Commentary

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Introduction

Soldiers, especially generals, are often accused in their planning of fighting the last war, not the next one. It is no new observation that in formulating new rules of international humanitarian law international lawyers and diplomats (who are, in this context at least, only international lawyers with stripes) are similarly prone to regulating the last war, not the next one. Of course, formally this is not the case. With the possible exception of jurisdiction over war crimes, there is no tendency towards retrospectivity in the international treaties on the laws of war, which really do attempt to regulate future conflict. But they do so in the light of past practice, and in this area State practice has a more than usually tenacious habit of going its own way. This is particularly true of the rules relating to *scrutiny* of the application of international humanitarian law, for example in the institution of protecting powers. The 1977 Protocols reaffirm that institution and attempt in various ways to restore it to the effective operation it once (more or less) had, despite the fact that in only four cases since 1949 have protecting powers been appointed — and for various reasons in no case have they operated with any great effect in the field. One is reminded of the law of the belligerent status of insurgent forces — no sooner had it become clarified and encapsulated in 19th Century conflicts such as the American Civil War than State practice passed it by, and there has hardly been a case of it this century.[1] The illustration is relevant in another way, since one of the consequences of recognition of belligerency was the application of the international laws of war. The desuetude of this aspect of the law is one reason for the difficulty of applying any substantial aspect of the international rules of war to domestic conflicts, or conflicts plausibly classified as domestic. As is well known, Protocol I Article 1.4 has added to this difficulty, but it already existed.

There are of course, a variety of ways, some of them referred to in Dr Gasser's paper, of securing compliance with international law. But it is difficult or impossible to secure compliance in time of war, when knowledge of violations is absent or disputed. So scrutiny is of enormous significance. Dr Gasser has referred to the ICRC's work in this area. I want to deal briefly with two issues: first, the problem of ensuring the operation of protecting powers in international conflicts, and the related question of the relationship between the provisions for protecting powers or substitutes and the ICRC's humanitarian functions under

1. See Crawford, J., *The Creation of States in International Law* (1979), pp 252-5, 268-9.
2. In addition to the works cited by Dr Gasser, there is a very useful paper by Pierce, GAB, "Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC" (1980) 90 Military LR 89-162.

common Article 10.3, and secondly, the problem of scrutiny in internal conflicts under Protocol II, a matter with respect to which Dr Gasser's paper, with a reticence which speaks volumes, has virtually nothing to say.

Protecting powers or substitutes in international conflicts: the problem of "automaticity" and the role of the ICRC[2]

The institution of protecting powers derives from 19th Century practice, and was not given a textual base until after the First World War.[3] Article 86 of the Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929[4] sought to ensure that "a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between Protecting Powers". The juxtaposition between "guarantee" and the "possibility of collaboration" demonstrated the essentially voluntary character of the institution of protecting powers at the time. The absence of any obligation to agree to or ensure the appointment of protecting powers was clear. By contrast the 1949 Geneva Conventions went a good deal further in the provision for protecting powers or substitutes. Common Article 8/8/8/9 provided that the Convention "shall be applied . . . under the scrutiny of the Protecting Powers". Although delegates of the protecting powers would be subject to approval, the parties were to facilitate, to the greatest extent possible, the task of representatives or delegates of the protecting powers. Their activities were to be restricted only "as an exceptional and temporary measure when this is rendered necessary by imperative military necessity".[5] Common Article 10/10/10/11 provided that if protecting powers were not appointed, substitutes could be appointed by agreement, and that in the absence of a protecting power or substitute, the detaining power "shall" request a protecting power or substitute. Nonetheless the leading authority states that there was no legal obligation to appoint or accept a protecting power,[6] and Common Article 10/10/10/11 (paragraph 3) itself provided that if protection could not be arranged through a protecting power or substitute, their humanitarian functions were to be performed by a body such as the International Committee of the Red Cross.

This reinforcement of the machinery for appointing protecting powers or substitutes, whether or not it led to a formal legal obligation, was clearly a good deal more elaborate and articulated than anything in the earlier practice or in the 1929 Convention. Nonetheless the disappointing experience with appointment of protecting powers in the period after 1949 led to attempts not so much to rethink the institution as to attempt to improve the machinery to ensure the appointment of protecting powers or substitutes.[7] Thus a key issue, with respect to international armed conflict, in the revision of the 1949 Conventions during the 1970s was the so-called problem of "automaticity". Although few were prepared to support a provision which created an unequivocal obligation to consent to the appointment and operation of protecting powers, various formulae

3. For the evolution of the system of protecting powers see Pierce, op cit, pp 93-100.
4. 118 LNTS 343.
5. 1949 Conventions, Common Art, 8/8/8/9, paras 1–3.
6. Draper, GIAD, "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978" (1979) 164 HR-I, pp 15-16.
7. For post-1945 experience with protecting powers see Pierce, op cit, pp 119-130.

were tried in an attempt to come somewhere close to this position, without actually achieving it. The eventual result, Article 5 of Protocol I, thus contains rather contradictory language, though its ultimate effect is plain. Article 5.1 created what was described as a 'duty' to secure the appointment of Protecting Powers, and Article 5.2 and 3 attempted in various ways to provide machinery which would facilitate the appointment of Protecting Powers. Nonetheless paragraph 4 of Article 5 clearly envisaged the probable outcome:

> "If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organisation which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Convention and this Protocol."[8]

Thus despite the apparent injunction to the Parties that they "shall accept without delay" an offer to act as a substitute made by the ICRC or some other equivalent organisation, Article 5.4 is explicit in making the functioning of such a substitute subject to the consent of the parties. The apparent internal inconsistency, and the real effect of such provisions, were summarised in a comment by an Australian delegate on an earlier draft of Article 5.4: this was supported "not because it made it more obligatory for the Party concerned to accept the offer of the ICRC but because it appeared to do so".[9] In this case, apparently, the appearance *was* the reality.

It is easy to be critical of the inconsistencies and tergiversations of language in these provisions, but it is clear from their history that they mark the limits of the current consensus with respect to the appointment of protecting powers and substitutes. That this is so is underlined by the fact that the ICRC itself has been consistent in its support for the view that the appointment of a substitute (in particular itself) can only be achieved by agreement.

As we have seen, Common Article 10 paragraph 3 of the 1949 Conventions provides for the "humanitarian" functions performed by protecting powers to be performed, in the absence of protecting powers, by a humanitarian organisation such as the ICRC. Specifically, Article 10.3 provides:

> "If protection cannot be arranged accordingly, the Detaining Power shall request, or shall accept, subject to the provisions of this Article, 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 Protecting Powers under the present Convention."

The failure of the Diplomatic Conference in 1977 to take matters significantly further has raised fears in some quarters that Article 5 paragraph 4 of Protocol 1 might be regarded or interpreted as weakening the effective Article 10 paragraph 3 retroactively.[10] As a matter of law this is difficult to accept, in particular given

8. Protocol I, Art 5.4.
9. Australian delegate (1975), cited by Forsythe, DP, "Who Guards the Guardians: Third Parties and the Law of Armed Conflict" (1976) 70 AJIL 41 at p 51.
10. Egyptian delegate (1977), cited by Pierce, op cit, p 142.

the generally acknowledged proposition that the 1977 Protocols were intended to supplement rather than to derogate from the 1949 Conventions, which of course they do not replace. On the other hand the distinction between the functions of a Protecting Power or substitute and those of the ICRC or a similar humanitarian organisation under Article 10.3 is likely to be slight, in particular since consent is clearly required to the functioning of a humanitarian organisation under Article 10.3, as Article 9 makes clear. Indeed it is hard to see any distinction between the "humanitarian activities" under Article 9 and the "humanitarian functions" under Article 10.3. Pierce's conclusion is that "even with the procedural additions of Article 5.3 the process by which a Protecting Power is appointed has changed little from the time of the Franco-Prussian war."[11] This only underlines the role of the ICRC, developed with admirable flexibility, and a frequently judicious willingness not to make explicit the basis on which action is taken.

Scrutiny in internal conflicts.

It is apparent the effective operation of protecting powers even in international armed conflict raises many difficulties. These are clearly much increased when the conflict is, or is regarded by a belligerent as, an internal rather than an international armed conflict. Common Article 3 of the 1949 Conventions provided that "an impartial humanitarian body such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". However notwithstanding the many civil conflicts since then, it has proved extremely difficult in practice for an impartial body such as the ICRC to offer assistance in situations of internal conflict. Indeed, much of the assistance given, in particular to insurgents, in internal conflicts has been given by other States or organisations which have been far from impartial, quite often under the guise of premature recognition. As is well known, the 1977 Protocols have if anything exacerbated this problem. On the one hand Protocol 1 Article 1.4 internationalizes a few internal conflicts, where these can be plausibly identified as conflicts by a body struggling to assert a right of self-determination on the part of a subjugated people. The difficulty is in determining in complex and controversial cases when the right of self-determination applies, and in the inevitable antagonism that such an identification tends to cause. In terms of the application of the laws of war applicable in international armed conflicts to situations of belligerency, it is interesting that the Confederated forces in the United States Civil War (the clearest example of belligerency in the 19th Century) would probably not have qualified under Article 1.4 of the 1977 Protocol.[12]

On the other hand the sensitivities of many countries with respect to internal rebellions or attempts at secession resulted in the provisions of Protocol II being in this respect particularly weak. Article 3 emphasises that there is to be no intervention in such internal conflicts "for any reason whatever". The only mention of the work of humanitarian agencies is contained in Article 18.1 which

11. Ibid, p 155.
12. For discussion of this aspect of Protocol I see eg O'Brien, WV, "Jus in bello in revolutionary war and counter-insurgency" (1978) 18 Virg JIL 193; Gorelick, RE, "Wars of national liberation, jus ad bellum" (1979) 11 Case West Res JIL 71.

provides only that "relief societies located in the territory of the High Contracting Party . . . may offer their services". The paragraph also provides, unremarkably, that help may also be offered by "the civilian population . . . even on its own initiative". The implication is very much that charity, whether or not it begins at home, is also to end there. Article 8.2 leaves open the possibility of "relief actions for the civilian population . . . subject to the consent of the High Contracting Party". Although Article 8.2 does not say so, this could clearly be done by a body such as the ICRC, but this capacity existed quite independently of Protocol II, which therefore adds nothing to the securing of relief, much less a degree of impartial scrutiny in internal conflicts.

Faced with these problems, it is easy to see the difficulty the ICRC often has in specifying the legal basis of its operations, and the reasons for its intense reluctance to do so. Problems of characterisation can arise in three different ways: in determining whether a conflict is an internal conflict or not for the purposes of Article 10.3 and/or Protocol II (that is, whether the level of violence is above the respective thresholds of these two provisions, which are not necessarily the same); in specifying whether the conflict is an internal conflict or one covered by Protocol I Article 1.4; and third, apart from that possibility, in determining whether a conflict is an internal or an international one. The distinction drawn between Article 1.4 of Protocol I and the situations covered by Protocol II is regrettable more because of the further blurring of categories and the highly controversial characterisation problems it creates than for any other reason. Faced with this situation, it is inevitable that the ICRC should be as reticent as possible over the basis of its actions or offers, since in practice the burden of scrutiny falls upon it alone.