

PROTECTION OF DEFENSELESS PERSONS IN INTERNATIONAL HUMANITARIAN LAW

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1. Introduction

In discussing the protection of defenseless persons in International Humanitarian Law,¹ one should at the out set be clear about the term 'protection'. In this paper the term 'protection' means to guard 'defenseless persons' against measures that could do them harm: violence, deprivation of their basic rights, attacks on their physical or moral being. It also includes, assistance to them with what they lack to maintain a minimum level of existence: food, clothing, care and shelter, moral, intellectual and spiritual relief. Assistance and protection are twin pillars of relief. Reciprocally, an operation to provide assistance often opens the way to protective action. For the purpose of this paper 'defenseless persons' are those persons who do not participate in the hostilities or who are no longer taking part in the hostilities. Thus, they may include sick, wounded, shipwrecked members of the armed forces; prisoners of war; those who did not take part in hostilities but provided support to armed forces and civilians who never took part in hostilities.

The first three Geneva Conventions i.e., *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949*, (hereinafter referred to as the first Convention); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949*, (hereinafter referred to as the second Convention); *Geneva Convention relative to the 'Treatment of Prisoners of*

¹ The term "Humanitarian Law" applies to those rules of international law which aim to protect persons suffering from the evils of armed conflicts as well as, by extension, not directly serving military purposes. There is therefore an essential difference between 'humanitarian law' and 'human rights', for the latter do not apply only in time of armed conflict. International Humanitarian Law generally consists of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

War, of 12 August 1949, (hereinafter referred to as the third Convention) deal with protection of combatants and the fourth Convention i.e., *Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 1949* deals with the protection of civilians (hereinafter referred to as the fourth Convention). In a broad and generalised sense, combatants may simply be defined as those who take part in hostilities or are involved in aiding those who are taking part, while civilians are those who do not take part in hostilities of armed conflict.

In international humanitarian law the protection of defenseless persons is twofold: protection of defenseless persons in international armed conflict and protection of defenseless persons in non-international armed conflict. Apart from the four Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions adopted on 8 June 1977 which supplement the four Geneva Conventions, the first one i.e., Protocol I concerns protection of victims of international armed conflict, while Protocol II which supplements common Article 3 of the four Geneva Conventions² is solely devoted to the protection of victims of non-international armed conflict.

2. Protection of Defenseless Persons in International Armed Conflict

Common Article 2 of the four Geneva Conventions provide that the Conventions *inter alia* " ... shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state war is not recognised by one of them". There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Conventions. The Conventions become applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it

² Common Article 3 of the four Geneva Conventions introduced for the first time rules of protection to defenseless persons applicable in non-international armed conflict.

automatically into operation.

Now the question arises what is meant by 'armed conflict'? The substitution of this much more general expression for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defense. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 even if one of the parties denies the existence of a state of war.³

The protection of various categories of defenseless persons in international armed conflict is elaborated below.

2.1 Protection of Wounded, Sick and Shipwrecked Persons

The first Geneva Convention of 1949⁴ delineates rules of protection of the wounded and sick in armed forces in the field while the second Convention of 1949,⁵ provides rules of protection of the wounded, sick and shipwrecked members of armed forces at sea. The definition of the above three categories of persons does not appear in the Geneva Conventions but in the Additional Protocol I of 1977.⁶

³ See Jean S. Pictet *et al*, *Commentary on the Geneva Convention*, Vol. I, Geneva, ICRC, 1952 p. 32

⁴ For the text of the first Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement*, ICRC Geneva, 1994, pp. 23-46. For discussion see Jean S. Pictet *et al*, *Commentary on the Geneva Convention* Vol. I, Geneva, ICRC, 1952.

⁵ For the text of the second Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement*, ICRC Geneva, 1994, pp. 47-66. For discussion see Jean S. Pictet *et al*, *Commentary on the Geneva Convention* Vol. II, Geneva, ICRC, 1952.

⁶ Article 8 of the Additional Protocol I defines sick, wounded and shipwrecked as follows:

"wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as infirm or expectant mothers, and who refrain from any act of hostility.

"shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

The first and second Geneva Conventions respectively envisage in Article 12 that the wounded, sick and ship wrecked persons, ... shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Protocol I of 1977 has added to the list of prohibited acts, such as: physical mutilation and removal of tissue organs, while laying down strict rules for amputation, skin grafts or blood transfusions carried out in the interests of patients, consistent with generally recognised standards.⁷

Article 15 of the first Convention provides that parties to the conflict shall take all possible measures to "search for and collect the wounded and sick, to protect them against pillage and ill-treatment". It is generally necessary to collect the wounded, sick and shipwrecked persons after military engagements; and for this reason arrangements should be made whenever possible for a cease-fire.⁸

The parties to the conflict under Article 16 of the first convention should record as soon as possible any particulars, which may assist in the identification of each wounded, sick or dead person of the adverse party. Such information should be forwarded to the Information Bureau as described in Article 122 of the third Geneva Convention. The first Convention in Article 18 has provided for the role of the population. It envisages that the civilian population shall respect the wounded

⁷ Article 11(2) of 1977 Protocol I.

⁸ See, Rezek, J.F., "Protection of the victims of armed conflicts: wounded, sick and shipwrecked persons", in *International Dimensions of Humanitarian Law*, Toman, J., (ed.), UNESCO, p. 156.

and sick and in particular abstain from offering them violence. Reprisals against the wounded and sick personnel are prohibited.⁹

As mentioned earlier, the second Geneva Convention provides rules for the protection of the wounded, sick and shipwrecked members of armed forces at the sea. Accordingly Article 16 provides that the wounded, sick and shipwrecked persons who has fallen into the hands of enemy shall be recognised as the prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. Article 18 provides rules regarding search for casualties after an engagement. After each engagement parties to the conflict shall without delay take all possible measures to "search and collect the shipwrecked, wounded and sick to protect them against pillage and ill-treatment". Following the first Convention, the second Convention in Article 19 provides that parties to the conflict shall record as soon as possible any particular, which may assist in the identification of each shipwrecked, wounded and sick person of the adverse party.

Besides the first and the second Geneva Conventions, Protocol I of 1977 provide provision on protection and care,¹⁰ role of civilian population¹¹ and prohibition of reprisals¹² regarding the wounded, sick and the shipwrecked persons. The Protocol I of 1977 in Article 19 further provides that the neutral and other states not parties to the conflict shall accord protection to the sick, wounded and the shipwrecked persons.

2.2 Protection of Prisoners of War

The protection of prisoners of war is detailed in the third Geneva Convention.¹³ Article 4 of the Convention catalogues list of persons who would be treated as prisoners of war while Article

⁹ See, article 46 of the first Geneva Convention of 1949.

¹⁰ Article 10 of Protocol I.

¹¹ Article 17 of Protocol I.

¹² Article 20 of Protocol I.

¹³ For the text of the third Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement* ICRC Geneva, 1994, pp. 67-135. For discussion see, Pictet, J.S. *et al* *Commentary on the Geneva Convention* Vol. 111, Geneva, ICRC, 1952.

44 of the Additional Protocol I defines prisoners of war.¹⁴

Following the first and second Geneva Convention, the third Geneva Convention in Article 13 provides that the prisoners of war must at all time be humanely treated. They are entitled to respect for their person, both physical and moral. The following acts for example, are contrary to respect for the physical person: any unlawful act or omission causing death or seriously endangering the health of a prisoner of war, not to mention physical mutilations, medical or scientific experiments which are not justified by the patient's treatment, removal of tissue or organs for transplantation;¹⁵ acts of violence or intimidation;¹⁶ prolonged questioning, whether or not accompanied by acts of brutality, with the aim of extracting information;¹⁷ omission of medical care to the wounded and sick;¹⁸ prolonged deprivation of sanitary facilities¹⁹ or of physical, intellectual and recreational pursuits;²⁰ inadequate conditions of food,²¹ quarters²² and clothing²³ extended over any length of time; keeping prisoners in a danger zone²⁴; making them do labour of a dangerous nature or one which does not take into account the prisoners' physical aptitude or their professional qualifications.²⁵

A prisoner of war shall be tried only by a military court offering guarantees of independence and impartiality and affording the accused the rights and means of defence provided for by the Convention.²⁶ He shall, in particular, be entitled to choose

¹⁴ Article 44 reads as follows: "Any combatant, as defined in article 43, who falls into the power of an adverse Party shall be a prisoner of war".

¹⁵ Article 13 of the third Convention; Article I I(1) and 11(4) of Additional Protocol I.

¹⁶ Article 13 paragraph 2 of the third Convention.

¹⁷ Article 17 paragraph 4 of the third Convention.

¹⁸ Articles 15 and 30 of the third Convention.

¹⁹ Article 29 of the third Convention.

²⁰ Article 38 of the third Convention.

²¹ Article 26 of the third Convention.

²² Articles 15 and 25 of the third Convention.

²³ Articles 15 and 27 of the third Convention.

²⁴ Article 19 paragraph 1 of the third Convention.

²⁵ Articles 52 and 49 of the third Convention.

²⁶ Articles 34 and 99 of the third Convention.

counsel for his defense, to call witnesses and to obtain the services of a competent interpreter; the representatives of the Protecting Power shall be entitled to attend the trial and give assistance to the accused,²⁷ who shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition.²⁸ If death penalty is pronounced on a prisoner of war the sentence shall not be executed before the expiration of a period of six months from the date when the protecting Power receives, at an indicated address the notification of findings and sentence.²⁹

2.3 Protection of Civilians

The fourth Geneva Convention³⁰ deals with protection of civilians. The definition of civilian does not appear in the Convention. Article 50 of the Additional Protocol I defines 'civilian' and 'civilian' population as follows:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

The following paragraphs elaborate the protections offered to

²⁷ Article 105 of the third Convention.

²⁸ Article 106 of the third Convention.

²⁹ Article 101 of the third Convention.

³⁰ For the text of the fourth Geneva Convention see, *Handbook of the International Red Cross and Red Crescent Movement*, ICRC Geneva, 1994, pp. 136-187. For discussion see Jean S. Pictet et al. *Commentary on the Geneva Convention* Vol. IV, Geneva, ICRC, 1952.

the civilians under the fourth Geneva Convention and the Protocol I.

2.3.1 Protection of Civilians in General

Section I of Part III of the fourth Convention deals with the treatment of civilians in the power of the enemy. It ensures elementary human rights of the protected persons in the hands of a party to the conflict, which will even be responsible for the treatment given to them by its agents.³¹ According to Article 27, protected persons are to be treated humanely at all times without any adverse distinction based, in particular, on race, religion or political opinion. Towards this end, the Party to the conflict is obliged in all circumstances: a) not to use violence against the life and physical integrity of the protected persons; b) to protect them against all acts of violence or threats thereof and against insults and public curiosity; c) to respect their persons and honours; d) to respect their family rights; e) to respect their religious convictions and practices; and f) to respect their manners and customs.

Under the fourth Convention, prohibited forms of ill-treatment are physical or moral coercion, in particular, to obtain information from protected persons,³² as well as "any measure of such a character as to cause the physical suffering or extermination of protected persons".³³ These measures comprise "murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person", and also "any other measures of brutality whether applied by civilian or military agents".³⁴ No protected person is to be "punished for an offence he or she has not personally committed".³⁵ Collective penalties

³¹ Article 29 of the Fourth Convention.

³² Article 31 of the Fourth Convention.

³³ Article 32 of the Fourth Convention.

³⁴ *Id.*

³⁵ Article 33 of the Fourth Convention.

and reprisals against protected persons and their property as well as "all measures of intimidation or of terrorism" and pillage are prohibited.³⁶

The fourth Convention lays down in Articles 69 to 78, certain other minimal standards for the Occupying Power's own system of penal administration against protected persons in occupied territory. Such as they should not be arrested, prosecuted or convicted by the Occupying Power for acts committed or opinions expressed before the occupation, except for the breaches of the laws and customs of war.³⁷ An accused person is entitled to be informed, in writing, in the language which he understands, of the charges leveled against him and shall be brought to trial as rapidly as possible.³⁸ An accused person enjoys the right of defense,³⁹ and, if convicted, the right to appeal.⁴⁰ In pronouncing the judgment, the court will take into account the duration of the arrest period awaiting trial, which will be deducted from any period of imprisonment awarded.⁴¹

2.3.2 Protection of Children

Children are the most severely affected victims of war and armed conflict. The question arises what should the word 'children' be considered to mean for the purposes of the fourth Geneva Convention? Although children have an important place in the Convention, there is no general definition of the word. On the other hand the fourth Convention has fixed various age limits in the provisions prescribing preferential treatment for children: fifteen years of age, in Articles 14,⁴² 23,⁴³ 24 and 38(5);⁴⁴ twelve years of age in Article 24,

³⁶ *Id.*

³⁷ Article 70 of the Fourth Convention.

³⁸ Article 71 of the Fourth Convention.

³⁹ Article 72 of the Fourth Convention.

⁴⁰ Article 73 of the Fourth Convention.

⁴¹ Article 69 of the Fourth Convention.

⁴² Hospital and safety zones.

⁴³ Consignment of relief supplies.

⁴⁴ Measures relating to child welfare.

paragraph 3;⁴⁵ and, as will be seen, eighteen years of age in Articles 51, paragraph 2⁴⁶ and 68, paragraph 4.⁴⁷

However, Article 14 of the fourth Convention *inter alia* seeks to create hospital and safety zones for the protection children under the age of fifteen. Article 24 seeks to ensure the maintenance and education of children by the state if the children are orphaned or separated from their parents. Thus, where children are deprived of their natural protectors as the result of an even of war, the Convention makes it obligatory for the country where they are living to adopt the necessary measures to facilitate, in all circumstances, their maintenance, their education and the exercise of their religion. The Convention does not specify the measures to be taken and the Parties to the conflict therefore enjoy great freedom of action; they may apply the measures, which seem most appropriate under the conditions prevailing in their territory. The maintenance of the children concerned means their feeding, clothing, and accommodation, care for their health and, where necessary medical and hospital treatment.⁴⁸

Article 50 enjoins upon the occupying power to facilitate the proper working of institutions devoted to the care and education of children. The obligation of the Occupying Power to facilitate the proper working of institutions for children is very general in scope. The provision applies to a wide variety of institutions and establishments of a social, educational or medical character, etc., which exist under of great variety of names in all modern State (e.g. child welfare centres, orphanages, children's camps, children's homes and day nurseries, "medico-social" reception centres, social welfare services, reception centres, canteens, etc.). All these organizations and institutions, which

⁴⁵ Identification

⁴⁶ Compulsory labour.

⁴⁷ Death penalty.

⁴⁸ See Jean S. Pictet *et al*, *Commentary on the Geneva* Vol. IV, Geneva, ICRC, 1952 p.187.

play a most valuable social role even in normal times, become of increased importance in wartime when innumerable children are without their natural protectors, who have fallen on the battlefield, or have been victims of bombing, conscripted to do forced labour, interned or deported.⁴⁹

2.3.3 Protection of Refugees and Stateless Persons

Among the enemy aliens in the territory of a party to a conflict there may be one category of persons whose position warrants special consideration- namely refugees who have been forced by events or by persecution to leave their native land and seek asylum in another country. Article 44 of the fourth Convention concerns with the protection of refugees. The provisions of Article 44 applies to a person, a national of an enemy state, who is without diplomatic protection either because he has severed relations with his country's government or because he does not wish to claim its protection. Since a refugee is technically an enemy alien being devoid of assistance of a protecting power, he occupies a special position. Article 44 reduces the difficulties of the refugee by imposing an obligation on the Detaining Power not to treat the refugee as an enemy alien who may very well be a 'friendly enemy'. On the other hand, article 44 does not exempt refugees absolutely from security measures such as internment. The status of refugee does not itself guarantee immunity.⁵⁰

Article 45 provides that in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. 'Protected persons' under the Fourth Convention are persons who "find themselves, in case of a conflict or occupation, in the hands of a Party . . . of which they are not nationals".⁵¹ Stateless persons therefore, by implication

⁴⁹ Ibid, p 186.

⁵⁰ See, Pictet, J.S., *et al*, *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Vol. IV, Geneva, ICRC, 1952, p. 264.

⁵¹ Article 4, paragraph 1.

enjoy the status of protected persons. Article 73 of Protocol I of 1977 explicitly grants them such status. Article 73 reads as follows:

Persons who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or state of residence shall be protected persons within the meaning of Parts I & III of the Fourth Convention, in all circumstances without any adverse distinction.

Although they are not explicitly protected by the 1949 Convention, stateless persons enjoy the protection of all the provisions of the Fourth Convention by virtue of Article 4, paragraph 1. According to this provision, "persons protected by the Conventions are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".⁵²

As regards Part I of the Fourth Convention, Article 73 of the Protocol has the effect of modifying Article 4 of that Convention by adding to the list of protected persons "refugees in the sense of Article 73 of the Protocol" and eliminating the restrictions of paragraph 2 in respect of them.⁵³ Thus, refugees enjoy the protection of all the relevant provisions of the Fourth Convention, irrespective of their nationality and regardless of the Party in whose power they have fallen.

3 Protection of Women in International Armed Conflict

The four Geneva Conventions and Protocol I provide measures of protection to women in international armed conflict both as

⁵² Pictet J.S., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 854.

⁵³ Id.

members of civilian population not taking part in hostilities and also as combatants, fallen into the hands of the enemy. The following paragraphs elaborate the various aspects of such protection.

3.1 Protection of Women as Members of Civilian Population

In an International armed conflict, women are among the persons protected by the Fourth Geneva Convention relative to the protection of civilian persons in time of war. Under general protection, they benefit from all the provisions which state the basic principle of humane treatment, including respect of life and physical and moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages. Furthermore, in the event of infractions committed in relation to the conflict, women have the right to trial by an independent and impartial court established by law respecting the generally recognized principles of judicial procedure.

In addition to the general protection from which all civilians benefit, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault".⁵⁴ According to Article 38 "pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned". Likewise, the Occupying Power shall not hinder the application of any preferential measures . . . which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.⁵⁵

Article 85 guarantees provision of separate sleeping quarters and sanitary conveniences for the use of women internees. The above guarantee is a case of a particular application of the

⁵⁴ Article 27 paragraph 2 of the Fourth Convention, and Articles 75 and 76 of Protocol I.

⁵⁵ Article 50 of the Fourth Convention.

general principle laid down in Article 27, paragraph 2, concerning the respect due to women's honour. For the same reasons, a woman internee shall not be searched except by a woman.⁵⁶

Further, in international armed conflict, women benefit from supplementary protection. Protocol I, Article 76(2) specifies that pregnant women and mothers having dependent infants who are arrested, detained for reasons related to the armed conflict, shall have their cases considered with the utmost priority. This is intended to make sure that pregnant women are released as rapidly as possible. In 1949, a similar provision was included in the Fourth Convention urging the Parties to conclude agreements during the course of hostilities for the release, repatriation, and return to places of residence or the accommodation in a neutral country of interned pregnant women.⁵⁷ This Article does not specify an obligation to reach such agreements but it does constitute an urgent recommendation based on experience.

The Fourth Convention in Article 89 provides that "expectant and nursing mothers in occupied territories shall be given additional food, in proportion to their physiological needs". According to Article 76(3) of Protocol I the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

3.2 Protection of Women as Members Taking Part in Hostilities

Like men, women who take part in hostilities, are protected by international humanitarian law from the moment they fall into

⁵⁶ Article 97 paragraph 4 of the Fourth Convention.

⁵⁷ Article 132 of the Fourth Convention.

the power of the enemy. It is essential for them to be members of the armed forces of a Party to the conflict if they are to be considered as combatants entitled to the status of prisoners of war, once captured. Apart from the general protection from which women benefit on the same basis as men, they enjoy special protection resulting from the principles previously stated.

The Third Geneva Convention contains various provisions based on the principle in Article 14, paragraph 2, stipulating that "women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men". Article 25 paragraph 4 states that in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them. Furthermore, under the terms of Article 29 paragraph 2 in any camps in which women prisoners of war are accommodated, separate conveniences must be provided for them. The question of sanitary conveniences is of the utmost importance for the maintenance of cleanliness and hygiene in camps. These conveniences should be so constructed as to preserve decency and cleanliness and must be sufficiently numerous. It goes without saying that the most elementary rules of decency require that separate conveniences should be provided for women prisoners of war.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.⁵⁸ Articles 97 and 108 provide in particular that women prisoners of war, undergoing disciplinary or penal punishments, respectively shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.⁵⁹

⁵⁸ Article 88 paragraph 2 of the Third Convention.

⁵⁹ See, also article 75(5) of Protocol I.

If women in real life are not always protected, as they should be, it is not due to the lack of a legal basis. Despite adoption of the Fourth Geneva Convention and the two Additional Protocols, women as members of the civilian population continue to be the first victims of indiscriminate attacks against civilians, since the men are usually engaged in the fighting. Article 27 of the Fourth Convention, which provides special protection for women against any attacks on their honour and in particular against rape, enforced prostitution or any form of indecent assault, did not prevent the rape of countless women in the conflict in Bangladesh in 1971 for example. This was one of the reasons why the authors of Protocols I considered it necessary to repeat in Article 76(1), the contents of the earlier Article.

International humanitarian law undoubtedly gives extensive protection to women. They benefit not only from all the provisions, which protect the victims of armed conflicts in general. In addition, among the approximately 560 Articles in the Geneva Conventions of 1949 and the Additional Protocols of 1977, about 40 are of specific concern to women.

4. Protection of Defenseless Persons in Non-International Armed Conflicts

In the absence of a general definition of non-international armed conflict, which may take very different forms, an attempt should be made to describe situations of this type in relation to the objective facts characterizing them.

First, a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory. It is therefore appropriate to raise the question whether all forms of violent opposition to a government, from simple localized

rioting to a general confrontation with all the characteristics of a war, can be considered as non-international armed conflicts.⁶⁰

The expression "armed conflict" gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces that are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State.⁶¹

Common Article 3 of the Conventions constitutes the keystone of humanitarian law applicable in non-international armed conflicts. Protocol II supplements, develops and amplifies Article 3 without changing the conditions of its application. Although common Article 3 lays down the fundamental principles of protection, difficulties of application have emerged in practice, and this brief set of rules has not always made it possible to deal adequately with urgent humanitarian needs. In the following sections, the protection of various kinds of defenceless persons in non-international armed conflict are detailed.

4.1 Protection of Wounded, Sick and Shipwrecked Persons

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by

⁶⁰ Pictet J.S., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. 1319.

⁶¹ *Ibid.*, p. 1320

their condition. There shall be no distinction among them founded on any grounds other than medical ones.⁶² Article 8 of Additional Protocol II envisages that whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

4.2 Protection of Medical and Religious Personnel

Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks, which are not compatible with their humanitarian mission. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.⁶³

4.3 Protection of Civilian Population

The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁶⁴

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter,

⁶² Article 7 of Additional Protocol II.

⁶³ Article 9 of Additional Protocol II.

⁶⁴ Article 13 of Additional Protocol II.

hygiene, health, safety and nutrition.⁶⁵

4.4 Protection of Children

Children shall be provided with the care and aid they require, and in particular: a) they shall receive education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.⁶⁶

4.5 Protection of Women

In a non-international armed conflict, women are protected by the fundamental guarantees governing the treatment of persons not taking part in hostilities, which are contained in Article 3, common to all four Conventions. However, this Article does not provide special protection for women. Protocol II completes and develops this provision. Its Article 4 expressly forbids "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form

⁶⁵ Article 17 of Additional Protocol II.

⁶⁶ Article 4(3) of Additional Protocol II.

of indecent assault". Article 5 paragraph 2(a) specifies that women, who are arrested, detained or interned "shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when members of a family are accommodated together". Death penalty shall not be carried out on mothers of young children and pregnant women.⁶⁷ Protocol 11 also specifies that women arrested, detained or interned shall be held in quarters separated from those of men and shall be under the immediate supervision of women except when families are united.⁶⁸

5. Conclusion

The state of war and armed conflict justifies the recourse to violence against an active adversary, with the aim of destroying or weakening its military potential. On this basis, it can be said that reason, cold and amoral, leads to the respect of those unable to do any harm. The motive for protecting wounded, sick, shipwrecked persons and the civilians is however to be found in the feeling of humanity. While reason is the basis of a passive attitude as demonstrated in the respect shown to these persons, the active protection which modern law grants them, has its origin in pity, an emotion which, more than a century ago, overwhelmed the solitary witness of the suffering at the battle of Solferino.

The question of the protection of victims of armed conflicts has gained through international humanitarian law, a great significance, marked by two salient characteristics: the prohibition of reprisals, and the assistance provided by neutral States. On the one hand, breaches of the provisions of this law may not be justified by the fact that they are made in response to illicit acts of an identical nature. On the other hand, the neutrality of States not parties to the conflict is in no way compromised by such relief actions as they may undertake.

⁶⁷ Article 6 paragraph 4 of Additional Protocol II.

⁶⁸ Article 5 paragraph 2(a) of Additional Protocol II.

This is in fact no more then logical since the victims should be protected by the enemy as well as by the State on which they depend, and no reasonable argument can stem from a neutrality which could be invoked to compel neutral States to abstain from such protection.

The four Geneva Conventions of 1949 along with the two Protocols of 1977 have gone a long way in alleviating the sufferings of defenseless persons and protecting them in both international and non-international armed conflicts. The machinery available within the four corners of its provisions can ensure justice and humanity where previously injustice and human sufferings existed, but much depends upon the will of the state parties to abide by and implement the norms set in the Conventions and the Protocols.