in its final paragraph, it requested the ICRC “ to make a thorough study of the legal status of such persons and take the action in this matter that it deems necessary.”

b) Application of the IVth Convention in Non-International Conflicts

It will be recalled that the final paragraph of a draft Convention for the protection of civilian persons in time of war, submitted by the ICRC to the XVIIth International Red Cross Conference (Stockholm, 1948) provided that:

“ In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the

present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status ”.

It is however certain that this provision, by itself, would not have been enough, for it is not possible to apply, without serious adaptations, the IVth Convention—the whole system of which is based on nationality—to an internal conflict. It is true that the provisions of Part II (“ General protection of populations against certain consequences of war ”, articles 13 to 26) and of section I of Part III (“ Status and treatment of protected persons ”, “ Provisions common to the territories of the parties to the conflict and to occupied territories ”, articles 27 to 34) can be applied to all civilian persons. On the other hand, for interned persons (detained or sentenced) a special system of rules should be provided: perhaps it might thus be possible to consider that persons detained or prosecuted for acts or attitudes in relation to the conflict should benefit, by analogy, from the provisions applicable in that field to the inhabitants of occupied territories.

c) Rules relating to the conduct of hostilities and the use of weapons ¹¹

Unless there is a declaration of recognition of belligerency, the rules relating to the conduct of hostilities and to the use of weapons are not, in law, applicable in non-international conflicts.¹² When one thinks of the ferocity of such conflicts and the extent of the means employed on either side, which are no less than in interstate conflicts, one cannot help finding this situation abnormal. Many voices have been raised to ensure respect for the rules in non-international conflicts. As Vattel already wrote in the XVIIIth

¹¹ These last two proposals were the subject of a conclusion read by Mr Henri Rolin following the conference on “ Humanitarian Law and Armed Conflicts ” which he presided, which was organized by the Centre de droit international de l’Université de Bruxelles, and which was held on 28-30 January 1970.

¹² It should be pointed out, however, that article 3 requires respect for “ persons taking no active part in the hostilities ”, which already implies certain limitations in the conduct of hostilities and the use of weapons. Resolution 2444/XXIII confirmed that interpretation and recognized “ the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants *in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare* ”. (our italics).

century: "A flatterer, or a cruel ruler, is quick to say that the rules of war are not made for rebels deserving of extreme penalties... But whenever a large group believes itself entitled to resist the sovereign, and finds itself in a position to take up arms, war between them should be conducted in the same way as between two different nations".

The question therefore arose whether the principle of article 3, with automatic entry into force as soon as certain conditions were objectively fulfilled, could not equally well be adopted for the rules relating to the conduct of hostilities and the use of weapons.¹³

But in what cases will belligerents—government or insurgent—recognize that article 3 is applicable? All too often, unfortunately, the authorities tend to deny its applicability. The tenor of article 3 is clear yet at the same time not very explicit: "armed conflict", "hostilities", "armed forces" suggest operations on no small a scale and lasting for some time (past or predictable future), a number of victims and possibly (an idea implied in some proposed amendments in 1949) a territory in the hands of the insurgents.

The Expert Commission to examine the question of aid to the victims of internal conflicts, meeting at Geneva in 1962, concluded that the existence of an armed conflict within the meaning of article 3 could not be denied if the hostile action directed against the government was collective and to at least a minimum degree organized. In the opinion of that Commission, account had to be taken of such factors as the duration of the conflict, the number of rebel groups, the extent to which they were under officer supervision, their entrenchment or action in part of the territory, the prevailing tension, the existence of victims and the efforts made by the government to restore order.

Other experts convened by the ICRC at Geneva in February 1969 reiterated these criteria, but stressed that they should not be too narrowly interpreted.

The UN Secretary-General's report on "Respect for Human Rights in Time of Armed Conflict" to the twenty-fourth General

¹³ See C. Zorgbibe, "De la théorie classique de la reconnaissance de belligérance à l'article 3 des Conventions de Genève", Rapport présenté à la Conférence "Droit humanitaire et conflits armés" ("Humanitarian Law and Armed Conflicts"), Brussels, January, 1970, Doc. R/4, 16 pages.

Assembly went even further. In paragraph 104 it stressed that "in situations of armed conflict which occurred in recent times the determination whether the conflict was or was not of an international character was often difficult to make. While, from the point of view of other branches of international law, e.g. from the point of view of the rights and obligations of neutral Powers, this distinction may be of great importance, this may not be so as far as the questions under consideration are concerned, i.e. the securing of minimum humanitarian standards under circumstances of armed conflict."

These remarks are in keeping with the twenty-third UN General Assembly's unanimous Resolution 2444 in December 1968 recognizing the "*necessity of applying the basic humanitarian principles in all armed conflicts*".

In conclusion, there are no political or legal barriers to humanitarian law and it is to be hoped that a statement of principles like Resolution 2444/XXIII will lead to regulations applicable to this kind of conflict, and especially to more complete Red Cross action in them. As Professor Siotis wrote, "internal armed conflicts are steadily taking on the features of a struggle between the great social and national currents, and nothing short of regulations with a solid foundation in objective bases can subordinate the high feeling which they generate to respect for the principles of humanity and law".¹⁴

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¹⁴ SIOTIS, Jean. *Le droit de la guerre et les conflits armés d'un caractère non international*, Paris, Librairie générale de droit et de jurisprudence, 1958, p. 229.