

***JUS AD BELLUM, JUS IN BELLO AND NON-INTERNATIONAL
ARMED CONFLICTS*** ¹

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*“Lost to the clan, lost to the hearth,
lost to the old ways,
that one who lusts for all the horrors
of war with his own people.”*

Homer, *The Iliad*, Book IX

1. INTRODUCTION

Of all the calamities that can befall a people or a state, civil war has always been considered one of the worst. Setting son against father, brother against brother and neighbour against neighbour, civil war is a merciless struggle that is not limited to the clash of armed forces. Characterised by denunciations, acts of

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vengeance and the settling of scores, civil war unleashes the built-up tension and hatred within a society.

On the pretext of doing nothing that might legitimise insurrection or rebellion, states refused for too long to adopt rules intended to limit violence in civil war and to protect its victims. Even today, the law applicable to such conflicts remains rudimentary and responds in only a very limited manner to the need for protection generated by internecine strife. Furthermore, each party accuses the other of having torn apart the social fabric and uses this argument to justify the escalation of violence. At a time when the criminal law cannot be enforced in part of the national territory, the party claiming to represent the legitimate government often inflicts the most severe penalties on the insurgents, who no longer recognise the authority of the national laws or the legitimacy of the power that is enforcing them; the courts hand down the maximum sentence for the crime of rebellion. As for the insurgents, they set up their own courts to penalise their adversaries or give free rein to reprisals.

Are the distinction between *jus ad bellum* and *jus in bello* and the principle of the autonomy of *jus in bello* with regard to *jus ad bellum*, which are not easily imposed even in conflicts between states, applicable to civil wars? In other words, is it possible to apply all or part of the laws and customs of war in the event of civil war, leaving aside the question as to which of the warring parties was responsible for sparking off the struggle? That is the question to which this article seeks to offer a reply.³ Before this question is considered, however, it has to be established whether the concepts of *jus ad bellum* and *jus in bello* do indeed apply in the event of civil war.

It would be easy to put forward the view that the concepts of *jus ad bellum* and *jus in bello* emerged in relation to conflicts between states and that they do not apply to civil war.

But the matter calls for a closer look. Beginning with *jus in bello*, while it is true that the law of war developed in the framework of conflicts between states, the latter ended up by admitting that certain basic rules also apply in the event of internal conflict. There is, therefore, a set of treaty and customary rules

³ ‘Traditionally, a distinction is drawn between *jus ad bellum* (that is, the set of rules of international law relating to the conditions in which a subject of international law is permitted to resort to armed force) and *jus in bello* (that is, the set of rules of international law applicable to the mutual relations of parties to an international armed conflict, or more briefly the laws and customs of war).’ Ch. Rousseau, *Le droit des conflits armés* (Paris, Éditions A. Pedone 1983) p. 25. In the present article the expression *jus ad bellum* is used to designate the set of rules governing the right to resort to force or the prohibition on so doing, whether these are rules of international law or rules prohibiting the use of force in domestic law, and *jus in bello* to designate the set of rules governing the mutual relations between belligerents, whether in an international or an internal armed conflict.

that govern the mutual relations of the warring parties in cases of non-international armed conflict. In its judgment of 2 October 1995 in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly recognised that the concept of serious violations of the laws and customs of war applied to internal as well as international conflicts.⁴ Similarly, the Statute of the International Criminal Court, adopted on 17 July 1998, allows the Court to impose penalties for war crimes committed during non-international armed conflicts as well as those committed during international armed conflicts.⁵ It is therefore indisputable that the concept of *jus in bello* applies to non-international armed conflicts.⁶ The content of these rules is more rudimentary than that of the rules applicable in international armed conflicts, but today there can be no doubt that a body of treaty and customary rules applicable to non-international armed conflicts does indeed exist.

Does the concept of *jus ad bellum* also apply to such conflicts? Here there is room for doubt. Admittedly, the United Nations Charter does not prohibit civil war,⁷ and it is recognised that every state has the right to resort to force in order to preserve its territorial integrity and to crush a rebellion. However, the Charter of the United Nations⁸ and a long series of resolutions of the General Assembly⁹ recognise the peoples right of self-determination. The exercise of this right may

⁴ ‘All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.’ *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 2 October 1995, para. 134, cited by M. Sassoli and A. Bouvier in *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC 1999) pp. 1192-1193.

⁵ Art. 8(2)(c) of the Statute of the International Criminal Court, *International Review of the Red Cross (IRRC)* No. 325, December 1998, pp. 678-682, in particular p. 681; A. Roberts and R. Guelff, eds, *Documents on the Laws of War*, 3rd edn., (Oxford, Oxford University Press 2000) pp. 667-697, in particular pp. 678-679.

⁶ ‘International humanitarian law governs the conduct of both internal and international armed conflicts.’ *The Prosecutor v. Duško Tadić*, *supra* n. 4, para. 67.

⁷ In its judgment of 2 October 1995 in the *Tadić* case, the ICTY Appeals Chamber nevertheless recognised that an internal conflict could constitute a threat to peace: ‘It can thus be said that there is a common understanding, manifested by the subsequent practice of the membership of the United Nations at large, that the threat to peace of Article 39 may include, as one of its species, internal armed conflicts.’ *Ibid.*, para. 30.

⁸ In particular Art. 1(2) and Art. 55.

⁹ In particular Resolutions 1514 (XV) 1960, 2621 (XXV) 1970, 2625 (XXV) 1970, 2674 (XXV) 1970, 2852 (XXVI) 1971 and 3103 (XXVIII) 1973.

include the resort to armed force to achieve it.¹⁰ There is therefore a set of norms regulating the recourse to armed force in non-international armed conflicts, although those rules are still rudimentary and state practice is not always consistent.¹¹ At the domestic level, the law of every state prohibits rebellion and applies the most severe penalties for the offence.¹² It is therefore essentially in the context of the prohibition of rebellion in domestic law that the question of the relationship between the ban on the use of force and the rules governing the mutual relations of the parties to the conflict must be examined. Does the fact that one or another of the warring parties has violated the law by resorting to armed force preclude the application of the humanitarian rules applicable to

¹⁰ ‘... the continuation of colonialism in all its forms and manifestations [...] is a crime and [...] colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination recognized in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [...] The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law. Any attempt to suppress the struggle against colonial and alien domination and racist regimes is incompatible with the Charter of the United Nations [...] and constitutes a threat to international peace and security’ proclaims Resolution 3103 (XXVIII) 1973 adopted by the General Assembly on 12 December 1973. See also Resolutions 1514 (XV) 1960, 2621 (XXV) 1970, 2625 (XXV) 1970, 2674 (XXV) 1970 and 2852 (XXVI) 1971.

¹¹ Few states recognized the right of the population of East Pakistan to revolt against the central government of Pakistan in the spring and summer 1971. However, as soon as the intervention of the Indian Armed Forces in support of the insurgents precipitated the break up of Pakistan and the emergence of the new state of Bangladesh, most states and international organizations rushed to recognize it.

¹² In legal theory a fundamental distinction is drawn between the situation of a state, which is entitled to resort to the use of armed force in order to preserve its national integrity and to crush a rebellion, and that of the insurgent party, which has no right to take up arms, except in the exercise of the right of self-determination. There is therefore a fundamental inequality between the two parties, from the viewpoint of both the internal law of the state concerned and that of international law. In practice, the situation is often more complex. If a civil war occurs, it is always because the legitimacy of the party in power is in dispute. In many cases that party has not respected the constitutional order or has gained power by force, or is violating human rights or a people’s right to self-determination. Quite frequently there are two parties involved, each claiming to embody the legitimacy of the state. Finally, even the international community may be divided on the issue. Depending on their political interests and ideological leanings, some states grant recognition to one of the parties to the conflict while others recognise the adverse party. In the absence of any centralised and binding mechanism for granting recognition, the distinction between government party and insurgent is often not as clear-cut in practice as legal theory would have it.

non-international armed conflict? That is the question we shall now endeavour to answer.

First of all, however, it is necessary to recall the origins and development of the principle of the autonomy of *jus in bello* with regard to *jus ad bellum* in international armed conflict.¹³ This study therefore focuses on the following themes:

- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in international armed conflict;
- the regulation of internal conflicts via the traditional mechanism of recognition of belligerency;
- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in the light of Article 3 common to the four 1949 Geneva Conventions;
- the question of the autonomy of *jus in bello* with regard to *jus ad bellum* in the light of Protocol II additional to the 1949 Geneva Conventions; and
- prospects for the future: towards further development of the law applicable to non-international armed conflict.

2. THE AUTONOMY OF *JUS IN BELLO* WITH REGARD TO *JUS AD BELLUM* IN INTERNATIONAL ARMED CONFLICT

Throughout history, whenever states and peoples have taken up arms, they have asserted that they were doing so for a just cause. All too often this argument has been used to justify refusing their opponents any mercy. In fact, history shows that the more the belligerents insist on the sanctity of their reasons for resorting to armed force, the more those same reasons are used to justify the worst excesses. The Crusades and the wars of religion, alas, left a long trail of atrocities in their wake.

It was only when war was recognised as a means – and a very imperfect means – of settling a dispute between two sovereigns that states began to accept the idea of limiting armed violence.¹⁴ The emergence of nation states and the

¹³ For a more thorough consideration of this matter, reference may be made to the works and articles cited in the author's study, 'Just Wars, War of Aggression and International Humanitarian Law', 84 *IRRC* (2002) pp. 523-546.

¹⁴ 'War inexorably expresses the prevailing ideas of the age. It takes the form of the passions on which it feeds. On the battlefield man encounters his own demons. It is in fact the ceremonial aspect of this bloody confrontation that the law of war is designed to regulate. But the law of war also implies a certain respect for one's adversary. The

development of professional armies led states to gradually accept a body of rules intended to limit the horrors of war and to protect its victims. For a long time these rules remained customary in nature; they began to be codified in the mid Nineteenth Century.

The law of war developed, however, in an environment where the use of force was not prohibited. War was an attribute of sovereignty and was lawful when waged on the orders of the ruler, who was the sole judge of the reasons which prompted him to take up arms. In these circumstances, the application of the laws and customs of war could not be contingent on the reasons for resorting to armed force, and the question of the possible subordination of *jus in bello* to *jus ad bellum* did not arise.

Today the situation is entirely different. Recourse to force as an instrument of national policy was restricted by the Covenant of the League of Nations, and then prohibited by the Pact of Paris and the United Nations Charter.

Under the terms of the Pact of Paris, the contracting states declared that they condemned 'recourse to war for the solution of international controversies', and renounced it 'as an instrument of national policy'.¹⁵ The United Nations Charter prohibits any recourse to force in international relations, with the exception of the collective enforcement action provided for in Chapter VII and the right of individual or collective self-defence reserved in Article 51.

That being the case, the following question arises: Is the fact that a belligerent has resorted to armed force in violation of international treaties and commitments an obstacle to the application of *jus in bello*? Two possibilities may be envisaged:

- either the war of aggression is deemed to be the international crime *par excellence*, a crime which subsumes all others and which therefore cannot be regulated, in which case the laws and customs of war do not apply to either of the belligerents; or

Roman canon that that which is foreign is barbarian legitimates extermination and creates a barrier to the emergence of the law. The same applies when the enemy are considered as inferior beings or as the agents of a criminal ideology. Here again the conditions for an attitude of restraint disappear and the 'right' which justifies the unleashing of violence highlights the defeat of the rule of law. War against criminals is not subject to any restraining influence since one does not negotiate with criminals. It is only to the extent that war appears as an unfortunate and tragically inadequate means of settling international disputes that it can be tacitly or contractually codified.' P. Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima* (Geneva, Henry Dunant Institute 1985) pp. 141-142.

¹⁵ Pact of Paris or Briand-Kellogg Pact, signed at Paris on 27 August 1928. Text in 94 *LNTS*, pp. 58-64.

- the aggressor alone is deprived of the rights conferred by *jus in bello*, whereas all his obligations under this law remain unchanged, while the state which is the victim of the aggression continues to enjoy all the rights conferred by *jus in bello* without incurring any obligations.

The first hypothesis is the only one that draws all the logical conclusions from any subordination of *jus in bello* to *jus ad bellum*. It must nevertheless be rejected out of hand, for it would lead to unbridled violence. The consequence of an abdication of the rule of law, that solution would produce absurd and monstrous results.

The second solution entails a differentiated application of the laws and customs of war, but it must be rejected just as vigorously as the first, for in practice it would produce the same result. In the absence of a mechanism to determine aggression and to designate the aggressor in every case and in such a way as to be binding equally on all belligerents, each of the latter would claim to be the victim of aggression and take advantage of this to deny his adversary the benefits afforded by the laws and customs of war. In practice, therefore, this solution would lead to the same result as the hypothesis whereby wars of aggression cannot be regulated: a surge of unchecked violence. The autonomy of *jus in bello* with regard to *jus ad bellum* must therefore be preserved. This conclusion had already been clearly demonstrated by Emer de Vattel (1714-1767) :

‘War cannot be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true. However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.’¹⁶

Thus, Vattel does not expressly reject the doctrine of just war, developed by the Fathers of the Church, but puts it into perspective and draws its sting.

¹⁶ E. de Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Charles G. Fenwick (Washington D.C., Carnegie Institution 1916) Book III, Chapter III, p. 247, paras 39 and 40 (new edn: William S. Hein, Buffalo, N.Y. 1995; 1st edn: London 1758).

The autonomy of *jus in bello* with regard to *jus ad bellum* was confirmed after the Second World War by the Charter of the Nuremberg Tribunal, which made a distinction between war crimes, that is, acts committed in violation of the laws and customs of war, and crimes against peace.¹⁷ This distinction was confirmed by the practice of the Tribunal. Indeed, the Tribunal scrupulously respected the distinction between crimes against peace on the one hand and war crimes on the other; it assessed the intrinsic unlawfulness of war crimes against the laws and customs of war, regardless of the fact that the crimes concerned had been committed during a war of aggression. By acknowledging that the laws and customs of war could be invoked not only by the prosecution but also by the defence for the accused, the Tribunal unequivocally confirmed the autonomy of *jus in bello* with regard to *jus ad bellum*.¹⁸ The great majority of national tribunals entrusted with the task of judging war crimes committed during the Second World War upheld this distinction.¹⁹

The Geneva Conventions of 12 August 1949 doubly confirmed the autonomy of *jus in bello* with regard to *jus ad bellum*. First, in Article 1 common to the four Conventions, the High Contracting Parties undertake to respect and ensure respect for these instruments ‘in all circumstances’.²⁰ There can be no doubt that in adopting this provision states ruled out the possibility of invoking arguments based on the legality of the use of force in order to be released from their obligations under the Conventions.²¹

¹⁷ Art. 6 of the Charter of the International Military Tribunal. The text of the London Agreement of 8 August 1945 and of the annexes thereto is reproduced in 82 *UNTS*, pp. 280-301.

¹⁸ The judgment of the Nuremberg International Tribunal is reproduced in 41 *AJIL* (1947) pp. 172-333. It should be noted in particular that the Tribunal refused to condemn Admirals Dönitz and Raeder for conducting all-out submarine warfare, including the torpedoing of Allied and neutral merchant shipping and the abandonment of the survivors, on the grounds that the illegality of these acts under the laws and customs of war had not been sufficiently proven (pp. 304-305 and 308). Thus the Tribunal acknowledged that the rules of *jus in bello* worked not only against the accused but also in their favour. The accused could not be condemned for hostile acts whose illegality under the laws and customs of war had not been proven, even though the acts in question had been committed during a war of aggression.

¹⁹ Here reference may be made to the numerous cases cited by H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris, Éditions A. Pedone 1970) pp. 62-76.

²⁰ Furthermore, common Art. 2 specifies that the Conventions apply to all cases of declared war or of any other armed conflict between two or more of the High Contracting Parties.

²¹ The same interpretation is given in Meyrowitz, op. cit. n. 19, pp. 37-40.

Secondly, the Conventions prohibit any reprisals against persons or property protected by their provisions.²² Obviously, any state using the argument that it is the victim of a war of aggression to justify its refusal to apply humanitarian law to enemy nationals would be in violation of this prohibition.

Finally, the Preamble to Protocol I additional to the Geneva Conventions, adopted by consensus on 7 June 1977, put an end to all argument on the matter by a pointing out that:

‘... the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’.²³

The principle of the equality of belligerents before the law of war, which is in a way the corollary of the autonomy of *jus in bello* with regard to *jus ad bellum*, is thus firmly rooted in both treaty law and state practice.

This principle dominates the entire body of the laws and customs of war. It finds its main application, however, in the status of prisoners of war as it took shape in Europe from the Seventeenth Century. The decision to make war was the responsibility of the sovereign alone; the soldier, who was in the sovereign’s service, could not be held responsible for his participation in the hostilities. Hence captivity in a war situation was no longer seen as a dishonour or a punishment but as a security measure whereby the captor prevented enemy soldiers who had surrendered from again taking up arms against him. When peace was restored, prisoners of war had to be freed, regardless of their number or rank and without any ransom being demanded. This was the rule laid down by Article LXIII of the Treaty of Münster of 30 January 1648, which put an end to the Thirty Years War:

‘All Prisoners of War shall be released on both sides, without payment of any ransom, without distinction and without exception....’²⁴

²² First Geneva Convention, Art. 46; Second Geneva Convention, Art. 47; Third Geneva Convention, Art. 13(3); Fourth Geneva Convention, Art. 33(3).

²³ Protocol I, para. 5 of the Preamble. Under the terms of Art. 31(2) of the Vienna Convention on the Law of Treaties of 23 May 1969, the preamble is an integral part of the treaty.

²⁴ ‘Omnes bello capti relaxentur, ab una & altera parte, sine lytri ullius solutione, distinctione, aut exceptione captivorum qui extra Belgium militarunt & sub aliis

Recognition of the principle of the equality of belligerents before the law of war was not achieved without difficulty, however, and its implementation raises recurrent problems and comes up against psychological obstacles which cannot be disregarded. Indeed, states and peoples that are convinced that they are victims of a war of aggression are often extremely reluctant to acknowledge that their enemies are entitled to enjoy the benefits afforded by the laws and customs of war.

In both the United States and the Soviet Union, certain authors tried to formulate a theory based on a differentiated application of the laws and customs of war.²⁵ While in the United States these ideas were never recognised as official doctrine, quite a different view was taken in the Soviet Union. The theory that the victim of aggression was not bound by humanitarian law constituted the official doctrine of the Soviet state, it being understood that from the Marxist-Leninist viewpoint aggression was by definition an attribute of capitalist states.²⁶ In this way the Soviet Union maintained the possibility of claiming the protection of international humanitarian law for itself while refusing from the outset to grant the benefits afforded by the law to its enemies.

Only the Democratic Republic of Vietnam, however, went so far as to draw practical conclusions from the subordination of *jus in bello* to *jus ad bellum* in order to call into question the application of humanitarian law and the activities of the International Committee of the Red Cross (ICRC). Indeed, until the Paris agreements of January 1973 which were supposed to bring the Vietnam War to an end, and until the repatriation of the American prisoners of war, the Democratic Republic of Vietnam rebuffed all offers of services by the ICRC. It

vexillis signisve quam Dominorum Ordinum,' Art. LXIII of the peace treaty between Spain and the Low Countries, signed at Münster on 30 January 1648, C. Parry, ed., *The Consolidated Treaty Series*, Vol. 1 (New York, Oceana Publications 1969-1986) pp. 1-91, *ad* pp. 31-32 and 88.

²⁵ The main positions of this theory are set forth in Meyrowitz, *op. cit.* n. 19, pp. 77-140. For a review of the American positions, see R.W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, The Johns Hopkins Press 1960). For a summary of the Soviet doctrine, see G. I. Tunkin, *Droit international public: Problèmes théoriques* (translated from the Russian by the Center for Research on the USSR and the Eastern Countries of the Strasbourg University Faculty of Law, Political Science and Economics), (Paris, Éditions A. Pedone 1965) pp. 35-55 and 210-219. With regard to the Soviet conception of the law of armed conflict, reference may be made to J. Toman, *L'Union soviétique et le droit des conflits armés* (Geneva, Graduate Institute of International Studies 1997).

²⁶ Lenin (Vladimir Ilich Ulianov), *Imperialism: The Highest Stage of Capitalism*, New York, International Publ. Corp. 1939 (first edn : 1917) *passim*; J. Toman, *L'Union soviétique et le droit des conflits armés*, *op. cit.* n. 25, in part, p. 19.

argued, in particular, that Vietnam was the victim of a war of aggression waged by the United States and that in consequence the country was not bound to apply the Third Geneva Convention to American prisoners of war or to allow the ICRC to conduct the activities provided for in the Convention on behalf of those prisoners. All the ICRC's approaches aimed at bringing aid to the prisoners remained in vain.²⁷

The government of the Socialist Republic of Vietnam relied on the same argument during the Sino-Vietnamese conflict of February 1979. Following lengthy discussions, however, this government finally authorised ICRC delegates to visit the Chinese prisoners of war captured during the conflict, despite Viet Nam's assertion that it had been the victim of a war of aggression waged by the People's Republic of China.²⁸

If the application of the principle of the equality of belligerents before the law of war raises major difficulties in situations of international armed conflict, it may well be imagined that even more formidable obstacles lie in its way in

²⁷ The Hanoi government stated its position on many occasions, and in particular in the note of 31 August 1965 from the Ministry of Foreign Affairs of the Democratic Republic of Vietnam in response to the appeal of 11 June 1965 by the International Committee of the Red Cross relating to the conduct of hostilities in Vietnam (the English translation of this note was reproduced in 5 *IRRC* (1965) pp. 527-528). Reference may also be made to document CDDH/41 submitted on 12 March 1974 to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974-1977), 17 vols., Vol. IV (Berne, Federal Political Department 1978) pp. 177-190. A summary of the negotiations between the ICRC and the government of the Democratic Republic of Vietnam is to be found in the study by M. Barde entitled *La Croix-Rouge et la révolution indochinoise: Histoire du Comité international de la Croix-Rouge dans la guerre du Vietnam* (Geneva, Graduate Institute of International Studies 1975), and in the work by Professor J. Freymond, *Guerres, révolutions, Croix-Rouge: Réflexions sur le rôle du Comité international de la Croix-Rouge* (Geneva, Graduate Institute of International Studies 1976) pp. 85-94. The government of the Democratic Republic of Vietnam also invoked the reservation it had formulated with regard to Art. 85 of the Third Convention, relating to the treatment of war criminals. For an examination of the position of the Hanoi authorities in the light of international humanitarian law, reference may be made to an article by P. de La Pradelle, 'Le Nord-Vietnam et les Conventions humanitaires de Genève', 75 *Revue générale de droit international public* (1971), pp. 313-332.

²⁸ Report on the protection and assistance mission to the Socialist Republic of Vietnam, 5-14 April 1979, in particular Annex 7.1, p. 11; Report on the protection and assistance mission to the Socialist Republic of Vietnam, 24-31 May 1979, in particular pp. 6-10 and Annex 8, ICRC Archives, file 251 (69).

situations of non-international armed conflict. Indeed, a state facing an insurrection will almost invariably begin by invoking a dual inequality:

- on the one hand, the state will accuse the insurgents of having violated national law and endeavour to bring the full force of the criminal law to bear against them; while claiming to be fully within its rights, it will do everything it can to criminalise its adversaries;
- on the other hand, the state will rely on the inequality of the insurgents' legal status under domestic law and, in most cases, under international law, to justify rejecting any relationship with them based on an equal footing.

The autonomy of *jus in bello* with regard to *jus ad bellum* and the principle of the equality of belligerents before the law of war therefore meet with particular obstacles in situations of non-international armed conflict. It is on that type of conflict that we shall now focus our attention.

3. *JUS AD BELLUM, JUS IN BELLO* AND INTERNAL CONFLICT: THE REGULATION OF INTERNAL CONFLICTS BY MEANS OF RECOGNITION OF BELLIGERENCY

The law of war was born of the clash on the battlefield of sovereigns enjoying equal status under the law.²⁹ For a long time it was a body of customary rules which sovereigns respected with regard to their peers but ignored in confrontations with their rebellious subjects. Similarly, the earliest humanitarian law conventions applied only between the contracting parties, that is, between states.

For having rejected the authority of the ruler and taken up arms against him, the insurgents were regarded as outlaws and treated accordingly. Moreover, having taken up arms without the authorisation of their sovereign, the insurgents were taking part in a private war and could not claim the protection of the laws and customs of war.

The ruler therefore considered himself free of any obligation deriving from the laws and customs of war and applied the most violent measures of repression. As for the insurgents, being rejected from the ambit and protection of

²⁹ 'The law of war, as a system of legal rules, finds its origin in the customary regulation of relations on the battlefield between two entities which were equal in legal terms,' J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international* (Paris, Librairie générale de Droit et de Jurisprudence 1958) p. 53.

the law, they resorted in their turn to reprisals against the sovereign whose authority and laws they no longer recognised.

Furthermore, whether for fear of doing anything that might legitimise rebellion or to preserve their freedom to resort to means of their choice to crush it, states steadfastly refused, until the early Twentieth Century, to establish rules designed to limit violence in civil war and to protect its victims.³⁰ In practice, this system left the way open for an escalation of reprisals and unrestrained violence.

Vattel was the first to denounce this situation and to propose that the laws and customs of war be applied to relations between a sovereign and his rebellious subjects. In his major work *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, Vattel devoted a chapter to civil war, which began with a critique of the state of the legal doctrine and practice of his time:

‘It is a much-discussed question whether the sovereign must observe the ordinary laws of war in dealing with rebellious subjects who have openly taken up arms against him. A flatterer at court, or a cruel tyrant will immediately answer that the laws of war are not made for rebels, who deserve nothing better than death.’³¹

After reviewing the different forms of insurrection, Vattel observed that civil war severs the links that hold society together:

³⁰ ‘As the delegate of the Imperial Government, I consider and declare that the Imperial Government would under no circumstances, and in no form whatever, become a party to, or even discuss, any agreement or recommendation on this subject; I consider that, in view of its politically serious nature, this subject should not even be a matter for discussion at a conference devoted exclusively to humanitarian and peaceful affairs. I further consider that Red Cross Societies have no duty whatsoever towards bands of insurgents or revolutionaries who cannot be considered by the laws of my country as anything other than criminals (...). Any offer of services from Red Cross Societies, whether direct or indirect, to insurgents or revolutionaries could be seen only as a breach of friendly relations, indeed as an unfriendly act likely to encourage and foment sedition and rebellion ...’ declared General Yermolov, the Russian delegate at the Ninth International Conference of the Red Cross, held in Washington in 1912. *Neuvième Conférence internationale de la Croix-Rouge, tenue à Washington du 7 au 17 mai 1912, Compte rendu* (Washington, The American Red Cross 1912) p. 45 In a reversal such as often occurs in history, it so happened that Russia was the scene of the first Red Cross operation in a civil war that took place after the Washington Conference.

³¹ Vattel, op. cit. n. 16, Book. III, Chapter XVIII, p. 336.

‘When a party is formed within the State which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a civil war. [...] Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. Of necessity, therefore, these two parties must be regarded as forming thenceforth, for a time at least, two separate bodies politic, two distinct Nations. Although one of the two parties may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are none the less divided in fact. Moreover, who is to judge them, and to decide which side is in the wrong and which in the right? They have no common superior on earth. They are therefore in the situation of two Nations which enter into a dispute and, being unable to agree, have recourse to arms.

That being so, it is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness and honor, which we have earlier laid down, should be observed on both sides in a civil war. The same reasons which make those laws of obligation between State and State render them equally necessary, and even more so, in the unfortunate event when two determined parties struggle for the possession of their common fatherland. If the sovereign believes himself justified in hanging the prisoners as rebels, the opposite party will retaliate; if he does not strictly observe the capitulations and all the conventions made with his enemies, they will cease to trust his word; if he burns and lays waste the country they will do the same; and the war will become cruel, terrible, and daily more disastrous to the Nation.’³²

The reasoning is easy to follow. Vattel bases his argument on what actually happens – the division of the nation into two adverse parties – to plead for observance of the laws and customs of war by both sides, regardless of the reasons which prompted one or the other to take up arms. In other words, the *de facto* situation – the division of the state – interposes itself between the crime of rebellion on the one hand and respect for the laws and customs of war on the other, between *jus ad bellum* and *jus in bello*: ‘Although one of the two parties

³²

Ibid., p. 338.

may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are none the less divided in fact'.³³

A philosopher's dream, some would say. But these pages penned by Vattel cannot be taken lightly. They have their place among the great texts that have contributed to the advance of civilisation. Indeed, in these pages Vattel lays the foundations for the doctrine of recognition of belligerency: when ordinary means of repression have not succeeded in putting down a rebellion, recognition of belligerency allows a sovereign to claim the rights of a belligerent for himself and to acknowledge that the same rights apply to the adverse party. The effect of such recognition is to bring into force, between the sovereign who pronounces it and his adversaries, the full range of *jus in bello*, apart from the law governing occupation, which does not apply in civil conflicts.³⁴

The first recorded case of recognition of belligerency occurred during the American War of Independence. Sir James Robertson, appointed to take command of the British forces in America, informed General George Washington of his determination to comply with the laws and customs of war and proposed that the two supreme commanders agree that such rules be respected and enforced on either side.³⁵ Washington received this proposal favourably and undertook to respect the laws and customs of war. Although there were violations, in this conflict as in others, on the whole the war was waged according to the same rules as if it had been an international armed conflict.³⁶ It was brought to an end with the signing of the Treaty of Paris of 30 November 1782, which provided for the suspension of any proceedings against any person by reason of his participation in the hostilities, and for the release of all prisoners.³⁷

³³ Ibid.

³⁴ Recognition of belligerency by the government of a state in which civil war is raging, which has the effect of making the laws and customs of war applicable between that government and its adversaries, must not be confused with recognition of belligerency by the government of another state, which has the effect of making the law of neutrality applicable between that state and the parties involved in the civil war.

³⁵ Siotis, op. cit. n. 29, p. 60.

³⁶ Ibid.

³⁷ 'That there shall be no future Confiscations made, nor any prosecutions commenced against any Person or Persons, for or by reason of the Part which he or they may have taken in the present War, and that no person shall on that account suffer any future Loss or Damage, either in his Person, Liberty or Property; and that those who may be in confinement on such charges at the time of the Ratification of the Treaty in America, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued. [...] All Prisoners on both sides shall be set at Liberty.' Provisional Articles of Peace between Great Britain and the United States, signed at Paris, 30 November 1782, Arts. 6 and 7, *The Consolidated Treaty Series*, Vol. 48, pp. 223-229,

Another example is offered by the Order of 4 November 1847 and the Proclamation to the Army of 5 November 1847, in which General Guillaume-Henri Dufour, who had just been appointed Commander-in-Chief of the Swiss Army, enjoined divisional commanders and troops to comply with the laws and customs of war during the civil conflict which divided Switzerland in the middle of the Nineteenth Century.³⁸ Despite certain excesses, which Dufour was the first to condemn, numerous accounts confirm that the laws and customs of war were indeed respected during the conflict. At the end of the war, military tribunals imposed sentences of one or two years' imprisonment without remission, depending on rank, on members of the federal army who had failed to meet their military obligations or had deserted during the campaign. As for the armed forces of the *Sonderbund*, they were all discharged at the end of the fighting without further ado. The occupation of the cantons making up the *Sonderbund* came to an end in spring 1848.³⁹ This compliance with the laws and customs of war and the leniency shown to the vanquished paved the way for reconciliation and the restoration of harmony within the Confederation as soon as the hostilities were over.

Similarly, three days after the attack on Fort Sumter, which marked the start of the American War of Secession, President Abraham Lincoln declared a blockade of Confederate coasts and ports.⁴⁰ Blockade brings an important part of the law of war into effect and constitutes a violation of the principle of the

ad p. 228. These provisions were confirmed by Art. VI of the Definitive Treaty of Peace between Great Britain and the United States, signed at Paris, 3 September 1783, *ibid.*, pp. 487-498 and pp. 493-494.

³⁸ In December 1845, political and religious divergences between the Confederates prompted the seven Catholic cantons of Lucerne, Uri, Schwyz, Unterwald, Zug, Fribourg and Valais to conclude a separate alliance (the '*Sonderbund*'). The federal Diet, comprising representatives of all the Swiss cantons, considered that this alliance was contrary to the Confederal Pact and ordered its dissolution. The Catholic cantons refused to submit and withdrew from the Diet. On 4 November 1847 the Diet ordered an armed intervention and appointed Guillaume-Henri Dufour to lead the federal troops. Twenty-six days later the campaign was over, before the major powers had had time to become involved. The 'Recommendations for proper conduct towards inhabitants and troops' of 4 November 1847 and the 'Proclamation to the Army' of 5 November 1847 are cited in O. Reverdin, *La guerre du Sonderbund vue par le Général Dufour, juin 1847 - avril 1848*, (Geneva, Éditions du Journal de Genève 1948) pp. 42-45; D.M. Pedrazzini, 'Conceptions et réalisations humanitaires du général Guillaume-Henri Dufour lors de la guerre du Sonderbund', in R. Durand and J. Meurant, eds., *Préludes et Pionniers: Les précurseurs de la Croix-Rouge, 1840-1860*, (Geneva, Henry Dunant Society 1991) pp. 55-67.

³⁹ P. du Bois, *La guerre du Sonderbund: La Suisse de 1847* (Paris, Alvik Éditions 2002) pp. 154-156.

⁴⁰ On 15 April 1861. H. Brogan, *The Penguin History of the USA*, 2nd edn. (London, Penguin Books 1999) p. 315.

freedom of the seas and of the rights of neutral states, which could never be tolerated outside a situation of belligerence.⁴¹ The war was, on the whole, conducted in compliance with the rules applicable to international conflicts.⁴² On 22 July 1862, for example, General John A. Dix and General D.H. Hill signed, on behalf of the Confederates and of the Union respectively, an agreement providing for the general exchange or release on parole of prisoners of war captured by either side.⁴³ It was also during the War of Secession that President Lincoln promulgated, on 24 April 1863, the famous Orders for the Government of Armies of the United States in the Field, drawn up by the German-born American jurist Francis Lieber. These orders, known more generally as the Lieber Code, represent the first attempt to bring together, in the form of a code, the entire body of the laws and customs of war.⁴⁴ After four years of debilitating struggle, the war drew to a close with the signing of a capitulation agreement by the Army of Northern Virginia at Appomattox on 9 April 1865. Under the terms of this agreement, concluded between General Robert E. Lee and General Ulysses Grant, all members of the Confederate Army, from the topmost general to the most humble soldier, were allowed to return to their homes, the only condition being that they laid down their weapons and undertook to observe the laws of the United States.⁴⁵

⁴¹ '...the very act of placing the Confederate ports under blockade constitutes application of a whole chapter, and one of the most important, of the law of war.' Siotis, op. cit. n. 29, p. 80.

⁴² One notable exception is General Sherman's campaign through Georgia in the last months of the war, during which his army laid waste to vast tracks of land in a way which would probably be considered today as contrary to the law of belligerent occupation. However, the law of belligerent occupation was not as developed then as it is today; furthermore, it was not considered that the recognition of belligerency led to the application of the law of belligerent occupation. The occupation regime applied to the former Confederate States after the end of the conflict also left deep wounds and long lasting bitterness.

⁴³ *Documents on Prisoners of War*, edited with annotations by H.S. Levie, International Law Studies, Vol. 60 (Newport, Rhode Island, United States Naval War College 1979) pp. 34-36.

⁴⁴ 'Instructions for the Government of Armies of the United States in the Field', prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd edn. (Geneva, Henry Dunant Institute, and Dordrecht, Martinus Nijhoff 1988) pp. 3-23; *Documents on Prisoners of War*, op. cit. n. 43, pp. 37-44.

⁴⁵ 'The troops shall march by Brigades and Detachments to a designated point, stock their arms, deposit their flags, sabres, pistols, etc. and from thence march to their homes under charge of their Officers, superintended by their respective Division and Corps Commanders, Officers retaining their side arms, and the authorized number of private horses.' Art. 1 of the Articles of Agreement in Regard to the Surrender of the

Recognition of belligerency has been enormously useful. It is the most effective way of limiting violence in the event of civil war, since its effect is to bring into force the major part of the laws and customs of war.⁴⁶ It is, however, a discretionary matter for a state faced with an insurrection on its territory, and it fell into disuse during the Twentieth Century. During the Russian Civil War and the Spanish Civil War, the belligerents stubbornly refused to recognise a state of belligerence. Both these wars were fought with extreme ferocity and almost total disregard for the laws and customs of war.

The only known example of recourse to the mechanism of recognition of belligerency in the Twentieth Century is the civil war in Nigeria. Immediately after the declaration of independence by the Eastern Province of Nigeria under the name of the 'Republic of Biafra' (30 May 1967), the federal government of Nigeria ordered the blockade of the coasts and ports controlled by the insurgents.⁴⁷ The interception on 10 July 1967 of the Panamanian vessel *Kastel Luanda*⁴⁸ demonstrated the effectiveness of the federal blockade, whose validity was no longer called into question. In fact, throughout the war the matter of supplying the civilian population in the secessionist enclave was dealt with on the basis of Article 23 of the Fourth Geneva Convention, and the treatment of prisoners of war on that of the provisions of the Third Geneva Convention.⁴⁹

Army of Northern Virginia under Gen. Robert E. Lee, signed at Appomattox Court House, VA, on 9 April 1865, 10 April 1865; War Department, Record and Pension Office, 1892-1904; Records of the Adjutant General's Office, 1780s-1917; Record Group 94; National Archives. http://www.classbrain.com/artteenst/publish/article_124.shtml; Brogan, op. cit. n. 40, pp. 344-345. W. Churchill, *The Great Republic: A History of America* (New York, Random House 1999) pp. 217-218.

⁴⁶ E. Castrén, *Civil War* (Helsinki, Suomalainen Tiedeakatemia 1966) p. 152; P. Guggenheim, *Traité de Droit international public*, first edn., with the collaboration of D. Bindschedler-Robert, Vol.1 (Geneva, Librairie Georg & Cie 1953) p. 207; N. Mugerva, 'Subjects of international law', in M. Sørensen, ed., *Manual of Public International Law* (London, MacMillan 1968) pp. 247-310, in particular p. 287; L. Oppenheim, *International Law: A Treatise*, edited by H. Lauterpacht, Vol. II, *Disputes, War and Neutrality*, 7th edn. (London, Longman 1952) pp. 211-212 and 371; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict* (London, Stevens & Sons 1968) p. 691; Siotis, op. cit. n. 29, pp. 109-110; Ch. Zorgbibe, *La guerre civile* (Paris, Presses universitaires de France 1975) pp. 47-56.

⁴⁷ *Keesing's Contemporary Archives* (Bristol, Keesing's Publications Limited 1967) p. 22088.

⁴⁸ *Africa Research Bulletin, Economic Series* (London, Exeter, Blackwell Publishers 1967) p. 775; Ch. Zorgbibe 'Sources of the recognition of belligerent status', 17 *IRRC* (1977) p. 111.

The conflict ended with the collapse of 'Biafra' and restoration of the authority of the federal government by force of arms. It appears, however, that the federal government decided not to prosecute the members of the rebel forces, and on 14 May 1970 the Nigerian Minister of Defence informed the ICRC that all the prisoners of war captured during the conflict had been released.⁵⁰

What are the effects of recognition of belligerency on the relationship between *jus ad bellum* and *jus in bello*? By recognising a situation of belligerence, a state affected by civil war claims for itself the rights and obligations of a belligerent and acknowledges that its adversary has the same rights and obligations. In relations between the government that declares recognition of belligerency and its adversaries, the effect of such recognition is to bring into effect almost all the laws and customs of war, except for the law governing occupation and the Protecting Powers mechanism. Enemy combatants therefore have to be treated as if they were prisoners of war, and indeed this is the term generally used, as in a situation of international conflict.

In other words, recognition of belligerency prevents any subordination of *jus in bello* to *jus ad bellum*. Humanitarian law applies equally to all parties, regardless of which of them may be responsible for starting the conflict. At the end of active hostilities prisoners of war are released, as they would be in an international armed conflict. Should the secessionist party be victorious, the conflict comes to an end like an international conflict. In fact, a victory by the secessionist party transforms the internal conflict into an international conflict and brings international settlement mechanisms into play. Prisoners of war are then released according to the procedure applicable to international conflict. Should the insurgent party be defeated, the state reestablishes its authority but does not bring legal proceedings against its adversaries. Captives are freed in accordance with the terms and conditions set out in the capitulation agreement, if such an agreement has been concluded, otherwise they are freed by a unilateral decision on the part of the victorious party in order to restore national unity through reconciliation. Obviously, amnesties and immunities granted to members of the defeated party do not rule out prosecution for war crimes, that is, violations of the laws and customs of war.⁵¹

⁴⁹ ICRC *Annual Reports*, 1967 to 1970. On the negotiations relating to the blockade of the secessionist province and to relief operations, reference may be made to T. Hentsch, *Face au blocus: La Croix-Rouge internationale dans le Nigéria en guerre (1967-1970)* (Geneva, Graduate Institute of International Studies 1973).

⁵⁰ Note from the Nigerian Minister of Defence to the ICRC delegation in Lagos, 14 May 1970, ICRC Archives, file 219 (186); ICRC *Annual Report 1970*, p. 10.

⁵¹ At the end of the War of Secession, for example, the United States government decided not to prosecute members of the Confederate armed forces for their participation in the hostilities. On the other hand, Captain Henry Wirz, who had been in charge of the prisoner of war camp in Andersonville, Georgia, was prosecuted and

**4. *JUS AD BELLUM, JUS IN BELLO* AND INTERNAL CONFLICT:
ARTICLE 3 COMMON TO THE FOUR GENEVA CONVENTIONS
OF 12 AUGUST 1949**

During the civil war in Russia, the Spanish Civil War, the civil war in China and the civil war in Greece, the governments concerned stubbornly refused to implement the traditional mechanism of recognition of belligerency. In every case, the struggle was characterised by the utmost ferocity. Countless prisoners were massacred, sometimes after spurious forms of trial and often as a measure of reprisal and outside any judicial control.

The Tenth International Conference of the Red Cross, held in Geneva from 30 March to 7 April 1921, adopted a significant resolution on the Red Cross and civil war, which gave the ICRC a mandate to organise relief operations in such situations.⁵² This resolution was crucial during the conflict in Upper Silesia, and especially during the Spanish Civil War. But the question of the treaty-based regulation of civil war remained outstanding. Indeed, the civil wars in Russia and Spain had shown that it was possible to help the victims of internal conflicts, but that in the absence of any legal basis such action was extremely precarious. Above all, those two wars had shown the need to draw up a legal framework applicable to non-international armed conflicts, in order to prevent any return to the atrocities that inevitably accompanied any fratricidal struggle.

This was one of the aims that the International Committee set for itself at the start of the preparatory work, which was to lead to the adoption of the 1949 Geneva Conventions. No other issue was considered at such length, and few others gave rise to such impassioned debate.

The difficulties were obviously enormous. The deep-rooted resistance of governments to any international regulation of matters they consider to be exclusively within their national jurisdiction is well known; states are never so concerned about their sovereignty as when they feel it is threatened.

Furthermore, the very concept of non-international armed conflict is misleading, giving the impression that all such struggles are similar. They

found guilty of war crimes perpetrated in that camp. *Documents on Prisoners of War*, op. cit. n. 43, pp. 46-56.

⁵² Resolution XIV: 'The Red Cross and Civil War', *Tenth International Red Cross Conference, Geneva, 30 March - 7 April 1921, Report* (Geneva, ICRC 1921) pp. 217-218.

certainly are not, as can be seen when internal conflicts are compared with wars between nations. The latter include all conflicts between two states or groups of states. The scale of the fighting and the relative power of the belligerents may vary enormously, but the fact that there are sovereign states on each side, each with its government, territory, population and regular armed forces, clearly places all such conflicts in the same homogenous category.

The same cannot be said for non-international conflicts. From a sociological point of view, there exists a wide variety of conflict situations ranging in unbroken progression from local riots or isolated, sporadic acts of violence to outright civil war between two organised parties separated by a front line, each controlling part of the national territory and of the population.⁵³ It is possible for one and the same conflict to escalate from one extreme of the scale to the other: an uprising, local at first, gradually spreads, and ultimately culminates in pitched battles resembling those of an international war.⁵⁴ Quite apart from the sensitivity of governments referred to above, it is easy to see the problems inherent in trying to establish a legal framework to cover such diverse situations.

Since there could be no question of applying the entire Geneva Conventions to all situations of internal strife – in the case of riots or isolated and sporadic

⁵³ From the legal standpoint, the law of armed conflict establishes, by virtue of Art. 1(2) of Protocol II additional to the Geneva Conventions, a line separating situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other similar acts, which are not considered to be armed conflicts, from non-international armed conflicts, to which Art. 3 common to the four Geneva Conventions and in some cases Protocol II are applicable. The article states: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. It is nevertheless obvious that this is a distinction between legal categories that the human mind imposes upon a sociological phenomenon which is in fact a continuum. From the sociological and phenomenological viewpoint there is a gradation of situations of violence which proceed, without any break in continuity, from mere riots to a civil war between two organised parties, each of which controls part of the national territory and deploys organised armed forces. One and the same conflict can go through the entire range of such situations.

⁵⁴ For example, the massacre in April 1927 of the workers' militias which had helped Chiang Kai-Shek to take the city of Shanghai marked the split between the Kuo Min Tang and the Chinese Communist Party and the start of the civil war, which was to end in 1949 with the victory of the Chinese communists after a series of pitched battles involving hundreds of thousands of men on either side. Similarly, on 26 July 1953, Fidel Castro, leading a handful of insurgents, failed in his attempt to take the Moncada barracks; freed in 1955, Castro took refuge in Mexico; on 2 December 1956 he landed in Cuba with a few companions and hid out in the Sierra Maestra, from where he continued the struggle until his victorious entry into Havana on 1 January 1959.

acts of violence it would have been disproportionate to do so – two possibilities arose:

- either to apply all their provisions to a limited number of conflict situations, or
- to apply a limited number of humanitarian rules to all non-international armed conflicts.⁵⁵

The Seventeenth International Conference of the Red Cross, meeting in Stockholm in August 1948, unhesitatingly opted for the first alternative, recommending that all the provisions of the Geneva Conventions be applied to non-international armed conflicts, but without defining the threshold of hostilities above which this regime would have to take effect. Indeed, it inserted in the four draft conventions that the ICRC had prepared a paragraph stating:

‘In all cases of armed conflict not of an international character which may occur on the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.’⁵⁶

The Diplomatic Conference of 1949 resolutely embarked upon the course set by the Stockholm Conference, that is, application of all the treaty provisions to a limited number of conflict situations – those which most closely resembled international armed conflicts. However, as the discussions wore on and draft after draft was debated, the conditions laid down by the Conference became so difficult to fulfil that, in the view of experts, they would not have been met even in the case of the Spanish Civil War.⁵⁷ In other words, the Conference was heading towards the adoption of a legal regime which would never have been applied.

It was the French delegation that deserved the credit for leading the Diplomatic Conference out of the impasse into which it had strayed. This delegation proposed the reverse solution: adoption of minimum rules that could

⁵⁵ *Final Record of the Diplomatic Conference of Geneva of 1949* (hereinafter: *Final Record 1949*) 4 Vols., Vol. II-B (Berne, Federal Political Department 1950-51) p. 122.

⁵⁶ Art. 2(4) of the Stockholm Draft, *Revised and New Draft Conventions for the Protection of War Victims: Texts approved and amended by the XVIIth International Red Cross Conference* (Geneva, ICRC 1948) pp. 10, 32, 51-52 and 114; *Final Record 1949*, Vol. I, pp. 47, 61, 73 and 113.

⁵⁷ *Final Record 1949*, op. cit. n. 55, Vol. II-B, pp. 47-48 (remarks by Pilloud).

be applied by right to *any* non-international armed conflict, whatever its magnitude and duration and whatever the degree of organisation of the insurgent party. The result was Article 3 common to the four Geneva Conventions of 1949, a veritable ‘miniature convention’⁵⁸ applicable to all non-international armed conflicts :

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

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

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

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

⁵⁸

It appears that this term was coined by the Soviet delegation, *Final Record 1949*, *ibid.*, Vol. II-B, pp. 35 and 326.

(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."*⁵⁹

What effect does Article 3 have on the relationship between *jus ad bellum* and *jus in bello*? Article 3 creates minimum obligations that are equally binding on all parties to a conflict, regardless of the origins of the conflict and of the reasons that prompted the parties to take up arms. Indeed, the first paragraph begins:

⁵⁹ For the legislative history of Article 3, see: *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross (Geneva, July 26 - August 3, 1946)* (Geneva, ICRC, January 1947) pp. 14-15, 70-71 and 105; *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947)* (Geneva, ICRC, December 1947) pp. 8-9, 103 and 272; XVIIth International Conference of the Red Cross, Stockholm, August 1948, *Draft Revised or New Conventions for the Protection of War Victims*, Document No 4a (Geneva, ICRC, May 1948) pp. 5-6, 35-36, 53-54 and 156-157; XVIIe Conférence internationale de la Croix-Rouge, Stockholm, août 1948, *Sténogramme des séances de la Commission juridique* (cyclostyled), pp. 36-57 and 62-64; *Seventeenth International Red Cross Conference held in Stockholm from 20 to 30 August 1948, Report* (Stockholm, Swedish Red Cross, 1948) pp. 71-73; *Revised and New Draft Conventions for the Protection of War Victims: Texts approved and amended by the XVIIth International Red Cross Conference*, revised translation (Geneva, ICRC, October 1948) pp. 9-10, 32, 51-52 and 114; *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals submitted by the International Committee of the Red Cross* (Geneva, ICRC, February 1949) pp. 9, 26, 36-39 and 68; *Final Record 1949*, vol. I, pp. 47, 61, 73, 113, 205-206, 225-226, 243-244, 297-298, 343 and 351; vol. II-A, pp. 207-208, 221-222, 576-577 and 847-848; vol. II-B, pp. 9-16, 26, 27, 34-35, 36-39, 40-50, 76-79, 81, 82-84, 89-90, 91, 93-95, 97-102, 106, 107-108, 120-127, 128-129, 157, 165-166, 171, 189, 325-339 and 525-526; vol. III, pp. 27-28, 50, 58 and 100.

‘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...’.

In other words, as far as the obligations it imposes are concerned, Article 3 rules out any subordination of *jus in bello* to *jus ad bellum*. The rules it contains are equally binding on all parties to the conflict, irrespective of their share of responsibility for the breakdown of social harmony and for starting the struggle.

But Article 3 sets out only minimum rules. While it affords all detainees a guarantee of humane treatment, it does not confer any immunity on captured combatants, apart from prohibiting ‘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’. As long as judicial guarantees are respected, each party to the conflict will consider that it is entitled to prosecute enemy combatants who have fallen into its hands.

Furthermore, Article 3 does not regulate the situation prevailing at the end of active hostilities, even though it might logically be construed that the minimal guarantees it provides for the victims of the conflict while active fighting is going on should *a fortiori* be respected once active fighting is over. Given that international law failed to regulate the situation at the end of the conflict, this will be decided by the force of arms. Two situations may arise :

- if the civil war ends with a victory for the secessionist party, the settlement will take place according to the procedure applicable to international armed conflicts;⁶⁰ in fact, a conflict that starts as an internal conflict then ends as an international conflict;
- if the conflict ends with the restoration of state unity, the victorious party will unilaterally release its own prisoners and will feel free to bring legal

⁶⁰ The war in Algeria, for example, which began with a series of terrorist attacks in Algeria on 1 November 1954 and which has always been regarded as a non-international armed conflict, came to an end on 18 March 1962 with the signing in Évian of a ceasefire agreement concluded between the French government and the Provisional Government of the Algerian Republic. Art. 11 of the agreement provided for the release of all prisoners of war. See 66 *Revue générale de droit international public* (1962) pp. 686-692. Similarly, the war which ravaged East Pakistan in 1971 and ended with the independence of Bangladesh was settled by a series of agreements concluded between Pakistan and the new state of Bangladesh; the matter of the release and repatriation of the prisoners captured on either side was dealt with essentially by the agreement on the repatriation of prisoners of war concluded in New Delhi on 28 August 1973, 12 *ILM* (1973) pp. 1080-1084.

proceedings and apply the most severe penalties against combatants of the adverse party, whether victory was gained by the insurgents or by the party which, on the outbreak of the conflict, claimed to represent the legitimate government.⁶¹

5. ***JUS AD BELLUM, JUS IN BELLO* AND INTERNAL CONFLICT: PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949**

The countless internal conflicts that have occurred since 1949 have amply demonstrated the value of common Article 3. No other article of the Geneva Conventions has been applied to so many situations, and certainly no other single article has had effects comparable with those of Article 3.

But those conflicts have also highlighted the limits of Article 3. As a set of minimum standards, the article offers conflict victims only rudimentary protection which very often should have been supplemented by bringing into force other provisions of the Geneva Conventions, in particular those concerning aid for wounded and sick combatants, the protection of medical facilities, the status of prisoners, the protection of the civilian population, relief operations, and so on. The fact is, however, that belligerents have hardly ever reached agreement on a wider application of the Conventions, with the result that Article 3 – which should have constituted only a minimum guarantee, a kind of humanitarian safety net – has all too often been regarded as the norm.

It is therefore easy to understand the many calls for the protection of victims of internal conflicts to be strengthened by the adoption of new rules to supplement the provisions of Article 3.

The International Committee took the lead in this movement for change.⁶² Following the conferences of government experts held in Geneva in 1971 and

⁶¹ Indeed, on many occasions both sides claim to represent the legitimacy of the state. In such cases the international community is split, some states granting recognition to one of the adversaries and other states granting it to the other, all on the basis of political or ideological affinities and regardless of any legal criteria and considerations of effectiveness.

⁶² *Protection of Victims of Non-International Conflicts*, report submitted by the International Committee of the Red Cross to the Twenty-first International Conference of the Red Cross (Istanbul, 1969), published in 9 *IRRC* (1969) pp. 343-352, and *Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts*, report submitted by the International Committee of the Red Cross (Geneva, ICRC 1969) (cyclostyled) pp. 112-142.

1972, the ICRC drew up a draft protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II). The draft served as the basis for discussion at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which took place in Geneva from 1974 to 1977.

It is not necessary here to give an account of all the stages in the negotiations. Suffice it to say that when the draft of Protocol II was submitted for discussion on second reading in plenary session, it was stripped of 19 of its articles, all of which would have substantially curtailed the freedom of action of parties to conflict.⁶³

Protocol II did not fundamentally change the relationship between *jus ad bellum* and *jus in bello* established by Article 3 common to the 1949 Geneva Conventions. Indeed, Article 1 states that the Protocol ‘develops and

⁶³ For the legislative history of Protocol II, the following documents should be consulted: Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, Documents submitted by the International Committee of the Red Cross, Vol. V, *Protection of Victims of Non-international Armed Conflicts* (Geneva, ICRC 1971); Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, The Hague, 1-6 March 1971, *Report on the Work of the Conference* (Geneva, ICRC 1971) pp. 43-52; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 24 May - 12 June 1971, *Report on the Work of the Conference* (Geneva, ICRC 1971) *passim*; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, second session, Geneva, 3 May - 3 June 1972, Documentary material submitted by the International Committee of the Red Cross, Vol. I, *Basic Texts* (Geneva, ICRC 1972) pp. 35-46; Vol. II, *Commentary*, Part Two, pp. 1-89; Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, second session, Vienna, 20 - 24 March 1972, *Report on the Work of the Conference* (Geneva, ICRC 1972) *passim*; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, second session, 3 May - 3 June 1972, *Report on the Work of the Conference*, 2 Vols. (Geneva, ICRC 1972) *passim*; *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva, ICRC 1973) pp. 33-46; *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (Geneva, ICRC 1973) pp. 130-176; *Report on the Study by the XXIIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva, ICRC 1974) *passim*; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974-1977), 17 Vols. (Berne, Federal Political Department 1978) *passim*. In the *Commentary on the Additional Protocols* published by the ICRC and in the work by M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts*, details are given of the legislative history of each article of Protocol II.

supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application'. The article goes on to say that the Protocol 'shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

Thus, Article 1 makes the application of Protocol II dependent on material circumstances linked to the nature of the military operations, that is, on the exercise of *de facto* control of part of the national territory and on the ability of the insurgent party to carry out sustained and concerted military operations and to implement the Protocol. It applies to all armed conflicts in which these conditions are met, regardless of how the conflict began and of the causes defended by or attributed to the parties involved.

A government faced with an insurrection can in no circumstances use the argument that the insurgents have illegally taken up arms to justify refusing to apply Protocol II, since the instrument was adopted precisely to govern situations of that nature. With respect to the obligations it creates, Protocol II therefore rules out any subordination of *jus in bello* to *jus ad bellum*. On the other hand Protocol II, just like common Article 3, does not afford any immunity to combatants who are captured.

Article 6, relating to penal prosecutions, sets out the judicial guarantees provided for in Article 3 of the 1949 Geneva Conventions: independence of the courts, rights of defence, individual responsibility, non-retroactivity of penalties, presumption of innocence, information on judicial remedies. It also prohibits the pronouncement of the death penalty on persons who were under the age of 18 years at the time of the offence and its execution on pregnant women or mothers of young children.

When it comes to the question of amnesty, however, Article 6(5) contains a provision which is merely exhortative:

'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'

The reasoning of the diplomats who took part in the Diplomatic Conference was based on the premise that it was necessarily up to the party claiming to be the legitimate government to decide on any amnesty, while the rebels would be the possible beneficiaries.

In fact it is victory on the battlefield that determines which party will be ‘the authorities in power’ at the end of the conflict. If the rebels win, they will find in the arsenal of legislation in force everything they need to punish their adversaries, and the roles will be reversed.

The regime of General Franco, for example, which resulted from the *coup d'état* of 18 July 1936, convicted officers who remained loyal to the Spanish Republic of military rebellion.⁶⁴ Similarly, Nicaragua’s Sandinista regime sentenced the members of President Somoza’s National Guard for belonging to a criminal association.⁶⁵

Thus Protocol II, like Article 3, establishes a separation between *jus ad bellum* and *jus in bello* as far as the obligations it creates are concerned. Nevertheless, as it comprises rudimentary rules and affords combatants no immunity from prosecution for the mere fact of having participated in the hostilities, Protocol II – again like common Article 3 – establishes that separation only to a limited extent.

6. TOWARDS FURTHER DEVELOPMENT OF THE LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT

One of the characteristics of the period following the Second World War was the prolonged nature of the armed conflicts that ravaged every continent, and especially the civil wars. Although the Spanish Civil War (1936-1939) seemed endless to its contemporaries, we can remember civil wars that lasted for decades, in South-East Asia, in Angola, Mozambique and Peru. In Colombia, the war has been simmering since 1945 with no end in sight.

⁶⁴ H. Thomas, *The Spanish Civil War* (new edn.) (Harmondsworth, Penguin Books 1974) pp. 224 and 760-761; R. Tamames, *La República, La Era de Franco (Historia de España Alfaguara, Vol. VII)*, 6th edn. (Madrid, Alianza Editorial, Ediciones Alfaguara 1977) pp. 324-325 and 370-373.

⁶⁵ The members of President Somoza’s National Guard were sentenced for belonging to a criminal association (*‘asociación para delinquir’*), ‘Special tribunals in Nicaragua’, Note for the record, 20 May 1980; Report on mission to Nicaragua by Mr André Pasquier, Delegate-General, from 31 October to 12 November 1980, ICRC Archives, file 200 (93).

Many reasons have been given for this deplorable state of affairs: the economic interests of warlords; the social standing that war seems to confer on clan chiefs and many young people with nothing better to do; and outside interference, which has certainly served to prolong numerous conflicts, especially in the context of the Cold War. All these factors play a role, but it would be a mistake not to also take into account the rudimentary state of the rules applicable to non-international armed conflict.⁶⁶ The rules in force are insufficient to halt the escalation of violence, and the combatants, who risk incurring the most severe penalties for the mere fact of having taken part in the hostilities, are hardly motivated to comply with the laws and customs of war. Indeed, all the civil wars of the Twentieth Century were characterised by wholesale violations of international humanitarian law. The violence of the clashes, the penalties imposed by each side and the escalation of reprisals cause deep psychological wounds, which obstruct any prospect of halting the fighting and of reconciliation.

Furthermore, the judiciary plays a role: judges and prosecutors are not usually willing to give up the powers conferred on them by the law. In not a few cases the parties to the conflict succeed in reaching agreement on a ceasefire, but the combatants obstinately refuse to lay down their arms for fear of being prosecuted as soon as they do so. The members of the judiciary oppose any amnesty proposal, declaring that passing over the crime of rebellion is out of the question. As everyone concerned remains on a war footing, the slightest incident is enough to spark off renewed fighting and the ceasefire accord shares the fate of the morning dew. Two questions then arise:

- What can be done to enhance respect for international humanitarian law applicable to non-international armed conflict?
- What can be done to put an end to conflicts which drag on interminably?

There are no easy answers to these questions, whose complexity is all too evident.⁶⁷

⁶⁶ The rudimentary nature of the regime established by Art. 3 results from the preparatory work and the wording of the article: '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...' (emphasis added). The rudimentary nature of Protocol II is clearly revealed by a comparison between the draft prepared by the ICRC and the draft resulting from the work of the Committees of the Diplomatic Conference, on the one hand, and the text finally adopted by the Plenary Assembly, on the other.

⁶⁷ In 2003, the ICRC organised five regional expert seminars on the implementation of international humanitarian law. These seminars took place in Cairo, Pretoria, Kuala Lumpur, Mexico City and Bruges. A sixth seminar, on the effects of direct participation in hostilities, was organised jointly with the T.M.C Asser Institute in The Hague; additionally, the 27th San Remo Round Table, organised jointly with the

The ideal solution would obviously be the adoption of a new legal regime applicable to non-international armed conflicts which would significantly enhance the protection afforded to victims of such situations and would in particular grant a status to captured combatants. This new codification could draw on the conclusions of a study which the ICRC has been conducting for many years on customary international humanitarian law, and which is due to be published in 2005.⁶⁸

There are, however, doubts whether states are ready to envisage a new legal regime applicable to non-international armed conflict. States generally resist any extension of rules designed to regulate matters which, in their opinion, fall under their exclusive jurisdiction, in particular if such rules are supposed to apply to situations in which their sovereignty is challenged.⁶⁹ Pending a new

International Institute of Humanitarian Law, focused on the interplay between international humanitarian law and other legal regimes in situations of violence. On the basis of these seminars, the ICRC submitted an important report to the 28th International Conference of the Red Cross and Red Crescent, which met in Geneva in December 2003 : *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Geneva, ICRC, 2003). Most of the ideas and proposals indicated in the present section were submitted to the experts taking part in these seminars and led to stimulating and lively debates.

⁶⁸ The Intergovernmental Group of Experts for the Protection of War Victims, meeting in Geneva from 23 to 27 January 1995, recommended that the ICRC be invited to prepare, with the assistance of experts on international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of humanitarian law applicable in international and non-international armed conflicts. The 26th International Conference of the Red Cross and Red Crescent, meeting in Geneva in December 1995, endorsed that recommendation. More than 100 experts contributed to the study, conducting extensive research with a view to identifying state practice and that of belligerents during international and non-international armed conflicts. The study is currently being printed and is due to be published at the beginning of 2005.

⁶⁹ For many years, a group of states objected, as a matter of principle, to any development of the law applicable to non-international armed conflict. However, since some of them have been confronted with armed insurrection on their national territory, they have recognised the importance of a legal regime limiting violence in such conflicts and protecting their victims, clearing the way for new developments in the law applicable to non-international armed conflict in recent years. The Ottawa Convention on the Prohibition of the Use, Stockpiling Production and Transfer of Anti-Personnel Landmines and on their Destruction, of 18 September 1997, applies to all armed conflicts, and so does the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, of 26 march 1999. The Rome Statute of the International Criminal Court of 17 July 1998 gives to the Court jurisdiction over war crimes committed in international and non-international armed conflicts. On 21 December 2001, the Review Conference of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which are

codification of the rules applicable to non-international armed conflict, what measures could be taken on the basis of the law now in force?

The first measure, and also the most effective, would be to have recourse to the system of recognition of belligerency, since its effect is to bring into application almost the entire range of the laws and customs of war. Although it has not been used for more than 30 years, nothing prevents a state beset by civil war from resorting to this measure. By so doing, the government of a state confronted with civil war would significantly enlarge the span of the means it can resort to in order repress the rebellion, while containing the violence of the conflict by reinserting it in a definite legal framework.

In the absence of recognition of belligerency, non-state actors could be persuaded to make a formal commitment to complying with international humanitarian law. Of course, Article 3 common to the four Geneva Conventions applies fully to all warring parties by virtue of the elementary nature of the obligations it imposes.⁷⁰ Today, the same could possibly be said of Protocol II.⁷¹ Be that as it may, no actor, governmental or non-governmental, will readily agree to acknowledge being bound by an instrument if he has no way of expressing his commitment to respecting it.⁷²

deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 adopted the revised Article 1 of the Convention which extends the field of application of the framework Convention and of its Protocols to non-international armed conflicts.

⁷⁰ 'Insurgents are bound to observe the rules of Article 3, not by virtue of the accession or ratification by the established government, but in accordance with the desire of the international community, of which that government, on the point in question, is no more than an agent – a case in which a government's duty to act both as the representative of its particular State and as a member of the international community (...) is particularly evident,' R.-J. Wilhelm, 'Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international', 137 *Collected Courses of the Hague Academy of International Law* (1972) p. 368. In its judgment of 27 June 1986 in the case concerning military and paramilitary activities in and against Nicaragua, the International Court of Justice declared that Art. 3 formed part of the 'elementary considerations of humanity' applicable to international and non-international armed conflicts. International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States of America)*, Merits, *ICJ Rep.* (1986) pp. 14-150, at p. 114.

⁷¹ According to the above mentioned study on customary international humanitarian law (note 68), the majority of the provisions of Additional Protocol II, in particular the fundamental guarantees embodied in Article 4 as well as the provisions on the conduct of hostilities (Articles 13 to 17), reflect international custom.

⁷² There is surely a contradiction in demanding that non-state actors comply with international humanitarian law without giving them the opportunity to adhere to the instruments of international humanitarian law applicable to non-international armed

Bearing this in mind, two courses of action may be envisaged. First, by concluding an agreement between themselves, the parties to the conflict could undertake to respect all or part of the other provisions of the Geneva

Conventions. Such agreements are expressly provided for in paragraph 3 of common Article 3, which states:

‘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.’

Special agreements concluded between the parties to a conflict are a particularly effective means of defining and developing the law applicable to the conflict in question, since they establish an identical legal regime for all parties to the agreement on the basis of their free consent. Such agreements are also effective instruments for informing the combatants of the shared intention of the warring parties to comply with certain provisions of humanitarian law.

Experience has shown, however, that a government faced with an armed insurrection will often hesitate to conclude an agreement with its adversaries for fear that such an agreement might confer upon them the legal personality or political respectability which that very government is committed to denying them.

Article 3 anticipates that objection by stating in paragraph 4: ‘The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’ There can be no doubt that this provision also covers the special agreements which may be concluded in accordance with paragraph 3 of the same article.

Even so, the path to the negotiating table is strewn with obstacles. There have, however, been examples of agreements being concluded to define and develop the law applicable to certain non-international conflicts. The ICRC is often called upon to offer its services in order to facilitate the conclusion of such agreements, in cases where it has not itself taken the initiative. Under Article 3(2), the ICRC is authorised to offer its services to the parties to the conflict. As the ICRC is an organisation born of private initiative, such offers of services can in no way change the legal status of those to whom they are addressed.⁷³

conflicts or the opportunity to make a formal commitment to complying with those instruments.

⁷³ With regard to the ICRC’s offers of services, reference may be made to the author’s work, *The International Committee of the Red Cross and the Protection of War Victims* (Geneva, ICRC 2003) in particular pp. 403-465.

One example is the agreement concluded under the auspices of the ICRC on 22 May 1992 between the three parties involved in the conflict that was ravaging Bosnia and Herzegovina at the time.⁷⁴ Although the agreement was marred by serious violations – who could forget the massacre at Srebrenica? – it was recognised as governing the mutual relations between the warring parties throughout the conflict, and later served as a reference point for quite a number of the decisions of the International Criminal Tribunal for the former Yugoslavia.⁷⁵

Secondly, if it proves impossible to bring the parties together around the negotiating table, non-state actors may be invited to make unilateral declarations whereby they undertake to respect the rules of humanitarian law. Such a declaration would confirm their intention to comply with the law, and would be a powerful means of raising awareness of the humanitarian rules among the armed forces or groups fighting for that side in the conflict.⁷⁶

Of course, there is a risk that non-state actors might express their commitment to comply with humanitarian law only to gain a measure of respectability or to enhance their international status, and without any intention of abiding by the commitment made. That risk cannot be disregarded; but when one considers the ingenuity with which all too many governments try to evade their treaty-based obligations in situations where it is their duty to fulfil them, one might just as legitimately question the will of those same governments to be bound by their commitments.

Furthermore, with the development of international criminal justice, and in particular the adoption of the Statute of the International Criminal Court, the insurgents know that they may have to answer for the way in which they have discharged their obligations under international humanitarian law.⁷⁷ The risk of

⁷⁴ B. Jakovlević, 'The Agreement of May 22, 1992, on the implementation of international humanitarian law in the armed conflict in Bosnia-Herzegovina', 39 *Yugoslavenska Revija za Medjunarodno Pravo* (1992) pp. 212-221; M. Mercier, *Crimes Without Punishment: Humanitarian Action in Former Yugoslavia* (London, Pluto Press, 1995) pp. 203-207.

⁷⁵ Tadić Appeals Decision, *supra* n. 4, para. 73.

⁷⁶ During the 1970s and 1980s, the ICRC recorded and mentioned in its *Annual Reports* or published in the *International Review of the Red Cross* the declarations whereby various national liberation movements undertook to comply with international humanitarian law. At the time, however, the ICRC could draw support from the fact that these movements were recognised by the regional organisations concerned. D. Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé', 18 *Revue belge de droit international* (1984-1985) pp. 298-320.

⁷⁷ Under the terms of Art. 8(2)(c) of the Statute of the International Criminal Court, the Court has jurisdiction in respect of serious violations of Art. 3 common to the four

seeing insurgent movements make such declarations purely for reasons of propaganda and without any intention of honouring the commitments made is undoubtedly smaller today than it was before the establishment of the Court.

For such declarations to take full effect they should be registered, but that entails determining the body with which the relevant documents should be deposited. Switzerland, the depositary state of the Geneva Conventions, feels it would be inappropriate for it to play this role, for to do so would inevitably create confusion between that function and registration of the deposit of instruments of ratification or accession.⁷⁸ In the absence of specific legal criteria, which would probably not be easy to establish, the ICRC would not be in a position to assume that role, for the registration of such declarations would certainly raise sensitive political issues. Could the United Nations or regional organisations register such declarations? That is a possibility worth exploring.⁷⁹

Agreements between belligerents or unilateral declarations should allow the parties involved in an internal conflict to indicate their intention to respect the law applicable to such conflicts. It cannot be denied, however, that the international humanitarian law applicable to non-international armed conflict, as it exists today, does not offer warring parties much incentive to comply with its provisions. Indeed, when combatants risk the most severe penalties merely for having taken part in the hostilities, it is difficult to see what would persuade them to observe the laws and customs of war. If the mere fact of bearing weapons or being a member of a rebel movement or of government armed forces may be sanctioned by the death penalty or life imprisonment, why should combatants refrain from committing war crimes in situations where they feel that such action might allow them to gain a tactical advantage, or by way of reprisal?

This leads to another question: should not the international humanitarian law applicable to non-international armed conflicts draw a more precise line between acts of war and war crimes, as does the law applicable to international armed conflicts? When it comes to the treatment to be accorded to combatants

Geneva Conventions; under the terms of Art. 8(2)(e), the Court has jurisdiction in respect of other serious violations of the laws and customs applicable in armed conflicts not of an international character, as defined in this provision, 38 *IRRC* (1998) pp. 678-682, in particular p. 681; *Documents on the Laws of War*, op. cit. n. 5, pp. 667-697, in particular pp. 678-679.

⁷⁸ On the role of the depositary state and the practice of Switzerland in that capacity, reference may be made to the memorandum of the Swiss Federal Political Department (now the Federal Department of Foreign Affairs) of 28 December 1960: 'Obligations of the depositary government of a multilateral treaty', 20 *Annuaire suisse de droit international* (1963) pp. 76-83.

⁷⁹ On the issue of anti-personnel landmines, the Geneva Call, a non-governmental organisation, fulfills this role of registering declarations of intent by non-state actors.

who have fallen into the hands of the adverse party, should not a clearer distinction be made between those who have complied with the laws and customs of war and those who have committed war crimes? Here, various possibilities may be envisaged.

The first, applicable while hostilities are underway, would be to apply to combatants who have complied with the laws and customs of war a regime comparable to that applicable to prisoners of war in international armed conflict.

For example, on 19 March 1958 General Salan, Commander-in-Chief of the French forces in Algeria, ordered that special camps be set up for NLA (National Liberation Army) combatants captured while bearing weapons openly. Although the French government had specified that they were not to be considered as prisoners of war, the regime applied to the captives thenceforth was to a large extent aligned with the one foreseen for prisoners of war. The order stated that the prisoners were to be treated ‘in as liberal a manner as possible, and that this should be made known’. In taking this decision – the importance of which cannot be overestimated – the French authorities gave up the idea of systematically prosecuting NLA members captured bearing weapons. The memorandum went on to say: ‘Proposals for bringing captives before the courts should be systematically avoided, except in the case of those who have committed atrocities or who demonstrate a degree of fanaticism likely to prejudice a favourable evolution in the general state of mind.’⁸⁰

⁸⁰ Superior Army Command, 10th Military Region, Memorandum of 19 March 1958, ICRC Archives, file 225 (12); *The ICRC and the conflict in Algeria* (Geneva, ICRC 1963) p. 8 (cyclostyled). The link between the treatment given to captured insurgents and their conduct in battle is highlighted in General Salan’s memorandum of 19 March 1958 ordering that military internee camps be set up for insurgents captured bearing weapons. Under the title ‘General concepts’, the memorandum contained the following preliminary observations:

‘Rebels driven to the wall very often fight with a degree of ferocity which leads to their extermination.

This obstination is due less to a spirit of sacrifice dedicated to a cause regarded as sacred than to efficacious psychological preparation.

The interrogation of prisoners has, in fact, revealed that during their training the ‘mujaheddin’ are warned in pressing terms about what will happen to them should they surrender. They are told that the French troops first torture then kill prisoners or, in the most favourable cases, bring them before courts which automatically condemn them to death.

Extracts from certain French and foreign newspapers, liberally quoted by rebel and foreign radio stations, back up this propaganda very effectively.

The fear perpetuated in this way gives armed groups a determination which must be weakened as far as possible in order to reduce our own losses.

Similarly, Article 2.4 of the agreement reached on 22 May 1992 between the three parties involved in the conflict in Bosnia and Herzegovina provided that captured combatants would be granted the treatment prescribed by the Third Geneva Convention of 12 August 1949, and that the ICRC would have free access to them in order to discharge its humanitarian mandate in accordance with the same instrument.⁸¹

Compliance with the laws and customs of war and the possibility of bringing conflicts to an end are also contingent on the fate reserved for captured combatants at the end of active hostilities. The question that arises in that regard is how to limit the exercise of repressive jurisdiction against enemy combatants.

It has already been pointed out that Article 6(5) of Protocol II is only in the nature of an exhortation: ‘At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty...’ This provision imposes no definite obligation on the parties to a conflict. It offers no judicial security to the combatants, either during the conflict or at the end of it. It could never really encourage combatants to respect the laws and customs of war in the hope that this will be taken into account in the event of capture, nor does it provide any motivation for ending an internal conflict or for the necessary reconciliation of the two sides.

De lege ferenda, various measures might be envisaged:

- granting combatants immunity from prosecution for merely having participated in the hostilities, as is the case in international armed conflicts;
- making amnesty compulsory for the offence of rebellion or armed insurrection;

One way of doing this is to treat prisoners as liberally as possible and to make this fact known.’

General Salan’s initiative was taken for the sake of military effectiveness. The ICRC’s representations recommending adoption of this measure, on the other hand, were prompted by the wish to see enhanced respect for the laws and customs of war, a consideration also reflected in the memorandum of 19 March 1958, which stated: ‘Proposals for bringing captives before the courts should be systematically avoided, except in the case of those who have committed atrocities...’.

⁸¹ ‘Art. 2.4: Captured combatants:

Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention.

The ICRC shall have free access to all captured combatants in order to fulfill its humanitarian mandate according to the Third Geneva Convention.’ Cited in Mercier, op. cit. n. 74, p. 205.

- laying down the maximum sentence that may be imposed on combatants for the mere fact of having participated in the hostilities.

Naturally, any immunity granted to combatants, and any amnesty or limitation of the sentence that may be imposed on them for merely having taken part in the hostilities, would apply only to the fact of having participated in the hostilities, in other words to the offence of insurrection or rebellion. There could be no question of immunity or amnesty for violations of humanitarian law, since the object is precisely to make a distinction between combatants who have complied with the laws and customs of war and those who have committed war crimes. Moreover, under Articles 49/50/129/146 common to the four Geneva Conventions, states are bound to prosecute persons who commit grave breaches of those Conventions.⁸²

Some experts have claimed that it is difficult to give effect to the distinction between acts of war, which should not be prosecuted or should be covered by an amnesty at the end of an armed conflict, and war crimes, which must be prosecuted.⁸³ This objection does not withstand scrutiny. War crimes are clearly defined by international law.⁸⁴ Furthermore, the distinction between acts of war and war crimes applies in identical terms in the event of international armed conflict and in the event of non-international armed conflict. Yet it has never been alleged that implementation of this distinction raised serious

⁸² There have been for many years diverging views on whether states are bound to prosecute war crimes committed during non-international armed conflicts. According to common Article 49/50/129/146, the High Contracting Parties are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the Geneva Conventions and to bring such persons before their own courts. In our view, since common Article 3 is part of the 1949 Geneva Conventions, there is no reason why grave breaches of this article should not be considered as grave breaches of the Geneva Conventions. While refraining from using the term ‘grave breaches’, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that customary international law imposes criminal responsibility for serious violations of common Article 3 (*The Prosecutor v. Duško Tadić*, *supra* n. 4, para. 134). Furthermore, there is no doubt that each party to the conflict is under an obligation to prosecute members of its own armed forces alleged to have committed, or to have ordered to be committed, war crimes, whether during international or non-international armed conflicts.

⁸³ This view was aired by two or three experts taking part the series of the five regional expert seminars organized by the ICRC in 2003 (see note 67); however it was not supported by the other experts.

⁸⁴ Art. 50/51/130/147 common to the four Geneva Conventions defines grave breaches of those Conventions; Art. 85 of Protocol I defines grave breaches and categorises them as war crimes; Art. 8 of the Statute of the International Criminal Court defines the war crimes committed in the case of international or non-international armed conflict.

difficulties in the case of international armed conflict. It underpins the entire law of armed conflict, and in particular the status of prisoner of war.

Finally, international humanitarian law could set a minimum standard of treatment applicable to any person who is detained in connection with an armed conflict and who is not entitled to any more favourable treatment. That minimum standard could be based on the fundamental guarantees set out in Article 75 of Protocol I, but should apply to all armed conflicts, both international and non-international. It would constitute a real ‘humanitarian safety net’, and would protect any person not enjoying more favourable treatment by virtue of the Geneva Conventions or the Protocols additional thereto, regardless of the legal category to which the conflict belonged and of the status of the individual concerned.

7. CONCLUSIONS

The distinction between *jus ad bellum* and *jus in bello* and recognition of the autonomy of *jus in bello* with regard to *jus ad bellum* have been decisive factors in the development of the laws and customs of war and in the protection of victims of international armed conflict.

In the case of non-international armed conflict, the separation between *jus ad bellum* and *jus in bello* and recognition of the autonomy of *jus in bello* with regard to *jus ad bellum* are respected as far as the obligations deriving from Article 3 common to the 1949 Geneva Conventions and from Protocol II are concerned. Those principles, however, do not extend to the status of combatants who have fallen into the hands of the adverse party. Such combatants may be prosecuted and sentenced for the mere fact of having participated in the hostilities, and the humanitarian law currently in force sets no limits on the penalties they may incur.

One of the principal challenges facing international humanitarian law today is to find means of strengthening the distinction between *jus ad bellum* and *jus in bello* in non-international armed conflicts, especially as concerns the status of combatants who have fallen into the hands of the adverse party. This is the price to be paid for the possibility of curbing violence in civil war and of ensuring better protection for its victims.

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