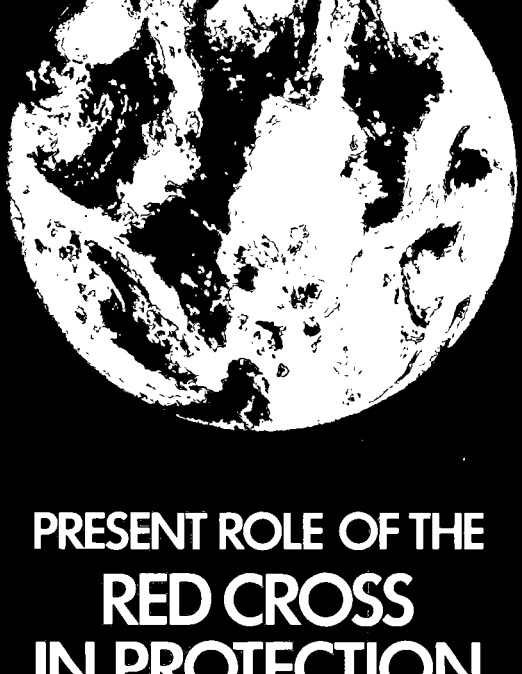

PRESENT ROLE OF THE RED CROSS IN PROTECTION

REAPPRAISAL
OF THE ROLE OF THE RED CROSS

Present Role of the Red Cross in Protection *is one of a series of background papers being published as part of a Reappraisal of the Role of the Red Cross. Covering all parts of the Red Cross movement and all their activities, the Reappraisal was begun in 1973 under the sponsorship of a Joint Committee composed of representatives of the various Red Cross bodies.*

The background papers were designed to explain what Red Cross is and does. This paper, covering the present role of Red Cross in the protection of victims of conflict, has been prepared for the Study Director by David P. Forsythe. The views expressed are those of the author and are not necessarily shared by members of the Joint Committee. The original language of the paper was English.

A final report by the Study Director, containing the overall conclusions of the Reappraisal, will be submitted to the Joint Committee later this year. The final report will list all the donors who have made the Reappraisal possible. Here, however, it is fitting to express our appreciation to the Volkswagen Foundation, whose grant was directed towards specific parts of the Reappraisal, including this study of Red Cross protection.

D. D. TANSLEY
Study Director
Joint Committee for the
Reappraisal of the
Role of the Red Cross

Geneva
February, 1975

A Note on the Author

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For the past three years, Dr. Forsythe has studied the work of the International Committee of the Red Cross (ICRC) in protection and has accompanied several ICRC field missions. He is at work on a book based on his studies of the ICRC. Among his publications is "The 1974 Diplomatic Conference on Humanitarian Law", American Journal of International Law, *January, 1975.*

Additional copies in English, French, or Spanish may be purchased from the Henry Dunant Institute, 114, rue de Lausanne,
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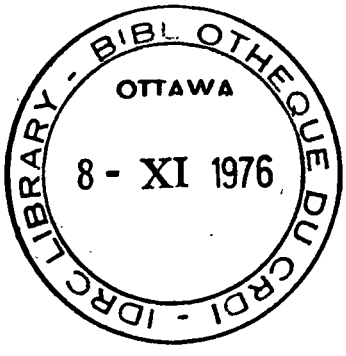
Present Role of the Red Cross in Protection

by David P. Forsythe

Joint Committee for the Reappraisal of the Role of the Red Cross

Background Paper No. 1



Contents

The Red Cross

The Red Cross is a non-political, non-religious, world-wide movement based on the fundamental principles of humanitarianism, neutrality and impartiality. The originator of the Red Cross was a Swiss businessman, Henry Dunant, who witnessed the carnage of the Battle of Solferino in the War of the Italian Succession in 1859. In a book describing his experiences, Dunant called for the formation of national relief societies to supplement the then inadequate army medical services and for an international convention to ensure the protection of the sick and wounded on the battlefield. In 1863, a five-man committee was set up in Geneva, with Dunant as one of its members, to give practical effect to his ideas.

Since that time, the Red Cross idea has spread across the world. The movement today assumes various organisational forms:

1. **The International Committee of the Red Cross** — an independent, Geneva-based body, composed of Swiss citizens, concerned mainly with victims of conflict. The Committee traces its origin to the 1863 Geneva committee.

2. **The National Societies** — which are found at present in 122 countries. These Societies share the principles and ideals of the Red Cross but conduct programmes and activities directed towards the particular humanitarian needs of their own countries. Many of the National Societies were initially concerned with war-wounded. Now their activities are, for the most part, in disaster relief, health, and welfare. While most of them are referred to as Red Cross Societies, those in some Moslem countries are referred to as Red Crescent Societies and, in Iran, as the Red Lion and Sun Society.

3. **The League of Red Cross Societies** — the federation of the 122 National Societies, with its secretariat in Geneva. Created after World War I, the League acts as the international spokesman of the National Societies, assists the Societies in their development, and coordinates such activities as international disaster relief.

These three action agencies of Red Cross are referred to collectively as the "International Red Cross". They meet as a body every four years, together with the governments that are signatory to the Geneva Conventions, to form the International Conference of the Red Cross: the supreme deliberative body of the International Red Cross. Between sessions of the Conference, coordination and harmony between the League and the International Committee are the duty of the Standing Commission of the International Red Cross.

I. Setting for Red Cross Protection

The International Red Cross has long identified one of its main functions as the protection of individuals. This function was first performed in the context of armed conflict. It has gradually been extended to other situations of conflict as well.

International Red Cross Structure

Red Cross protection occurs in a structural setting of great complexity. The ICRC was the undisputed leader of the international Red Cross movement from about 1860 until just after World War I. At that time, the ICRC was joined not only by a growing number of national Red Cross societies, but also by the new federation of these societies, the League of Red Cross Societies. Since then, the Red Cross movement has been loosely organised. Agencies within the movement are independent of one another, and there is no central authority.

Red Cross protection is executed principally by the ICRC, which is formally and financially independent. The ICRC, all-Swiss in composition, is a private corporation under Swiss law. It is recognised as a distinct entity in public international law. It has its own governing rules, called statutes, which say that the ICRC " shall be an independent organisation having its own statutes..." Those statutes may only be amended by the ICRC. While those statutes pledge the ICRC " to accept the mandates entrusted to it by the International Conference of the Red Cross ",[1] the last 110 years of Red Cross history indicate that the ICRC is independent from the rest of the movement. The ICRC decides for itself what it will and will not attempt to do.

While independent, the ICRC is not isolated from the other Red Cross agencies. The ICRC has always been, and still is, responsible for recognising new National Societies. Recognition is one of the few clear grants of authority that one Red Cross agency can exercise over another. After recognition, however, the ICRC and the National Societies tend to go their own way. (The subject of withdrawal of recognition has been recently approved in principle by the International Red Cross Conference but has never been practised.)

Membership of National Societies in the League usually follows, but is separate from, recognition by the ICRC. The League does not have full authority over the National Societies, and its own activities are not fully integrated with the ICRC.

International Red Cross Conferences are prepared by a Standing Commission composed of representatives of the ICRC and the League and people elected by the previous Conference. The Commission also represents the Conference in the interim between sessions. Neither the Conference nor the Commission is an action agency in the administrative sense, nor does either have much influence on the actions of the ICRC, the League, and National Societies.

When, therefore, it is reported that " the International Red Cross " visited prisoners of war or provided emergency relief, what is usually meant is that the ICRC, the League, or one or more National Societies did something. This looseness of organisation permits flexibility of action, and also gives rise to problems in coordination. But the fact remains that the Red Cross movement rarely takes action as one entity.

Functions

Despite this structural complexity, the agencies of the Red Cross movement agree on two basic functions—protection of victims of conflict and assistance to people in need. This movement-wide agreement is abstract and frequently dissolves at the level of specific action. With respect to the protection function, there are three areas of unclear definition: what is the proper focus of Red Cross protection, what is the boundary between protection and assistance, which agency in the Red Cross movement is to be the primary actor in a given situation.

First, the confusion about the focus of Red Cross protection concerns the proper recipients. What is the proper definition of a prisoner of war; does a guerrilla fighter not in uniform so qualify? Should the Red Cross concern itself with political prisoners? Should the Red Cross be involved in hijackings or kidnappings? Should the Red Cross concern itself with individuals in a situation that might be either a civil war or an internal disturbance, depending upon definitions and points of view, as in Northern Ireland or Kurdish Iraq? Therefore exactly *who* is to be protected by the Red Cross—which individual in what situation—is frequently controversial.

Second, the boundary between Red Cross protection and assistance may be more artificial than real. When a Red Cross agency helps the wounded in an armed conflict, is that protection or assistance? When the ICRC arranges family unification and facilitates international movement of people for education in occupied territory or in the aftermath of war, is that protection or assistance? This blurring of functions sometimes has no practical consequence.

In the Middle East since 1967, there has been no controversy over the fact that the ICRC acted on behalf of the Red Cross movement in trying to help non-Israelis under Israeli control.

Third, however, the overlap between functional boundaries can develop into confusion over which Red Cross agency is to be the *primary* actor in a situation. This problem within the Red Cross movement centres upon who is to do what in assistance in conflicts.

The ICRC has developed a special position with regard to conflict situations, concerning both protection and assistance. This position, developed on the basis of pragmatic concern for the victims of conflict, is reflected in the ICRC statutes in terms of a " special role ", defined in part as follows:

> to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of these Conventions and to take cognisance of any complaints regarding alleged breaches of the humanitarian Conventions;
>
> to take action in its capacity as a neutral institution, especially in case of war, civil war or internal strife; to endeavour to ensure at all times that the military and civilian victims of such conflicts and of their direct results receive protection and assistance, and to serve, in humanitarian matters, as an intermediary between the parties;
>
> to work for the continual improvement of humanitarian law and for the better understanding and diffusion of the Geneva Conventions and to prepare for their possible extension...

Thus the special position of the ICRC pertains to conflict situations, covers protection and assistance, and involves three basic roles: 1) development and 2) application of international law, and 3) taking non-legal actions—that is, actions without a precise legal base.

The ICRC's special position is widely accepted within the Red Cross movement, although tasks performed by the ICRC are not well understood. The position is recognised not only in resolutions of the International Conference but also in the Geneva Conventions and in several resolutions by the United Nations.

This widespread consensus in support of the ICRC's special position in relation to conflict situations is based on three points:

1) The ICRC, composed entirely of Swiss members and based in neutral Switzerland, has the best capacity for maintaining a neutral image necessary for humanitarian protection work.

2) The National Red Cross Societies are too closely identified with their governments to be effective intermediaries for international humanitarian protection.

3) The League is too susceptible to political pressures to be an adequate agency of protection.

Notwithstanding acceptance of this conventional wisdom historically, at present there appears to be a growing conviction that certain protection tasks could be performed by other Red Cross agencies as well as by the ICRC.

The consensus in support of a special position for the ICRC with regard to conflicts relates mainly to protection. There remains some confusion as to who is the primary Red Cross actor for assistance in conflict situations. Traditionally the Red Cross movement has tried to distinguish between assistance in " man-made " and natural disasters, leaving the former to the ICRC and the latter to the League and National Societies.

But who is the primary Red Cross actor in a " man-made " disaster that is not viewed as an armed conflict by all participants? Or when a natural disaster like a typhoon occurs during an armed conflict? And at which point in an undeclared armed conflict should a particular Red Cross agency begin and end its action? Controversy over who is the primary Red Cross actor can arise especially where assistance is required in a situation of conflict which is not clearly defined as war.

In sum, the International Red Cross agrees on the need to exercise the two primary functions of humanitarian protection and assistance, but there can be disagreement as to focus, division of function, and division of labour. Nonetheless, the ICRC has clearly been the main Red Cross agency engaged in protection, and this special position has been widely accepted.

The Nature of Red Cross Protection

There have been few attempts to specify the nature of Red Cross protection. For introductory purposes, understanding of Red Cross protection may be facilitated by examining what Red Cross agencies have done to help individuals, excluding help that is considered assistance (such as material and medical aid).

Red Cross protection, oriented towards action to help the individual in a conflict situation, basically entails the three roles noted earlier:

1) helping to develop international humanitarian law,

2) helping to apply that law, and

3) engaging in *ad hoc* diplomacy on the basis of humanitarian motivation.

Each role has a direct and an indirect aspect. The direct aspect has been practised almost exclusively by the ICRC. The indirect aspect has, in some cases, been practised by other Red Cross agencies as well.

Thus the ICRC has helped directly to develop humanitarian law for armed conflicts by playing host to preparatory meetings and drafting articles leading to the formal adoption of the Geneva Conventions. It has directly helped to supervise that law by serving as a humanitarian substitute for a Protecting Power (which is a state or international organisation that tries to assist conflicting parties in implementing the law). And it has directly engaged in *ad hoc* diplomacy in an effort to protect political prisoners, hostages, and others.

Indirectly, protection is exemplified by the work of a Red Cross agency in lobbying for the adoption of a particular article in the Geneva Conventions, in teaching the law in order to promote its eventual application, and in providing logistical support for the direct protection of hostages or detainees.

The present paper deals with the substance of what is done directly or indirectly under the name of Red Cross protection in these three roles. The

specific nature of Red Cross protection should thus emerge from this examination of various tasks at present being performed within these roles.

Before examining this substance, however, a word is in order about the difference between Red Cross protection and the protection offered to individuals in conflict situations by other agents in world affairs. Generally speaking, the difference is not very great. (This applies only to humanitarian protection that is not characterised by force; forceful "humanitarian" intervention by a state in the affairs of another state is, of course, quite far removed from what the ICRC does.) There are a number of agents in world affairs that can provide a neutral presence to ensure that a party to a conflict does not harm a defenceless person. This was seen in the 1974 armed conflict in Cyprus, where United Nations troops or a British diplomat, as well as the ICRC, constituted the international presence that effectively protected individuals. Or, to take another example, the substance of protection offered by the United Nations High Commissioner for Refugees is not very different from the protection offered by the ICRC; the difference lies in the legal status of the people protected.

What is common to these situations of protection is the presence of a disinterested party that seeks to ensure that unjustified physical or psychological harm is not done to individuals who are, for whatever reason, non-combatants at the time of need. Thus one form of Red Cross protection is the presence of a Red Cross agent—in settings ranging from a legal meeting to a prison.

While the substance of Red Cross protection may be the same as protection practised by other actors, the Red Cross symbol has become associated with particular situations and characteristics, three of which are:

— *Victims of armed conflict.* Red Cross protection has been associated primarily with prisoners of war and other people wounded or detained in a situation of armed conflict. By comparison, the UN High Commissioner is associated with international refugees, from armed conflict and other man-made situations. Another important difference between the two agencies is that the High Commissioner's activity is limited by statutory law, whereas Red Cross agencies seek a broader field of operation than that permitted under the Geneva Conventions.

— *Absence of other protecting agents.* The Red Cross, principally through the ICRC, seeks to offer humanitarian protection for victims of conflict in the absence of adequate protection from other sources even if the concern of the Red Cross extends beyond the Conventions.

— *Discretion.* Red Cross protection has also had a distinctive tone and character. Red Cross efforts to protect an individual are at present expected to be discreet rather than publicised, impeccably responsible rather than irresponsible, within the bounds of the expected rather than revolutionary.

The following sections examine the substance of Red Cross protection as it is practised in the mid-1970s, focussing on ICRC experience in the three roles heretofore identified: the development of law, the application of law, and the practice of *ad hoc* diplomacy.

II. Development of Law

Since 1864, the ICRC has defined one of its protection roles as promoting the development and codification of international law pertaining to victims of armed conflicts. The ICRC, and especially its widely recognised legal scholar, Jean Pictet, has regarded this subject matter as a distinct part of the law of armed conflict known as international humanitarian law. Some legal scholars, however, do not agree that there is anything called humanitarian law that is qualitatively different from the rest of the body of the laws of armed conflict. Without now going directly into this controversy, three aspects of the role of the ICRC and the development of law for victims of armed conflict can be noted:

1) The ICRC has been the primary mover in the development of that part of the law of armed conflict called the Geneva Tradition.

2) There has been a constant, if slow, expansion of the subject matter regulated under this Tradition.

3) Whatever the differences in the past between the Geneva Tradition and other sections of the law of armed conflict, in the 1970s law concerned with victims is expanding in such a way that the Geneva Tradition and humanitarian law are being recognised as an ever larger part of the law of armed conflict and, therefore, almost, but not quite, synonymous with it.

The Geneva Tradition

The ICRC is at present accepted by almost all governments as an international secretariat for the development of international law pertaining to

victims of armed conflict. The ICRC has done for the Geneva Tradition what the International Law Commission is supposed to do for all of international public law: work continuously to keep it attuned to present realities. This position evolved as the ICRC urged states to adopt, and helped them in adopting, a series of international legal agreements pertaining to the individual in an armed conflict. Because of the role of the ICRC in the drafting of these conventions, these agreements have become known as the Geneva Tradition of international law. Included in this grouping are the Geneva Conventions of 1864, 1906, 1929, and 1949. As this paper is being written, efforts are underway, with the help of the ICRC, to produce more law.

One of the other major sources of the law of armed conflict is the Hague Tradition. The two traditions are not entirely separate as far as the subject matter is concerned. The difference is only relative. As noted, the Geneva Tradition is largely concerned with war victims, such as the wounded and the sick, both civilian and military. In contrast, the Hague Tradition is more concerned with the interests of states than with war victims. Thus states have held a series of conferences and adopted conventions largely concerned with such things as rights and duties of neutral states in time of war, without a central role for the ICRC. But the Hague Tradition is also concerned with such matters as aerial bombardment of civilians and permissible weapons, subjects that have humanitarian aspects inasmuch as they affect the legal and factual position of individual victims of warfare. This overlapping in the motivation behind both the Hague and Geneva Traditions has been noted by certain legal scholars. Nevertheless, two traditions have emerged, depending in part on the locale of diplomatic conferences and on the role of the ICRC as catalyst and drafter.

Geneva Tradition Expanded

The subjects regulated under the Geneva Tradition of international law have expanded over the last century. In 1864, the only subject covered in law was army wounded; they were to be evacuated from the field of battle at the earliest opportunity, those employing the Red Cross symbol in trying to protect the wounded from further harm were not to be fired upon, and other practices were to be observed. In 1906 the law was expanded to include the sick as well as the wounded. Whereas it took forty years to achieve this slight increase in legal protection, it then took twenty-three years to write extensive protection for prisoners of war into law; this occurred in 1929. In 1949, after World War II had interrupted ICRC plans for a conference, a major advance in legal protection occurred. Written into the law then were extensions of protection to the sick and wounded, from field to naval personnel, and to civilians in war zones and occupied territory. Some protection was written for civil wars in addition to fully international wars. Further extensions of legal regulation are now being discussed, with the possibility of providing detailed regulation for civil wars, wars of national self-determination, and other conflicts.

In sum, through its history the ICRC has been quite successful in helping to enlarge the body of law pertaining to the individual in situations of armed conflict. Of course there is a gap between law on the books and law applied, a subject to be taken up subsequently. Furthermore the historically

impressive progress in writing humane laws of armed conflict and persuading states to accept them has been accompanied, and often preceded by, the horrors of warfare and other armed strife. Victims of conflict in Korea, the Indian sub-continent, the Middle East, Algeria, Viet Nam, the Congo, Nigeria, and other scenes of mass violence would be less interested (if aware at all) in this record of humanitarian law than legal scholars.

Nevertheless, the writing of law is a precondition for the application of law (though not necessarily for the application of humanitarian principles of behaviour). That some 70,000 Pakistani prisoners of war were repatriated in 1974 is in part the result of legal development efforts in the preceding fifty years.

Geneva Tradition at Present

The subjects regulated under the law connected to the ICRC have by now expanded to such proportions that the Geneva Tradition and the Hague Tradition have been merged to a considerable extent. This arises partly from the fact that since there is no agency responsible for bringing the Hague Tradition up to date, the ICRC has assumed responsibility for raising proposals and drafting changes for the large part of the Hague Tradition relating to war victims, as well as for the Geneva Tradition. Moreover, principles from the Nuremburg Tradition of international law, establishing individual responsibility for violations of the Hague and Geneva norms, are also being written into the projected law now drafted by the ICRC.[3] Thus the ICRC has become a drafting centre not only for the Geneva Tradition but for most law of war. This expansionary trend was reflected in the Diplomatic Conference on Humanitarian Law in Armed Conflict in the mid-1970s and in two draft protocols to the 1949 Geneva Conventions presented to the conferences by the ICRC.[4] This trend was also reflected in a meeting on weapons, held in Lucerne between the 1974 and 1975 sessions of the Diplomatic Conference, for which the ICRC was the official host.

ICRC Legal Tactics

The precise tactics of the ICRC in assisting the development of law are varied. It plays host to the preparatory meetings. It may serve as the agent that crystallises an emerging consensus into a draft article, as it has recently done with regard to the subject of whether reservations may be added to ratifications. In the absence of consensus, the ICRC may call for further study, as it has recently done with regard to the relation between penal law and humanitarian law. On some subjects the ICRC may simply yield to the opinion of states, as it did in the early 1970s with regard to its attempt to insert a prohibition against reprisals against protected persons into the 1974 protocols.

Rather than engaging in public debate and direct argument, the ICRC tends to use the wording of draft articles and its commentary to try to influence other parties engaged in the legislative process. Thus historically the ICRC has tended to adopt a cautious role in the process, being less of an overt lobbyist and more a drafting secretariat. Of course, some discussions take place between ICRC officials and governmental officials (usually from Western governments) during a diplomatic conference and also at the United Nations.

Legal Issues Excluded

In closing this discussion on the development of law, it is appropriate to note what the ICRC has *not* considered to be a proper domain for its legal talents. It is implicit in the foregoing discussion that the ICRC has concentrated its legal development work only on the law of armed conflict. It has avoided two other legal subject areas: 1) the law *of* peace, and 2) the law *in* peace.

As to the first exclusion, the ICRC has largely avoided all legal questions concerned with the origins of war, which are known as *jus ad bellum*, law for the start of war. Such matters as defining aggression and self-defence have been regarded as outside the Red Cross concern for the individual in need whatever the circumstances. However much the Red Cross movement may be philosophically dedicated to peace, the ICRC has been interested only in law *in* war. This position stems from Red Cross principles stressing impartiality and neutrality.

Furthermore, the ICRC has avoided legal questions touching upon legal rights of individuals in a situation falling short of armed conflict. If a situation cannot be characterised as an armed conflict, the ICRC has not historically shown a *legal* interest. This position rests on the principle of avoiding entanglement in matters of domestic jurisdiction. But this is not to say that it has not shown a *diplomatic* interest in human rights or played a role in assistance or other operations. The avoidance by the ICRC both of *jus ad bellum* and legal aspects of human rights in time of peace has been a consciously chosen path by the ICRC, fully explored in the writings of Jean Pictet.[5] There is little controversy within the ICRC on this point, and there has been little demand outside the ICRC for adoption of a different legal approach. It is possible, however, that the 1975 Diplomatic Conference could lead the ICRC into a posture that some might regard as plunging into the controversy of *jus ad bellum*. It is also possible that the ICRC diplomatic concern with political prisoners might lead it into increased legal interest in human rights in situations short of armed conflict. These points will be examined in more detail later.

III. Applied Protection Under Law

The second role of the Red Cross in protection is to facilitate application of humanitarian law. Since 1949, this role has been linked to the four Geneva Conventions of that year. It is highly probable that these four Conventions will remain the statutory basis for Red Cross protection for at least the rest of the 1970s. Under optimum conditions, any new law now in the process of legislation would not be binding before about 1980. Given lack of progress at the 1974 Diplomatic Conference, it may be more reasonable to assume an even later date for any change from the current law.

Key Factors in Analysis

To fully understand the linkage between Red Cross protection and the Geneva Conventions, it is necessary to keep in mind three factors:

1) the relationship between factual situations and legal labels;

2) types of factual situations characterised by violence;

3) the protecting power system created by the 1949 Conventions.

First, facts and law differ, and one of the major obstacles to Red Cross protection in international relations is to obtain from a government the appropriate legal label for the existing factual situation. Governments (and non-governmental parties) have all sorts of reasons for making a legal argument that does not correspond to the factual situation, or at least not to the ICRC's view of the appropriate legal label.

Second, it is important to note the differences among domestic instability (internal troubles and tensions), non-international armed conflicts, international armed conflict, and mixtures or hybrid cases of these three categories of conflict.

Third, under the protecting power system created in 1949 for the supervision of the Conventions, a Protecting Power or its substitute has full rights only in an international armed conflict, limited rights in a non-international armed conflict, and no guaranteed legal rights in domestic instability.

The First Two Conventions and Indirect Protection

The First and Second Conventions, which are concerned with the protection and care of wounded, sick, and shipwrecked members of armed forces, are largely left to the signatories for implementation. While the subject matter of the first two Conventions in practice calls less for third-party activity than the Third and Fourth Conventions, there is nonetheless provision for third-party supervision of the implementation of the law. However, since 1949, third parties (sometimes the ICRC) have seldom played independent roles under the First and Second Conventions. The evacuation of the wounded and dead, the return of bodies, and the creation of neutral zones have simply occurred when the belligerents desired. The ICRC has been useful in these situations only as a sort of agent for the conflicting parties.

Situations in which the ICRC might serve as a counterforce to a belligerent are few under the First and Second Conventions. In certain cases the ICRC is entitled to receive complaints about violation of the Conventions, and such complaints do occur. In the Nigerian civil war, for example, the Biafran authorities complained to the ICRC many times that the Federal Military Government of Nigeria was responsible for the deliberate, repeated, and systematic bombing of installations marked with the Red Cross symbol. Likewise, the government of the People's Republic of Viet Nam complained to the ICRC that the American government was responsible for similar acts in North Viet Nam. In such cases, the First and Second Geneva Conventions authorise the ICRC or a Protecting Power to transmit the allegations to the appropriate party but to do no more. No third party, Red Cross or otherwise, is legally permitted to carry out an inspection of the sites in question or in any other way to compel the defendant authorities to respond to the complaints. Beyond this weak role for a third party as the conveyor of messages, there is no third-party supervision on behalf of the First and Second Conventions.

Therefore indirect Red Cross protection—through dissemination and education—is particularly important to implementation of the two Conventions. Primary and legal responsibility for educational activities in support of the Conventions is lodged with the signatory states. Yet while the 1949 Conventions are among the most widely accepted pieces of international law ever drafted, being ratified or adhered to by almost all states throughout the world, Red Cross agencies, which have been largely responsible for this development, have not carried out a systematic check to see what is being taught. Questionnaires are distributed to states by the ICRC from time to time. The results, which are fragmentary, are presented to the Red Cross Conference every four years, along with the figures on ICRC publications about the Conventions. Given the poor response of states and the absence of more extensive follow-up by the Red Cross, efforts to disseminate information and teach about the Conventions appear to be weak.

Beyond dissemination and education, there is little role of any guaranteed impact for applied Red Cross protection in relation to the First and Second Conventions. The application of the law is left to the armed forces, who may

choose to work with National Societies. With regard to the Third and Fourth Conventions, however, the ICRC frequently has important direct roles in the protection of victims of armed conflict.

The Third Convention

The Third Geneva Convention, pertaining to prisoners of war, has been important in both a humanitarian and political sense many times since it was drafted in 1949. Of course the question of humanitarian treatment of prisoners war goes back much further—in modern international law at least seventy years and in philosophical discourse centuries earlier.

The ICRC has had a major role in relation to the Third Convention on many recent occasions. Indeed, to the extent that the ICRC is known at all, it is largely associated with prisoners of war.

Protecting Powers and Types of Conflicts. The Geneva Conventions of 1949 provide for a system of supervision which some legal scholars term the Protecting Power system. In an international armed conflict, the conflicting parties are to appoint another state to assist them in securing their legal rights and in upholding their legal duties. The ICRC, or " any other impartial humanitarian organisation " (Third Convention, Article 9), may also be appointed. " If protection cannot be arranged accordingly, the Detaining Power (of prisoners of war) shall request or *shall accept...* the *offer* of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by the Protecting Powers under the present Convention." (Third Convention, Article 10, emphasis added). Thus in an international armed conflict, the conflicting parties have a legal duty to accept the offer of the ICRC to help in applying legal protection to prisoners of war if another entity has not been appointed as Protecting Power.

This provision applies to international armed conflict only. If the factual situation is legally characterised as an armed conflict not of an international nature, then only Common Article 3 applies, not the entire Third Convention. This article includes the statement, " An impartial humanitarian body, such as the International Committee of the Red Cross, may *offer* its services to the Parties to the conflict " (emphasis added). Thus in a civil war there is no legal duty on the part of conflicting parties to accept the ICRC's offer to help in protecting prisoners of war; the ICRC is simply authorised to offer.

And if there is a situation of violence that is legally characterised as something short of both civil and international war, no part of the law of armed conflict applies. Any attempted protection by the ICRC or other Red Cross agency in domestic instability is without precise legal authorisation and falls under the category of *ad hoc* diplomacy. (Some general law in support of ICRC *offers* to help apply protection in those situations not legally characterised as armed conflicts is discussed in the section on *ad hoc diplomacy*, page 30).

Although applied legal protection in situations legally called international armed conflicts under the Third Convention are supposed to entail third-party supervision, in no international armed conflict since 1949, excepting the Suez affair of 1956 and India's take-over of Goa in 1961, has the Protecting Power system of supervision been implemented through the appointment of states as

full protecting powers. For nearly a quarter of a century now, the ICRC has become a partial substitute for a protecting state.[6] No other " impartial humanitarian body " has ever supervised the application of the Third Convention. It should be added that at times no supervisory system whatever has been created, regardless of legal obligation, and that since 1949 there have been relatively few situations of violence legally characterised as international armed conflict by all parties involved.

Although in most cases consensus in support of legally labelling a violent situation an international armed conflict has not been achieved, there are notable exceptions. In the Suez affair of 1956, the Indochina war since 1965, the Indo-Pakistan wars of 1965 and 1971, the Arab-Israeli wars of 1967 and 1973, and the 1969 war between El Salvador and Honduras, all parties agreed that the situation should be called an international armed conflict. In all these situations the ICRC served as a substitute for the Protecting Power for humanitarian tasks, supervising the implementation of the Third Convention with regard to treatment of prisoners of war. However, the ICRC was not permitted to assume that role by North Viet Nam because of that state's interpretation of the meaning of its reservation to the Third Convention. The key to understanding Red Cross protection in these situations is the extent of consensus on applying to them the legal label of international armed conflict.

The appointment of states as Protecting Powers in situations of consensus does not necessarily rule out a role for the ICRC. In the 1971 war for Bangladesh, Switzerland provided " good offices " to the parties, but this did not prevent the ICRC from supervising the Third Convention. Again, the appointment of Protecting Powers by England and France in the Suez situation in 1956 did not prevent the ICRC from playing its usual role.

But one of the major trends in international relations is that violence does not occur so much any more in the traditional form of clear international war. Violence is increasingly found in situations that are 1) factually a mixture of international and civil wars, 2) some form of civil war, 3) a mixture of civil war and domestic instability, or 4) pure domestic instability. In such situations, the conflicting parties are not obliged to accept an offer by the ICRC to supervise the application of the Third Convention.

The Algerian war is a case in point. Initially the French labelled the situation a matter of French domestic jurisdiction. This unilateral determination was adhered to until 1956, when the Guy Mollet government referred to the situation as a civil war. In the latter stages of the war, about 1960-62, the French acted largely as if it were an international armed conflict, but without officially saying so. On the other hand, the Algerian authorities at the outset of violence argued that the violence constituted an international armed conflict. When the occasion arose, however, the Algerian authorities refused to allow the ICRC full access to French prisoners of war held by them, thereby acting contrary to their legal claim. Subsequently, the Algerians indicated their support of Common Article 3.

In this situation of violence between the early 1950s and the end of the Algerian conflict in 1962, the legal definition of the type of violence was not agreed upon. Therefore offers of the ICRC to help to ensure the well-being of prisoners of war on both sides were not automatically accepted. Nevertheless the ICRC came to play an increasing role, especially on the French side. Because Algerians were holding French personnel, and because of domestic and

foreign criticism of the war and the way the French were fighting it, French governments eventually allowed the ICRC not only to inspect places of detention in Algeria, but also to visit Algerians detained in France. As for the Algerian authorities, they permitted an occasional ICRC visit to certain captured French personnel when they deemed such a visit in keeping with their needs—for example, when they wished to use an ICRC visit to prove that they were holding the French prisoners of war on Algerian soil rather than in another state. The Algerian authorities also cooperated with the ICRC in the repatriation of prisoners of war.

The point is that the role of the ICRC was not guaranteed in law because of the legal controversy surrounding the nature of the conflict. The ICRC came to play a role in protecting detained military personnel according to the needs of the parties to the conflict—principally public relations needs to create a certain image. Because of such needs, the ICRC was permitted to have a rather complete role on the French side and a limited role on the Algerian side.

Nor in many other situations of violence since 1949 involving prisoners of war has the ICRC been able to use the argument that its offer to protect individuals should be accepted automatically because of the legal wording of the Third Convention. However, even in situations falling short of agreed international armed conflict, nothing prevents the parties from accepting the Geneva Conventions as legally binding. This occurred in the Nigerian civil war of 1967-70, when the ICRC provided protection to prisoners of war on both sides in keeping with the Third Convention, largely without significant problems.[7] Also in the civil war in the Congo, 1960-64, which had a number of international overtones, the various parties agreed to apply the Third Convention and the ICRC played a role in securing partial implementation.

To sum up the general pattern: The ICRC offer of protection to individuals falling within the scope of the Third Convention has never been accepted under legal obligation to do so, but on many occasions the ICRC offer is accepted voluntarily by one or more parties in the conflict, in which case the Red Cross protection occurs largely by analogy to the Third Convention unless the parties agree to make the Convention legally binding on an *ad hoc* basis. Furthermore, in some situations a party in the violence will permit the ICRC to check on the conditions of detained individuals as long as the ICRC makes no reference to the Geneva Conventions and to the overall nature of the conflict. This occurs when a party to the conflict feels a need to have neutral inspection of detention conditions but does not wish to categorise the situation as legally a civil or international war. This was the case with the British government with regard to violence in Northern Ireland: the government voluntarily permitted the ICRC to inspect detention conditions but continued to insist that the situation was a matter of domestic instability, not civil war. Thus the ICRC role fell under *ad hoc* diplomacy.

Keeping in mind the trend towards contemporary violence that frequently falls short of traditional international armed conflict, a pattern of successes and problems in the record of Red Cross protection relative to the Third Convention can here be identified:

Successful Red Cross Supervision. The Red Cross has been somewhat successful in protecting military personnel *hors de combat.* First of all, in many of the violent situations since 1949, one or more parties have agreed that either the Third Convention or Common Article 3 (establishing general principles of

humanitarian behaviour in civil wars) should apply. On a number of occasions the ICRC has taken the initiative to suggest to the parties that either the entire four Conventions or Common Article 3 applied, and in many cases the parties have given verbal or written assurances to the ICRC that they would accept legal obligations, ranging from minimal to extensive. Since this is a frequent first step in securing Red Cross protection for prisoners of war, the initiative of the ICRC is quite important. Thus a written ICRC initiative in 1965 resulted in an agreement by the United States to categorise the violence in Indochina officially as an international armed conflict. The United States government thereby had to deal with its legal obligations towards prisoners of war in that situation. And since the Third Convention provides that the capturing power retains responsibility over prisoners of war no matter in whose care they are placed, the positive U.S. response to the ICRC initiative meant, in law and in fact, that the U.S. would take up the subject of treatment of prisoners of war with its ally in Saigon.

There have also been failures in this first stage of securing general agreement on the applicability of some part of the law of armed conflict. In the Korean war, which occurred at a time when none of the parties was legally obligated under any of the 1949 Geneva Conventions (ratifications had not yet taken effect), the ICRC made several requests related to behaviour towards prisoners of war held in North Korea, but neither China nor North Korea ever agreed that it had legal obligations towards prisoners of war. But by and large there has been some success in obtaining an initial agreement that some law applies, especially in international armed conflict but also civil wars.

The ICRC has also usually managed to gain access to prisoners of war in the wake of the initial agreement. The Algerian failure to follow up fully on its verbal endorsement of the Geneva Conventions has been noted. The only other case where a party has endorsed the law but failed to permit ICRC access was that of North Viet Nam. The North Vietnamese government used arguments that by their logic characterised the violence as international armed conflict, namely referring to United States forces as aggressors in Indochina and to the authorities in Saigon as colonial puppets. It also accused its opponents of directly violating various aspects of the Geneva Conventions. Yet the North Vietnamese government never permitted the ICRC to have access to prisoners of war during the American phase of the war (1954-1973).

In this regard it is interesting to note that in the French phase of the Indochina war (1947-1954), after an initial ICRC visit to French prisoners of war held by Hanoi, the government of Ho Chi-minh permitted no further ICRC visits.

As the violence in Indochina continued, and as attention was focused increasingly on captured American pilots in the late 1960s and early 1970s, Hanoi developed the legal argument that American flyers were war criminals and thus not entitled to protection under the Third Convention. While the ICRC did not agree with this interpretation, it was unable to secure a change in Hanoi's policy. Otherwise, once a party has agreed that a violent situation is either an international or civil war, the ICRC has gained access to the prisoners of war, although delays do occur.

Finally, once agreement is gained to apply the law and access is gained to the individuals in question, the actual protection applied generally follows the rule book. The role of the ICRC is to observe conditions directly; talk to

the prisoners of war in private; report to the detaining authority in order to help the detaining authority create conditions and treatment in keeping with, and sometimes beyond, the law, and finally to make formal reports to the detainee's country of origin and to the detaining authority.

In some cases the ICRC plays an important role in providing the material assistance that allows a detaining authority to meet the protection standards of the Third Convention. Thus because of a shortage of food in the eastern region during the Nigerian civil war, the ICRC had to provide the food not only for the prisoners of war but for the detaining personnel as well. At one point the prisoners of war were better nourished than their guards. It is more typical for the ICRC to provide either medicaments or the money to purchase them in order to maintain the health of prisoners of war. The ICRC also advises the detaining authorities when certain conditions are likely to produce trouble. Because of its long experience in these matters, the ICRC can frequently indicate to the detaining authorities that overcrowding is likely to lead to violence among the prisoners of war. There is also the important role of allowing prisoners of war to maintain some contact with the outside world either through private talks with ICRC personnel or through communications organised by the ICRC. Such matters are obviously of great psychological importance to prisoners of war.

Of special note in this regard is the Central Tracing Agency in Geneva, an annex of the ICRC, and its affiliate, the International Tracing Service in Arolsen, West Germany. In evolution since 1870, the Central Tracing Agency has become recognised in international law and is the most efficient organisation of its kind in the world. It was created mainly to keep track of prisoners of war, but it is now concerned with establishing the whereabouts of all types of individuals. With regard to prisoners of war, the Third Convention makes operation of the Agency mandatory during times of international armed conflict. Also, detaining authorities are required to supply correct information to the Agency within a short time. This is an essential step in securing protection for prisoners of war, for once a detaining authority has admitted the existence of a person in detention, it is obliged to treat him in accordance with the Convention.

The Agency became so efficient in dealing with prisoners of war that it was asked to locate other types of individuals as well, so much so that during World War II incoming post ran between 50,000 to 100,000 letters each day. At present the Agency maintains information on tens of millions of people, gives advice to National Red Cross Societies and other groups on setting up similar organisations, and in the case of the civil war in Chile in 1973 set up a regional office on the scene. The office at Arolsen is specifically concerned with requests for information stemming from World War II, and in the early 1970s was still receiving over 125,000 requests per year. The work has become routine, carried out by a cadre of specialists. Thus Red Cross tracing efforts are taken for granted, although the practical difficulties involved in locating a single individual in a world of some 4,000,000,000 people should not be minimised.

Many other ICRC tasks related to prisoners of war during the stage of actual visitation have, despite their continuing importance, become accepted as a matter of routine without serious disputation. Of course even after gaining initial agreement that the law applies and after gaining access, major problems can occur. In the wake of the 1971 war for Bangladesh, despite the Third

Convention provision that prisoners of war should be repatriated without delay when the war was over, many prisoners were detained until 1974 because of bargaining among Bangladesh, India, and Pakistan on various issues. The prisoners of war become pawns in the bargaining process, and the ICRC was unable to secure their repatriation until the detaining authorities resolved their differences and had no more need for the prisoners. Nevertheless, the generalisation holds that visits to prisoners of war have become routine.

Problems in Supervision. The greatest obstacle is the lack of clear legal obligation by parties where there is no agreement that international armed conflict exists. In non-international armed conflict—i.e., civil wars—not only is there no guaranteed supervisory system for the Third Convention, but also what is supervised is vague. As noted previously, Common Article 3 established only principles of behaviour, not precise norms. Thus the actual conditions and treatment accorded to prisoners of war depends upon an unstructured exchange between the ICRC and the detaining authority, with the ICRC reasoning by analogy to the entire Third Convention. And of course where the detaining party does not admit that even a civil war exists, that party denies having any international legal obligations whatever, as it claims those detained are not prisoners of war but ordinary prisoners under domestic law. As noted, if the ICRC is permitted to visit these people it does so outside the jurisdiction of even Common Article 3. This problem of non-applicability of the complete Third Convention to situations of civil war and domestic instability has been widely recognised, both by the ICRC and others interested in trying to protect those regarded as an enemy by the detaining party.[8]

A second problem is to ensure that at least some of the laws of armed conflict are regarded as *jus cogens*; that is, absolute and not subject to bargaining and conditions of reciprocity. The ICRC has adopted a " pure " interpretation of some norms of the Third Convention, arguing that the laws are to be implemented by the signatory parties regardless of the policies of an opponent. This interpretation, which is consistent with a non-political and humanitarian philosophy, runs counter to the tendency of conflicting parties to use prisoners of war as pawns in the bargaining process. Already mentioned are the example of North Viet Nam in 1954-73 and the states on the Subcontinent in 1971-73. This tendency of belligerents to make the implementation of the Geneva Conventions conditional upon reciprocity and upon agreement on issues not directly related to the Conventions was also evident in the 1973-74 violence in the Middle East. Syrian failure to hand over lists of Israeli prisoners of war to the ICRC and to authorise ICRC prisoner-of-war visits led Israel to refuse to allow the ICRC to assume its traditional duties under the Fourth Convention in the area of the Golan Heights. On the Sinai front, too, both the Israelis and Egyptians used prisoners of war as weapons in the bargaining, making the implementation of the Third Convention dependent upon some prior condition. The ICRC has opposed these policies to some extent and has tried, while being aware of political reality, to persuade all parties that a military man *hors de combat* should also be considered *hors de la politique*. There is every reason to believe that this tension between humanitarianism and bargaining will persist as a problem in Red Cross protection.

A major problem under the Third Convention that is likely to loom larger in the near future is that of drawing non-state, non-government parties into

commitments to treat prisoners of war in accordance with international law. Under the 1949 Conventions, only states may sign and ratify or otherwise adhere to the Conventions. But as noted, violence is increasing *within* states rather than between states, and one of the fighting parties is frequently not recognised universally as a state. This was true in Algeria, Viet Nam, Nigeria, Cyprus, the Congo, Northern Ireland and Yemen in the 1960s. It also applied to Iraq and the Kurds in the 1970s; Portugal, Rhodesia, and South Africa *vis-à-vis* liberation movements, and Israel and the Palestinians.

Some non-state parties agree to abide by the Third Convention, but others do not. Both the National Front for the Liberation of Angola (FNLA) and the Popular Movement for the Liberation of Angola (MPLA) permit the ICRC to visit Portugese nationals held as prisoners of war, and the ICRC operates as if the Third Convention applied. On the other hand the National Liberation Front (NLF) in South Viet Nam never accepted any legal obligation with regard to captured South Vietnamese and American nationals, arguing with impeccable legal logic that it had not been permitted to sign the Geneva Conventions and was therefore not legally bound. The NLF in South Viet Nam did issue a statement saying it would give humanitarian treatment to those it captured, but it never permitted the ICRC or any other party to inspect the conditions and treatment of detention. Whenever non-state parties do not voluntarily accept legal obligations, the ICRC is deprived of an argument in its effort to gain access to those detained in the fighting.

A related problem is the definition of a prisoner of war, especially in legally ambiguous situations. The Third Convention was written with World War II in mind: armies fighting in uniform, with front lines and rear areas, although some note was taken of resistance movements tied to one of the belligerent states. By comparison the situation in Viet Nam was far more complex with regard to defining prisoners of war entitled to protection under the Third Convention. The regular military units of the conflicting states presented no analytical difficulties. But what of fighting personnel of the NLF? And what about individuals born in the South but trained and sent to fight by the government in Hanoi? And what about the individual in the administrative arm of the NLF who was captured while not bearing arms?

In this situation, the policy implemented by the ICRC with the cooperation of the parties was the same as in Algeria. Regular military personnel and other individuals captured with arms at the ready for fighting were considered prisoners of war. This policy was generally implemented in the south of Viet Nam. Indeed one of the little noted aspects of the Viet Nam war is that a large number of prisoners of war held in the South by the United States and South Viet Nam, including guerilla fighters, were treated in accordance with the Third Convention. But some guerrilla fighters provisionally detained as prisoners of war were finally denied that legal label and were sent to Saigon's regular prisons because the Saigon government regarded them as highly dangerous to its régime.

The main problem, however, was that there were many other detainees held by the Saigon authorities who were not labelled as prisoners of war. To these, the ICRC never received complete and systematic access. In fact, the permission granted by the Saigon government was so limited and so obstructed that the ICRC took the rare step of itself stopping Red Cross visits to these detainees in 1972. The ICRC believed its visits were damaging the image of ICRC protection without corresponding gain for the detainees. The problem in

general is that a government that holds a suspected enemy who is its national can use its own national law to detain him, under an order pertaining to curfew, say. Under national law, then, the individual becomes exempt from prisoner-of-war status and ICRC visits. Hence national law can be, and frequently is, used to thwart the intent of the Third Convention and the activity of the ICRC. The Viet Nam case is simply illustrative of the general problem.

Finally there is the problem of whether the Geneva Conventions apply to armed forces engaged under the United Nations symbol. In legal terms these forces are both national and international, being donated by national governments but authorised to act by a UN organ. The question is whether the UN authorising body, or the Secretary General, can commit them to obey the Conventions, and whether opposing forces must treat these troops as prisoners of war if captured.

This problem has been resolved in favour of the broadest possible application of the Third Convention. UN officials have issued statements endorsing the principle of applying the Geneva Conventions, and the states donating troops and other personnel to UN forces have signed a statement endorsing the application of the letter of the Conventions. Especially in the Congolese civil war in the early 1960s, the ICRC was active in checking on the conditions of detention and treatment provided by UN forces and on UN personnel detained by other armed elements. Likewise in the Korean War, where the forces opposing North Korea and China were operating under UN approval (though directed primarily by the United States), the ICRC was active in the territory controlled by these " UN forces ". This was by *ad hoc* permission, as the 1949 Conventions were not binding. The ICRC also tried to treat these " UN forces " as regular prisoners of war when detained by North Korea or China, but neither country permitted the ICRC to enter its territory for prison visits. At present the problem of UN forces and the Third Convention seems largely to be resolved, with the ICRC treating UN military personnel as if they represented a state. This ICRC approach has wide approval in the international community and is legally incorporated into contracts between states and the UN.

Review. The ICRC has become a regular, although unofficial, substitute for the Protecting Power in matters relating to prisoners of war. ICRC access to prisoners of war has become a normal expectation on the part of almost all states. ICRC access is desired by a number of non-state parties as a mark of their entry into international relations and of their responsibility. Thus the ICRC frequently takes the initiative in seeking access to detained military personnel and is frequently asked to seek access.

ICRC decisions to take the initiative or to respond-affirmatively to a request are complicated in many cases, especially where the situation of violence lacks a clear legal label. Such choices are further complicated at present by a two-fold trend in international relations. First, governments have shied away from formal declarations of international armed conflict (war) to avoid activating international law and possible secret agreements depending upon a state of war.

Second, governments have resisted admitting officially that Common Article 3 should come into force as this confers greater status to matters they

regard as domestic affairs. The acceptance of Common Article 3, for example, might constitute an admission that a domestic opponent (a liberation movement or terrorist gang, say) has attained the first step towards being considered a belligerent in international law. Or it might signify that the situation has become serious enough and the challenging faction powerful enough for it to be a civil war, regulated by some international law.

Hence the ICRC decision to seek access to detained military personnel under either the complete Third Convention or Common Article 3 affects the over-all political strategies of the conflicting parties. While the ICRC would like that decision to be purely humanitarian, in reality it is as political as it is humanitarian. As such, it becomes a decision of great importance in international relations.

The over-all record of Red Cross protection with regard to prisoners of war has been marked generally by a pattern of pragmatic activity followed by the development of international legal authority. In World War I the ICRC visited prisoners of war on the Allied side without a firm legal basis. Given the absence of a Convention pertaining to prisoners of war and the negative attitude of the Central powers towards visits by the ICRC, the ICRC encouraged National Red Cross Societies to make visits on the Central side. The result was that 41 ICRC delegates made 524 visits (that is, an inspection of one place of detention, regardless of how many individuals were seen or how long the visit took). This activity was formally legalised in the 1929 Geneva Convention on prisoners of war. The ICRC engaged in other activity without a legal basis by visiting detained personnel in civil war situations, which were not regulated by the 1929 Convention. In the Spanish Civil War, as well as in the international armed conflicts involving the Chaco and Ethiopia, the ICRC sought to protect military and civilian detainees with very modest efforts. Then in World War II, the ICRC, with a staff of almost 350 delegates, made over 11,000 visits to prisoners of war on both sides. By the 1970s, the question of whether the ICRC had access to, say, American or Israeli military personnel in enemy hands, and whether these individuals were treated in accordance with the Third Convention as verified by the ICRC, had become major issues in international relations. Public criticism of an opponent for violating the Third Convention and denying ICRC supervision is not only to demand protection for one's nationals but also to categorise one's opponent publicly as irresponsible and in the wrong.

The ICRC in relation to the Third Convention has thus evolved to a role of central importance in both a humanitarian and political sense.

The Fourth Convention

The Fourth Convention is concerned with the protection of civilians in time of war. Much of what has been said about the Third Convention pertains to the Fourth as well, especially with regard to the application of law to different types of violent situations. There is one major difference in the application of the Third and Fourth Conventions, however. Whereas the Third Convention or its Article 3 have been agreed to on a number of occasions, no government since 1949 has stated that it viewed the Fourth Convention as fully in effect. Therefore the 159 articles of the Fourth Convention (pertaining to " those [excepting prisoners of war] 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 national ") have not been implemented as intended.

A possible exception is the Suez affair of 1956, in which the attacking states agreed that all Four Geneva Conventions of 1949 applied. Some ICRC protection and assistance to civilians in the affected area did occur, and Protecting Powers were appointed. But the violence of 1956 was of such short duration, and the activities of the ICRC and Protecting Power so limited, that it was not a solid example of Red Cross protection of civilians. Such ICRC action as occurred was mainly directed toward assistance, and thus events in 1956 provide little information on Red Cross protection related to the Fourth Convention.

The limited implementation of the Fourth Convention to date is due primarily to the changed nature of violence, for there are perhaps only two factual situations where the Fourth should have been applied—the Middle East since 1967 and the Sub-continent in 1971. (At the time of writing, and therefore too late for discussion, a third situation occurred which, in the view of the ICRC, warranted application of the Fourth Convention—the 1974 war for Cyprus.)

The War for Bangladesh. Among the situations since 1949 in which the ICRC has tried to base its protection activities on the Fourth Convention was the 1971 war for Bangladesh. At a point in that conflict, the Indian army, in the territory that became Bangladesh, assumed responsibility for the Bihari population in order to prevent the Bengali population from doing them harm. The ICRC joined in providing assistance to the Biharis, and when the Indian army withdrew to Indian territory, the ICRC itself tried to protect the Biharis. At that point the legal status of the Biharis became unclear and so did the ICRC's tasks. The state and government of Bangladesh had been formed, and presumably the Biharis who had resided in the territory became citizens of the new state. But the Bengalis did not want them as citizens, and neither Pakistan nor India claimed them as citizens.

In this situation, the ICRC did not believe that there was adequate protection for the Biharis from other sources, either national or international. The Bengalis well knew that the Biharis in the east had been willing allies of West Pakistan. With the war over, many Bengalis believed they had scores to settle with their local antagonists. The ICRC stayed on the scene in Bangladesh, hoping by its presence to deter acts of violence against the Biharis, who were regrouped into enclaves. The ICRC not only provided timely protection through assistance on the scene but raised questions with the new Bangladesh authorities about the fate of these people. It was largely because of the presence, diplomacy, and assistance of the ICRC that the Biharis were protected during the period 1971-74. By the end of the period, the Pakistani government agreed to accept a number of Biharis, and they were transported to Pakistan by the UN and the ICRC. The fate of those Biharis remaining in Bangladesh is still unclear at the time of writing. But the role of the ICRC during this period had been extremely important to the Biharis.

In the same conflict, the ICRC believed that the Fourth Convention should be applied without reservation to Pakistani civilians detained in India

and Indian civilians detained in Pakistan. While the government of India never officially endorsed the application of the Convention, it generally permitted the ICRC to act as if the Convention were legally binding with regard to Pakistani civilians detained in *camps* in India. The Indian government permitted no ICRC access to Pakistani civilians detained in Indian prisons.

The Middle East Since 1967. In the Middle East situation since 1967, a major issue in international relations has developed around the question of Red Cross protection linked to the Fourth Convention. The government of Israel stated that it wished to leave "open" the question of whether the Convention applied to the territories taken by Israel in 1967 and 1973.

As in the case of India and Pakistan in 1971, the ICRC raised the question of the applicability of the Fourth Convention with Israel after the 1967 war, and again in 1973. The ICRC held that the Convention did indeed apply to civilians in the territory falling under Israeli control through war. In this view the ICRC was supported by resolutions from a number of UN bodies and by the views of a number of states.

While Israel refused to issue a statement of general acceptance of the Fourth Convention, it permitted the ICRC to enter the acquired territories, except in the Golan for a time. The government of Israel agreed to cooperate with ICRC requests on a number of points raised by the ICRC, responding as if the Convention were in force. On a number of other points, however, the ICRC obviously believed that the Israeli response was unsatisfactory, since it took the unusual step of publishing its view of the situation in terms that were candid, at least compared to usual ICRC publications (see the *International Review of the Red Cross*, August and September, 1970). This act by the ICRC represented a major departure from its normal practices in that its view of conditions pertaining to prisoners of war and civilians normally goes only to the detaining authority and to the state of origin of the individuals. For example, in the Middle East situation, the ICRC had refused detailed information even to the UN organs interested in the territories.

From the ICRC's published reviews of its communications with Israel, and from other sources, it seems clear that the ICRC regarded several matters as violations of the Fourth Convention: 1) the treatment and conditions of civilian detainees; 2) the forced relocation of civilians within Israeli-controlled areas; 3) the expulsion of civilians to other states; 4) collective punishment without judicial process, as in the destruction of civilian houses for suspected activities, and without payment of compensation; 5) the adequacy of legal assistance to civilians required to appear before Israeli military courts, and 6) concerns relating to material, medical, and social assistance to civilians.

One of the central problems for the ICRC in this continuing situation, which at the time of writing has lasted for eight years, is that the image of the Red Cross has been linked to systematic violation of the Fourth Convention, thereby affecting the ICRC's humanitarian efforts in the Arab world and elsewhere. The ICRC appeared to some parties as an unwilling partner in the violation of the Convention since its very presence in the territories gave an aura of legitimacy to Israeli practices. Yet the ICRC believed that its presence was in the interests of civilians there.

The application of the Fourth Convention since 1949 has, therefore, presented the ICRC with difficult protection tasks, especially in the Middle East and on the sub-continent, not to mention trouble with assistance in Nigeria. Since governments have shown a clear reluctance to admit their legal obligations in a given situation even though they have agreed to the terms of the Fourth Convention by signing it, the ICRC has developed a policy of trying to do as much as it can for civilians who are supposed to be protected by that Convention. While the ICRC has not been allowed to do everything it would like to do, it has been able to do more than other organisations. Neither in the case of Indian civilian camps nor Israeli-occupied territories were other outside organisations allowed even to try to protect the civilians. (A partial exception in the Middle East is United Nations Relief Works Administration, which is charged with assisting the Palestinian refugees from the 1948 war.)

This partial implementation of the law raises serious problems for the ICRC. Governments tend to become very comfortable with a situation in which the ICRC is prevented from performing some of its most important tasks, such as holding private interviews with civilian detainees to ascertain their treatment during interrogation. Thus the ICRC is seen as an unwilling accessory to the violation not only of international law but also of human dignity. Concern over this problem is matched by a concern for continuing the protection that can be achieved in other areas of activity. Although a pull-out by the ICRC could demonstrate opposition to certain governmental policies that violate the Fourth Convention, it would also mean a cessation of the positive work being done.

Other Issues Under the Fourth. As if these problems for the ICRC were not great enough, the ICRC has recently shown a tendency to take a more active role in the course of battles. In the 1973 Middle East war the ICRC actively sought to protect civilians before a territory was definitely occupied, or before civilians had definitely fallen under the control of a foreign power.

This type of protection is covered by the Fourth Convention, as a number of its articles specify that combatants in battle are to respect non-combatants in specific ways. The ICRC has long been concerned with these matters, especially in Algeria and Indochina, where the ICRC has been aware of the danger to civilians from air raids, forced relocation, creation of " free fire zones ", and other factors. The ICRC has been aware of the effect of both modern conventional and guerilla war on civilians, whether it be Palestinian guerillas killing Israeli children or the Rhodesian government creating the no-go zone, its version of the free fire zone.

In the 1973 Middle East war, the ICRC tried to affect governments' policies on victimisation of civilians by public appeals as well as by private interventions with the combattants. Between 9th October and 13th December, the ICRC made ten public statements on the subject of civilian protection. Not only did it publicly remind the parties of their legal obligations under the Conventions but it also proposed the creation of a commission of inquiry to aid in implementation. Further, the ICRC proposed that the parties abide not only by the terms of the Fourth but also by an ICRC draft protocol to the 1949 Conventions, which was not yet law. With regard to the latter proposal, the ICRC publicised the negative reply of Israel, emphasising the point by including the negative aspect in the heading of its press release. All of these efforts by the ICRC had no visible impact on the war. Its efforts to mobilise

some collective interest in protecting civilians (and prisoners of war) by issuing pointedly worded press statements represents a move towards the maximum end of the scale of what the ICRC could do in the situation.

Summary of Red Cross Supervision Under Law

The change in patterns of violence in world affairs has left the legal basis of ICRC attempts to supervise application of law under the 1949 Geneva Convention somewhat out of touch with reality. The type of violent situation envisaged by the four Conventions does not often obtain today. The law is at variance with the facts. The decline in frequency of traditional aggression, fighting, and occupation of territory has tended to negate the utility of the Fourth Convention and raised a number of problems with regard to the Third.

Moreover, in an international system in which many states have the power to make a unilateral determination of how they will behave, whatever the law, states may easily choose not to meet their legal obligations. Therefore the ICRC is compelled by the nature of things to try to protect individuals less by legal argument and more by humanitarian persuasion.

Since humanitarian appeals often become intertwined with political strategies of states, the protection task of the ICRC is exceedingly complex. The 1949 Conventions are useful mainly as a point of reference for reasoning by analogy in situations where states do not permit the Conventions to legally apply.

Interestingly enough, the Third Convention has been more generally accepted than the Fourth, both in law and in fact. ICRC supervision of prisoner of war conditions according to the rule book has become routine in many situations (not withstanding some glaring exceptions, such as the policy of North Viet Nam). Whereas, for example, both India and Pakistan accepted prisoner of war protection by the ICRC as normal, ICRC protection of civilians was rejected, except for the partial acceptance on the Indian side. That the ICRC should be allowed to protect fighters but not civilians is an irony of the times.

IV. Protection Through Ad Hoc Diplomacy

As noted earlier the trend of unclear legal labels on factual situations has led the ICRC to base its approach to protection on humanitarian requests rather than on guaranteed legal rights. This is the only approach possible when there is not an armed conflict present since there is no international law, global or regional, that authorises the ICRC to act in situations of domestic instability. Despite this lack of law, the ICRC is very active in trying to protect individuals outside situations of armed conflict. In any given year, the ICRC may well devote much more of its budget and manpower to this activity that has no statutory base in international law, than to activity related to the Geneva Conventions. *Ad hoc* diplomacy is becoming increasingly important to Red Cross protection.

Attempts at protection without specific authorisation in international law are based primarily on Article 4 of the statutes of the ICRC:

" The special role of the ICRC shall be... (d) to take action in its capacity as a neutral institution, especially in case of war, civil war *or internal strife*: ... and to serve, in humanitarian matters, as an intermediary between the parties; " (emphasis added). " The ICRC may also take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and consider any question requiring examination by such an institution. "

This authorisation is referred to as the ICRC's right of initiative. Its use has been endorsed by numerous meetings of the International Conference of the Red Cross.

This right of initiative, it will be recalled, is to be accepted by signatories of the Geneva Conventions in situations of international armed conflict when other supervisory provisions have not been made. In non-international

armed conflict, the ICRC's right to offer its services has been confirmed in law even as has the right of states to reject that offer. It can be argued on the basis of innumerable factual situations, though not legally proven at the moment, that beyond armed conflict the ICRC's right of initiative in humanitarian matters has become part of customary law, certainly of customary international practice.

Thus in many situations falling short of armed conflict, the ICRC offers its services in the interest of protecting individuals who do not fall under any provisions of the Geneva Conventions. Protection through *ad hoc* diplomacy has greatly expanded in the period since World War II, although it has been the cornerstone of ICRC activity for over a hundred years. This type of protection is discussed below in terms of: 1) political prisoners, 2) hostages, and 3) miscellaneous tasks and services.

Political Prisoners

In the 1970s one of the most important protection tasks involving the Red Cross symbol concerns political prisoners. As the number of traditional international armed conflicts has decreased, as governments have avoided labelling a situation a civil war, as all manner of states have been confronted with violence within their borders ranging from terrorism to secessionist movements, it is increasingly common for people to be detained because of some political activity or belief without recourse to protection under the Geneva Conventions. And awareness is growing of the plight of these people, who are here referred to as political prisoners—a controversial label on which there is little agreement—if only for lack of a better term.

The ICRC has shown interest in these individuals for quite some time.[9]

This concern became more systematic and more serious in the late 1950s and early 1960s, coincidental with increased interest by other organisations, especially Amnesty International. In the period 1958-73, the ICRC reported visits to political prisoners in 65 different states (thus in almost half of the states in the world), entailing 1,300 visits to over 100,000 individuals.

Scope of ICRC Interest. There is debate, both within and outside the ICRC, as to whether the ICRC should be engaged in this type of activity and as to what it can accomplish. The ICRC has shown interest in these individuals because they tend to be regarded as enemies by the detaining authority and as such tend to be the recipients (one could say victims) of unusual treatment, such as excessive punishment or denial of normal judicial process. ICRC interest thus stems from the conditions of detention.

In Indonesia, the government has openly admitted that it lacked trial evidence for a large number (some 60,000) detained for some alleged connection with the 1965 *putsch*, and was thus simply going to hold them. Detention at the pleasure of the executive through administrative ruling rather than through judicial process is prevalent in current world affairs and in many types of régimes—from Indonesia to South Africa, from Guinea-Conakry to the United Kingdom, from South Viet Nam to Canada, from Brazil to Turkey.

But it is not just the absence of a generally recognised legal procedure that attracts the attention of the ICRC. It is also the harshness of detention, alleged or real. Public proof sometimes exists to indicate that a detaining authority

regards some detainees as enemies and thus beyond the pale of humane treatment. When a Canadian television crew films released political prisoners whose legs are paralysed or atrophied from long confinement in leg irons in an Asian country, there is little question but that there is a need for some party to enquire into the conditions of their detention. More frequently, there is some type of allegation rather than proof regarding detention conditions or treatment, as when the UN raises charges about South Africa, or the Council of Europe about Greece, or British newspapers about Rhodesia. Allegations to which the ICRC responds are frequently accompanied by *prima facie* evidence that a humanitarian inquiry is merited. This may emanate from a variety of sources, including published national laws, eyewitness reports, third-party claims, press reports, and governmental information.

Therefore evidence or allegation of mistreatment of people with " enemy status " may give rise to a request by the ICRC to check on the detainees. In such cases the ICRC may offer its humanitarian services to the detaining authority, and the government may be interested in the offer as a way of deflating foreign (or domestic) criticism.

Intent and Tactics. On the basis of its own experience, the ICRC believes that by enquiring into the welfare of political prisoners, it can improve the conditions of their detention.

The protection offered political prisoners is similar to that offered to prisoners of war or civilian detainees—regular inquiry into the conditions and treatment of detention and requests to the detaining authority for improvements. Moreover, the ICRC offers to take certain responsibilities upon itself, such as arranging and paying for family visits, education courses, and the installation of prison libraries and radio systems. Defined so broadly, protection has been merged with small-scale assistance.

Normally no publicity is given after an ICRC visit unless the detaining authority itself chooses to publish a statement or the ICRC report. If it does so it must use the entire ICRC report; if the government engages in partial publication or in distorted comments, the ICRC may publish the entire report. The British, South African, and Greek governments have chosen to publish ICRC reports of visits to political prisoners. The Greek and South Vietnamese governments and the ICRC have had exchanges regarding what constitutes an accurate statement of ICRC findings. Some observers believe the ICRC should not agree to government publication of a single report but should insist on the publication of a series using all the relevant ICRC reports, if anything is to be published. The ICRC, however, seems content with its current policy.

Problems. Despite the ICRC's belief that it should attempt to visit political prisoners in a variety of situations and that it can better the situation for them, especially when visits are systematic, a number of problems remain to confront the ICRC and to keep the subject controversial. In fact, the problems are so numerous and complex that only a superficial indication can be given here.

1. The primary problem is the lack of agreement on what is a political prisoner. International law does not generally use the term, except in relation to extradition treaties, which include the terms political crime and political fugitive. But these treaties do not define what is meant by political crime, and no common definition has emerged from treaty interpretation. Nor are the

terms political prisoner or political crime used at present in national law (though there are some exceptions, as in Lebanon). Thus in general, neither national nor international law uses " political prisoner " as a legal term (though, again, there are some pieces of law, such as the 1973 Paris Accords, where reference is made to political prisoners in euphemistic terms). The law recognises only prisoners under domestic law and prisoners under the Third and Fourth Geneva Conventions.[10]

Even organisations that try to deal with what they call political prisoners do not have a precise definition or a common focus. Amnesty International differs from the ICRC in that it tends to focus on those detained because of political belief, but Amnesty may also take an interest in people who are detained by reason of political action.

The ICRC, in 1973 and 1974, reviewed its position on political prisoners and directly confronted the problem of definition. The best it could come up with was a series of criteria that would be taken into consideration in determining whether ICRC *ad hoc* protection should be attempted. In situations of " domestic troubles " the ICRC was to see whether

1) the trouble is serious, involving acts of violence,
2) events are prolonged rather than occasional,
3) there is a struggle among one or more organised groups,
4) there are victims in need.

In situations of lesser domestic instability, the ICRC listed another set of criteria, any of which could trigger its involvement,

1) the aftermath of civil war or other serious domestic troubles,
2) existence of a serious state of political, religious, racial or social tension,
3) suspension of judicial due process, introduction of emergency laws, or disrespect of national laws,
4) administrative detention or expulsion and deportation,
5) excessive penalties,
6) *prima facie* evidence of inhumane treatment.

These criteria, of course, do not define what a political prisoner is; they comprise a check list of situations to watch for. A political prisoner can be considered one who, because of his political opinion or action he takes for political reasons and which the government regards as an illegal attack on the régime, is detained, with or without trial. This falls short of a definition because of disagreement on the meaning of " political opinion " and because a government and an individual may disagree on what is a political act unacceptable to the régime.

The ICRC has found in its experience with political prisoners that it is more useful to talk to governments in terms of someone regarded as an enemy of the government rather than a detainee who has violated a certain type of law, expressed a certain opinion, or taken a certain action. As a result, both the ICRC and the detaining government can agree on the individuals who are the subject of Red Cross interest even if the government says it has no political prisoners or uses another term.

The imprecise boundaries of this concern for political prisoners give rise to all sorts of difficulties. Since the ICRC's varying criteria afford it great room

for discretion in deciding whether to seek involvement, a government may resent the implications of an ICRC request to see detainees in a certain category.

From the point of view of the ICRC, it is difficult to determine, for example, just what constitutes behaviour in the context of an Asian society that meets the criterion of " excessive penalty ". It is no secret that the Indonesian government has a forced labour camp for political prisoners on the island of Buru. But is it possible that it is more humane for a political prisoner to be there, doing something in the open air, than to be in an unhygienic urban prison doing nothing?

Because of different standards as to what is humane, or legal, or normal, an ICRC decision to seek involvement is frequently interpreted by the detaining authorities as an unwarranted interference by outsiders in the domestic affairs of the nation. They resent having the ICRC imply that penalties are unusually severe, or that normal citizens' rights have been violated. This is particularly the case when the government does not recognise a separate category for the people that the ICRC is concerned about. In a number of states, what the ICRC thinks may be a group of political prisoners in need of international protection is, from the government's point of view, a group of prisoners who have committed treason or subversion and who should be punished according to national standards. The issue is somewhat clearer for the ICRC when the government has taken exceptional measures, such as administrative detention or use of special courts.

Moreover, the ambiguity surrounding the subject, as well as the fact that the ICRC is not widely associated with protection of political prisoners and has not widely explained this activity, sometimes leads the government to fear that an ICRC presence in the country will cause others to view the situation as an armed conflict. The ICRC is associated with the Geneva Conventions, and application of the Conventions in armed conflict reduces the government's freedom of manoeuvre. Since association of the ICRC with the Conventions creates one more barrier to access to political prisoners, the ICRC seeks access on the basis of humanitarian principles rather than legal arguments. The less the ICRC refers to Common Article 3, the more likely it is to gain access to those in question.

2. Partial access, a second problem for the ICRC, has two aspects. First, should the ICRC agree to visit political prisoners if it cannot see prisoners in the stage of interrogation? This is, in fact, the stage at which torture and mistreatment most often occur. And torture and mistreatment are more likely to be used against political prisoners than ordinary prisoners because the government is more likely to assume the political prisoner knows something of vital interest to the government's security.

The ICRC generally assumes that if a detainee is regarded by the government as an enemy, he is in need of international protection. This need is pronounced if he is in the hands of the police or special interrogation unit and is thus not under the normal prison administration. The problem for the ICRC is that most governments will not permit any third-party supervision of interrogation; governments that do permit such supervision entrust it to national courts. It is public knowledge that only two governments have given such permission to the ICRC—Greece, for one year starting in November, 1969; and Chile, after the *coup d'état* against the Allende government in 1973.

In Greece the ICRC was able to implement written permission; in Chile, there was a difference between the written permission and what the ICRC was allowed to do in fact. In all other cases the ICRC has had to content itself with visits to places of detention after interrogation.

The ICRC believes that, given government attitudes, this is not only necessary but that a certain measure of control over interrogation can be obtained through visits after interrogation. In one situation, for example, the ICRC and the government agreed that an individual would be kept in solitary confinement and interrogation for no longer than three weeks before the ICRC would have the right to talk privately with him and take up any matters of concern to the ICRC with the detaining authorities. Furthermore, from time to time physical traces of mistreatment are visible during visits after interrogation, which the ICRC then discusses with the authorities. And if there is a pattern of allegations about mistreatment that does not leave a physical trace, the ICRC may discuss this with the authorities less categorically.

The role of the ICRC includes " helping to prevent the bad which does not occur ", as well as correcting the bad that has occurred. The preventive effectiveness of Red Cross visits to political prisoners cannot be measured; actions that do not occur, such as no mistreatment of prisoners, obviously cannot be counted, so there is no measure of the number of times the ICRC presence *after* interrogation has prevented mistreatment *during* interrogation. Yet it is quite conceivable that an ICRC presence after interrogation, coupled with a governmental directive to avoid mistreatment, could serve as something of a deterrent to mistreatment during interrogation. The subject is likely to remain controversial.

The other aspect to partial ICRC visits concerns whether the ICRC should accept access that is partial not only because it occurs after interrogation but because of other limitations as well. In general the ICRC will accept partial access because that is what a government will give. Hence the ICRC tends to operate on the " one more blanket " theory. As long as it can bring " one more blanket " to an individual, it will do so, even if another person is not permitted a visit. The ICRC has not, in general, practiced group ethics; it does not insist on an-all-or-nothing approach.

In Rhodesia, from 1959 to 1974, the governments (both the British and the Ian Smith administrations) permitted the ICRC to see those detained but not convicted under the emergency regulations laws; in South Africa, it was just the reverse—the ICRC was allowed to see those convicted for political crimes (the ICRC and the government tacitly agreed on what was a political crime) but not those detained without charge. Only in South Viet Nam in 1972 did the ICRC believe that its partial access was so without benefit to the political prisoners that it withdrew altogether from partial visitation.

Aside from the benefit to those who are visited, the ICRC accepts partial permission in the hope of possible future extension of permission once it has demonstrated its role. But the core of the problem is that the government may permit the ICRC to have access where it is least needed, and in the process to use the ICRC for public relations purposes, such as deflating foreign criticism by saying the Red Cross is present, when in fact the Red Cross is not totally present.

Finally, ICRC visits usually occur with advance notice to authorities at places of detention. While this appears to be a practical necessity if the local

authorities are to facilitate the visit, there have been times when the detaining authorities took special measures to improve conditions just prior to the visit. The detainees, of course, are usually quick to point this out to the ICRC delegates.

3. A related matter is whether the ICRC should agree to conduct visits to political prisoners without private interviews. ICRC discussion with detainees without representatives present from the detaining authority is the key to ICRC protection once permission to visit has been granted. Without private interviews, ICRC visits are relatively insignificant, for few detainees will speak candidly when the captor is present. Nevertheless the ICRC in the past has agreed to visit political prisoners in the presence of a governmental official. It has done this on some occasions where the ICRC had reason to believe the conditions of detention were so bad that any type of visit was preferable to none at all. It has done so in the hope that once it has demonstrated its manner of operation it would be allowed to visit without witnesses. The ICRC has now taken the position that normally it will not accept permission to visit political prisoners unless it can do so without witnesses. It may agree to visit with witnesses once, to demonstrate the process, but any further visits with witnesses require specific approval from the higher levels of decision-making in Geneva.

4. A fundamental question is whether the ICRC should ever raise a question with a government about the *reasons* for detention, as compared to the *conditions* (and treatment) of detention. The ICRC has maintained the position for some time that it should not raise any question as to the reasons for detention. (The exception is inquiries on such humanitarian grounds as the age of political prisoners [the very young or the very old], health, or family considerations.) Some critics say that by this policy the ICRC condones situations which should not exist and that the ICRC should struggle against certain forms of detention, not just against bad conditions.

The ICRC position reflects the belief that other groups are struggling against a particular over-all situation, and, moreover, that the price of getting into the detention centres is that of not questioning the reasons for detention. And, in fact, the ICRC is the only organisation that is able to visit political prisoners around the world, although the extent of the work varies; visits in Eastern Europe, for example, have been few and unsystematic. Nevertheless some parties continue to criticise the ICRC for making a bad situation more tolerable and thus for thwarting, say, a revolution that would sweep the bad situation away.

In response the ICRC believes that total changes are frequently more imagined than real and in any event a long time in coming when they do, that there is much individual good to be done in the meantime, and that even when the " desired revolution " does come, the new régime, too, is likely to have political prisoners. In other words, ICRC philosophy is one of concern for individual victims, leaving it to others to work towards a total solution. It is a belief that no change is in fact likely to be a total solution. Thus the coup in Portugal in 1974 freed the old political prisoners and detained the political police, which was indeed a change. The coup did not, however, erase the problem of political prisoners.

Notwithstanding its reasons, the ICRC's position against questioning the reasons for detaining political prisoners is not universally accepted.

5. A fifth problem is how often visits must occur to result in benefit for the detainees. In some cases ICRC visits have been widely spaced by the government. In other cases the ICRC itself has apparently lacked the manpower or money to make systematic visits.

6. There is disagreement over the tendency of the ICRC to become something of a general inspector of prisons in some parts of the world. This role arises from three factors:

First, in a number of places of detention, political prisoners and ordinary prisoners under national law are detained together. Thus it is practically impossible, as well as ethically difficult, to visit one type of prisoner but not another.

Second, in many parts of the world, all prisoners suffer poor detention conditions, not because they are all regarded as enemies of the government so much as because the government lacks the material resources or administrative competence to run a humane prison system.

Third, even where political prisoners are not mixed in with ordinary prisoners or conditions for all prisoners are not poor, the ICRC may wish to visit ordinary prisoners so that it will already be on the scene with the confidence of the government when political prisoners are detained.

The ICRC may regard the visiting of ordinary prisoners in order to see political prisoners at present or in the future as a means to an end. But there is controversy as to whether the ICRC should visit ordinary prisoners. In particular, the capability of the ICRC to assume this general protection role is questioned, since penology is a very large subject, entailing many complexities.

7. Finally, as far as this limited survey is concerned, there is the problem of whether the ICRC should follow the political prisoners into the courts or content itself with enquiries into prison conditions and treatment. In rare situations, the ICRC not only observes trials but also provides legal assistance to the defendants. In most ovservations of trials, the ICRC usually considers itself entitled to do so by virtue of its role as a *de facto* substitute for a Protecting Power; in some situations, however, the ICRC does go into court with regard to a " pure " political prisoner, one who does not fall under the Geneva Conventions.

It is almost impossible to measure the impact of a Red Cross observer at a trial; an acquittal or a moderate judgment may be due more to the mood of the judge that day than to any concern for international opinion as represented by a Red Cross observer. And Red Cross legal assistance has been so limited in these situations as to provide little ground for analysis. In any event, debate continues as to whether the ICRC should go into the courts at all.

Alternatives to ICRC Action. Other agencies have not wanted to act, or have not been allowed to act, in the role of protecting political prisoners. This is true of National Red Cross Societies. While many Societies criticise the ICRC for not keeping them informed and for not enlisting their aid in ICRC work, a number of Red Cross Societies have not been able, or have not wanted, to give aid to the ICRC in matters concerning political prisoners.

The National Society more often than not is part of the establishment, if not *de facto* part of the government, and political prisoners are enemies, an

out-group allegedly challenging the establishment. Even if a group within a National Society is interested in assisting political prisoners, it may fear to take action—at least officially as Red Cross—because of govermental or public opinion. The Society may fear loss of national support for its other activities. For example, in Uruguay in the 1970s, it was difficult for those components of the Uruguayan Red Cross interested in the well-being of detained Tupamaros (leftist urban guerrillas) to take any action on their behalf, since both public opinion and governmental policy was strongly against any attention being focused on the detainees. In Rhodesia, it was very difficult for elements in the National Red Cross to play any role related to the violence associated with the African liberation movement in the country; the Rhodesian Red Cross was multiracial, and some white members were opposed to showing concern for African detainees, while some African members were opposed to doing anything related to the white-dominated government and army.

In some situations, a National Society may accompany the ICRC in visiting political prisoners, as in Malaysia in the mid-1970s, or supply interpreters for the ICRC visits, as in South Viet Nam prior to 1969. The National Society may also support the role of the ICRC by making contact with key governmental personnel or by bringing the ICRC delegates up to date on recent situations in the country. Hence, while a National Society can itself become involved in protection, its role, if any, is usually to support and follow up on ICRC protection.

But the presence of National Societies guarantees nothing. While the ICRC now has an official policy of making contact with the National Society as a first step in political prisoner matters, in most cases the ICRC finds it cannot count on direct National Society protection. The Red Cross movement has been " nationalised ", and, as noted, national Red Cross opinion, like other components of national opinion, frequently regards the political prisoner as a total enemy. In such situations, it is easier and more efficacious for a non-national organisation like the ICRC (assuming it is not a question of Swiss political prisoners) to act. To entrust the protection of political prisoners in some situations to National Red Cross Societies is to offer no real Red Cross protection at all.

Other parties have shown interest in political prisoners and tried to protect them. The other most active non-governmental international organisation is probably Amnesty International, based in London. Amnesty's main approach is publicity—issuing press statements on various political prisoner situations, granting interviews to journalists and commentators, and publishing longer studies and books. While Amnesty engages in other actions, such as trial observations and discussions with governmental officials, publicity remains its key tactic. Therefore, Amnesty is usually not allowed to enter places of detention in the states in question. In its life-span of less than two decades, Amnesty International has made fewer than half-a-dozen prison visits. This is not to say that its work is unimportant. Amnesty may have done more for the betterment of political prisoners than the ICRC, especially in states denying access to the ICRC. Since the ICRC can do almost nothing for political prisoners without seeing them, publicising the situation from abroad may do some good, although it is still an open question whether publicity does more good or harm.

The question of relative effectiveness between Amnesty and the ICRC is in some ways a false issue, for at times the two organisations are complementary.

The more Amnesty publicises a situation, the more likely the government is to give access to the ICRC to offset foreign criticism. The more the ICRC is denied access, or restricted, or kicked out, the more evidence Amnesty has of a probable bad situation. Certainly Amnesty, more than the ICRC, has created concern for political prisoners among the attentive public, people who pay consistent attention to national and international politics. The ICRC finds it easier to operate in such a climate. One of the reasons the ICRC was unable to do anything for political prisoners in Indonesia for so long was that there was little concern amongst the general public about that situation anywhere in the world.

United Nations organs, being composed of governments rather than non-governmental personnel for the most part, have not paid serious attention to political prisoners. Spasmodic debate in the UN Human Rights Commission and its subsidiary bodies has not led to anything that could be called protection. The same holds true for debate in the General Assembly. The movement to create a High Commissioner for Human Rights, similar to the High Commissioner for Refugees, has failed, at least for the moment. But two UN agencies are active in protection—one trying to offer some protection, the other actually providing protection to a particular type of individual:

First, the little-known UN Commission on Crime Prevention and Control has produced the UN Standard Minimum Rules for the Treatment of Prisoners. The Commission has shown interest recently in what it calls non-delinquent detainees—administrative detainees neither charged nor convicted. However governments have not paid much attention to the Rules or to the meetings of the Commission, which in any case occur at rather lengthy intervals.

Second, the High Commissioner for Refugees, whose office is highly respected, provides protection and assistance under statutory law to people who flee a country because of actual or feared man-made events and decide to sever their normal ties with their government and thus become refugees in the legal sense rather than aliens in the country of refuge. Thus the High Commissioner protects those who flee a situation, while the ICRC works with those entrapped within a situation. Their work does not over-lap but rather tends to be complementary. In Chile in the mid-1970s, for example, the ICRC dealt with Chilean nationals who were the target of government restrictions under emergency laws. The High Commissioner tried to protect non-Chilean nationals in Chile at the time of the *coup* who found themselves the target of some governmental restrictions; they were mostly leftists who had gone to Chile earlier from non-leftist régimes.

In addition to global international law and organisations, there is some protection for political prisoners from regional law and organisations. The most adequate regional protection for political prisoners is found under the European Convention on Human Rights, which created a Human Rights Commission and Court for implementation. These agencies are entitled to enquire not only into the conditions and treatment during detention but also into whether the detention is compatible with the Convention. Since the Convention came into force in 1951, however, the ICRC has continued its protection tasks regarding political prisoners in Western Europe. For one thing, proceedings under the Convention are slow, and questions arise in the meantime as to conditions and treatment. Thus even though the Republic of Ireland challenged British detention policies in Northern Ireland under the

Convention, the ICRC still visited administrative detainees who were members of the Irish Republican Army detained under British authority. Furthermore, a number of states in Western Europe do not at present fall under the jurisdiction of the Convention, including Spain, Portugal, Greece, Turkey, France, and Switzerland.

In the Americas, too, there is some regional protection, though at the moment nothing similar to the European Convention. A regional commission for human rights has been very active regarding political prisoners in certain situations, such as the Dominican Republic in 1965. And there is a draft convention for human rights approved by the Organisation of American States. The ICRC remains very active in Latin America, however, and if Western Europe is any guide, there is every reason to believe that regional developments will not exclude a need for Red Cross protection for political prisoners.

Summary. The subject of political prisoners is both important and controversial for the ICRC. If a government detains a foreigner for being an enemy in time of armed conflict, he is protected by international law as a prisoner of war or a civilian detainee. But if the government detains one of its own nationals as an enemy, the detainee has no international protection. (Indeed a foreigner may very well be better treated than a national.) In this situation the ICRC has perceived a need to try to protect that individual from his own government.

In general it can be said that in the last two decades, the ICRC has carved out a niche for itself in world affairs in so far as the subject of political prisoners is concerned. Using its reputation for humanitarian and non-political activity, it has secured access to political prisoners (whatever they are called) in almost half the countries of the world. It was visiting them in approximately one-third of the countries of the world in the mid-1970s. Its action generally complemented rather than conflicted with other groups. (There is continuing controversy, however, over ICRC visits to political prisoners in Greece from the autumn of 1969 to the autumn of 1970 and in South Africa. Some critics charge that the ICRC thereby allowed itself to be used by the detaining governments as a weapon against the Council of Europe and the United Nations, respectively, who were also making inquiries into the status of the prisoners.)

The ICRC has made an internal quantitative analysis which tends to support its belief that its activities improve the conditions of, and treatment for, political prisoners. The conclusion is suggested here, on the basis of field observation, that that is indeed the case.

Furthermore the work of the ICRC with regard to political prisoners is probably the most important protection activity it is now doing. The number of traditional prisoners of war has declined along with the number of traditional wars, and the number of those protected under the Fourth Geneva Convention is miniscule in historical terms. On the other hand, the number of people detained " by reason of political events " is increasing. Precisely because they do not fall under the Geneva Conventions and because there is no other functioning system of international protection of any importance except for the UN High Commissioner for Refugees and the European Convention on Human Rights, both of which have limited jurisdiction, these detainees are left at the mercy of national authorities whose policies can be quite inhumane. As

political violence within states increases, so does the need for increased protection for those detained because of political events. The ICRC is thus embarked on an activity which is in keeping with changing trends of violence—trends which are likely to continue into the foreseable future.

Hostages

While political prisoners can be considered hostages held by a government, non-governmental groups frequently seize hostages as part of their political struggle to gain power or to change existing policy. Unlike political prisoners, however, a hostage is not always regarded as an enemy by his captors. The hostage is frequently an innocent bystander to a political conflict who nevertheless becomes useful to the non-governmental group. By contrast in Latin America, say, groups holding a business man hostage regard him as part of an enemy system.

In the 1960s and 1970s, the ICRC came to play an increased role in trying to protect hostages. During this period, the ICRC was involved in a series of hijacking incidents, and to a much lesser extent in several kidnappings.

Hostages in Hijackings. Hijackings were a little-known international event prior to World War II. Even in the immediate postwar period, a slight increase in international hijackings did not cause general concern in international relations or lead to any Red Cross protection efforts. Hijackings in the late 1940s and 1950s were primarily personal events, with slight political overtones. Aircraft were sometimes hijacked by people who wanted to escape with their families from a particular state. The pattern was Eastern Europe to the West, and from Cuba to the United States. Such flights did have some political overtones, as they represented a rejection of a particular state and its ideology or life style. But they were far less disruptive internationally than the type of hijackings that followed.

In the late 1960s a rash of highly political hijackings started. (They coincided with hijackings by psychopaths and ordinary criminals, for attention or money, respectively, but no Red Cross protection efforts were entailed in these.) Political hijackings between 1968 and 1973 led to eleven cases of ICRC involvement, either by exercise of the right of initiative or by *ad hoc* request of some party. In these cases the ICRC found itself in a situation in which the entire event was primarily political, with humanitarian overtones—the reverse of the situation just after World War II. The later hijackings were usually aimed at calling international attention to the political cause of the hijackers, and at giving the hijackers some weapon—such as people and planes—in their political bargaining. International law and organisations were generally ineffective in preventing hijackings. While meetings were held and resolutions adopted, the hijackings continued. One reason was that several states permitted hijackers to land without prospect of sure and firm penalty. Attempted Red Cross protection and assistance to the hostages became a regular aspect of many hijackings during this period (see chart, page 42). Red Cross protection through ICRC involvement in hijackings gave rise to a number of points of difficulty.

First, when the ICRC exercised its right of initiative some party occasionally objected strongly. This was not always the case; the ICRC

HIJACKINGS INVOLVING ICRC, 1968-1973

Year	*Airline Involved*	*Place of Landing*	*Origin of ICRC Involvement*
1968	El Al	Algeria	Israeli request
1969	Trans-World Airlines	Syria	ICRC initiative
1969	Portuguese commercial	Congo	ICRC initiative, then Portuguese request
1969	South Korean private	North Korea	South Korean request
1970	Olympic Airlines	Egypt	ICRC initiative
1970	Trans-World Airlines, British Overseas Airways Corporation, Swissair	Jordan	Palestinian request, then three governments' request
1970	Japan Air Lines	North Korea	Japanese Red Cross involvement, ICRC informed
1971	Portuguese private	Congo	Congolese request, then Portuguese Red Cross
1972	Lufthansa	Aden	Requests from USA, West Germany, Japanese Red Cross *re* passengers
1972	Sabena	Israel	" Palestinian Red Crescent " request
1972	Turkish private	Bulgaria	United Nations request
1973	Middle East Airlines	Israel	Lebanese request
	Other Aircraft Incidents Involving ICRC, 1968-1973		
1970	British Overseas Airways Corporation	Israel	Unexpected landing in Israel; government arrests two Algerians; Algeria requests ICRC role
1973	Libyan Airlines	Sinai	Shot down by Israel; ICRC initiative, then Lybian request
1973	USSR military helicopter	China	Mistaken landing, Russian Red Cross request
1973	Iranian military helicopter	Iraq	Iranian Red Lion and Sun request

initiative towards the Syrian authorities in 1968 regarding a hijacked TWA flight resulted in little controversy and the early release of the passengers. But in the 1970 hijacking of an Olympic airliner in Athens, there was exceptionally strong opposition to the role of an ICRC delegate by those who had their own plans for countering the hijackers. This opposition was one of the factors causing the ICRC to curtail the use of the right of initiative without request in hijackings.

Second, the ICRC may be asked by one party or another to guarantee the terms arrived at in the bargaining, such as the safe-passage of the hijackers to an asylum state or the release of detainees somewhere in return for the release of passengers. If an agreement guaranteed by the ICRC should be opposed in some circles, or if the agreement is violated by some party (both of which occurred in the 1970 Athens affair), the Red Cross image is damaged and the ICRC encounters future problems in being acceptable to all parties.

Third, a party may use violence while the ICRC is involved in a hijacking situation, thus implicating the Red Cross symbol in political violence. In the Sabena affair of 1972, the Israeli authorities directly used the Red Cross symbol to take by force a hijacked airliner on the ground at Lod airport. And in the 1970 hijacking of three aircraft to Jordan by Palestinians (the Zerka affair), one aircraft was destroyed during the course of ICRC negotiations with the Palestinians.

Fourth, the ICRC may become a leading protagonist in the events, not simply a conveyor of messages. In the Athens affair and especially in the Zerka affair, the ICRC became a major participant in the bargaining. This gave rise to all sorts of difficult choices—practical and ethical—for the ICRC. The ICRC's active role aroused opposition within and outside the ICRC in both cases. Thus while a role as active participant does not necessarily have to constitute a point of difficulty, in practice to date it has become controversial.

Finally, in all these situations of ICRC involvement, the parties sought to manipulate the ICRC and the Red Cross symbol for political advantage. There was rarely a need for the purely humanitarian task of conveying messages and helping the hostages. In most cases, radio contact was maintained between hijackers and government, the duration of the episode was relatively short, and release of the hostages did not depend on third-party roles but simply on agreement between the parties. The ICRC had to weigh these facts against the fact that one party had asked for Red Cross involvement and that there was some need among the passengers for medical and nutritional care, the latter need being pronounced in the Zerka affair.

By the early 1970s, especially in the wake of the Athens, Zerka, and Sabena affairs, the ICRC established a formal policy regarding its role in hijackings. As a statement of principle, the ICRC condemned the taking of hostages and thus it opposed hijacking. Nevertheless, the ICRC agreed to serve as a humanitarian intermediary, but not to enter into the bargaining. The ICRC resolved it would not project itself into a situation, but would become involved under two conditions. First, if asked by one party and the other side agreed. Second, if the parties agreed to forego the use of force or any action prejudicial to the well-being of the passengers and crew. The ICRC would not become a guarantor of any agreement, and would ask for the full cooperation of all parties and for special attention to special cases such as sick and wounded.

Analysis of the ICRC role in hijackings leads to three conclusions:

1. As the ICRC became involved on a case-by-case basis without any guidelines, it became drawn, or projected itself, into the politics of the situation. This was inevitable since the situation was primarily political and partially humanitarian.

2. As the ICRC began to realise this, it progressively tried to extricate itself from the political aspects. Indeed, after the Athens affair in 1970, some ICRC officials wanted the organisation to stay out of hijacking situations altogether. But because the ICRC recognised that some humanitarian need existed that it was asked to meet, it continued to play a protection role, but in as cautious and non-political a way as possible.

3. A basic question remains about Red Cross protection and hijackings: that is, whether the ICRC can play any important role and still maintain its cautious and " almost-purely-humanitarian " approach. Phrased differently, the question is whether the ICRC approach to hijacked hostages is so " low profile " as to exclude any meaningful Red Cross protection. Because of the decline in the number of hijackings in the mid-1970s, due to improved security measures for departing aircraft, the question remains unanswered. How important the subject of hijacked hostages will be in the future is of course unknown.

Kidnapped Hostages. At about the same time that the ICRC was becoming more involved in hijackings, it found itself involved in a series of political kidnappings in Latin America. In 1970 and 1971, four governmental officials were kidnapped by non-governmental groups, leading to ICRC involvement. In one case the German ambassador was killed in Guatemala before the ICRC could act. In another case, the British ambassador was released in Uruguay before the ICRC was officially asked to act. But in the third case, involving both an American and a Brazilian official kidnapped by the Tupamaros in Uruguay, the ICRC became centrally involved over several months. For the ICRC, this situation was similar in some ways to the 1970 hijackings in Jordan (the Zerka affair): the ICRC was asked to intervene by a non-governmental party, the host government was not enthusiastic about ICRC involvement but did not block it, the ICRC entered into the substantive bargaining by making proposals and evaluating other proposals, and the eventual release of the hostages occurred without direct ICRC participation. But in both situations, local politics dominated events: in the Zerka affair nothing less than an ensuing civil war determined the outcome; in the Uruguayan situation, the ICRC was unable to change governmental, Tupamaran, or other local policy.

Very early in the Uruguayan affair, the ICRC had stated a policy that was very similar to its policy in hijackings: It condemned kidnappings but would serve as a neutral intermediary if asked, it would not guarantee any agreements, and if other third parties could help the hostage(s), the ICRC would defer to them.

The limited role of the ICRC in political kidnappings does not permit further analysis. This role seems to be less important than that of trying to protect hijacked hostages, but it would take only one major event to change this evaluation. Both kidnappings and hijackings have been less important in Red Cross protection efforts to date than activity related to political prisoners.

Miscellaneous

The ICRC, and on occasion other Red Cross organs, perform a number of *ad hoc* protection tasks that do not concern political prisoners or hostages. While these tasks are unrelated to each other, it is possible for purposes of analytical description to group them under various headings in order to avoid an encyclopaedic description of everything done under *ad hoc* Red Cross protection apart from political prisoners, hijackings, and political kidnappings.

Supervision of Agreements. From time to time the ICRC is asked to supervise the execution of an agreement, humanitarian or otherwise.

The ICRC has frequently been asked to supervise surrenders, which represent a tacit agreement between conqueror and conquered. In the Middle East War of 1973, for example an Israeli contingent in Sinai during the early days of fighting would insist on occasion upon the presence of ICRC delegates before laying down their arms. The Red Cross presence was obviously a symbol of expected fair treatment and thus a form of protection.

The ICRC has also been asked to supervise agreements involving the movement of populations. For example, at the very time when the ICRC was *persona non grata* in North Viet Nam, it supervised an agreement between that government and Thailand which provided for the movement of Vietnamese in Thailand to North Viet Nam. Similarly, despite lack of extensive dealings between the ICRC and North Korea, the ICRC supervised the movement of 100,000 Koreans in Japan to North Korea, including some Japanese spouses. Thus governments having limited contacts with one another found the ICRC useful as an intermediary. Also in these cases, there was a formal agreement between the governments on a humanitarian matter. While there were some diplomatic and political overtones (the ICRC was interested in furthering relations with Asian Marxist régimes, and South Korea had political reasons for being displeased with Japanese-North Korean cooperation), these agreements on humanitarian matters represented little difficulty for the ICRC.

In rare cases the ICRC is asked to supervise what can be called a political agreement. In the Cuban missile crisis in 1962, the USSR and the US agreed that the ICRC should be asked to supervise Soviet ships coming into Cuba, to ensure that no missile parts were on board. This was a major point in the bargaining between the two superpowers. While there were obviously humanitarian considerations involved, not the least of which was whether the world would be blown up as a result of the superpower confrontation, the issue of withdrawal of Soviet missiles can quite properly be regarded as political. The ICRC responded in the affirmative, stating that the exceptional seriousness of the question permitted an ICRC departure from traditional roles. As matters turned out the ICRC did not have to execute the role it had agreed to perform, since the Soviets stopped sending any ships to Cuba for a time after the crisis. It is noteworthy that in this momentous situation the ICRC was acceptable to a Marxist state.

Requests for the ICRC to supervise *projected* agreements sometimes arise in relation to requests to conduct investigations. The timing and nature of the ICRC response may lead to charges that it is not neutral.

During the Korean war, China charged the American forces with using biological warfare. Subsequently, four East European Red Cross societies

made the same charge to the ICRC. Following its traditional practice, the ICRC communicated the protests to the United States. In turn, that government proposed to the ICRC that it conduct an investigation into the cause and extent of the alleged epidemic. The day following receipt of of the American proposal, the ICRC contacted the parties concerned and asked them to agree to the creation of a commission of inquiry. The commission was to be under the aegis of the ICRC but made up of personnel chosen from Switzerland and Asian states not involved in the Korean war.

Neither China nor North Korea ever responded officially to this ICRC proposal. Rather, Chinese governmental radio broadcasts denounced the ICRC as part of the imperialist camp. The ICRC finally notified the United States that the investigation could not be conducted. After all this transpired during the spring of 1952, the Soviet Union brought up the subject in the UN Security Council that summer. Again the Americans proposed that the ICRC conduct an investigation. Again this was unacceptable to the Marxist states, and the Soviet Union vetoed the American draft resolution.

Thus the rapid and favourable ICRC response to the American request for an investigation laid the ICRC open to the charge of being pro-Western. Had it not responded favourably, or rapidly, it could have laid itself open to the charge of being anti-Western. Clearly, therefore, requests to supervise a projected agreement are fraught with difficulties for the ICRC, especially when the projected agreement deals with an investigation into alleged violations of the law of armed conflict.

In sum, the ICRC has been asked, and has generally agreed, to supervise various agreements. When the subject is a clearly humanitarian one regulated by formal agreement, the ICRC can be expected to respond affirmatively. When the matter is as much political as humanitarian (as in Cuba), the ICRC may make a foray out of the purely humanitarian field if it believes the gravity of the issue warrants unusual action. And where the parties directly involved do not agree fully on the request for supervision, it can be assumed as a present rule that the ICRC will not act, especially when there are strong political overtones to the situation.

Involvement Without Request. Most of the time the ICRC is asked by some party to exercise its right of initiative vis-à-vis another party, but the Red Cross symbol has been employed a few times in some protection task without request from individuals or groups involved.

During the civil war in Yemen in the 1960s the ICRC delegate in the area responded on his own to reports that there were victims in a certain place as a result of a bombing raid. His report, based on autopsies and treatment by ICRC doctors, documented the use of gas warfare by the air force attacking a Royalist-controlled area. This report led to a public appeal to all parties to refrain from gas warfare and to a private report to the governments involved in the fighting. The original report by the ICRC delegation in Yemen was eventually obtained by *The New York Times* and became public knowledge. After these events transpired in the first half of 1967, there were no proven instances of gas warfare in the Yemeni civil war.

In 1971, the ICRC in Geneva authorised the flight of two aircraft filled with medical supplies and other assistance material to Pakistan, as a demonstration of ICRC concern for the situation in what was then East

Pakistan. While this may be regarded as an attempt at assistance, the move was partly designed to deter further repressive policies in the East by the Pakistani government, and was thus a form of attempted protection. The ICRC did not have authorisation from the Pakistani government. The government refused to accept the ICRC mission, and it had to return to Geneva.

Further examples of attempted Red Cross protection without prior approval are the roles of Red Cross representatives in arranging truces and cease-fires. In the Dominican Republic in 1965, both the representatives of the American Red Cross and the ICRC arranged truces. Without doubt, this type of unrequested action has occurred throughout the history of the Red Cross Movement in numerous unrecorded situations.

Beyond arranging truces and perhaps neutral zones on an *ad hoc* and unrequested basis, this type of involvement without request is not likely to become a prevalent form of Red Cross protection activity. The risks are usually much greater than the promise of success. There is likely to be more damage to the Red Cross symbol and image because of rejection and criticism of its initiative than actual benefit to the individuals. Yet these *ad hoc* unrequested involvements can be important in protecting people.

Technical Services. The ICRC has developed, because of practical need, a Red Cross travel document. In a limited way it can be considered a substitute for a passeport for certain people, since it is an internationally recognised document on which can be stamped visas permitting international travel. Especially during and after wars, many individuals' normal passport or other papers have been lost or destroyed. A government desiring to help these people can be at a loss to do so because some technical requirements are lacking. The ICRC has played a technically important role in providing basic documentation, thus permitting both governments and international organisations to operate in accordance with their respective technical procedures.

The Red Cross travel document continues to be useful in international relations. It was provided to a number of individuals in the aftermath of the 1973 coup in Chile, which allowed the United Nations High Commissioner for Refugees to meet certain technical requirements in seeking the resettlement of a number of refugees. In Uganda, the Red Cross travel document was important to a number of individuals of Indian origin who had lost their British passports and who had also lost their right to remain in Uganda without detention.

Moreover, the ICRC did more than provide travel documents to foreign nationals found in Germany at the close of World War II. Because foreign nationals—workers who had been deported to Germany—lacked a local protector, the ICRC became a *de facto* consulate, with the tacit permission of the victorious states, signing papers and in many ways handling the everyday technical affairs of a consulate.

The ICRC has also provided technical services connected to indemnity programmes for political prisoners and for people protected under the Geneva Conventions. There have been two main examples, both following World War II.

Under Article 16 of the Japanese Peace Treaty the ICRC became a humanitarian intermediary for distributing Japanese assets held in neutral

countries to former detainees who had suffered undue hardship in Japanese detention places. Similarly, the ICRC was asked by the West German government to assist in the payment of compensation to former detainees of the Third Reich who had been victims of pseudo-medical experiments. The task of the ICRC was to serve as a contact principally with the Polish and Czech governments, with whom West Germany had no diplomatic relations, in order to establish who was entitled to compensation, and how much.

These technical tasks connected to indemnity programmes illustrate requests made to the ICRC outside the bounds of the Geneva Conventions and ICRC statutes.

Diplomatic Negotiations. The Red Cross symbol is sometimes, through rarely, employed in general diplomatic negotiations—attempted protection in the broadest possible sense.

There have been several occasions when a National Red Cross Society has negotiated with a counterpart somewhere as part of an over-all effort to achieve peace or, in less grandiose terms, a normalisation of relations. This has occurred, for example, between the Red Cross Societies of the two Koreas, the two Germanies, Iran and Iraq, and El Salvador and Honduras. On occasion a National Society is simply an agent of the government, but at other times it acts independently, at least partially so. Sometimes the ICRC is involved, sometimes not. This sort of activity, in that it is directed towards the avoidance of violence and the betterment of relations, can be perhaps considered anticipatory or preventive protection.

Summary

With regard to *ad hoc* protection, then, there is a great deal of Red Cross Protection not directly related to the development of law or supervision of law under the 1949 Geneva Conventions. This is not to say that this *ad hoc* protection cannot become customary or statutory law. Indeed, the pattern in the history of the ICRC is that *ad hoc* protection comes to be generally accepted as normal, and is then developed into international law. *Ad hoc* protection of the wounded preceded the 1864 Convention, just as *ad hoc* protection of prisoners of war in World War I preceded the 1929 Convention, just as Red Cross protection in civil wars preceded the writing of Common Article 3 in 1949.

Of all the *ad hoc* protection tasks pursued under the Red Cross sign, tasks connected with political prisoners have been pursued the most systematically and have involved the most consistent and sizeable expenditure of manpower and money. Yet this task has been performed with any real consistency for only the last decade and a half. Thus it is likely to remain *ad hoc* rather than legally based for some time to come, if it remains a Red Cross activity.

V. Review of Red Cross Protection Roles

Red Cross protection through the development of law, the supervision of applied law, and *ad hoc* diplomacy is a product of the history of international relations over the last 110 years. The protection roles of the Red Cross, in their broad outlines, are well suited to the international milieu in which they are played for precisely the reason that the roles have evolved as part of international relations rather than being recently interjected.

Legal development and codification are attempted where international consensus permits. There has been consensus in support of some supervision of the written law, though the consensus has been shallow in the sense that effective enforcement is still lacking. Where there has not been general consensus in support of Red Cross protection, the ICRC has pursued a policy of pragmatic and case-by-case protection without emphasis on legal questions. Thus Red Cross protection, as practiced principally by the ICRC, is a blend of law-centred activity and pragmatism.

The specific tasks of Red Cross protection are varied, ranging from pure diplomatic activity—discussions and drafting of law and the presence of delegates in places of detention—to small-scale assistance. Red Cross protection is interpreted by the ICRC not only in the minimum sense of deterring bodily harm but also at times in the maximum sense of developing the individual's qualities as a human being. Thus the ICRC facilitates educational programmes and seeks to preserve personal ties through family reunification or visits of relatives to detainees.

The intent of Red Cross protection is to help the individual in need without regard to the reasons for that need. In some ways the work of the ICRC is similar to groups which defend civil liberties without regard for the

political philosophies in question (such as the American Civil Liberties Union, which has defended freedom of speech for both fascists and communists). Hence the ICRC has sought to protect American and North Vietnamese prisoners of war without attention to which was the aggressor and which the defender. Hence the ICRC visited political prisoners in East Germany and Portugal without challenging the validity of the laws of either régime that produced the political prisoners.

The indeterminate or intermediate nature of Red Cross protection has been precisely what has made Red Cross protection useful. It does not seek total protection through total solutions; it does not seek to protect people by changing régimes or eliminating the basic cause of detention. While many groups have wished to do away with war or with one political movement or another, Red Cross protection has been consistently oriented to the individual without regard for other considerations. While this philosophical underpinning has provided uniqueness to Red Cross protection, it has also produced criticism and controversy. For there have always been those who regard ICRC activity as getting in the way of total solutions or unduly favouring a given régime. The roles—and the controversy—continue.

NOTES

1. The complete statutes of the ICRC, as well as the statutes of the League and the International Red Cross are found in *Handbook of the International Red Cross*. The confusing nature of the different sets of statutes and the way they have been interpreted over the years fall outside the scope of this paper.

2. Almost all the ICRC statutes are important for understanding Red Cross protection. Only the most important are listed here. The entire list is found in *Handbook*, op. cit., pp. 288-289, eleventh edition.

3. The effect of the 1974 ICRC draft protocols to the 1949 Conventions on the Nuremburg Principles is important but is more a matter of international penal law than humanitarian law, and thus falls outside this inquiry. It is important to note that the Nuremburg Principles have never been definitely made a part of international law. Their legal status has remained controversial especially since the General Assembly of the UN has refused to approve them formally. The 1974 protocols, if adopted, would explicitly endorse some of the Nuremburg Principles by writing them into the statutory law of armed conflict, thus removing much of the controversy over their legal status. For background information see S. D. Bailey, *Prohibitions and Restraints in War* (London and New York: Oxford University Press, 1972).

4. The Diplomatic Conferences that produce the law of armed conflict associated with the Geneva Tradition are called and hosted by the Swiss Government at the request of the ICRC. The 1974 session not only resulted from the ICRC's desire for the law to be brought up to date, a view endorsed by the International Red Cross Conference, but also from diplomatic undertakings within the UN framework by states urging improved protection of human rights in armed conflicts.

Because of both UN and Red Cross resolutions, the ICRC called a series of preparatory meetings of Red Cross and legal officials. The result of this process was two draft protocols that served as the basis of discussion at the 1974 and 1975 Diplomatic Conferences. The intent of the two protocols was to supplement the 1949 Geneva Conventions. Protocol I pertained to international armed conflict and would supplement all four Conventions in various ways. Protocol II pertained to non-international armed conflict and would supplement Common Article 3 of all four Conventions by specifying the rules regulating non-international armed conflict.

5. See especially Pictet, *The Principles of International Humanitarian Law* (Geneva: ICRC, 1966) and *Le Droit Humanitaire et la Protection des Victimes de la Guerre* (Leiden: Sijthoff, 1973).

6. As a legal nuance, it is worth noting that the ICRC has served as a *de facto* and humanitarian substitute for the Protecting Power rather than as a formal and full substitute. Thus with regard to the Third Convention, it has acted under Article 9, referring to the traditional humanitarian tasks of the ICRC, not under Article 10, referring to the Protecting Powers and their substitutes.

7. The subject of prisoners of war in the Nigerian civil war demonstrates the neutrality of Red Cross protection. One of the questions arising from the war was whether the prisoners of war held by Biafra could be flown out to a third state for better medical and nutritional care and for detention for the duration of the war. While Biafra authorised the ICRC to do this, the ICRC did not so act because Lagos did not agree, fearing the move would give some *de facto* recognition to Biafra. (The ICRC did fly some children and some severely wounded out of Biafra.)

8. Despite the ICRC's proposed draft protocol pertaining to armed conflict not of an international nature, the ICRC has not proposed anything that would provide international regulation in situations of domestic instability because of its view that governments would not accept such international regulation. The 1974 Diplomatic Conference confirms the ICRC view. While it is premature, at the time of writing, to forecast changes in international law on this point, it is reasonable to guess that in the not too distant future there will be an extension of the law of armed conflict to provide further specific legal regulation in wars of self-determination and in civil wars. The basic problem will remain that of getting the conflicting parties to agree on how the violent situation should be labelled in law. The choices will be: 1) a normal international armed conflict, 2) a war of self-determination that *ipso facto* is an international armed conflict, 3) a non-international armed conflict (hence a civil war), 4) domestic instability. Whatever the specific legal changes produced, if any, the ICRC will probably have an extensive role in the first two, a more extensive role than in the past with regard to the third option, and an uncertain role regarding the fourth.

9. This has been traced very well by Jacques Moreillon of the ICRC in *Le Comité International de la Croix-Rouge et la Protection des Détenus Politiques* (Lausanne: L'Age d'Homme, published for the Henry Dunant Institute, 1973).

10. Against this background it is interesting to observe the types of inquiries made by the ICRC and the types of responses made by governments in matters concerning political prisoners. This information is found in the Moreillon book, *ibid.* A general pattern is that the ICRC has played down the use of claims under Common Article 3 of the Geneva Conventions, as they tend to produce a negative reply from the government concerning ICRC access.

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