

CIVIL WAR

by A. Schlögel

It is known that the XXIst International Conference of the Red Cross voted a resolution (No. XVII) relative to the protection of the victims of non-international armed conflicts and by which it "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". However, before the meeting at Istanbul, the author of the following article had already written a study on the subject entitled "Der Bürgerkrieg", which is of topical interest and of which we now give extracts at some length in our own translation (Ed.).

Preliminary observation

In this study we will be examining above all, from the legal angle, the aid which the Red Cross can bring in time of civil war. This implies both a limitation of the subject, as there is no intention of raising many questions connected with international law, and also an extension of the subject, because going beyond problems of pure law, discussion will be made of the concrete aspects of humanitarian activity. It is proposed to discover how the present situation could be improved, a situation which is generally considered to be far from satisfactory.

CIVIL WAR IN THE GENEVA CONVENTIONS

I. Historical background

1. There have been civil wars ever since States existed, the established order finding itself constantly in danger, it was often restored or modified by force. However, it has only relatively recently been seriously pre-occupying international law. One can easily see why. As international law is always connected with relations between States, there is no place there for rebellion against the established power. It was international humanitarian law, that is to say the branch of international law which is dependent on the principles of humanity in cases of conflict which also led to the broaching of this important aspect of the subject. International humanitarian law starts from the premise that the individual has a legitimate right to be protected and given aid irrespective of the State to which he belongs.

The first attempt at an International Conference of the Red Cross to deal with the subject of civil war was made in 1912 in Washington. An American motion was submitted on that occasion. This concerned the role of the Red Cross in the case of civil war or uprising which already comprised a draft international Convention some of whose provisions we now give below for their interest:

6. Such Red Cross Societies of other countries extending their assistance in time of such disturbances shall confine their aid strictly to the care and nursing of the sick and wounded, as provided in the Geneva Conventions and in the Hague Conventions for the Adaptation to Naval War of the principles of the Geneva Convention, or to relieving the suffering of non-combatant inhabitants of the country, and such societies shall render such aid and assistance with the utmost impartiality as between the members of the opposing factions. In rendering assistance to the sick and wounded or to non-combatant inhabitants such societies must in no way interfere with the operations of the armed forces either of the established government or of the disturbing elements. They shall extend such assistance at such places and at such times as the appropriate military authority of the respective parties shall indicate. But such forces shall under no circumstances appropriate in any form the food which is necessary for

the sustenance of the personnel of the volunteer service, nor the clothing and shelter necessary for such personnel.

10. Aid extended by such societies to non-combatant persons outside the line of operations either of the established government or of the disturbing elements, shall not be regarded as assistance to combatants...

General Yermolow, representing the Tsar of Russia, opposed discussion of this motion. He justified his attitude in the following way, which was characteristic of the times: " I consider, in addition, that the Red Cross Societies should have no duty towards insurgents or bands of revolutionaries whom the laws of my country regard as criminals ". This statement met with such general approval that it was not possible to have a mere exchange of views on the subject.

Although subsequently the International Committee of the Red Cross showed itself active in various civil wars, its efforts had no legal basis. In consequence these attempts often met with fierce opposition and considerable obstacles. However, two cases deserving our special attention then presented themselves. These were the ICRC's activity in Russia during the Bolshevik Revolution in 1918-1919 and the Hungarian Revolution in 1919. These events led the Committee to submit to the Xth International Conference of the Red Cross, meeting in Geneva in 1921, a draft which resulted in a resolution some of whose provisions were as follows:

The International Red Cross Committee, having assured itself of the consent of the government of the country in which the civil war is raging, should organize relief work by appealing to the foreign relief organisations.

If the government in question refuses its consent, the International Red Cross Committee shall make a public statement of the facts, supported by the documents relating thereto. (General Principles IIIb)

The Tenth Conference, inspired by the painful experience had by the Red Cross in the countries in which civil war is raging, calls the attention of all peoples, governments and political parties, national or otherwise, to the fact that the state of civil war cannot justify the violation of international law, and that the international law must be safeguarded at every cost. (Resolution 4)

The Tenth Conference condemns the system of political hostages and insists upon the non-responsibility of families and especially of

CIVIL WAR

children, for the acts of the heads and other members of families. (Resolution 5)

The Tenth Conference deploras the boundless sufferings to which prisoners, and those interned in countries in which civil war is raging, are often subjected, and considers that the political prisoners, in time of civil war, should be regarded and treated by the belligerent parties as prisoners of war; that is, according to the principles of the Hague Convention of 1907. (Resolution 6).

Two months only after its adoption the resolution was to come under fire. Civil war broke out in Upper Silesia. The delegates of the International Committee, on the basis of that resolution, obtained authorization to accomplish their mission, visit prisoner of war camps and care for the women, children and the aged. The two sides went even further. They in fact undertook to apply the Geneva Convention throughout the duration of hostilities. Upper Silesia was thus the first case in history where, thanks to the ICRC's intervention, two opposing parties in a civil war considered themselves explicitly bound to the Geneva Convention.

The ICRC was less fortunate during the Irish civil war in 1921-1922, both sides rejecting the Committee's offers of aid as being hostile.

Matters were more satisfactory in the Spanish civil war. The subject has been comprehensively described by Marcel Junod, the ICRC's well-known delegate.¹ He encountered various difficulties but succeeded however in obtaining most positive declarations from the two adversaries, in Madrid and Burgos respectively. The two Parties undertook to respect the Geneva Conventions thus enabling aid to be brought to thousands of persons. Whilst civil war was still raging in Spain, the XVIth International Conference of the Red Cross, meeting in London in 1938, on the ICRC's proposal, adopted a revised resolution as follows:

The XVIIth International Red Cross Conference requests the International Committee and the national Red Cross Societies to endeavour to obtain :

¹ Marcel Junod, *Le Troisième Combattant*, Lausanne, 1947, Paris, 1967, with an English translation, *Warrior without weapons* by E. Fitzgerald, Jonathan Cape, London, 1951.

- a) *the application of the humanitarian principles which were formulated in the Geneva Convention of 1929 and the Xth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores,*
- b) *humane treatment for all political prisoners, their exchange and, so far as possible, their release,*
- c) *respect of the life and liberty of non-combatants,*
- d) *facilities for the transmission of news of a personal nature and for the re-union of families,*
- e) *effective measures for the protection of children.*

This resolution went a long way and anticipated the application of all the provisions of the Geneva Conventions in civil wars.

2. When, after the Second World War, the ICRC was preparing fundamental revision of the Geneva Conventions, it concerned itself from the outset with civil war. It first of all submitted the question to the preliminary Conference of National Red Cross Societies, which was held in Geneva in 1946. The ICRC there proposed that, in the case of civil war in the interior of a State, the opposing parties be invited to declare that they would apply the principles of the Convention, under the reservation of reciprocity.

The preliminary Conference of National Red Cross Societies went considerably further than this suggestion and chose the following text:

In case of armed conflict in the interior of a State, the Convention shall be equally applied by each of the adverse Parties, unless one of these expressly declares its refusal to conform thereto.

This draft went a long way.

The preliminary Conference of 1946 was followed in 1947 by the Meeting of Government Experts which proposed a new formula:

In case of civil war, in any part of the home or colonial territory of a Contracting Party, the principles of the Convention shall be equally applied by the said Party, subject to the adverse Party also conforming thereto.

CIVIL WAR

The essential difference here, in relation to the 1946 text, lies in the fact that mention is no longer made of applying the whole Convention, but only its principles. On the other hand, more emphasis is placed on reciprocity than in 1946. On the basis of the above, the International Committee drew up its draft for the International Conference of the Red Cross which was to be held in Stockholm in 1948. It is understandable that it based itself more on the suggestion made by the Red Cross Societies than on that of the Government experts. The text of this draft ran as follows:

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.

This was confirmed by the International Conference of the Red Cross of 1948, merely deleting the superfluous terms: *especially cases of civil war, colonial conflicts, wars of religion...*

3. This text which, with minor variations¹, was intended for the four drafts of the Convention, and was received in very diverse ways during the discussions at the Diplomatic Conference, meeting in Geneva in 1949, and led to heated arguments. At the basis of these discussions was, on the one hand, opposition for reasons of State and on the other hand, there was the equally legitimate humanitarian interest of the individual. Some saw in such a provision an encouragement of anarchy, the disintegration of the State and a support of banditry. Others, however, replied that one had often regarded as bandits those who were in fact patriots fighting for the independence and dignity of their country. The conduct of the Parties to the conflict would show whether they were criminals or real soldiers, deserving of the application

¹ For these minor differences see F. Siordet, *The Geneva Conventions and Civil War*, supplements to the *Revue internationale de la Croix-Rouge*, Vol. III, Nos. 8, 9 and 11, Geneva, August, September and November 1950.

of the Conventions. Furthermore, the distress of the population would be the same in an international conflict as in a civil war.

As a reflection of these divergences, proposals for making modifications varied considerably between each other. A Canadian suggestion was to suppress the entire proposal. The opposite view was taken by a Hungarian suggestion for the deletion of the clause on reciprocity. Between these two extremes, various suggestions were made to attempt to determine the conditions of application. One motion (Australia) was above all based on the question of discovering whether the legal government had recognized the adverse party as a belligerent Power and asked whether the conflict should not have been submitted to the Security Council of the United Nations as constituting a threat to peace. Another proposer (France), insisted that the adverse party possesses armed forces organized on a military basis and responsible authority over a defined area of the national territory and having the means to have the Conventions respected. The delegation of the United States laid down, in addition, the condition that the insurgent civilian authorities explicitly recognize the Geneva Conventions. In conclusion, a working party attempted to find a formula reconciling all the points of view expressed. It is evident that such an attempt could not achieve success.

France, basing itself on previous Italian proposals, was to give a new direction to the discussions by suggesting a further limitation to the applicable provisions. The little legal protection from which the victims of civil war benefited was the logical outcome of the impossibility, for governments, to agree on what should be demanded of the rebel party for it to have recognition of equal rights under the Geneva Conventions. This problem must be closely considered, as it still exists today, and will have a decisive influence on all future discussions.

Matters were then to move fast. Those taking part in the discussions were all obviously relieved to have found a solution. There was no need to define the few principles which were applicable as formulation of these, it was considered, had fortunately been

CIVIL WAR

made in the preamble proposed by the International Committee for the four Conventions. This preamble now being superfluous, as one wanted to avoid any preamble, its contents were to be essentially embodied in article 3. After a certain amount of deliberation the definite text, originating from the Joint Committee reads as follows:

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

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.

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.

II. Commentary on article 3 of the four Geneva Conventions ¹

1. It is evident that if one starts off with the idea that States intended to provide a minimum legal protection in all national conflicts and thereby, if possible, avoid raising the question of the qualification of the rebel party, interpretation of the notion "not of an international character" should be extremely wide and flexible. The fact that the rebel party possesses or does not possess armed forces organized on a military pattern with responsible authority, exercises its authority over a defined area or not, is recognized or is not recognized as a belligerent, or the fact that the conflict has or has not been submitted to the Security Council or the General Assembly of the United Nations, etc. is quite immaterial. What is demanded is the respect for a few rules whose essentials have always been recognized by civilized States and given legal sanction by their own internal laws.

2. What is more problematical is what has happened to the fact that all Parties to the conflict should apply these provisions? This concerns the State as well as its adversary. That the two Parties should be taken into consideration should not lead to imposing a certain reciprocity as a condition. The fundamental rules figuring in article 3 are absolute. There can be no limit in their application or absence of application in the form of reprisals. On the other hand, the rebel party has also great interest in rigorously respecting these rules so as to avoid being suspected of banditry or terrorism.

The difficulty experienced in approaching rebels is readily overestimated. As a general rule, negotiations are no more difficult to effect with them than with the "legal" government.

3. *Subject matter of the obligation.*—As has already been pointed out, the text of article 3, paragraph 1 (1) goes back to the preamble proposed by the ICRC. These terms are formal, but take no account of the particular characteristics of civil wars. It should

¹ Cf. J. Pictet, *Commentary on the Geneva Conventions*, vol. I, pp. 38-61 (comments on article 3 were edited by Mr. F. Siordet).

CIVIL WAR

not, however, be overlooked that the definition, shortened to the principles enunciated therein, does in fact facilitate the putting into concrete form of the idea upon which it is based. Attention should be given to the fact that sub-heading (1) deals with three groups or persons:

- a) *persons taking no active part in the hostilities* ;¹
- b) *members of the armed forces who have laid down their arms* ;
- c) *those placed hors de combat by sickness, wounds, detention, or any other cause.*²

Two requirements are stipulated as regards persons: humane treatment and the prohibition of any discrimination.

Concentration should be made on the words “treated humanely” and any attempt to give embodiment to article 3 should start with this term. Humane treatment is indeed not only the fundamental principle of the Red Cross, it is also that of the Geneva Conventions. Going further, it is the basic idea of human rights and of love of one’s neighbour. It is obvious that the enumeration of the four absolute prohibitions which follow (article 3, sub-heading (1), a)—d) is thoroughly incomplete and, as such, highly dangerous for their omissions. Such prohibitions explicitly stated are to be met with in many various places in the Geneva Conventions. It cannot be doubted that they are right and just in themselves. However, they can be criticised for those enumerated here, as grave breaches of these provisions, frequent also in civil wars, are not those which cause the worst suffering to the civilian population in time of war. Experience of nearly all civil wars has shown that the greatest harm is done in other spheres. Questions of supply (food and other items of prime necessity), expulsions, forced labour, long periods of detention for political opponents in conditions contrary to human dignity, and many other things besides: these are the burning questions in a civil war. It appears to us that the funda-

¹ This is a general concept, covering the two following sub-headings. It should however be pointed out that it is essentially civilians who come under this definition.

² Thought is here also given to members of the armed forces. This refers to persons who, in case of international conflict, are included amongst those given protection under Conventions I, II and III.

mental defect of article 3, which has, moreover, an unsystematic structure, lies in the lack of balance between the principle figuring in heading 1 and the enumeration as examples of particular violations under sub-headings a) to d).

4. An equally difficult problem is raised in the paragraph which concerns the International Committee of the Red Cross and confirms its right of initiative. It " may " offer its services to the Parties to the conflict. We do not consider this to be sufficient. In fact, it is impossible for the ICRC to lend the slightest weight to this unilateral offer. Whilst a number of passages allocate tasks to it which it can assume from the outset during international conflicts, article 3 only gives it the possibility of a unilateral offer, there being no corresponding obligation for the Party to a civil war to follow this up, nor is there even a recommendation to that effect.

Experience has shown that this provision is inadequate. The only progress made in comparison with previous law lies, according to Mr. F. Siordet, in the fact that the ICRC's offer can no longer be regarded as being an unfriendly act. In our opinion, the game would not be worth the candle!

In this connection yet another question is raised, which was also broached during the preliminary discussion of article 3. Should a Protecting Power be appointed in civil wars as article 8 does in case of international conflict? Criticisms made of this idea are not, in my opinion, convincing. Experience of Protecting Powers (Switzerland and Sweden in particular) during international conflicts speaks so clearly in favour of such institution that the possibility should also be considered for civil wars of long duration.

In the present state of affairs, the provision under paragraph 1 falls to the ground, as the bodies which, during international conflicts, have the task of ensuring respect for the humanitarian provisions, are not here considered, or else depend completely in their action on the goodwill of the Parties to the conflict.

Unfortunately, wide interpretation is not sufficient to counter this inadequacy of article 3.

5. The penultimate paragraph is most important. According to it " the Parties to the conflict should further endeavour to bring into

CIVIL WAR

force, by means of special agreements, all or part of the other provisions of the present Convention ". This stipulation could appear to stand by itself, but this is not so. In fact this way has been chosen in various cases. However, the inadequacy of this rule should not escape attention. It is based on the completely free decision of the Parties involved.

6. Finally, the last paragraph reflects the position of all governments, namely that " the application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This is moreover aimed at all the previous paragraphs. Even an agreement on the application of all the Geneva Conventions is not equivalent to recognition of belligerency, within the meaning of international law.

Dr. Anton SCHLÖGEL

Secretary-General of the German Red Cross
in the Federal Republic of Germany