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PROPOSED REVISIONS IN THE LAW OF WAR APPLICABLE TO INTERNAL CONFLICT

James E. Bond*

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I. INTRODUCTION

Human rights, often thought to be the newest, is, in fact, the oldest branch of international law. Although those who have forgotten this history regard the 1948 Universal Declaration of Human Rights¹ as the birth certificate of human rights law, its birth is actually recorded in the pages of Grotius' *Rights of War and Peace*.² The publication of the treatise that established Grotius as the "father of international law" coincided with the Thirty Years War which created the modern nation-state system. Grotius outlined in his classic a legal regime for the protection of human rights endangered by the wars which ravaged Europe in his lifetime. In the succeeding centuries, we have come to call this body of rules the law of war; and, we have labeled the increasingly detailed body of rules guaranteeing the individual rights to social, political, and economic freedom "human rights." Both human rights, understood in this narrow sense, and the law of war share a common theoretical rationale, reflected in the newer term, "international humanitarian law."³

Large gaps remain in the coverage of international humanitarian law despite its ancient lineage. Regulation of internal armed conflicts is one such gap. Traditionally, human rights regimes have not restrained governments dealing with external or internal emergencies, such as rebellions or insurrections. The law of war has never governed internal conflicts.⁴ The principles common to the human rights and law of war regimes nevertheless furnish us the materials with which to fashion a third category of international humanitarian law: a humanitarian code of internal armed conflict.

The 1949 Geneva Diplomatic Conference rejected the notion that all the laws of war should apply to internal conflicts.⁵ However, the International Committee of the Red Cross and others have recently proposed draft protocols which would extend a part of the law of war to internal conflict. As early as 1956, the ICRC published a

¹ G.A. Res. 217A, U.N. Doc. A/810 (1948).

² GROTIUS, *THE RIGHTS OF WAR AND PEACE* (1st ed. A.C. Campbell transl. 1901).

³ J. PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1970).

⁴ Common Article 3 of the Geneva Conventions does establish a "convention in miniature" for "armed conflict not of an international character." Bond, *Internal Conflict and Article Three of the Geneva Conventions*, 48 DEN. L.J. 263, 264 (1971).

⁵ See 75 U.N.T.S. Nos. 970-973, at art. 2. No. 970 refers to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. No. 971 refers to the Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. No. 972 refers to the Geneva Convention Relative to the Treatment of Prisoners of War. No. 973 refers to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The relevant Geneva Conventions will be referred to by the appropriate U.N.T.S. Nos. as noted above.

draft convention entitled "Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,"⁶ which recapitulated and modernized much of the Hague law of 1907 and made it applicable to all armed conflict, internal as well as international.⁷ Governments generally ignored the proposal, and the ICRC has recently suggested several modifications which it hopes will "make the medicine go down."

In the spring of 1971, the ICRC presented a draft "Protocol to the Geneva Conventions of 1949 Relative to Conflicts not of an International Character,"⁸ which included a chapter on the protection and care of the sick and wounded. The First Commission of Government Experts revised this chapter and promulgated a draft "Protocol on Protection of Wounded and Sick in Conflicts not International in Character."⁹ The Canadian delegation to the spring conference of Government experts submitted a draft "Protocol to the Geneva Conventions of 1949 Relative to Conflicts not International in Character,"¹⁰ which incorporates the key humanitarian provisions of Geneva law. Other significant proposals include the "Minimum Rules for Non-delinquent Detainees,"¹¹ drafted by the Medico-Legal Commission of Monaco and the "Standard Minimum Rules for the Treatment of Prisoners,"¹² produced by the United Nations Human Rights Commission. These proposals are all based on the same fundamental humanitarian spirit which permeates such documents as the Universal Declaration of Human Rights and the Covenant of Civil and Political Rights.¹³

The urgent need now is to analyze and integrate these various proposals. In many cases, the drafts deal with their particular subjects in virtually identical wording; in others, with markedly divergent language. Some address themselves to "Hague problems", i.e., the conduct of military operations, others to "Geneva problems"; i.e., the treatment of non-combatants. Even taken as a unit, they do not mend all the gaps in humanitarian protection for those caught up in internal conflicts. What follows is a coherent critique. It is an attempt to view these proposals from a broader perspective—one that encompasses the entire range of war law problems characteristic of internal conflicts.

⁶ See App. A.

⁷ *Id.* art. 2(b).

⁸ See App. B.

⁹ See App. C.

¹⁰ See App. D.

¹¹ See App. E.

¹² Cf. J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 106 (1970).

¹³ See note 1, *supra*; G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, U.N. Doc. A/6316 (1966).

II. SUBSTANTIVE REFORMS

A. *Limitations Should be Imposed on the Participant's Conduct of Hostilities*

Drafting a uniform set of rules for the conduct of military operations in internal conflicts is difficult, even though there is wide agreement on two principles. First, in so far as possible, the civilian population should be spared the sufferings of war. Second, attacks cannot be launched against civilians as such.¹⁴ The difficulty is that in internal conflicts there is no sharp distinction between those taking part in the hostilities and members of the civilian population. A convention which premises its provisions on the viability of such a distinction will inevitably leave major gaps or prove unenforceable. Nevertheless, even in this type of war, the law must continue to distinguish between what a soldier can do, for example, to the enemy firing an AK-47 at him, and what he can do to an old man plowing a rice paddy. The customary distinction between combatants and non-combatants remains valid because it is functional: it defines the attitude and the action of one party toward the other at the moment of their contact with each other. For instance, if "Charlie" is firing at an American soldier, he's a combatant; if he's waving a white flag, he's a non-combatant. The cruel battlefield reality of self-defense and survival dictates that a soldier can act differently toward a combatant than toward a non-combatant. The rules of such conflicts must be so fashioned as to enhance the soldier's effectiveness *vis-a-vis* the combatant enemy without unnecessarily endangering the non-combatant, whether he be friend or foe.

¹⁴ [T]he United Nations itself—and, consequently, the member states—has repeatedly expressed the idea that the civilian population is not a lawful objective. Three important resolutions must be mentioned here: Resolution 1653 (XVI) of 24 November 1961 on the legality of the use of nuclear weapons, which in its preamble deduces the illegality of these weapons from the prohibition against unnecessary human suffering and from the fact that these weapons cause indiscriminate suffering and destruction to mankind; Resolution 2162 B (XXI) of 5 December 1966 on chemical and bacteriological weapons (the question of the Geneva Protocol), which states in its preamble that weapons of mass destruction are "incompatible with the accepted norms of civilization" and asserts "that the strict observance of the rules of international law on the conduct of warfare is in the interest of maintaining these standards of civilization"; and finally, Resolution 2444 (XXIII) of 19 December 1968 with respect to human rights in armed conflicts, which "adopts as its own" resolution XXVIII adopted by the XXth Conference of the Red Cross (Vienna, 1965) and which reiterates the following principles: the choice of means for injuring the enemy is not unlimited, attacks against the civilian population as such are prohibited, and a distinction must be made at all times between combatants and the civilian population

[G.A. Res. 1653, 16 U.N. GAOR Supp. —, U.N. Doc. — (Nov. 24, 1961); G.A. Res. 21 U.N. GAOR Supp. —, U.N. Doc. — (Dec. 5, 1966); G.A. Res. 2444, 23 U.N. GAOR Supp. —, U.N. Doc. — (Dec. 19, 1968)]; D. BINDSCHEDLER-ROBERT, *THE LAW OF ARMED CONFLICT* 19 (C.E.I.P. 1971).

1. *Use of Weapons Should be Restricted*

To this end, the 1956 ICRC draft bans only those weapons "whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree of escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population."¹⁵ This does not necessarily constitute an absolute ban on incendiary, chemical, biological, or atomic weapons; nor should it be interpreted as such. It does, however, reflect the widely held view, reaffirmed by the International Law Institute at Edinburgh in 1969, that "international law prohibits the use of all weapons which by their nature affect indiscriminately both military objectives and non-military objects . . . or [are] otherwise uncontrollable."¹⁶

But the effects of some of the above noted weapons are controllable. Moreover, although the 1968 Teheran International Conference on Human Rights declared that "the use of chemical and biological warfare, including napalm bombing, erodes human rights and engenders counter-brutality,"¹⁷ some of these weapons may inflict less suffering than do ordinary weapons. An incapacitating tear gas could, for example, render an enemy force temporarily helpless without permanent injury to anyone. The United Nations Secretariat concedes that:

chemical weapons could be used within the zone of contact of opposing forces; against military targets such as airfields, barracks, supply depots, and rail centres well behind the battle area itself; or against targets which have no immediate connexion with military operations, such as centres of population, farm land, and water supplies. The circumstances in which they could be used within a zone of contact are many and varied—for example, to achieve a rapid and surprise advantage against a poorly trained, ill-equipped military force which lacked chemical protective equipment; to overcome troops in dug-outs, fox-holes, or fortifications where they would be otherwise protected against fragmenting weapons and high-explosives; to remove foliage, by means of chemical herbicides so as to improve visibility and to open up lines of fire, and to prevent ambush; to create barriers of contaminated land on or in the rear of the battlefield to impede or channel movement; or to slow an enemy advance by forcing them to use protective clothing and equipment.¹⁸

¹⁵ See App. A. at art. 14.

¹⁶ International Law Institute, Fifth Commission, Resolution No. 1, Sept. 9, 1969 (para. 7).

¹⁷ Final Act of the International Conference on Human Rights, — U.N. GAOR, Annexes, Agenda Item No. —, U.N. Doc. A/C 32/41 (1968) (Resolution No. 23, para. 4).

¹⁸ U.N. Doc. OPI. 373/19888 (1969), at pp. 7-8.

While their use in any of the above circumstances might endanger a portion of the civilian population, it need not.

Since some of these weapons have legitimate military uses, it would probably be futile to ban them entirely. It is, moreover, unrealistic to expect that nations would agree in the context of a convention on internal conflict to more restrictive provisions than are presently embodied in international agreements. Nations are more likely to limit their use of nuclear, chemical and biological weapons in separate treaties—a fact which the ICRC implicitly notes in the disclaimer that the Article 14 restriction is “[w]ithout prejudice to the present or future prohibition of certain specific weapons”¹⁹ Finally, these are not the weapons most frequently used in internal conflicts. Nuclear and biological weapons have never been used, and chemical weapons have been used rarely (though that use has been accompanied by great publicity and has occasioned great concern). There is little to be gained by only outlawing weapons which have never been and are not likely to be used in internal conflict while still permitting the unregulated use of common but deadly weapons.

Consider, for example, punji sticks. Punji sticks are wooden poles whose ends have been sharpened to a point and covered with excrement. They are placed in a hole, which is then covered with ground camouflage. This gives way as soon as someone steps on it. The unlucky victim falls and impales himself upon the poles. He may slowly die and, even if rescued, serious infection may set in, causing great suffering and perhaps death. Punji sticks have taken a far greater toll in the Vietnam war than have nuclear or biological weapons. And yet, the ICRC draft does not outlaw such weapons. That is why it is to be regretted that the ICRC draft does not incorporate the “unnecessary suffering” standard,²⁰ which is the basis for most of the present weapons law. The unnecessary suffering standard protects combatants as much or more than it does non-combatants, and so long as its sole aim is to insulate non-combatants from the effects of blind weapons, the omission is understandable. Difficult as it is to apply the standard, it is an explicit recognition that “[b]elligerents have not

¹⁹ See App A at art. 14. The SALT talks and the British draft convention on biological weapons are contemporary proof that the greatest hope for limiting weapons use lies in multilateral treaties negotiated among the major powers.

²⁰ The Army Field Manual 27-10, THE LAW OF LAND WARFARE (1956) amplifies the “unnecessary suffering” standard as follows:

What weapons cause ‘unnecessary injury’ can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets. *Id.* at 18.

got an unlimited right as to the choice of means of injuring the enemy."²¹ One could even add to the general language: "it is expressly forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering." In this way, one might specifically prohibit weapons such as punji sticks, as well as the most objectionable uses of fire and chemical weapons.

As an example, the convention could forbid the use of napalm against troops or individuals in the open. It could also forbid the destruction of food stores or farming areas by herbicides where their destructive impact impinges largely upon the non-combatant population. Professor Westing has pointed out that in Vietnam "enormous amounts of food must be destroyed in order to create a hardship for the Viet Cong."²² He adds:

In fact, classified studies performed for and by the U.S. in 1967 and 1968 revealed that food destruction has had no significant impact on the enemy soldier. Civilians, in contrast, did and do suffer. Estimates in these studies varied between 10 and 100 for how many civilians have to be denied food in order to deny it to one guerrilla.²³

The imposition of such unnecessary suffering should be forbidden.

2. Choice of Targets Should be Limited

The civilian population has suffered far more from indiscriminate aerial bombardment than it has from the misuse of other weapons systems. Not surprisingly, the ICRC draft devotes ten articles to bombardment, and only two to weapons.²⁴ The inadequate state—some would say absence—of international law governing aerial bombardment makes it difficult, if not impossible, to draw analogies from the present Conventions governing international armed conflict. The ICRC proposals are not without precedent, however. They reflect a mixed parentage: the draft "Rules of Aerial Bombardment," the practice of states, the principles underlying the law of land bombardment, and the insight of scholars.

First, the draft rules flatly forbid area bombardment: a single attack upon an area "including several military objectives at a distance from one another where elements of the civilian population or dwellings, are situated in between the said military objectives."²⁵

²¹ INTERNATIONAL CONVENTION CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND, CMD. No. 5030, at 149 (1910); cf. 36 Stat. 2301, T.S. No. 539 (art. 22 Hague Regulations).

²² Westing, *Agent Blue in Vietnam*, N.Y. Times, July 12, 1971, at 27, col. 3.

²³ *Id.*

²⁴ See App. A at arts. 6-13 (bombardment), 14-15 (weapons), 16-17 (bombardment).

²⁵ *Id.* art. 10. The same approach is also followed in Article 24 (3), THE GENERAL REPORT OF THE COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE RE-

Even when attacking a military objective "in towns and other places with a large civilian population,"²⁶ the bombardier must conduct the strike "with the greatest degree of precision."²⁷

Second, the draft rules, while permitting strategic bombing, specifically confine legitimate targets to "military objectives."²⁸ Even targets which fall within one of the enumerated categories of military objectives cannot be considered such "where their total or partial military destruction, in the circumstances ruling at the time, offers no military advantage."²⁹ The draft rules do not, as do the rules of land bombardment, specifically exempt some buildings (such as churches, schools, hospitals, or museums) from attack. Rather, they identify permissible military targets.

Third, the draft rules bar "[a]ttacks directed against the civilian population."³⁰ The frequent—and reprehensible—tactic of terror bombing is thus forbidden. The rules nevertheless recognize that "should members of the civilian population . . . be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective."³¹ Customary international law has never disallowed incidental injury to the civilian population. The draft rules carefully circumscribe this exception, however. The ban on area bombardment and the consequent emphasis upon precision strikes have already been noted. If the "person responsible for ordering or launching an attack" can choose from one of several objectives, any of whose destruction would render the same military advantage, "he is required to select the one, an attack on which involves the least danger for the civilian population."³² Furthermore, he must "refrain from the attack if . . . the loss and destruction [inflicted upon the civilian population] would be disproportionate to the military advantage anticipated."³³ He must insure that "no losses or damage are caused to the civilian population" or "are at least reduced to a minimum."³⁴

VISION OF THE RULES OF WELFARE, CMD. NO. 2201, at 27 (1924). This report hereinafter is referred to as the 1923 *draft rules*.

²⁶ *Id.* art. 9.

²⁷ *Id.*

²⁸ *Id.* art. 7. Article 24 (2) of the 1923 *draft rules* limited military objectives to "military forces; military works; military establishments or depots; factories constituting important and well known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes."

²⁹ *Id.* The same principle was embodied in Article 24(1) of the 1923 *draft rules*, *supra* note 25.

³⁰ *Id.* art. 6. Article 22 of the 1923 *draft rules*, *supra* note 25, prohibited "aerial bombardment for the purpose of terrorizing the civilian population."

³¹ *Id.*

³² *Id.* art. 8.

³³ *Id.*

³⁴ *Id.* art. 9. The 1923 *draft rules*, *supra* note 25, did not impose such stringent

Fourth, the draft rules seek further to protect the civilian population by imposing warning requirements. Article 8(c) states that "whenever the circumstances allow . . . the civilian population in jeopardy" should be warned "to enable it to take shelter."³⁵ It is not clear what "circumstances" would preclude warning, though one would surely be that the warning would alert enemy forces who could then frustrate the attack. In most internal conflicts, the government retains air superiority and can attack rebel areas from the air with impunity. In such "circumstances," excusing a failure to warn on the above ground sounds disingenuous. In reality, it belies the government's intention to strike directly at the civilian population.

Fifth, and finally, the draft rules encourage the parties to broaden the categories of exempt targets. They may declare "open towns."³⁶ The rules carefully define the "conditions" which a town must "satisfy" to be declared an open town and authorizes verification inspections. "In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations . . . the States or Parties concerned are invited . . ." to agree upon their immunity where the installations are "intended essentially for peaceful purposes" or have no "connection with the conduct of military operations."³⁷ Parties to a conflict are always free to conclude such agreements, of course. They rarely do, and it is doubtful that these provisions will prove any more effective in inducing wartime agreements than have similar provisions in current treaties. Parties to the Geneva Conventions have never, for example, heeded the Article 3 suggestion that they "endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."³⁸

duties. Nevertheless, Article 25 ordered the commander "to spare in so far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals, and other places where the sick and wounded are collected . . ." The language was lifted almost verbatim from Article 27 of the Hague Rules, *supra* note 21, at 151.

³⁵ *Id.* art. 8(c). The 1923 draft rules, *supra*, note 25, did not require any warning.

³⁶ *Id.* art. 16. The 1923 draft rules, *supra* note 25, at art. 26, did not speak of "open towns," but they authorized the creation of "zones of protection" for historical monuments.

³⁷ *Id.* art. 17.

³⁸ Common art. 3 of the Geneva Conventions states:

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

3. *Other Restraints Should be Imposed*

The non-combatant population may suffer as much or more from the participants' irresponsible conduct of ground operations as from their indiscriminate aerial bombardment. Indeed, many common battlefield practices victimize the non-combatant population far more than they do combatants, and their prohibition in the Hague Regulations³⁹ underscores the common purpose it shares with the Geneva Conventions: protection of non-combatants. Fortunately, the Canadian draft incorporates some of the most basic Geneva restrictions. It reaffirms the Article 3 prohibition against taking hostages.⁴⁰ It also forbids pillage⁴¹ and "reprisals against persons and property."⁴²

The Hague prohibitions on pillage are absolute. While other provisions permit the destruction of property when required by military necessity,⁴³ pillage could never be justified. In other words, the draftsmen weighed whatever military benefit might accrue from pillage against its impact on the population and concluded that it should never be permitted. It is difficult to see why the law should strike a different balance in internal conflict. Although indiscriminate looting may demoralize the pillaged population, it may also demoralize the soldiers. They may degenerate into "hyenas of the battlefield." Since a pillaging force gains thereby no significant military advantage, an absolute prohibition is desirable.

Additionally, the Canadian draft absolutely forbids reprisals.

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.

75 U.N.T.S. No. 970-73 at art. 3.

³⁹ 36 Stat. 2301-03, T.S. No. 539 (art. 22-28, Hague Regulations).

⁴⁰ See App. D at art. 12(1); 75 U.N.T.S. No. 970-73, at art. 3. See also *id.* No. 973, at art. 34.

⁴¹ *Id.* art. 12(2); 75 U.N.T.S. No. 973, at art. 33. See also 36 Stat. 2303, T.S. No. 539 (art. 28, Hague Regulations).

⁴² *Id.* art. 12(3); 75 U.N.T.S. No. 973, at art. 33.

⁴³ See 36 Stat. 2303, T.S. No. 539 (art. 23, Hague Regulations); 75 U.N.T.S. No. 973, at art. 53.

Moreover, it does not limit the ban to "protected" persons or property, as does Article 33 of the Geneva Civilian Convention upon which, the draftsmen assure us, they modeled Article 12.⁴⁴ The omission is an important one. It means, quite simply, that reprisals are outlawed. A party to the conflict may henceforth never resort to a reprisal, whatever the opposing party's conduct. The draft thus goes far beyond present law, which still permits reprisals against unprotected persons and property.

The Canadian draft also imposes, as does Article 3, a general requirement of humane treatment "with respect to persons belonging to it or under its control."⁴⁵ In amplifying language, it includes a prohibition on "medical or scientific experiments not necessitated by the medical treatment of such persons."⁴⁶ This specific prohibition, though common to all four Geneva Conventions,⁴⁷ is not found in the Hague Regulations. While experiments such as those conducted by German scientists upon Jews in World War II fortunately have not plagued internal conflicts, one can scarcely object to the inclusion of the prohibition.

One other provision, not found in either the ICRC draft or the Canadian draft but which should be included, is the Secretary-General's proposal for the establishment of safety zones.⁴⁸ These zones might, for example, embrace farm areas or population relocation centers. The idea of safety zones is not new, of course;⁴⁹ but their use in internal conflicts could minimize destruction and suffering. The general guidelines for the establishment of "open towns" would serve equally well as criteria for the creation of safety zones. It is also crucial to emphasize that the creation of special zones does not reduce the parties' obligation to conduct military operations responsibly elsewhere.

Finally, none of the drafts clearly outlaws the use of terror tactics. Difficult as they would be to proscribe entirely, inclusion of the Hague prohibition on treacherously wounding "individuals belonging to the hostile army or nation"⁵⁰ would be helpful.

⁴⁴ Explanatory Notes—Draft Protocol Presented by the Canadian Expert 3, Doc CE Com II/7 (May 27, 1971). See also *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. No. 973, at art. 33.

⁴⁵ See App. D at art. 13; 75 U.N.T.S. Nos. 970-973, at art. 3.

⁴⁶ See App. D. at art. 13.

⁴⁷ 75 U.N.T.S. Nos. 970-73, at art. 12 (Nos. 970, 971), art. 13 (No. 972), art. 32 (No. 973).

⁴⁸ Report of the Secretary General, U.N. Doc. A/8052 (Sept. 18, 1970).

⁴⁹ 75 U.N.T.S. No. 973, at arts. 14, 15.

⁵⁰ INTERNATIONAL CONVENTION CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND, CMD. No. 5030, at 150 (1910); 36 Stat. 2302, T.S. No. 539 (art. 23 Hague regulations).

By merging the ICRC draft with chapter 4 of the Canadian draft, substantial protection would be provided to the non-combatant population in internal conflicts. The minimal restraints embodied in the drafts would not impede either side from effectively waging war. They would, however, reduce those excesses which inflict great suffering upon the non-combatant population without achieving any proportionate military advantage.

B. The Law Should Protect Non-Combatants

1. The New Rules Should Provide for the Determination of the Status of Various Participants in Internal Conflicts.

A wide variety of individuals and groups participate in internal conflicts in an equally wide variety of ways. Since the human rights to which they are entitled should depend upon the nature of their participation, international law should establish appropriate categories—statuses—which reflect the different kinds of participation. Traditionally, international law has identified two broad groups of participants in internal conflict: combatants and the civilian population.

This traditional categorization has two major defects. The first is that it is often difficult to distinguish between combatant rebel forces and the civilian population. Men, women, and children who ostensibly appear to be civilians often assist guerrilla forces by providing food, shelter, and/or information. They may also aid rebel forces by simply refusing to cooperate with government authorities or by giving them misinformation under the guise of cooperation. These people may act out of fear or sympathy or even indifference, but they do thereby aid rebel forces. Traditional international law never identified the point at which the civilian passes beyond the pale of “innocence”; but surely at some point along the continuum of increasing involvement in the rebellion, he becomes more a rebel than a civilian.

And what of the “Sunshine Patriots”—loyal citizens by day but rebels during the hours of darkness? These patriots hide behind the mask of civilian innocence. While this disguise makes the government job of identifying and apprehending the rebels much more difficult, it also greatly endangers the civilian population because the government may feel compelled to cast a broad net. Unable to distinguish between rebels and the civilian population, it may treat them equally. The results are indiscriminate bombardment, mass arrests, searches, detentions, and forced resettlement programs.

The second defect in the traditional categorization is that it ignores major differences among participants within each category.

When the International Committee of the Red Cross asked experts whether international humanitarian law protected combatants in international conflicts, it specified twelve different classes of combatant:

- (1) regular armed forces of the established government;
- (2) rebel armed forces;
- (3) mercenaries;
- (4) infiltrators;
- (5) governmental special anti-guerrilla forces;
- (6) guerrilleros complying with Article 4 of the POW Convention;
- (7) guerrilleros not complying with some of the conditions of that article;
- (8) guerrillas operating on the territory of neutral states;
- (9) deserters and "transfugees";
- (10) saboteurs;
- (11) spies and informers;
- (12) terrorists.⁵¹

Similarly, the ICRC divided the civilian population into nine groups:

- (1) political opponents;
- (2) senior politicians and civil servants;
- (3) those providing administrative services;
- (4) police;
- (5) displaced and resettled persons;
- (6) population subject to intermittent control by the guerrilla forces;
- (7) population constantly subject to control by guerrilla forces;
- (8) persons passively (not denouncing) or actively (transport, shelter, information, etc.) assisting guerrilla forces;
- (9) persons refusing to obey guerrilla forces.⁵²

There is, however, as great a danger in drawing too many lines too finely as in drawing too few too crudely. Sabotage, spying, treason, and terrorism may well be defined, for example, in separate criminal statutes and different punishments meted out to the perpetrators thereof. But there is little reason for conditions of their detention or their rights to and in a judicial proceeding to vary. Similarly, the government's regular forces and its special guerrilla forces, while of course performing different military tasks, should be subject to the same laws and entitled to the same rights. The need is to define those broad categories of persons entitled to the same or similar treatment.

The little-known classification procedures presently used by the allied forces in Vietnam provide a good starting point for discussion

⁵¹ ICRC, PRELIMINARY REPORT ON THE CONSULTATION OF EXPERTS CONCERNING NON-INTERNATIONAL CONFLICT AND GUERRILLA WARFARE 18 (1970).

⁵² *Id.* at 28.

of possible classification schemes.⁵³ Generally, the aim in Vietnam is

⁵³ Military Assistance Command in Vietnam, Directive No. 381-46, Annex A, Dec. 27, 1967 states:

CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. **PURPOSE.** To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. **DEFINITIONS.**

a. *Detainees.* Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions.

b. *Classification.* The systematic assignment of a detainee in either the PW or Non-Prisoner of War category.

c. *Prisoners of War.* All detainees who qualify in accordance with paragraph 4a, below.

d. *Non-Prisoners of War.* All detainees who qualify in accordance with paragraph 4b, below.

3. **CATEGORIES OF FORCES.**

a. *Viet Cong (VC) Main Force (MF).* Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.

b. *Viet Cong (VC) Local Force (LF).* Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specified VC province or district.

c. *North Vietnamese Army (NVA) Unit.* A unit formed, trained and designated by North Vietnam as an NVA unit, and composed completely or primarily of North Vietnamese.

d. *Irregulars.* Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

(1) *Guerrillas.* Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

(2) *Self-Defense Force.* A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not have their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

(3) *Secret Self-Defense Force.* A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. **CLASSIFICATION OF DETAINEES.**

a. Detainees will be classified PW's when determined to be qualified under one of the following categories:

(1) A member of one of the units listed in paragraph 3a, b, or c, above.

(2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.

(3) A member of one of the units listed in paragraph 3d, above who admits or for whom there is a proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b. Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:

(1) *Civil Defendants.*

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.

to separate from all others those foreign soldiers and domestic citizens who have taken up arms against the government. They are treated as POW's even though many could not meet the Geneva Convention criteria for the POW status. "All others" are further subdivided into three groups: civil defendants, returnees, and innocent civilians. Those classified as innocent civilians are promptly released and returned to their homes. Returnees, those previously disaffected who agree to support the government, are sent to Chieu Hoi centers⁶⁴ where they are rehabilitated. Civil defendants are prosecuted in the local Vietnamese courts for whatever crimes they are alleged to have committed.

On the whole, these distinctions make sense. The government has an obvious interest in separating out innocent civilians caught in its nets and returning them to their homes. A brief detention and interrogation, while an inconvenience to the citizen, is not too great an infringement on his rights. It is difficult to see how the government could with any lesser interference ascertain the status of the non-combatant.

At the other extreme, it is also easy enough to understand why foreign soldiers are treated as POW's. They, of all participants in guerrilla conflicts, fit most neatly into the regular Geneva Convention categories. While the government could arguably treat them as spies and saboteurs, policy reasons dictate extending POW status to them. Trying and executing foreign nationals unnecessarily inflames passions and may frustrate the possibility of a negotiated settlement, the usual outcome of these conflicts. The North Vietnamese government, for example, prudently dropped its plans to try U.S. airmen as

(c) A detainee who is suspected of being a spy, saboteur or terrorist.

(2) *Returnees (Hoi Chanh)*. All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN Control.

(3) *Innocent Civilians*. Persons not members of any units listed in paragraph 3, above, and not suspected of being civil defendants.

5. DISPOSITION OF CLASSIFIED DETAINEES.

a. Detainees who have been classified will be processed as follows:

(1) *US captured PW's* and those PW's turned over to the US by FWMAP will be retained in US Military channels until transferred to the ARVN PW Camp.

(2) *Non-Prisoners of War* who are suspected as civil defendants will be released to the appropriate GVN civil authorities.

(3) *Non-Prisoners of War* who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.

(4) *Non-Prisoners of War* determined to be innocent civilians will be released and returned to place of capture.

b. Responsibilities and procedures for evacuation and accounting for PW's are prescribed in MACV Directive 190-3 and USARV Regulation 190-2.

⁶⁴ A Chieu Hoi Center is similar to a reform school where formerly disaffected citizens are re-educated, i.e., indoctrinated. Once authorities are satisfied that the citizens are loyal, they are released.

war criminals when the United States and other countries raised strenuous protests.

The reasonableness of classifying one's own nationals as POW's is less obvious. In most cases, those who have taken up arms against their government will have violated its criminal laws and could therefore be tried as common criminals. Most states have adopted such a policy, particularly in the initial stages of the insurgency. There is, however, one advantage to treating captured rebels as POW's: a POW may be interned for the duration of the conflict. Contrawise, treating all rebel citizens as POW's would arguably preclude an effort like the Chieu Hoi program.⁵⁵ But so long as the government is dealing with its own citizens rather than with foreign nationals, the Chieu Hoi program may be defended as an act of amnesty or pardon, powers traditionally held by all governments.

The government should be permitted discretion in choosing between these alternate methods of handling its dissident citizens so long as it treats all humanely. The government cannot be faulted for enforcing its criminal laws against those it deems citizens. The citizen-turned-rebel can little complain if his former government takes him at his word, accepts his renunciation of allegiance, and treats him as it would any other foreign enemy. Furthermore, there is no reason why the government must treat all citizens either as POW's or as civil defendants, so long as it uses a rational basis for distinguishing those against whom it pursues the normal criminal process from those it interns as POW's.

In Vietnam, for example, the government separates its citizens into three groups: POW's, civil defendants, and returnees. It is important that the government retain its flexibility in dealing with rebels. Yet it is also essential that it act within the law. Thus, Kelly and Pelletier conclude:

a firm, yet flexible system of law, is required so as to permit the government to act effectively to meet this threat while, at the same time establishing limits and protections for the nationals of the country to insure their individual rights.⁵⁶

While countries may, as have the U.S. and its allies, voluntarily adopt classification schemes, nothing in international law presently insures their adoption. Moreover, a state may adopt a classification scheme considerably less rational and just than the minimum standards of humanity would dictate. While sovereign states should retain considerable discretion in dealing with their domestic and

⁵⁵ *Id.*

⁵⁶ Kelly & Pelletier, *Legal Control of Populations in Subversive Warfare*, 5 VA. J. INT'L L. 175 (1965).

foreign enemies, international law must circumscribe their exercise of an otherwise unfettered discretion. Prisoner of war, returnee, civilian defendant, and innocent civilian constitute functional categories which wisely reflect the need to treat different kinds of participants differently. Since some states object to calling captured nationals POW's (though not necessarily to treating them as such), "detained combatant" might prove a more acceptable term.⁵⁷

There are two other categories of individuals who deserve particular protection: the sick and wounded and medical personnel. The sick and wounded may, of course, also fall within one of the other previously enumerated classes and may ultimately derive their rights and obligations from their "other" status; but their condition entitles them initially to special treatment. Medical personnel may also fall within other categories; and to the extent that they participate as combatants, they must lose whatever immunity otherwise enjoyed in the discharge of their medical services.

The Canadian draft contains several articles which deal with the problems of the sick and wounded, and the ICRC has proposed a separate protocol devoted exclusively to the same subject. The Canadian draft singles out the wounded and sick for "particular protection and respect" and provides that they "shall receive the care necessitated by their condition without any adverse distinction" and "with the least possible delay."⁵⁸ It imposes the obligation "to search for and collect the wounded and sick" and "to communicate to each other all details on persons who are wounded, sick, or who have died . . ."⁵⁹ Finally, a separate article urges the parties "to conclude local arrangements for the removal [of the sick and wounded] from areas where hostilities are taking place . . ."⁶⁰ Article 1 of the ICRC draft protocol also emphasizes that the wounded and sick deserve "particular protection and respect," but it further stresses that "combatants . . . who are wounded and sick" fall within that category. The ICRC draft likewise imposes the same obligation to search for and collect the wounded and sick⁶¹ and to communicate information about them.⁶² Although the ICRC draft contained no

⁵⁷ The United States, for example, objected to the use of "Prisoners of War" in the ICRC draft protocol on care for the sick and wounded in non-international conflict, as implying that combatants may have POW status. The objection received unanimous support.

⁵⁸ See App. D at art. 2(1)&(2). Article 12, the "Keystone" provision common to the Geneva Conventions for the Protection of the Sick and Wounded, embodies the same principles. 75 U.N.T.S. No. 971, at 38, 92-94.

⁵⁹ See App. D at art. 3(1)&(2); cf. 75 U.N.T.S. Nos. 970-71, at 42-46 (No. 970) & 96-98 (No. 971).

⁶⁰ See App. D at art. 7.

⁶¹ See App. B at art. 2(1).

⁶² *Id.* art. 2(2).

evacuation requirement, the Commission revision included—at the behest of the Canadian delegation—an article identical to Article 7 of the Canadian draft.⁶³

If the wounded and sick are to be nursed effectively, those who care for them must also enjoy special protection. Both the Canadian and ICRC drafts contain a provision immunizing from molestation or conviction any member of the population who nurses the wounded and sick.⁶⁴ This is an important provision in the context of international conflicts because individuals—peasants, farmers—will often care for the sick and wounded, particularly among the guerrillas. Similarly, both drafts guarantee medical personnel respect and protection and specify that “[t]hey shall receive all facilities to discharge their functions and shall not be compelled to perform any work outside their mission.”⁶⁵

The proposed protocols would also protect medical establishments and transports from attack.⁶⁶ The language of the respective articles is nearly identical, but the Canadian draft includes a third paragraph which authorizes use of the Red Cross emblem when the medical facilities are being used solely for medical purposes. This is a sound addition and is a useful implementation of the common article which makes the Red Cross emblem “the distinctive emblem of the medical services of the Parties to the conflict.”⁶⁷ Its usefulness depends upon universal adherence to the closing reminder: “It shall not be used for any other purposes and shall be respected in all circumstances.”⁶⁸ The two drafts thus breathe life into the simple Article 3 command to collect and care for the sick and wounded.⁶⁹

Chaplains, priests, and others who minister to the spiritual needs of the community should enjoy an immunity analogous to that given medical personnel. Thus, in both drafts, they are included alongside medical personnel as persons entitled to special respect and protection. They must be permitted to “discharge their functions,”⁷⁰ an indispensable right if detained persons are “to receive spiritual assistance from ministers of their faith . . .”⁷¹

The key to any sound classification system is rationality, and it

⁶³ See App. C at art. 6.

⁶⁴ See App. B at art. 3; App. D at art. 4(2); 75 U.N.T.S. No. 970, at 44 (art. 18).

⁶⁵ See App. D at art. 5; App. B at art. 4; cf. 75 U.N.T.S. Nos. 970-73, at arts. 24-32 (No. 970), arts. 36-37 (No. 971), art. 33 (No. 972), & art. 20 (No. 973).

⁶⁶ See App. D at art. 6; App. B at art. 5; cf. 75 U.N.T.S. Nos. 970-71, at arts. 19-23, 33-37 (No. 970) & arts. 22-35, 38-40 (No. 971).

⁶⁷ See App. D at art. 9; App. B at art. 6.

⁶⁸ *Id.*

⁶⁹ See note 38, *supra*.

⁷⁰ See App. D at art. 5; App. B at art. 4; cf. 75 U.N.T.S. No. 972, at arts. 34-38.

⁷¹ See App. D. at art. 19(b).

thus becomes important to insure that rationality by specifying how classification decisions are to be made. The who, how, and why of decision-making can either frustrate or implement the formal classification scheme; and yet, none of the current draft protocols or conventions establishes any procedural guidelines.

a. *The Rules Should Specify Who is Entitled to Make These Status Determinations.* The front line soldier must necessarily make the initial classification decision during the conduct of tactical operations. It is important, however, to insure that his initial decision be neither final nor prejudicial. In the first place, the category into which the non-combatant fits is not usually readily apparent. Peasants, for example, do not wear placards identifying themselves as "VC sympathizers" or "Ky-Thieu supporters." They look discouragingly alike. In such circumstances, classification becomes a complex political-legal judgment, which the average soldier is ill-equipped to make. Quite aside from the fact that he is not trained to interrogate or classify, he will rarely have time to question extensively; nor will he have access to other information which would enable him to accurately evaluate responses. About the most he can do is make rough judgments based on the facts as they appear to him and, perhaps, a brief interrogation. It is therefore important to require that a soldier who detains an individual either free him promptly or as soon as possible evacuate him to a safe area where his status can be finally determined.⁷² The prompt evacuation requirement also insures that detained people are removed from the area of hostilities and thereby reduces the likelihood that the capturing force will misuse them as hostages or shields.

Ideally, a panel composed of judicially qualified individuals should determine the status of detained individuals. The ideal is seldom an alternative, however, and many governments lack the personnel to staff such tribunals. As a minimum, a senior military officer or civil servant should be charged with the responsibility for making status determinations. Appeal from his decision should be permitted as a matter of right in any case in which the senior official classifies a citizen as a "combatant-detainee" or POW. The decision to deprive a citizen of his right to trial in civil courts and to confine without a judicial determination of guilt for an indefinite period is so extraordinary that it should only be made in a judicial forum.

⁷² The necessity to evacuate all captured personnel to the rear for classification is a basic point stressed in all army instructional programs. The recently revised Army Subject Schedule 27-1, The Geneva Conventions of 1949, and Hague Convention No. IV of 1907, state:

Combat soldiers do not determine the status of any captured person. All persons captured or detained should be evacuated to the detainee collecting point where proper authorities can classify them.

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b. *The New Rules Should Set Out the Procedure by Which the Determination Must be Made.* What rules should govern such proceedings? Again, Allied practice in Vietnam is instructive. In cases in which the status of a detainee is doubtful, his case is referred to a tribunal,⁷³ which, according to applicable Army regulations,⁷⁴ will consist of three or more officers who, where practicable, should be judge advocates or other military lawyers familiar with the Hague and Geneva Conventions. An army directive establishes very specific procedures for the hearings.⁷⁵ It specifies, for instance, that the individual has a right to an interpreter and to counsel with whom he may be present at all open sessions of the court.⁷⁶ Counsel must be informed of the tribunal procedures and have free access to his client. He can call, examine, and cross-examine witnesses.⁷⁷ While the tribunal is not bound by the Uniform Code of Military Justice rules of evidence, it must follow specified procedures⁷⁸ which insure that the defendant has his day in court. While it would probably be unwise to set out in the Conventions such a detailed tribunal procedure, a model set of procedures could be annexed to the Convention. Although its procedures would probably differ from those observed in a civil court trial, the minimum standards of due process and fairness should govern any hearing.

c. *The Rules Should Set Out the Criteria Upon Which the Classification Decision Must be Made.* Any new convention must define the status categories specifically enough to enable the authorities to classify accordingly. It must do better than the old Oklahoma statute which said that for its purposes anyone who looked like an Indian was an Indian. Unfortunately, the present drafts imply that anyone who looks like a civilian is one and must be treated as one both during the conduct of tactical military operations and thereafter. Much of the futile and often circular argument over the appropriate definition of the civilian population stems from a failure to analyze the point in time and the purpose for which the definition is sought. As has already been pointed out, the functional distinction during military operations is between the combatant and the non-combatant, not between the combatant and the civilian population. No reason requires that the soldier initially treat one non-combatant

⁷³ The U.S. and SVN are obligated by their view that the conflict is an international one to which all the Geneva Conventions apply to determine the status of persons before "a competent tribunal." 75 U.N.T.S. No. 972, at arts. 3,5. Nothing in Article 3, were it alone applicable, would require a government to submit doubtful cases of status to any tribunal. This is a major gap in Convention protection.

⁷⁴ Military Assistance Command in Vietnam, Directive No. 20-5, March 15, 1968.

⁷⁵ *Id.* at para. 7.

⁷⁶ *Id.* at para. 9.

⁷⁷ *Id.* at para. 11.

⁷⁸ *Id.* at para. 14.

differently from another. The non-combatant poses no immediate threat. He has surrendered or is offering no resistance. What action the soldier may take against non-combatants during the conduct of military operations should depend on a balancing of military necessity against the human rights of the individual—and not on whether they are citizens, enemy aliens, guerrilla sympathizers, or loyal supporters.

These differences are relevant in determining the *subsequent* treatment to which the non-combatant is entitled. A government fighting for its survival may legitimately distinguish between those among its citizens who support it and those who actively oppose it. It may punish the latter—swiftly and severely—so long as it does so in accordance with minimum legal standards of justice. It may intern them, confiscate their property, deprive them of their right to vote. It may, as all governments do, try, convict, jail, or execute those who violate its laws. Even in peacetime, governments distinguish between citizens and aliens; *a fortiori*, a government may in wartime greatly curtail the civil and political rights of aliens. But while governments may thus accord different types of non-combatants different civil and political rights, they cannot authorize soldiers to treat the different types of non-combatants differently during the conduct of tactical military operations.

A combatant may be defined as one who resists the opposing force by directly participating in military operations. All others would be non-combatants. A POW or “detained combatant” is a former combatant; that is, one who has resisted the capturing force by directly participating in military operations. This definition eliminates the restrictive and excessively formal Article 4 criteria,⁷⁹ which denied prisoner of war status to guerrillas. Some may fear that the broadened definition, while including guerrillas, would embrace too many others, such as sympathizers and collaborators. An entire people might thus become a legitimate military target. The scope of the category depends, of course, on the interpretation of “directly participating” and “military operations.” The use of the term “directly” implies some degree of casuality. The individual’s act must cause in some immediate sense the military damage inflicted upon the adversary. “Military operations” connote tactical maneuvers and should not be confused with the broader concept of “military effort.” The latter necessarily includes many non-combatants whose work does not directly inflict damage upon the enemy.

A returnee is a citizen combatant who elects to reaffirm his former allegiance. It is important to emphasize his *native* citizenship

⁷⁹ 75 U.N.T.S. No. 972, at art. 4.

because the government should not include the foreign nationals in such a category. The government must have the discretion to offer this opportunity to rebel citizens if it is to "win their hearts and minds." Alternatively, it will either incarcerate or exterminate them, neither of which seems a more humane program.

A civil defendant is one who has violated the criminal law of the country. Sympathizers and collaborators who do not directly participate in military operations and therefore do not qualify as POW's have probably violated domestic criminal law. They may be tried in the ordinary criminal courts and punished accordingly. Interestingly enough, aliens remain equally subject to the domestic criminal law and could thus be prosecuted in the ordinary criminal courts for aiding the revolutionary effort.

2. *The New Rules Should Specify the Treatment to Which Participants in Each Status Category are Entitled.*

The recently proposed draft protocols and conventions deal most effectively with the general problem of insuring humane treatment for non-combatants. Perhaps the plight of non-combatants touches more deeply the collective conscience of mankind; perhaps the law of Geneva solutions furnishes more useful analogs to the problem of treating non-combatants in internal conflicts humanely; or, perhaps the minutely detailed provisions of the Geneva Conventions provide a basis for deducing generalized norms applicable to non-international conflicts. Whatever the reason, these new proposals all flesh out the skeletal command in Article 3⁸⁰ to treat non-combatants humanely by: (1) specifying the nature of detention facilities; (2) establishing minimum standards for shelter, food, and medical care; (3) listing the fundamental rights to which any defendant in a judicial proceeding is entitled; and (4) imposing limitations on the kind and length of sentences.

a. *The Nature of Detention Facilities.* Chapter 6 of the Canadian draft protocol deals generally with the rights of "persons in restricted liberty." Internment camps may not "be set up in areas particularly exposed to dangers arising out of the conflict."⁸¹ And if the "area in which [such persons] are confined, detained, interned, or restricted becomes particularly exposed to dangers arising out of the conflict . . ." they must be removed.⁸² These provisions reflect analogous provisions in both the Civilian and Prisoner of War Conventions.⁸³ The draft convention also requires that the internment

⁸⁰ 75 U.N.T.S. Nos. 970-973 at art. 3. See for text of Art. 3. note 38, *supra*.

⁸¹ See App. D at art. 21(1).

⁸² *Id.* art. 19(e).

⁸³ 75 U.N.T.S. Nos. 972-73, at arts. 38(4), 83 (No. 973) & art. 19 (No. 972).

camps, and only internment camps, be marked as such.⁸⁴ The Geneva Conventions require similar marking for POW camps⁸⁵ and civilian detention facilities.⁸⁶ Finally, the same article obligates parties to advise each other of the location of internment camps as states are required to do under the Civilian Convention.⁸⁷

Unfortunately, the Canadian draft does not specify that internment camps be built in healthful areas and maintained in sanitary conditions. The Geneva Conventions offer the model upon which to fashion these minimal assurances of decent detention facilities.⁸⁸ Regrettably the draft also does not define internment camps. The Canadian delegation's explanatory notes do not illuminate their concept of an internment camp, and one suspects from the absence of any discussion that they used the term as it is used in the Civilian Convention. It is thus unlikely that the restrictions upon internment camps apply to either penal institutions or resettled villages or that the occupants of either enjoy the same rights as internees.

The "Minimum Rules for the Protection of Non-Delinquent Detainees" drafted by the Medico-Legal Commission of Monaco establishes more detailed and thorough criteria for any institution or place of detention than does the Canadian draft protocol.⁸⁹ Though the ICRC has recommended even more detailed standards,⁹⁰ the rules seem as vigorous as could be reasonably demanded. Moreover, the rules are applicable to a wider range of detention facilities than are those contained in the Canadian draft. They are intended to complement the minimum rules drawn up by the United Nations Social and Economic Council for Detained Delinquents⁹¹ and thus insure the same fundamental protections for all persons howsoever detained.

The Monaco Medico-Legal rules prescribe "adequate space, ventilation, lighting and heating for each detainee . . ."⁹² Each detainee is entitled to "an individual bunk or bedding" which must be "properly maintained and changed often enough to ensure its cleanliness."⁹³ The detention facility must have baths and toilets.⁹⁴ The

⁸⁴ See App. D at art. 21(2).

⁸⁵ 75 U.N.T.S. No. 972, at art. 23.

⁸⁶ 75 U.N.T.S. No. 973, at art. 83.

⁸⁷ See App. D at art. 21(3); 75 U.N.T.S. Nos. 972-73, at art. 23 (No. 972) & art. 83 (No. 973).

⁸⁸ 75 U.N.T.S. Nos. 972-73, at arts. 22, 25, 29 (No. 972) & art. 85 (No. 973).

⁸⁹ See App. E at arts. 10-15.

⁹⁰ Graven, *Minimum Rules for the Protection of Non-Delinquent Detainees*, 8 INT'L REV. RED CROSS 59, 63 (1968).

⁹¹ *Id.* at 59.

⁹² See App. E at art. 11.

⁹³ *Id.* art. 14.

⁹⁴ *Id.* art. 15.

Geneva Conventions impose similar and even more extensive requirements.

b. *Minimum Standards for Shelter, Food, and Medical Care.* The Canadian draft requires that all persons in restricted liberty "be adequately fed, clothed and sheltered . . ."⁹⁵ and receive necessary medical attention including periodical medical examinations and hospital treatment.⁹⁶ Article 19(a) and (c) must be read in conjunction with Article 2 which guarantees "the care necessitated by their conditions" to "[a]ll persons who are wounded or sick as well as the infirm, expectant mothers, maternity cases and children under fifteen . . ."⁹⁷

The language which accords protections to the sick and wounded parallels that found in Article 1 of the ICRC draft⁹⁸ and Article 1 of the Commission draft protocol for the Protection of Sick and Wounded.⁹⁹ The Commission draft does enumerate several prohibited examples of adverse discrimination, including, for the first time "caste," which was added at the insistence of African nations.

One important shelter provision is Article 19(f), which requires that women "be confined in separate quarters under the supervision of a woman." The Medico-Legal rules echo the separate quarter provision and further specify that "children less than six years of age shall in no case be separated from their mothers."¹⁰⁰ Both drafts contain provisions stressing the importance of communal housing in cases of interned families, although neither requires it.¹⁰¹ The Medico-Legal rules also guarantee separate housing for "civilian or military detainees belonging to countries which are hostile to each other" and proscribes confining non-delinquent detainees with "penal law detainees and convicted prisoners."¹⁰²

The Medico-Legal Institute draft is much more detailed in other aspects as well. It devotes an entire article to clothing, which must be appropriate to the climate, "clean and well maintained," and cannot be "degrading or humiliating."¹⁰³ Another article is devoted specifically to food. All detainees are entitled to "decently served . . .

⁹⁵ See App. D at art. 19(c); cf. 75 U.N.T.S. Nos. 972-73, at arts. 25-27 (No. 972) & arts. 85, 89, 90 (No. 973).

⁹⁶ See App. D at art. 19(a); cf. 75 U.N.T.S. Nos. 972-73, at arts. 30-31 (No. 972) & arts. 91-92 (No. 973).

⁹⁷ See App. D at arts. 2, 19(a) & (c).

⁹⁸ See App. B at art. 1.

⁹⁹ See App. C at art. 1.

¹⁰⁰ See App. E at art. 6; cf. 75 U.N.T.S. Nos. 972-73, at art. 25 (No. 972) & art. 85 (No. 973).

¹⁰¹ See App. D at art. 20; App. E at art. 6; cf. 75 U.N.T.S. No. 973, at art. 82.

¹⁰² See App. E at art. 9; cf. 75 U.N.T.S. No. 973, at art. 84.

¹⁰³ See App. E at art. 17.

wholesome meal(s) of nutritious value" whose "calorific value and vitamin content shall be consistent with acknowledged standards appropriate to age and work performed."¹⁰⁴ Detainees may under certain circumstances prepare their food or "obtain extra food at their own expense or at the expense of their family, friends, or a relief society"¹⁰⁵ The provisions on medical care are extensive. Detention facilities must have a resident doctor and access to the services of a psychiatrist.¹⁰⁶ The doctor must "examine detainees on arrival and whenever necessary thereafter"¹⁰⁷ He must also "advise the director of the institution on matters of hygiene and cleanliness" The detention facilities must be well-equipped.¹⁰⁸ Wherever women are housed, "suitable provision for pre- and post-natal treatment of maternity cases . . ." and nurseries must be made.¹⁰⁹ Other articles in the draft supplement those contained in Chapter VII. Work harmful to health is prohibited.¹¹⁰ Detainees are entitled to an hour's physical exercise daily.¹¹¹ Living and working conditions must be healthful.¹¹² Thus, the Medico-Legal draft incorporates more of the Geneva Convention protections than do any of the other drafts.

c. *Other Protected Rights.* Among the other protected rights to which any detainee should be entitled are the rights to communicate with family and friends and to practice his religion. The Canadian draft guarantees both,¹¹³ though it deletes without explanation the category of "objects necessary for religious worship" from the otherwise transplanted language of article 23.¹¹⁴ It nevertheless assures the detainees' freedom of worship. It also permits them freedom of correspondence; and while it does grant authorities the power to restrict the flow of correspondence from a detainee, they can never limit it to less than two letters and four cards monthly.

The Monaco draft also guarantees these rights. The correspondence provision is more vague than Article 19(g) in the Canadian draft. It permits the exchange of letters with "[the detainees'] families and relatives as well as with the legal representatives, agents or advisors whose services they require . . ." but only "[t]o an extent

¹⁰⁴ *Id.* art 20(1). The Geneva Conventions require authorities to consider "the habitual diet of the prisoners" in preparing meals.

¹⁰⁵ *Id.* art. 20(2).

¹⁰⁶ *Id.* art. 21(1).

¹⁰⁷ *Id.* art. 23(a). The Geneva Conventions require monthly inspections.

¹⁰⁸ *Id.* art. 21(1).

¹⁰⁹ *Id.* art. 22.

¹¹⁰ *Id.* art. 19. The Geneva Conventions closely regulate work; *cf.* 75 U.N.T.S. Nos. 972-73, at arts. 49-57 (No. 972) & arts. 95-96 (No. 973).

¹¹¹ *See* App. E at art. 18; *cf.* 75 U.N.T.S. No. 972-73, at art. 38 (No. 972) & art. 94 (No. 973).

¹¹² *See* App. E at arts. 11-12.

¹¹³ *See* App. D at arts. 19(b) & (g).

¹¹⁴ *Id.* art. 10(1); *See also* 75 U.N.T.S. No. 973, at art. 23.

compatible with the maintenance of good order, administrative needs and security requirements"¹¹⁵ On the other hand, the same article permits visits which the Canadian draft does not authorize. It also obligates the camp officials to keep detainees "regularly informed of major current events"¹¹⁶ Article 29 states that "[d]etainees shall as far as possible be provided with spiritual or religious comfort" It also adds that no detainee may be compelled to worship.

The draft conventions do not guarantee any right to work. Rather—and with good reason—they restrict the circumstances in which a detainee may be forced to work. One can scarcely quarrel with the regulation that "detainees shall be responsible for keeping rooms, premises and beds neat and tidy"¹¹⁷ But just as the Geneva Conventions have exempted POW's and others from dangerous or unhealthy work, the Monaco Medico-Legal draft prohibits compelling detainees to perform harmful or degrading work.¹¹⁸ This simple restriction is unfortunately not contained in the Canadian draft.

d. *Fundamental Rights to Which Defendant is Entitled in Any Judicial Proceeding.* The Canadian draft repeats the language of Article 3 but inserts one judicial guarantee recognized as indispensable by all civilized people: the right to be represented by counsel.¹¹⁹ The Canadian delegation did not explain why it specifically enumerated only the right to counsel. It is to be regretted that Article 15 also does not include at least the right to have an interpreter and to call and examine witnesses. The phrase "all the judicial guarantees which are recognized as indispensable by civilized peoples" is unnecessarily general, and these specific rights should be enumerated within the appropriate section of Article 3 as examples of judicial guarantees. For example, although the draft does impliedly guarantee a right of appeal, it also impliedly permits its suspension.¹²⁰ Retaining the general phrase allows the expansion of these rights as the international consensus on "judicial guarantees" evolves; listing the specific rights insures present adherence to minimum standards of justice.

The draft does authorize a trial observer. This important provision requires authorities to notify the National Red Cross and the

¹¹⁵ See App. E at art. 26(1). The Red Cross has suggested a much narrower exception. See note 90, *supra*, at 66.

¹¹⁶ See App. E at art. 27.

¹¹⁷ *Id.* art. 14.

¹¹⁸ *Id.* art. 19.

¹¹⁹ See App. D at art. 15; 75 U.N.T.S. No. 970-73, at art. 3.

¹²⁰ *Id.* art. 16.

International Committee whenever "an accused is to be tried for an offense arising out of his participation in the conflict the punishment for which may be death" ¹²¹ Representatives of these societies "shall have the right to attend the trial of any accused person, unless the hearing is, as an exceptional measure, to be held *in camera* in the interests of security." ¹²² The Geneva analog to this provision is found in Article 74 of the Civilian Convention.

The Medico-Legal draft rules, which are designed to govern detention of non-delinquent detainees, nevertheless contain provisions regulating punishment of detainees for offenses committed subsequent to detention (e.g., a violation of camp regulations). ¹²³ "[E]xcept in very minor cases," a detainee cannot be punished without "being informed of the accusation against him and his being given the possibility of presenting his defense, if necessary through an interpreter, and without a full and impartial inquiry by the director." ¹²⁴ While the draft does not specify what legal regulations the camp director must promulgate, it does enjoin any punishment—presumably even in very minor cases—"otherwise than in conformity" with such regulations. ¹²⁵

These rules, like those in the Canadian draft, seem unnecessarily vague. The draftsmen of the Prisoner of War Convention specifically enumerated many rights to which prisoners were entitled in circumstances analogous to those governed by Article 31 of the Medico-Legal draft. ¹²⁶

e. *Limitations on the Kind and Length of Punishments.* One of the major defects of common Article 3 is that it does not advert specifically to the problem of punishment. ¹²⁷ The Canadian draft at least forbids collective penalties, since under it one can be punished only for offenses he personally committed. ¹²⁸ The Canadian draft also limits imposition of the death penalty. The convicted person could not in any case be executed until he has exhausted all means of appeal and petition for pardon or reprieve. ¹²⁹ Furthermore, it forbids the carrying out of any "death sentence imposed upon persons whose guilt arises only by reason of having participated as combatants . . . until after hostilities have ceased." ¹³⁰ While the

¹²¹ *Id.* art. 17(2).

¹²² *Id.* art. 17(1).

¹²³ See App. E at art. 31. The Geneva Conventions are considerably more detailed. See 75 U.N.T.S. Nos. 972-73 at arts. 82-98 (No. 972) & art. 100 (No. 973).

¹²⁴ See App. E at art. 31(1).

¹²⁵ *Id.*

¹²⁶ 75 U.N.T.S. No. 972, at art. 105.

¹²⁷ See note 38, *supra*.

¹²⁸ See App. D at art. 14.

¹²⁹ *Id.* art. 18(2).

¹³⁰ *Id.* art. 18(1).

draft does not require a general grant of amnesty as some delegates urged, it does suspend executions until the end of hostilities, at which time amnesty is a likelihood. Some delegates argued for the abolition of capital punishment; others pointed out that states are not likely to smile so benignly on what, after all, may be treason.

Considering the nature of much non-capital punishment, one may wonder whether incarceration for the duration of the conflict is to be preferred to execution. Unfortunately, the Canadian draft does not impose any restrictions on non-capital punishment, but the Medico-Legal draft rules do. Article 31(2) of the latter prohibits "corporal punishment, confinement to cells which are dark or too small to permit normal posture, blows, and all cruel or degrading treatment."¹³¹ The draft rules also limit the imposition of solitary confinement, diet reductions, or any other punishment likely to impair physical or mental health. A doctor should certify in writing that such punishments are "bearable and without great danger."¹³² These more explicit restrictions are not startlingly new. They are found in the present Geneva Conventions,¹³³ and there is little reason why they should not apply with equal force to internal conflict.

C. *Humanitarian Relief Should be Allowed*

The right of humanitarian initiative presently contained in Article 3 is, as discussed above, an insufficient guarantee that suffering innocents will receive humanitarian aid. The Canadian draft convention would remedy this defect, (1) by explicitly authorizing the activities of the Red Cross and other relief societies "subject to temporary and exceptional measures imposed for reasons of security,"¹³⁴ and (2) by incorporating the principles of Article 23 of the Civilian Convention into Chapter 3 of the draft instrument.¹³⁵

Under Article 23 of the draft convention, parties to the conflict in effect give an advance or prior permission to their national Red Cross societies and other relief organizations to provide humanitarian assistance. Significantly, the Article neither confines this permission to the carrying out of normal services nor authorizes the parties to the conflict to establish criteria and conditions for the distribution of aid (other than those required "for reasons of security"). Rather, the article states that the Red Cross Societies shall "pursue [their] activities *in accordance with Red Cross principles as defined by In-*

¹³¹ See App. E at art. 31(2).

¹³² *Id.*

¹³³ 75 U.N.T.S. No. 972, at arts. 25, 29, 87-89, 98, all of which should be read in conjunction. The consequence, as some government expert pointed out, is that confinement is not a very effective penalty.

¹³⁴ See App. D at art. 23.

¹³⁵ *Id.* arts. 10-11; 75 U.N.T.S. No. 973, at art. 23.

ternational Red Cross Conferences."¹³⁶ It is not clear whether the statement that "[o]ther relief societies shall be permitted to continue their humanitarian activities under similar conditions" means that they, too, must conform to the guidelines established by International Red Cross Conferences or that they need simply act in accordance with the authoritative pronouncements of their respective policy-making organs.

The Red Cross "principles" referred to must constitute more than technical guidelines for the acquisition and distribution of goods and services. These would more properly be denominated rules or regulations and are in any case seldom the concern of International Conferences, which articulate broad humanitarian principles.¹³⁷ Their inclusion by reference is extraordinary, for it permits a private organization to establish standards binding upon signatory states. This provision also allows for the future expansion and development of the concept of humanitarian assistance as new Red Cross Conference declarations reflect evolution in the humanitarian conscience.

Since the draft article is nearly a verbatim transplant from Article 63(a) of the present Civilian Convention, the legislative history of that article and its subsequent application may provide some insight into the usefulness of draft Article 23. First, the delegates to the Geneva Diplomatic Conference agreed that authorities could not use the security exception as an excuse for suspending all humanitarian activities.¹³⁸ As Pictet observes in his commentary:

The Occupying Power may not use the reservation lightly. Its security must be threatened by some real danger.¹³⁹

The parties' general obligation to facilitate rather than frustrate relief efforts is underscored by the injunction in draft Article 22 to "encourage the work of organizations engaged on this task [reuniting families] provided they conform to security regulations." Article 11(2) also requires that parties grant to relief organizations "all facilities for carrying out their purposes within the bounds set by military or security considerations." Article 19(d) specifies that all confined, detained, or interned persons "be enabled to receive individual or collective relief"

Second, the legislative history reinforces the broad scope of permissible humanitarian activities. Again, one cannot improve upon Pictet's succinct statement:

This conception of the mission of the Red Cross implies a very broad

¹³⁶ See App. D at art. 23 (emphasis added).

¹³⁷ Cf. J. PICTET, RED CROSS PRINCIPLES (1955).

¹³⁸ J. PICTET, IV COMMENTARY 333 (1958).

¹³⁹ *Id.*

interpretation of the word "activities." Whether the activities in question are the traditional activities of the Red Cross or some entirely new task, the only condition set by the Convention—and it is an essential one—is that it should be in accordance with the true Red Cross spirit.¹⁴⁰

Articles 10 and 11 contain even more expansive guarantees. Although the draftsmen contend that they have merely adapted Article 23 of the Civilian Convention "to non-international situations,"¹⁴¹ even their frequent use of language lifted from that article cannot obscure their deletion of several of its restrictive provisions. First, the draft article permits shipments to all non-combatants, not just to "children under fifteen, expectant mothers and maternity cases." Second, it reduces the number of conditions justifying interference with the shipments while preserving the party's right "to prescribe under what reasonable technical arrangements the passage is to be made." Even the right preserved is a narrower one, since the standard of reasonableness is not found in the present Article 23. More significantly, the draft article does not include the objectionable provision which authorizes a state to forbid shipments if they would produce "a definite advantage . . . to the military efforts or economy of the enemy." The draft article, like Geneva Convention Article 23, obligates the parties to forward all consignments "as rapidly as possible." Since incumbent governments have proven sensitive about any implied recognition of rebel forces, the draft article wisely specifies that "[a]n offer of supplies . . . shall not be considered as an unfriendly act or have any effect on the status of the Parties to the conflict." Governments have also refused proffered relief shipments, perhaps resenting the implication that they could not care for their own. Article 10 would not permit states to sacrifice their helpless citizens on the altar of chauvinism. Paragraph 5 states:

The Party to the conflict to whom a consignment has been made may not refuse it unless the consignment is not needed to meet the needs of those persons for whose benefit it was intended.¹⁴²

The draft article, tailored to the peculiarities of internal conflict, thus incorporates the basic principles of Geneva Convention Article 23 while eliminating some of its restrictive provisions which often frustrated humanitarian relief efforts.

The second Article of Chapter 3 introduces into the draft convention the concept presently embodied in Article 30 of the Civilian Convention: the individual right to seek assistance from relief societies. The rapporteur of the Committee which considered Article

¹⁴⁰ *Id.* at 332.

¹⁴¹ See note 44, *supra*, at 16.

¹⁴² See App. D at art. 10(5).

30 thought it important that the Convention confer individual rights upon persons as well as lay general responsibilities—yes—on states.¹⁴³ Pictet concurs.¹⁴⁴

Although the ICRC draft "Protocol on the Protection of Sick and Wounded in Conflicts Not International in Character" did not contain guarantees for humanitarian relief, the Commission inserted an article which stated that "[a]n offer of medical assistance . . . shall not be considered as an unfriendly act or have any effect on the legal status of the Parties to the conflict."¹⁴⁵ It similarly excuses any "offer by another State to receive wounded, sick or infirm persons, expectant mothers and maternity cases on its territory." While Article 7 does not, other than by implication, authorize humanitarian relief for the sick and wounded, much less obligate parties to permit or accept such shipments, its inclusion is sound and is in no way inconsistent with the broader provisions of the Canadian draft convention.¹⁴⁶

III. INSTITUTIONAL REFORMS

Important as is substantive reform of the law, institutional reform must accompany it if it is to prove successful. Throughout the international legal process, the institutional framework is weak and inadequate. Nowhere is this more true than in the war law area. States retain almost exclusive unilateral authority to decide how to characterize conflicts and what laws to respect. They decide, again unilaterally, how to classify the other participants and what treatment to accord them. No international body possesses the authority to review such decisions. Neither can any observe the parties' discharge of their responsibilities. In such circumstances, it is not surprising that states keep the promise of humanitarian treatment to the ear but break it to the hope.

A. *Procedures Should be Established for Reporting Status Determinations and for Periodic Reports on All Persons Held in Custody*

The Canadian and ICRC drafts wisely impose reporting requirements. As we have seen, the ICRC draft obligates parties "to communicate to each other all details on enemy wounded, sick and dead in their hands." The Commission revision inserted the provision that when communication proved impossible, the party should "publish"

¹⁴³ See App. D at art. 11; 75 U.N.T.S. No. 973, at art. 30.

¹⁴⁴ J. PICTET, IV COMMENTARY 215 (1958).

¹⁴⁵ See App. C at art. 7.

¹⁴⁶ See App. D at art. 8.

the information. The Canadian draft, though it lacks the "publish" proviso, further refines the ICRC proposal by deleting the "enemy" or "adverse party" qualification: the parties must exchange reports on all "who are wounded, sick or who have died while in their hands." In the context of an internal conflict, it may be difficult to determine the loyalty of a corpse. Still, the family will want to claim the body, and should be informed.

These provisions are adequate, so far as they go, but they do not go far enough. In the first place, only the status of the sick, wounded, and dead need be reported. The same humanitarian reasons require reports on all detained persons. Their family and friends are equally interested in knowing their whereabouts and conditions. No possible military advantage can accrue to a party who conceals the identity of detained persons.

Secondly, the drafts require that parties need only report data to the enemy. The parties should also submit similar reports to the International Committee of the Red Cross or whatever other international body assumes supervisory powers. The ICRC could not, for example, discharge the Canadian draft's Article 17 responsibility to attend trials if it lacked adequate information on detained persons. Should it be given expanded investigatory and supervisory powers, it would need such information. A model report form should be annexed to any draft convention.

B. Filing of Military Manuals and Directives Should be Required

To a great extent there is no law of war except what the soldier does in the field. To paraphrase Holmes' famous aphorism, the law is what the soldier does in fact. He does not read the Geneva Conventions before he acts. He may recall his training. He may consult field regulations or field manuals. The soldier thus inevitably makes law on the battlefield. If he has received sound instruction in his responsibilities and if he has been issued directives which embody sound principles, he will usually make good law. The quality of the directives is all important because every army runs on directives.

States should file all unclassified manuals and directives which include guidance on the law of war with an international organization. The ICRC or other supervisory body could review them and offer appropriate suggestions. This is preventive law.

C. Procedures Should be Established for Inspecting a Party's Compliance with the Relevant Laws

Professor Levie scores as one of the four major inadequacies in the present law of war the absence of an "umpire" with sufficient au-

thority to oversee application of the law, to investigate alleged or possible violations, to determine the facts with respect thereto, and to take the necessary action to ensure the correction of the default."¹⁴⁷ Although the "protecting power" was intended to serve this purpose, Professor Levie points out:

although there have probably been close to one hundred armed conflicts of various sorts and sizes since the end of World War II, the institution of the Protecting Power has not once during that period been called into being.¹⁴⁸

It takes no more than a keen eye for the obvious to agree with the Secretary-General, who has admitted:

there would be pressing need for measures to improve and strengthen the present system of international supervision and assistance to parties to armed conflicts in their observance of humanitarian norms of international law.¹⁴⁹

Resuscitation of the protecting power concept is one solution. Though the Canadian draft does not use the term "protecting power," it does authorize other states "to receive wounded, sick or infirm persons, children under fifteen, expectant mothers and maternity cases on its territory"¹⁵⁰ This provision, however, is not mandatory. Moreover, it is excessively narrow, as is the traditional scope of a protecting power's authority. As Professor Levie reminds us:

it should be borne in mind that nowhere in either customary or conventional international law is there any rule which would authorize the Protecting Power, even if it were designated and functioning, to supervise the compliance of a belligerent with that area of the law of armed conflict governing the conduct of hostilities.¹⁵¹

A Government which is suppressing a rebellion will not look kindly upon the nationals of third party states operating on its territory. The Protecting Power is a moribund institution whose revival would still not solve the general problems of inspection.

Another alternative is reliance upon some present or future United Nations agency. Ad hoc U.N. fact-finding groups have often worked well in the past, and the Netherlands has proposed the creation of a permanent U.N. fact-finding agency.¹⁵² One should keep in mind, however, that previous fact-finding commissions have worked

¹⁴⁷ Levie, *Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict*, 14 HAMMARSKJOLD FORUM 11 (1970).

¹⁴⁸ *Id.* at 12.

¹⁴⁹ See note 147, *supra*, at page 12.

¹⁵⁰ See App. D at art. 8.

¹⁵¹ See note 147, *supra*, at 22.

¹⁵² The General Assembly has also encouraged the use of fact-finding procedures. G.A. Res. 2329, 22 U.N. GAOR Supp. 16, at 84, U.N. Doc. A/6716 (1967).

well only when welcomed by the host state. Any effective agency must possess mandatory powers of inspection, as it cannot always anticipate an open arms greeting. Moreover, the United Nations is an intensely political body; subjective disagreements about the justice of the respective participants' causes will inevitably complicate problems which are difficult enough to resolve from an impartial perspective. The United Nations efforts in Egypt and the Congo illustrate the detrimental impact of political disagreements within the organization upon permanent U.N. missions.

Professor Levie has suggested a third alternative: the creation of a twenty-five member "International Commission for the Enforcement of Humanitarian Rights during Armed Conflict" (hereinafter referred to as ICEHRAC):

Thus the convention creating that institution could provide that, when the existence of a state of armed conflict is acknowledged by the states involved, or when a decision to that effect has been reached by ICEHRAC in accordance with the other provisions of the convention, and no Protecting Powers have been designated in accordance with customary international law within one week thereafter, ICEHRAC would automatically begin to function in the capacity of a substitute for the Protecting Power, with all the rights and duties which have been, or which may be granted to such powers.¹⁵³

Professor Levie does not specifically suggest how the agency should conduct its inspection and supervisory functions beyond analogizing its role to that of a Protecting Power, whose authority he describes as vague. The frequency and nature of investigations, the conditions under which they will be undertaken, and the kind and identity of recipients of any report issued are all key unanswered questions.

ICEHRAC could retain wide discretion as to the appropriate response to some of these questions. As to others, however, it could not. The parties to a conflict could not tolerate investigations which interfered with the conduct of military operations. Bearing responsibility for the safety and welfare of the Commission staff on the scene (as they undoubtedly would), parties to the conflict would insist on reserving the right to deny approval to any mission which exposed the staff to grave dangers.

The unresolved problems which the creation of any new body generates may persuade observers to expand the powers of the International Committee of the Red Cross. This fourth alternative has numerous advantages. The ICRC has already acted successfully on many occasions as a substitute protecting power. It has a rich backlog of experience upon which to draw. It knows what to look for

¹⁵³ See note 147, *supra*, at 23.

and how to find it. The International Committee enjoys great prestige and would not have to prove either its competence or its impartiality.

There are nevertheless disadvantages to the proposal. Chief among them is the fear that the ICRC in the exercise of its mandatory functions would embroil itself in enervating disputes with parties to the conflict. Consequently, it might compromise the effectiveness of its voluntary assistance programs and all would be lost. Half a loaf may indeed be better than none at all. Professor Levie discounts similar fears about the viability of his proposed agency.¹⁵⁴ The answer to those critics who believe that the reach of mandatory powers may exceed their grasp is "or what's a heaven for?"

D. *Other Proposed Institutional Reforms*

Professor Levie has suggested still another institutional reform: the creation of an independent international body with the authority to decide when conflicting parties must observe the laws of war.¹⁵⁵ Indeed, this is to be the principal function of the previously mentioned ICEHRAC. Any party to the Convention establishing ICEHRAC could ask that body to decide whether a particular conflict required application of the laws of war. The parties involved would have an opportunity, if they wished, to argue their cases. Any ICEHRAC decision would bind all parties to the Convention; and should it subsequently determine that one of the parties ignored its decisions, all members would automatically be obligated to impose "complete economic and communications sanctions" against the non-complying state.

Existing organizations such as the Security Council could perform a similar function; but their politicization, which we have already discussed, would impede their effectiveness. Conferring such authority on the ICRC might indeed undermine it as even those who oppose giving it mandatory inspection powers fear. So long as a state retains the power to characterize the conflict, it probably will not balk at the mandatory activities of the ICRC, whose intercession it may anticipate among the consequences of its own unfettered decision to consider the conflict one calling for ICRC action. Put another way, the state can still determine when the ICRC may act by reserving the unilateral authority to characterize the conflict. Were the ICRC instead vested with the authority to decide when to exercise its mandatory powers, states might well object and refuse to cooperate with the organization at all. South Africa and Southern Rhodesia are proof enough that sovereign states can still thumb their noses at the international community.

¹⁵⁴ *Id.* at 16-18.

¹⁵⁵ *Id.* at 10.

States are not likely to consent to the creation of some independent third body such as ICEHRAC, desirable as it might be. The 1949 Geneva Diplomatic Conference rejected similar proposals,¹⁵⁶ and Professor Levie has stated that the creation of such a body "would entail a somewhat broader delegation of authority than States have heretofore been willing to make."¹⁵⁷ A clause permitting voluntary acceptance of the organization's compulsory powers might make the proposal more palatable, but only because none would partake of the bitter fruit. The unhappy history of voluntary acceptance of the World Court's jurisdiction would undoubtedly repeat itself.

IV. CONCLUSION

The substantive and procedural reforms analyzed herein have a single aim: the amelioration of suffering inherent in internal conflicts. We would all be happy to live in a world without war, but Plato's admonition echoes through the centuries—only the dead have seen the end of war. We can no longer excuse our failure to regulate internal armed conflict, as did the International Law Commission in 1949, on the naive assumption that the United Nations Charter outlaws war. The gathering clouds of the cold war belied this assumption even as the Commissioners uttered it, and the intervening years have brought us no peace. Instead, we have seen one nation after another drench itself in the blood of civil strife. If we cannot prevent these conflicts, we may at least temper their ferocity by insisting that participants therein observe certain minimal restraints. The applicable principles are old and tested; only the context in which we seek to apply them is new.

APPENDIX A
RULES FOR THE LIMITATION OF THE DANGERS
INCURRED BY THE CIVILIAN POPULATION
IN TIME OF WAR
INTERNATIONAL COMMITTEE OF THE RED CROSS
GENEVA, September 1956

Preamble

All nations are firmly convinced that war should be banned as a means of settling disputes between man and man.

However, in view of the need, should hostilities once more break out, of safeguarding the civilian population from the destruction with which it is threatened as a result of technical developments in weapons and methods of warfare,

¹⁵⁶ 1949 GENEVA DIPLOMATIC CONFERENCE, FINAL RECORD 11, 16 (1949).

¹⁵⁷ See note 147, *supra*, at 14.

The limits placed by the requirements of humanity and the safety of the population on the use of armed force are restated and defined in the following rules.

In unforeseen cases the civilian population will still have the benefit of the general rule set forth in Article 1, and of the principles of international law.

*
* *

Chapter I.—Object and Field of Application

Article 1

Since the right of Parties to the conflict to adopt means of injuring the enemy is not unlimited, they shall confine their operations to the destruction of his military resources, and leave the civilian population outside the sphere of armed attacks.

This general rule is given detailed expression in the following provisions:

Article 2

The present rules shall apply:

- (a) In the event of declared war or of any other armed conflict, even if the state of war is not recognized by one of the Parties to the conflict.
- (b) In the event of an armed conflict not of an international character.

Article 3

The present rules shall apply to acts of violence committed against the adverse Party by force of arms, whether in defence or offence. Such acts shall be referred to hereafter as "attacks."

Article 4

For the purpose of the present rules, the civilian population consists of all persons not belonging to one or other of the following categories:

- (a) Members of the armed forces, or of their auxiliary or complementary organizations.
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.

Article 5

The obligations imposed upon the Parties to the conflict in regard to the civilian population, under the present rules, are complementary to those which already devolve expressly upon the Parties by virtue of other rules in international law, deriving in particular from the instruments of Geneva and The Hague.

Chapter II.—Objectives barred from Attack

Article 6

Attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups.

In consequence, it is also forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population.

Nevertheless, should members of the civilian population, Article 11 notwithstanding, be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective.

Article 7

In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.

Only objectives belonging to the categories of objectives which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules.

However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.

Chapter III.—Precautions in Attacks on Military Objectives

Article 8

The person responsible for ordering or launching an attack shall, first of all:

- (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified.

When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population;

- (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population.

He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated;

- (c) whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter.

Article 9

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.

Article 10

It is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives.

Article 11

The Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in an attack—in particular by removing them from the vicinity of military objectives and from threatened areas. However, the rights conferred upon the population in the event of transfer or evacuation under Article 49 of the Fourth Geneva Convention of 12 Aug. 1949 are expressly reserved.

Similarly, the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces, military material, mobile military establishments or installations, in towns or other places with a large civilian population.

Article 12

The Parties to the conflict shall facilitate the work of the civilian bodies exclusively engaged in protecting and assisting the civilian population in case of attack.

They can agree to confer special immunity upon the personnel of those bodies, their equipment and installations, by means of a special emblem.

Article 13

Parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives.

Chapter IV.—Weapons with Uncontrollable Effects

Article 14

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

This prohibition also applies to delayed-action weapons, the dangerous effects of which are liable to be felt by the civilian population.

Article 15

If the Parties to the conflict make use of mines, they are bound, without prejudice to the stipulations of the VIIIth Hague Convention of 1907, to chart the mine-fields. The charts shall be handed over, at the close of active hostilities, to the adverse Party, and also to all other authorities responsible for the safety of the population.

Without prejudice to the precautions specified under Article 9, weapons capable of causing serious damage to the civilian population shall, so far as possible, be equipped with a safety device which renders them harmless when they escape from the control of those who employ them.

Chapter V.—Special Cases

Article 16

When, on the outbreak or in the course of hostilities, a locality is declared to be an "open town," the adverse Party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town, shall cease from all attacks on the said town, and refrain from any military operation the sole object of which is its occupation.

In the absence of any special conditions which may, in any particular case, be agreed upon with the adverse Party, a locality, in order to be declared an "open town," must satisfy the following conditions:

- (a) it must not be defended or contain any armed force;
- (b) it must discontinue all relations with any national or allied armed forces;
- (c) it must stop all activities of a military nature or for a military purpose in those of its installations or industries which might be regarded as military objectives;
- (d) it must stop all military transit through the town.

The adverse Party may make the recognition of the status of "open town" conditional upon verification of the fulfillment of the conditions stipulated above. All attacks shall be suspended during the institution and operation of the investigatory measures.

The presence in the locality of civil defence services, or of the services responsible for maintaining public order, shall not be considered as contrary to the conditions laid down in Paragraph 2. If the locality is situated in occupied territory, this provision applies also to the military occupation forces essential for the maintenance of public law and order.

When an "open town" passes into other hands, the new authorities are bound, if they cannot maintain its status, to inform the civilian population accordingly.

None of the above provisions shall be interpreted in such a manner as to diminish the protection which the civilian population should enjoy by virtue of the other provisions of the present rules, even when not living in localities recognized as "open towns."

Article 17

In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations—such as hydro-electric dams, nuclear power stations or dikes—through the releasing of natural or artificial forces, the States or Parties concerned are invited:

- (a) to agree, in time of peace, on a special procedure to ensure in all circumstances the general immunity of such works where intended essentially for peaceful purposes.
- (b) to agree, in time of war, to confer special immunity, possible on the basis of the stipulations of Article 16, on works and installations which

have not, or no longer have, any connexion with the conduct of military operations.

The preceding stipulations shall not, in any way, release the Parties to the conflict from the obligation to take the precautions required by the general provisions of the present rules, under Article 8 to 11 in particular.

Chapter VI.—Application of the Rules

Article 18

States not involved in the conflict, and also all appropriate organizations, are invited to co-operate, by lending their good offices, in ensuring the observance of the present rules and preventing either of the Parties to the conflict from resorting to measures contrary to those rules.

Article 19

All States or Parties concerned are under the obligation to search for and bring to trial any person having committed, or ordered to be committed, an infringement of the present rules, unless they prefer to hand the person over for trial to another State or Party concerned with the case.

The accused persons shall be tried only by regular civil or military courts; they shall, in all circumstances, benefit by safeguards of proper trial and defense at least equal to those provided under Articles 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

(Articles 18 and 19 dealing with the procedure for supervision and sanctions, are merely given as a rough guide and in outline; they will naturally have to be elaborated and supplemented at a later stage.)

Article 20

All States or Parties concerned shall make the terms of the provisions of the present rules known to their armed forces and provide for their application in accordance with the general principles of these rules, not only in the instances specifically envisaged in the rules, but also in unforeseen cases.

APPENDIX B ICRC DRAFT (1971)

Draft additional Protocol to the Geneva Conventions of 1949 relative to conflicts not international in character.

Chapter concerning the protection of the wounded and the sick.

Article 1—Protection and Care

- 1) All persons, whether military or civilian, combatants or non-combatants, who are wounded or sick, as well as the infirm, expectant mothers and maternity cases, shall be given particular protection and respect.
- 2) They shall in all circumstances be treated humanely and, with the least possible delay, shall receive the care necessitated by their condition, without any adverse distinction.

- 3) Any interference, without medical justification for the person concerned, in the health and the physical or mental well-being of persons shall be forbidden.

Article 2—Search and Recording

- 1) At all times and particularly after an engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment and to ensure their adequate care.
- 2) Parties to the conflict shall endeavour to communicate to each other all details on enemy wounded, sick and dead in their hands.

Article 3—Role of the Population

- 1) The civilian population shall respect the wounded and the sick, and in particular abstain from offering them violence.
- 2) No one may ever be molested or convicted for having nursed the wounded or sick.

Article 4—Medical Personnel

Military and civilian medical personnel and chaplains shall be, in all circumstances, respected and protected during the period they are engaged. If they should fall into the hands of the enemy they shall not be deemed prisoners of war. They shall receive all facilities to discharge their functions and shall not be compelled to perform any work outside their mission.

Article 5—Medical Establishments and Transports

- 1) Fixed establishments and mobile medical units, both military and civilian, which are solely intended to care for the wounded and the sick shall under no circumstances be attacked; they and their equipment shall at all time be respected and protected by the Parties to the conflict.
- 2) Transports of wounded and sick, or of medical personnel or equipment shall be respected and protected in the same way as mobile medical units.

Article 6—The Distinctive Emblem

The emblem of the Red Cross (Red Crescent or Red Lion and Sun) on a white background continues to be the distinctive emblem of the medical services of the Parties to a conflict. It shall not be used for any other purposes and shall be respected in all circumstances.

APPENDIX C
PROTOCOL ON PROTECTION OF WOUNDED AND SICK IN
CONFLICTS NOT INTERNATIONAL IN CHARACTER
COMMISSION DRAFT

Title—Additional Protocol to Article 3 of the Geneva Conventions of August 12, 1949, relative to armed conflicts not international in character.

Protection of the wounded and the sick.

Article 1—Protection and Care

All wounded and sick, whether non-combatants or combatants rendered hors de combat, as well as the infirm, expectant mothers and maternity cases, shall be the object of special protection and respect.

In all circumstances these persons shall be treated humanely and shall receive medical care and attention necessitated by their condition with the least possible delay, and without any adverse distinction or discrimination founded on race, colour, caste, nationality, religion, political opinion, sex, birth, wealth or any other similar criteria.

Any unjustified act or omission which endangers the health or physical or mental well-being of any person referred to in the first paragraph is prohibited.

Article 2—Search and Recording

At all times and particularly after an engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the wounded and the sick, to protect them against pillage and ill-treatment and to ensure their adequate care.

Parties to the conflict shall communicate to each other, or when this is not possible, publish all details of wounded, sick or dead of the adverse party in their hands.

Article 3—Role of the Population

The civilian population shall in particular respect the wounded and the sick and abstain from offering them violence.

No one may ever be molested or convicted for having nursed or cared for the wounded or sick.

Article 4—Medical and Religious Personnel

Chaplains and others exercising similar functions and military and civilian medical personnel shall be, in all circumstances, respected and protected during the period they are so engaged. If they should fall into the hands of the adverse party, they shall be respected and protected. They shall receive all facilities to discharge their functions and shall not be compelled to perform any work outside their mission.

Article 5—Medical Establishments and Transports

Fixed establishments and mobile medical units, both military and civilian, which are solely intended to care for the wounded and the sick shall under no circumstances be attacked; they and their equipment shall at all time be respected and protected by the Parties to the conflict.

Transports of wounded and sick, or of medical personnel or equipment shall be respected and protected in the same way as mobile medical units.

Article 6—Evacuation

The Parties to the conflict shall endeavour to conclude local arrangements for the removal from areas where hostilities are taking place of wounded or sick, infirm, expectant mothers, and maternity cases.

Article 7—Medical Assistance by Other States or by Impartial Humanitarian Organizations

An offer of medical assistance by another State or by an impartial humanitarian organization to aid in the relief of persons suffering as a consequence of the conflict shall not be considered as an unfriendly act or have any effect on the legal status of the Parties to the conflict.

An offer by another State to receive wounded, sick or infirm persons, ex-

pectant mothers and maternity cases on its territory shall not be considered as an unfriendly act or have any effect on the legal status of the Parties to the conflict.

Article 8—The Distinctive Emblem

The emblem of the Red Cross (Red Crescent or Red Lion and Sun) on a white background is retained as distinctive emblem of the medical services of the Parties to a conflict. It shall not be used for any other purposes and shall be respected in all circumstances.

Article 9—Legal Status of the Parties to the Conflict

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

APPENDIX D
CANADIAN DRAFT PROTOCOL TO THE GENEVA CONVENTIONS
OF 1949 RELATIVE TO CONFLICTS NOT
INTERNATIONAL IN CHARACTER
prepared and presented by the Canadian Expert

CHAPTER 1.—APPLICATION

Article 1—Purpose and Application of the Protocol

1) The present provisions, which reaffirm and supplement existing provisions of the Geneva Conventions of August 12, 1949 (hereinafter referred to as "the Conventions"), apply to all cases of armed conflict occurring in the territory of one of the High Contracting Parties, involving government military forces on one side and military forces whether regular or irregular on the other side, and to which common Article 2 of the Conventions is not applicable.

2) The present provisions shall apply as a minimum with respect to all persons, whether military or civilian, combatant or non-combatant, present in the territory where a conflict such as is described in 1) of this article is occurring.

3) The Parties to the conflict should endeavour to bring into force all or part of the provisions of the Conventions not included in this Protocol.

4) Each Party to the conflict should arrange for, or agree to, the presence in territory under its control of impartial observers who shall report to the party who has so arranged for or agreed to their presence, on the observance by persons in the territory under the control of that party of the provisions of this protocol. Where such action has not been taken by a Party to a conflict other states may request and encourage that Party to consider having recourse to such impartial observers.

CHAPTER 2.—SPECIAL PROTECTION

Article 2—Protection and Care

1) All persons who are wounded or sick as well as the infirm, expectant mothers, maternity cases and children under fifteen, shall be given particular protection and respect.

2) They shall in all circumstances be treated humanely and, with the least

possible delay, shall receive the care necessitated by their condition, without any adverse distinction.

Article 3—Search and Recording

1) At all times and particularly after an engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the wounded and the sick, to protect them against pillage and ill treatment and to ensure their adequate care.

2) Parties to the conflict shall endeavour to communicate to each other all details on persons who are wounded, sick or who have died while in their hands.

Article 4—Role of the Population

1) All persons shall respect the wounded and the sick and in particular shall abstain from offering them violence.

2) No one may ever be molested or convicted for having nursed the wounded or sick.

Article 5—Medical Personnel

1) Military and civilian medical personnel and chaplains shall be, in all circumstances, respected and protected during the period they are engaged. If they should fall into the hands of an adverse party they shall be respected and protected. They shall receive all facilities to discharge their functions and shall not be compelled to perform any work outside their mission.

2) Medical personnel may be authorized by a party to the conflict to wear the distinctive emblem of the Red Cross (Red Crescent or Red Lion and Sun) on a white background.

3) Personnel so authorized shall wear the emblem on the armlet affixed to the left arm and shall carry an appropriate identity card indicating in what capacity he is so entitled to wear the emblem.

Article 6—Medical Establishments and Transports

1) Fixed establishments, including blood transfusion centres and mobile medical units, both military and civilian, which are solely intended to care for the wounded and the sick, the infirm and maternity cases, shall under no circumstances be attacked; they and their equipment shall at all time be respected and protected by the Parties to the conflict.

2) Transports of wounded and sick, or of medical personnel or equipment shall be respected and protected in the same way as mobile medical units. Such transports may be marked by the emblem of the Red Cross (Red Crescent or Red Lion and Sun) when being used solely for such purpose.

3) With authorization from a Party to the conflict, fixed and mobile medical establishments and units shall be marked by means of the emblem of the Red Cross (Red Crescent or Red Lion and Sun) on a white background.

Article 7—Evacuation

The Parties to the conflict shall endeavour to conclude local arrangements for the removal from areas where hostilities are taking place of wounded or sick, infirm, expectant mothers, maternity cases, and children under fifteen.

Article 8—Medical Assistance by Other States

1) An offer of medical assistance by another state to aid in the relief of any persons suffering as a consequence of the conflict shall not be considered as an unfriendly act or have any effect on the status of the Parties to the conflict.

2) An offer by another state to receive wounded, sick or infirm persons, children under fifteen, expectant mothers and maternity cases on its territory shall not be considered as an unfriendly act or have any effect on the status of the Parties to the conflict.

Article 9—The Distinctive Emblem

The emblem of the Red Cross (Red Crescent or Red Lion and Sun) on a white background is the distinctive emblem of the medical services of the Parties to a conflict. It shall not be used for any other purposes and shall be respected in all circumstances.

CHAPTER 3.—RELIEF

Article 10—Consignment of Medical Supplies, Food and Clothing

1) Each Party to the conflict shall allow the free passage of all consignments of medical and hospital stores, essential foodstuffs, clothing and tonics intended only for non-combatants belonging to or under the control of another Party to the conflict.

2) The obligation of a Party to the conflict to allow the free passage of the consignments is subject to the condition that that Party is satisfied that there are no serious reasons for fearing that the consignments may be diverted from their destination or intended use.

3) The Party to the conflict which allows the passage of the consignments may make such permission conditional on the distribution to the intended beneficiaries being made under the local supervision of the ICRC or other appropriate agency.

4) Consignments shall be forwarded as rapidly as possible and the Party to the conflict which permits their free passage shall have the right to prescribe under what reasonable technical arrangements the passage is to be allowed.

5) The Party to the conflict to whom a consignment has been made may not refuse it unless the consignment is not needed to meet the needs of those persons for whose benefit it was intended.

6) An offer of supplier as described in paragraph 1) of this article shall not be considered as an unfriendly act or have any effect on the status of the Parties to the conflict.

Article 11—Applications to Relief Organizations

1) All parties belonging to or under the control of a Party to the conflict shall have the right to make application to the ICRC, the National Red Cross (Red Crescent or Red Lion and Sun) Society or other organization in the country in which the conflict is occurring which might assist them.

2) The several organizations referred to in this article shall be granted all facilities for carrying out their purposes by the authorities within the bounds set by military or security considerations.

CHAPTER 4.—HOSTAGES, PILLAGE, REPRISALS AND TORTURE

Article 12—Hostages, Pillage and Reprisals

- 1) The taking of hostages is prohibited.
- 2) Pillage is prohibited.
- 3) Reprisals against persons and property are prohibited.

Article 13—Prohibition of Torture, etc.

All persons shall be treated humanely and in particular no Party to the conflict shall, with respect to persons belonging to it or under its control, take any measure of such a character as to cause them physical suffering or extermination. This prohibition applies not only to murder, torture, mutilation and medical or scientific experiments not necessitated by the medical treatment of such persons, but also to any other measures of brutality whether applied by civilian or military agents.

CHAPTER 5.—PENAL PROCEDURES

Article 14—Individual Responsibility, Collective Penalties

No person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Article 15—Passing and Execution of Sentences

With respect to any accused person, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees, including the right to be represented by counsel, which are recognized as indispensable by civilized peoples, are prohibited.

Article 16—Appeals

A convicted person shall be advised of his rights of appeal or petition and such rights shall not be denied except in accordance with laws normally applicable thereto.

Article 17—Presence of Red Cross Representatives

1) Representatives of the National Red Cross (Red Crescent or Red Lion and Sun) Society and of the International Committee of the Red Cross, shall have the right to attend the trial of any accused person, unless the hearing is, as an exceptional measure, to be held *in camera* in the interests of security.

2) Where an accused is to be tried for an offence arising out of his participation in the conflict the punishment for which may be death, the National Red Cross (Red Crescent or Red Lion and Sun) Society and the ICRC shall be notified as to the date and place such trial is to take place.

Article 18—Death Penalty

1) Death sentences imposed upon persons whose guilt arises only by reason of having participated as combatants in the conflict shall not be carried out until after hostilities have ceased.

2) Death sentences imposed on any person shall not, in any event, be carried out until the convicted person has exhausted all means of appeal and petition for pardon or reprieve.

CHAPTER 6.—PERSONS IN RESTRICTED LIBERTY

Article 19—Persons Whose Liberty Has Been Restricted

All persons who for any reason are confined, detained, interned or whose liberty has otherwise been restricted, shall be humanely treated, and in particular shall:

- a) receive necessary medical attention including periodical medical examinations and hospital treatment;
- b) be allowed to practise their religion and to receive spiritual assistance from ministers of their faith;
- c) be adequately fed, clothed and sheltered, having particular regard to their health, age, condition and employment;
- d) be enabled to receive individual or collective relief sent to them;
- e) be removed if the area in which they are confined, detained, interned or restricted, becomes particularly exposed to dangers arising out of the conflict;
- f) if female, be confined in separate quarters under the direct supervision of women; and
- g) shall be allowed to send and receive letters and cards, except that where it is considered necessary to limit the number of letters and cards sent by a person the said number shall not be less than two letters and four cards monthly.

Article 20—Interned Families

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life. Internees may request that their children who are left at liberty without parental care shall be interned with them and, except where compliance with the request would be contrary to the interests of the children concerned, it shall be granted.

Article 21—Placing and Marking of Internment Camps

- 1) Places of internment shall not be set up in areas particularly exposed to dangers arising out of the conflict.
- 2) Whenever military considerations permit, internment camps shall be indicated by the letters IC placed so as to be clearly visible in the daytime from the air. The Parties to the conflict may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.
- 3) The Parties to the conflict shall give each other information concerning the location of internment camps.

CHAPTER 7.—GENERAL

Article 22—Dispersed Families

A Party to the conflict shall, to the extent possible, take or permit such measures or enquiries as shall facilitate the renewing of contact by members of families dispersed by or during the conflict. Parties to the conflict in particular shall encourage the work of organizations engaged on this task provided they conform to security regulations.

Article 23—National Red Cross and Other Relief Societies

Subject to temporary and exceptional measures imposed for reasons of security by the Parties to the conflict, the National Red Cross (Red Crescent or Red Lion and Sun) Society shall be able to pursue its activities in accordance with Red Cross principles as defined by International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions.

Article 24—Responsibilities

Each Party to the conflict is responsible for the treatment accorded by its agents to all persons belonging to it or under its control irrespective of any individual responsibility which may be incurred.

APPENDIX E MINIMUM RULES FOR THE PROTECTION OF NON-DELINQUENT DETAINEES

Considering that, in application of universally recognized principles of human rights for all sorts and conditions of men, a body of minimum rules for the treatment of detained delinquents has been drawn up on the basis of resolutions and recommendations adopted by the Congress of the United Nations, which met for that purpose in Geneva from August 22 to September 3, 1955;

Considering also that social conscience would not be satisfied if, whilst penitentiary science is increasingly adapting the treatment of delinquents deprived of their liberty to the requirements of justice and humanity, minimum guarantees were not granted to persons deprived of their liberty without having been prosecuted for penal offences and accused or convicted of an infringement of national or international law;

Considering, further, the absence of such guarantees for administrative, political and military internees and persons arrested for security reasons in the event of danger or internal and external strife;

There should be drawn up for the protection of these people a general statute prescribing minimum standards derived from the principle contained in article 94 of the Standard Minimum Rules for persons detained after legal conviction, even for civil offences, the letter and the spirit of which are to be found in the fundamental rules of the Universal Declaration of Human Rights of December 10, 1948, which stipulates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 5).

I. General principles

1. Nothing in these Rules shall justify or encourage measures of detention dictated by exceptional circumstances. Their sole object is to attenuate the hardships of detention.

2. The minimum Rules set forth in the following articles shall, in accordance with the requirements of article 2 of the Universal Declaration of Human Rights, be applied impartially and without distinction of any kind based on race, colour, national or social origin, sex, language, religious, political or other opinion, property or other considerations of a similar personal order.

3. Specific rules suitable for particular categories of non-delinquent de-

tainees, taking their condition and need for special treatment or work into account, are not precluded, provided they are consistent with these general Rules, notably in so far as they extend the guarantees or benefits herein provided.

II. Registration—Identification and control of detainees

4. In any place, institution or camp in which persons are detained, there shall be maintained complete and up-to-date lists or registers with numbered pages showing:

- a) The identity of each detainee, his citizenship or nationality and the conditions of his detention;
- b) the date of his arrival, details of any transfers from place to place, the date of release or departure.

5. Personal effects which cannot be left in his possession shall be recorded and maintained in proper condition to be returned to him upon his release.

III. Separation of detainees

6. Men and women detainees shall be accommodated in separate institutions or parts of institutions. In the event of collective detention, family or communal accommodation shall be provided wherever possible.

7. In the event of collective civilian detention, children shall remain with the family or family circle whenever detention conditions and organization make this possible. Notwithstanding, exceptions justified by educational or professional training requirements shall be permitted.

Children less than six years of age shall in no case be separated from their mothers.

8. Civilian or military detainees or internees belonging to countries which are hostile to one another shall be separated. They may be accommodated together in other cases, taking into account national, linguistic or other affinities.

9. Non-delinquent detainees shall in all cases and without exception be distinguishable and separated from penal law detainees and convicted prisoners.

IV. Premises, fixtures and fittings

10. All institutions or places of detention shall satisfy the necessary requirements of safety, health and hygiene, taking the number of detainees and climatic and seasonal conditions into account. They shall be sufficiently large to avoid overcrowding and demoralizing promiscuity. They shall be properly maintained and cleaned.

11. There shall be adequate space, ventilation, lighting and heating for each detainee, in a manner consistent with scientifically acknowledged standards of hygiene to provide normally healthy living conditions and to avoid any risk of impairing the health of persons detained. (As a general rule, 8 cubic metres of space of each detainee is an acceptable standard.)

12. Premises shall be appropriate to the demands of any work performed, particularly as regards space, lighting, ventilation and any other essential condition to enable work to be carried out normally and to maintain the health of the workers.

13. When detainees need not be kept in individual cells, but are in rooms and dormitories (when detainees are not in individual cells but in rooms and dormitories) they shall be grouped by selection according to their suitability for such accommodation, in accordance with disciplinary and moral requirements. Night supervision should be appropriate.

14. Each detainee shall, in keeping with local or national standards, have an individual bunk or bedding; the latter shall be properly maintained and changed often enough to ensure its cleanliness. Detainees shall be responsible for keeping rooms, premises and beds neat and tidy in accordance with standing regulations.

15. Amenities for baths, showers and cleanliness shall be adequate and maintained in proper operating condition at temperatures suited to the climate so that each detainee shall be enabled and required to use them as frequently as hygiene demands. Sanitary facilities shall be such as to enable detainees to comply with the needs of nature at any time in a manner proper and decent.

V. Hygiene, personal cleanliness, clothing, exercise

16. The authorities shall demand personal cleanliness of the detainees and provide them with the facilities therefor (water toilet requisites, necessities for care of the hair and the beard), to enable detainees to maintain a decent appearance, dignity and self-respect. The authorities' demands shall not be of a vexatious nature under the pretext of hygiene (e.g. head shaving or forbidding beards).

17. If detainees are not permitted to wear and change their own clothing that which is issued shall be appropriate to the climate and shall afford adequate protection. It shall not be degrading or humiliating nor give rise to confusion with the garb issued to convicted penal law offenders.

All clothing shall be clean and well maintained. When detainees are permitted to wear their own clothing arrangements shall be made to ensure that it is clean, decent and fit for use at the beginning of the detention period. Provision shall be made for the cleaning and changing of underclothing as frequently as is consistent with the demands of hygiene.

18. Every detainee shall be entitled to daily physical exercise (in the open air) for at least one hour; this may take the form of sport, gardening or supervised walks within the detention institution and to the extent permitted by climatic conditions. Grounds, equipment and other necessities appropriate to the number of detainees shall be provided as far as possible. (Detainees in single cells shall be permitted to leave them during the day to associate with other detainees. They shall be confined to their cells only during the night.)

VI. Work and diet

19. Work which detainees are compelled to perform shall not be harmful or degrading. It shall as far as possible be appropriate to their physical and intellectual ability. It shall not last for an excessive length of time and there shall be the necessary breaks to avoid impairing the health of those obliged to perform it.

Means of compulsion to enforce the performance of work or the standard output are subject to general rules in this respect (art. 30 and 31).

20. (1) Every detainee shall at normal hours be decently served a whole-

some meal of nutritious value sufficient to maintain health and strength. Drinking water shall be available as detainees require.

The daily diet shall be issued free and its calorific value and vitamin content shall be consistent with acknowledged standards appropriate to age and work performed.

(2) Permission for non-delinquent detainees to obtain extra food at their own expense or at the expense of their family, friends or of a relief society, shall be provided for in the internal regulations on condition that such facilities are not abused.

If circumstances permit, detainees may themselves prepare the food with which they are provided.

VII. Medical care

21. (1) Every place of detention shall have the services of at least one doctor. The medical service shall be organized in close co-operation with the public health administration.

Provision shall be made for the services of a psychiatrist for diagnosis and treatment of mental disorders.

Any place of detention where treatment is given shall, as far as possible, have experienced personnel, equipment, means for treatment and the pharmaceutical products required for nursing and for suitable and appropriate medical and dental treatment.

(2) When places of detention do not have the necessary doctors, personnel, equipment and means, provision shall be made for transfer of detainees to suitable civilian or military hospitals, subject to the essential security measures.

22. In every institution where women are detained there shall be suitable provision for pre- and post-natal treatment of maternity cases, and for childbirth. In the absence of such facilities provision shall as far as possible be made for transfer to hospital subject to the necessary security measures.

Nurseries shall be provided, with experienced personnel, where nursing infants may be cared for whenever they cannot be left with their mothers.

23. The doctor shall watch over detainees' health in accordance with the generally acknowledged principles of medical ethics. He shall carry out the necessary regular inspections and examinations.

In particular he shall:

a) examine detainees on arrival and whenever necessary thereafter, in order to isolate detainees who have or are suspected of having infectious or contagious diseases and those liable to be dangerous to their fellow detainees; to prescribe, order or take precautionary measures and give necessary treatment; to decide every detainee's capacity for work;

b) visit regularly and as the need arises, special cases, sick detainees, those who display or complain of symptoms of illness and those to whom his or the staff's attention has been drawn;

c) advise the director of the institution on matters of hygiene and cleanliness of premises, dormitories, work rooms and quarters, on the need for

and operation of occupational equipment and sanitary installations (lighting, ventilation, heating, etc.), on diet, suitable clothing, regulations for physical exercise, rest periods, and any other requirements for the health of the detainees.

24. The doctor shall report to the director regularly and whenever circumstance involving a detainee or detainees makes this necessary.

The director shall take into consideration the advice and reports of the doctor responsible for hygiene and the detainees' health. If the director agrees with the doctor he shall immediately take any necessary measures. If he disagrees he shall submit the matter without delay to higher authority.

VIII. Discipline and outside contacts

25. (1) Order and discipline shall be firmly maintained but shall not involve restrictions unnecessary to good order, security and organization of community life.

(2) No detainee shall be empowered to exercise disciplinary measures. According to circumstances, systems of good order and discipline, the operation of which is to some extent confided in the detainees themselves, with responsibility for organizing certain social, educational, sporting or recreational activities subject to supervision, may be justified.

(3) Detention conditions, the rights and obligations of detainees, working hours, leisure time, and the nature and duration of disciplinary punishment, shall be determined by legislation or administrative regulations.

26. (1) To an extent compatible with the maintenance of good order, administrative needs and security requirements, detainees shall be permitted to correspond with their families and relatives as well as with the legal representatives, agents or advisers whose services they require for the defence of their interests.

(Detainees shall be permitted to correspond with their families and relatives as well as with the legal representatives, agents and advisers whose services they require for the defence of their interests. They shall be permitted to receive visits from these persons. There shall be a strict time limit to any restrictions in this connection.)

Death, illness, serious accidents, transfer to an institution for mental cases or to another place of detention shall be communicated to the detainee's family or relatives either by the administration or by the detainee himself when he is able to do so or by a relative or friend at his dictation. Likewise detainees shall be kept informed of events concerning their families.

(2) Unless serious and exceptional circumstances demand otherwise, foreign detainees shall be granted reasonable facilities to communicate with their country's diplomatic or consular representatives or with those of the State entrusted with their interests, and with any authorities or national or international humanitarian institutions whose task it is to assist or protect detainees.

27. Detainees shall be kept regularly informed of major current events either through newspapers, periodicals, other publications, radio broadcasts, lectures or any similar media authorized or controlled by the administration.

IX. Culture, recreation and moral comfort

28. Subject to the same conditions of authority and control, reasonable recreational and educational amenities appropriate to the circumstances and

place of detention shall be provided in the form of lectures, slide or film projections, musical, theatrical, sport and other programmes, reading material and various games.

29. Detainees shall as far as possible be provided with spiritual or religious comfort. If there is a sufficient number of detainees of the same religion a minister thereof should be authorized to organize religious services and visit the detainees at specific times.

A detainee shall never be refused the right to contact a qualified representative of any religion. If a detainee refuses to receive a minister of religion or to take part in religious service his attitude shall be respected; no compulsion shall be used or punishment inflicted for that reason.

X. Instruments of restraint and punishment

30. (1) No means of restraint such as handcuffs, chains, irons or strait-jackets shall be used except in the following cases:

a) As a precaution against escape, during transfer or in conditions and circumstances involving a risk thereof; such implements shall be removed when the detainee appears before a judicial or administrative authority and when the risk of which there was reasonable apprehension no longer obtains;

b) On orders of the director, if need be after urgent consultation with the doctor, when normal means of controlling a detainee have failed or proved inadequate to prevent him from injuring himself and others and from damaging property;

(2) The nature and use of restrictive measures shall be prescribed by the general administration, to which the director of the institution shall report immediately on serious or urgent cases. They shall not be applied for longer than is strictly necessary.

31. (1) No detainee shall be punished otherwise than in conformity with legal provisions and regulations, and never twice for the same offence.

Punishment shall not be inflicted, except in very minor cases, without the detainee's being informed of the accusation against him and his being given the possibility of presenting his defence, if necessary through an interpreter, and without a full and impartial enquiry by the director.

(2) Corporal punishment, confinement to cells which are dark or too small to permit normal posture, blows, and all cruel or degrading treatment shall be prohibited.

Solitary confinement, reduction of diet or any other punishment likely to impair physical or mental health shall be inflicted only to an extent which is reasonable or certified in writing by a doctor to be bearable and without great danger.

The doctor shall visit detainees undergoing such disciplinary punishment and report to the director immediately if he considers the punishment should be changed or ceased for physical or mental health reasons.

XI. Transfers

32. In the event of transfer from one place of detention to another, detainees shall be protected as much as possible from the public gaze, unwelcome or hostile curiosity, humiliation, insult or violence.

33. The cost of transferring detainees shall be borne by the administration and transfers shall be carried out in the same conditions for all, subject to special consideration for age, sex or sickness and even rank where appropriate.

XII. Information and complaints

Transfer of detainees, prisoners or internees under conditions which are inhuman or dangerous for their health due to overcrowding, lack of air, light, or food or for any other circumstances affecting their physical well-being, shall be prohibited.

34. On arrival, each detainee shall be given, through posters or otherwise, precise, written, and clearly understandable information on conditions and rules applicable to detainees of his category, regulations for discipline, authorized methods of obtaining information and lodging requests or complaints, and any other details necessary for him to know his rights and obligations and to adapt to life in the penitentiary institution.

If a detainee is illiterate such information should be given to him orally.

35. (1) Every detainee shall have the opportunity for making requests or complaints to the director of the place of detention or to an official authorized to represent him, either through the ordinary channels adopted in the institution or by addressing himself to the inspector or panel of inspectors in the course of their inspection.

He shall be permitted to talk with the inspector or any officer appointed to carry out inspection, without the presence of the director, other members of the detention institution's staff or any other person.

(2) Unless a request or complaint is obviously groundless it shall be investigated quickly and impartially by the director and a reply shall be given as soon as possible. If rejected, the grounds therefor must be stated.

Detainees shall not be punished for making complaints even if they are rejected.

XIII. Staff professional qualifications and character

36. (1) The administration responsible for places of detention and for their proper organization and conduct shall exercise care in the recruitment of its officials and staff of all ranks in places of detention of all types (including detention camps and internment camps), by enquiring into their character, qualifications and sense of duty and responsibility.

(2) Any official or staff member committing a breach of legal and professional obligations or duties shall be punished by disciplinary or penal measures.

XIV. Inspections and supervision

37. Qualified and experienced inspectors appointed by the authorities shall regularly and frequently inspect places of detention and the conditions therein.

Inspectors shall, in particular, check that:

a) places of detention are run in conformity with the law, regulations, agreements or prevailing provisions, including the present Minimum Rules, with a view to ensuring observance of the conditions and aims thereof;

b) detainees and internees are treated in accordance with principles of humanity, justice and dignity consistent with the present Rules and those postulated by the Universal Declaration of Human Rights.

38. Inspection and control shall be authorized, particularly by qualified representatives of the International Committee of the Red Cross or other international or regional institutions of which the objectives are humanitarian and the action and impartiality acknowledged and known to be reliable.

The necessary arrangements for such inspections shall be made with the relevant administration and directors of institutions, camps and other places of detention or internment.

Visits and inspections shall be permitted without let or hindrance by conditions or obstacles which would vitiate them and impede the achievement of their humanitarian purpose. (Persons carrying out such inspections shall be given facilities to talk in private with detainees of their own choosing.)