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The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict

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The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict

David Weissbrodt*

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* Professor of Law, University of Minnesota. The author wishes to thank Kathy Ellis of the University of Minnesota Law School Class of 1987, for her assistance in the preparation of this article. A considerably abbreviated version of this article has been accepted for publication in E. LUTZ, K. BURKE & H. HANNUM, *NEW DIRECTIONS IN HUMAN RIGHTS* (forthcoming 1988).

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I. INTRODUCTION

Governments are principally responsible for the implementation of human rights law and humanitarian law during periods of international armed conflict.¹ During periods of noninternational armed conflict, governments and armed opposition groups each bear responsibility for their obedience to human rights law and humanitarian law.²

International human rights organizations can only encourage participants in armed conflicts to respect human rights law and humanitarian law. Several human rights organizations have attempted to do so. For many years the International Committee of the Red Cross (ICRC) has taken a leading role in encouraging the application of humanitarian law during periods of international armed conflict; recently it has also begun referring to human rights law in situations of domestic strife or tension that international humanitarian law does not cover.³

1. See International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, art. 2, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967) [hereinafter International Covenant]; common article 1 of the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] [hereinafter collectively the Geneva Conventions].

The Geneva Conventions also recognize that governments which are not parties to the conflict may serve as protecting powers, but such status is rarely, if ever, granted in practice. E. ROSENBLAD, *INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT* 15-17 (1977); 2 H. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 577-605 (1986). Article 90 of Additional Protocol I also envisages the appointment of an International Fact-finding Commission consisting of fifteen impartial persons of high moral standing, but this provision has not been used yet. See E. ROSENBLAD, *supra*, at 18.

2. See, e.g., Geneva Conventions, *supra* note 1, common art. 3.

3. First, Second, and Third Geneva Conventions, *supra* note 1, common art. 9; Fourth Geneva Convention, *supra* note 1, art. 10; Geneva Conventions, *supra* note 1, common art. 3; INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE RED CROSS AND HUMAN RIGHTS* 38-39 (1983) [hereinafter ICRC, *HUMAN RIGHTS*]; Schindler,

Intergovernmental organizations such as the United Nations General Assembly (General Assembly),⁴ the United Nations Commission on Human Rights,⁵ the International Court of Justice,⁶ the Inter-American Commission on Human Rights⁷ and several others have occasionally attempted to use their influence to seek the protection of human rights law during armed conflicts, and they have referred irregularly to humanitarian law in such endeavors.⁸ These intergovernmental organizations have

The International Committee of the Red Cross and Human Rights, 19 INT'L REV. RED CROSS 3 (1979).

4. See G.A. Res. 2675, 25 U.N. GAOR, Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970); see also *United Nations Action in the Field of Human Rights*, U.N. Doc. ST/HR/2, at 110-16 (1973).

5. The United Nations Special Rapporteur on Human Rights in Afghanistan devoted significant attention to the armed conflict in that nation and the applicable humanitarian norms. 41 U.N. ESCOR (agenda item 12), U.N. Doc. E/CN.4/1985/21, at 28-32, 42-45, 47-48 (1985). The United Nations Special Rapporteur on Human Rights in El Salvador identified the applicable international humanitarian standards in common article 3 of the Geneva Conventions [hereinafter common article 3] and Additional Protocol II, but did not use these standards in assessing the facts collected. 41 U.N. ESCOR (prov. agenda item 12), U.N. Doc. E/CN.4/1985/18, at 37-45 (1985); U.N. Doc. A/39/636, at 28-34 (1984). In contrast, the United Nations Special Rapporteur on Human Rights in Guatemala not only experienced difficulty in establishing relevant facts, but also failed to apply humanitarian law or any other specific human rights provisions. 41 U.N. ESCOR (agenda item 12), U.N. Doc. E/CN.4/1985/19 (1985). See generally the written statement submitted by Human Rights Advocates, Inc., a nongovernmental organization in consultative status, 42 U.N. ESCOR (agenda item 12), U.N. Doc. E/CN.4/1986/NGO/46 (1986).

6. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 14, 113-15, 129-30 (June 27, 1986); reprinted in 25 I.L.M. 1023, 1073-74, 1081 (1986).

7. The Inter-American Commission on Human Rights generally relies on the provisions of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights for its operative human rights standards, but it has found violations of common article 3. See, e.g., *Inter-American Commission on Human Rights, Report on the Situation of Human Rights in the Republic of Guatemala*, OAS Doc. OEA/Ser.L/V/II.61, doc. 47, rev. 1, at 69-70 (1983). See also Application 9213 (Disabled Peoples' International v. United States), Inter-Am. C.H.R. 184 OEA/SER.L/L/V/II.71, doc. 9, rev. 1 (1987) (citing common article 3) [hereinafter *DPI v. U.S.*]; *id.* (declaring admissible a complaint on behalf of sixteen persons who were killed and six who were injured when United States military aircraft mistakenly bombed the Richmond Hill Insane Asylum in Grenada, West Indies).

8. See generally Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Noninternational Armed Conflicts*, 33 AM. U.L. REV. 99 (1983); Wolf, *L'Oit et la Croix-Rouge - Convergences de leur action*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 1011 (C.

attempted to fill the vacuum left by the failure of the United Nations Security Council and other international mechanisms to cope successfully with violations of human rights law during periods of armed conflict.

International nongovernmental organizations⁹ such as Americas Watch, Amnesty International, International Alert, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Federation of Human Rights, the International League for Human Rights, the Lawyers Committee for Human Rights, and the Minority Rights Group have also recognized that human rights need protection during periods of armed conflict.¹⁰ In addressing human rights violations, these organizations and the United Nations have relied principally on the Universal Declaration of Human Rights¹¹ and the International Covenant on Civil and Political Rights.¹² These organizations have begun to refer more frequently, however, to principles of humanitarian law applicable to armed conflict, such as the principles in the four Geneva Conventions of August 12, 1949 (Geneva Conventions) and the two Additional Protocols of June 8, 1977 (Additional Protocols I and II or Additional Protocols).¹³

Swinarski ed. 1984) [hereinafter *STUDIES IN HONOUR OF JEAN PICTET*]. For a review of historical efforts to implement the Hague Regulations through international adjudication, see Gross, *New Rules and Institutions for the Peaceful Settlement of International Disputes*, 76 *PROC. AM. SOC'Y INT'L L.* 131 (1982).

9. See Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW* 403 (T. Meron ed. 1984); *id.* at 436-38 (for bibliography); Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 *N.Y.L. SCH. L. REV.* 89 (1978).

10. Serious human rights violations including arbitrary killings, detentions, and ill-treatment are likely to increase in times of armed conflict. Amnesty International, in its Annual Report of 1986, identified twenty-one countries in which human rights issues arose during periods of armed conflict: Afghanistan, Angola, Botswana (South African attacks), Burma, Chad, Colombia, El Salvador, Ethiopia, Guatemala, Honduras (Nicaraguan armed opposition groups), Israeli Occupied Territories, Kampuchea, Lebanon, Lesotho (South African attacks), Mozambique, Namibia, the Philippines, Somalia, the Sudan, Uganda, and Vietnam. The Annual Report also noted Amnesty International's concern about prisoners held by the Polisario Front and thus tangentially mentioned the conflict in Morocco and the Western Sahara. The report failed to mention the war between Iran and Iraq. AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL ANNUAL REPORT 1986* (1986) [hereinafter *AMNESTY INTERNATIONAL ANNUAL REPORT 1986*].

11. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

12. See *supra* note 1.

13. Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex I, *reprinted in* 16 *I.L.M.* 1391 (1977) [hereinafter *Protocol I*]; Protocol Additional to the Geneva Conventions of

This Article will first review how nongovernmental organizations attempt to apply human rights law and humanitarian law during periods of armed conflict. It will next review the practice of one principal intergovernmental organization—the United Nations General Assembly—in citing humanitarian law. Third, this Article will study the reasons why the United Nations and international nongovernmental organizations should or should not refer to humanitarian law in support of their human rights work. Fourth, it will consider the preeminent position in implementing international humanitarian law of the ICRC, a private Swiss organization engaged in various international activities including specific functions provided by international humanitarian law. This Article will then consider the role that other—principally nongovernmental—organizations can play in situations of armed conflict. Sixth, it will examine factors affecting fact-finding in periods of armed conflict. Finally, this Article will discuss the effectiveness of nongovernmental organizations in preventing human rights violations during periods of armed conflict.

II. PRACTICE OF INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS IN REFERRING TO INTERNATIONAL HUMANITARIAN STANDARDS

Considerable diversity exists in the way nongovernmental organizations use humanitarian law in their human rights work and in how they approach armed conflict situations. Indeed, even with regard to individual nongovernmental organizations, one can identify varying policies and practices. Different individual authors, a failure to develop consistent supervision over the content of reports, and the slow learning process in recognizing the importance of humanitarian law might explain why a single organization would use diverse approaches in its various reports.

A. *Reports Issued by Americas Watch*

Americas Watch has issued a series of semi-annual reports on human rights in El Salvador. The report dated January 31, 1984, is typical: it presented facts but failed to assess them under international legal principles, and it included no citations whatsoever to humanitarian law.¹⁴ The

12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts (Protocol II), *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

14. AMERICAS WATCH COMMITTEE & THE AMERICAN CIVIL LIBERTIES UNION, *AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR* (Supp. 1984). One

report dated August 1984 revealed a slight change: it reproduced the provisions of Additional Protocol II and referred by analogy to the provisions of Additional Protocol I when discussing the indiscriminate attacks on civilians.¹⁵ The August 1984 report made relatively little effort to apply these provisions to the facts, however, and in all other respects it simply set forth the facts without applying any international legal norms.

The Americas Watch report entitled *Violations of the Laws of War by Both Sides in Nicaragua 1981-1985* (Nicaragua Report) established a complete legal framework for the application of common article 3 of the Geneva Conventions (common article 3), Additional Protocol II and customary international law.¹⁶ The Nicaragua Report considered with precision the facts that determined how humanitarian law should characterize armed conflicts in and near the frontiers of Nicaragua. Having initially established the framework for applying humanitarian law, however, the Nicaragua Report did not carry its analysis through completely by applying the substantive norms to the facts developed in the latter part of the report.

The Americas Watch report on Colombia (Colombia Report) used a different approach to humanitarian law issues.¹⁷ The Colombia Report set forth the facts without using legal principles to assess whether human rights violations had occurred. An appendix to the Colombia Report, however, began with the observation that Americas Watch had been reporting violations of humanitarian law in countries with internal armed

finds a similar approach in AMERICAS WATCH COMMITTEE, *ABDICATING DEMOCRATIC AUTHORITY: HUMAN RIGHTS IN PERU* (1984).

15. AMERICAS WATCH & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, *FREE FIRE: A REPORT ON HUMAN RIGHTS IN EL SALVADOR* 42-46 (Supp. 1984). Similarly, the third supplement makes a very brief reference to common article 3, while the sixth supplement cites two provisions of Additional Protocol II. AMERICAS WATCH COMMITTEE & THE AMERICAN CIVIL LIBERTIES UNION, *THIRD SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* 59 (Supp. 1983); AMERICAS WATCH, *DRAINING THE SEA . . . SIXTH SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* 62-63 (Supp. 1985). *See also* AMERICAS WATCH, *THE CIVILIAN TOLL 1986-1987: NINTH SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR* 60 (Supp. 1987) (citing article 3 of Protocol II Additional to the Geneva Conventions of 1949) [hereinafter *THE CIVILIAN TOLL*]; AMERICAS WATCH, *HUMAN RIGHTS IN GUATEMALA: NO NEUTRALS ALLOWED* 70-100 (1982) (setting forth the facts without analyzing in depth the applicable legal norms, except in a chapter on the constitution, where the report relies principally on the American Convention on Human Rights and gives some consideration to common article 3).

16. AMERICAS WATCH, *VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985*, at 11-34, 96-98 (1985).

17. AMERICAS WATCH, *HUMAN RIGHTS IN COLOMBIA, AS PRESIDENT BARCO BEGINS* (1986).

conflicts. The report gave two reasons for this reliance on humanitarian law: first, humanitarian law, unlike human rights law, binds both governmental and nongovernmental parties to armed conflicts, thereby providing a legal framework for assessing abuses by all parties; and second, human rights law is designed to operate in times of peace while humanitarian law governs the conduct of military operations.¹⁸

The appendix to the Colombia Report is not as thorough and scholarly in its establishment of a framework for the application of humanitarian law as the Nicaragua Report. The Colombia report is relatively simplistic in that it did not analyze the armed conflict sufficiently to determine if common article 3 applied, although its appendix applied the provisions of common article 3 to the facts developed in the body of the report. Nevertheless, the Colombia Report's relatively simplistic reliance on common article 3 may have been appropriate to the armed conflict in Colombia and may have been necessary to keep the attention of the non-technical audience Americas Watch wanted to address. Moreover, because the appendix applied humanitarian law norms to the facts, the Colombia Report is more successful than the Nicaragua Report. In both reports, however, Americas Watch nearly ignored international human rights law and preferred to use humanitarian law, apparently believing humanitarian law would be more influential with United States public opinion—the principal audience Americas Watch strives to reach.

B. *Reports Issued by Amnesty International*

Amnesty International has sporadically made use of humanitarian law in dealing with torture, the imprisonment of prisoners of conscience, executions, and unfair trials in political cases arising during periods of armed conflict. Yet the limited mandate of Amnesty International—to work for the freedom of prisoners of conscience and for fair trials in

18. *Id.* at 57. This observation overstates the case in that human rights law does contain nonderogable rights that apply even in periods of armed conflict. *See, e.g.*, International Covenant, *supra* note 1, art. 4. Although the report is correct in stating that human rights law is directed principally at governments, human rights law does contain norms applicable to "every individual and every organ of society." *See, e.g.*, Universal Declaration of Human Rights, *supra* note 1, preambular para. 8; International Covenant, *supra* note 1, preambular para. 5; Daes, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights*, U.N. Doc. E/CN.4/Sub.2/432/Rev.2, at 50 (1983). The observation also overstates the previous practice of Americas Watch in using humanitarian law. Nevertheless, this 1986 pronouncement by Americas Watch represents a considerable development in the thinking process of that organization concerning the application of humanitarian law.

political cases—does not fit easily within the legal structure of humanitarian law. Nevertheless, within the last few years Amnesty International's efforts during periods of armed conflict have improved significantly and become more sophisticated, although its practices are still not entirely consistent.¹⁹

Amnesty International's 1977 report on human rights violations in Ethiopia cited both the Universal Declaration of Human Rights and the Convention and Protocol Relating to the Status of Refugees. It concluded: "The practice of the security forces in taking hostages and committing murder against civilians in the areas of armed conflict is contrary to Article 3 of the four Geneva Conventions of 12 August 1949."²⁰ The 1978 Amnesty International report on Ethiopia (Ethiopia Report) discussed the armed struggle in Eritrea, the Ogaden (against Somalia), and several other regions. Several errors are apparent, however, in the Ethiopia Report's analysis: it mistakenly relied on the Universal Declaration of Human Rights; it erroneously referred to the United Nations Charter as protecting the rights to life, freedom from torture, and a fair trial; and it omitted any reference to humanitarian law.²¹ Amnesty International has made similar errors in more recent reports. An Amnesty International memorandum on Ethiopia in 1986 again discussed the conflict between government forces and opposition groups "which claim to have substantial armed forces and to control territory," but it referred to the Standard Minimum Rules for the Treatment of Prisoners, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, without citing principles of humanitarian law.²²

19. See, e.g., AMNESTY INTERNATIONAL, *EXTRAJUDICIAL EXECUTIONS IN EL SALVADOR* 45 (1984) (AI Index: AMR 29/14/84) (citing common article 3); AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS IN ETHIOPIA* 26 (1977) (AI Index: AFR 25/07/77); AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS IN ETHIOPIA* 15-16 (1978) (AI Index: AFR 25/10/78); AMNESTY INTERNATIONAL, *ETHIOPIA: POLITICAL IMPRISONMENT AND TORTURE* 2, 18 (1986) (AI Index: AFR 25/09/86); AMNESTY INTERNATIONAL, *REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE KINGDOM OF MOROCCO, 10-13 February 1981* (1982); AMNESTY INTERNATIONAL USA, *TORTURE IN MOROCCO* 10 (1986); AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL'S CURRENT CONCERNS IN EL SALVADOR* 2 (1985) (AI Index: AMR 29/09/85).

20. AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS IN ETHIOPIA* (1977), *supra* note 19, at 26.

21. AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS IN ETHIOPIA* (1978), *supra* note 19, at 15-16.

22. AMNESTY INTERNATIONAL, *ETHIOPIA: POLITICAL IMPRISONMENT AND TORTURE*, *supra* note 19, at 2, 18.

Amnesty International's report of a mission to Morocco in 1981 did not deal with human rights violations arising during the armed conflict in the Western Sahara, although Amnesty International did raise with the Moroccan authorities the issue of individuals who had "disappeared" from uncontested Moroccan territory—including some who had "disappeared" in the context of the war in the Western Sahara.²³ Similarly, in its January 1986 report on torture in Morocco, Amnesty International acknowledged the continuing armed conflict in the Western Sahara, but failed to deal with related human rights violations.²⁴

Amnesty International's open letter of 1981 to the United States Secretary of State in relation to military assistance to the Government of El Salvador referred briefly to the Salvadoran Constitution, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. The letter stated that while Amnesty International knew the human rights violations in question occurred during a period of internal armed conflict, the human rights instruments referred to above all prohibit derogation of the rights to freedom from arbitrary deprivation of life, torture or other cruel, inhuman or degrading treatment. The letter went on to observe that those same actions violate common article 3, and it proceeded to quote from common article 3 at some length.²⁵

In a memorandum of June 1985, Amnesty International cited only the relevant provisions of common article 3 as a basis for its condemnation of extrajudicial executions in El Salvador.²⁶ After sending a mission to Guatemala in 1985, Amnesty International noted that while the Guatemalan armed forces were familiar with the standards in common article 3, the Guatemalan officers were unfamiliar with the relevant provisions of the United Nations Code of Conduct for Law Enforcement Officials and article 4 of the International Covenant on Civil and Political Rights.²⁷ Amnesty International recommended that members of the mili-

23. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE KINGDOM OF MOROCCO, *supra* note 19.

24. AMNESTY INTERNATIONAL USA, *supra* note 19, at 10.

25. AMNESTY INTERNATIONAL, *Letter to Alexander Haig, U.S. Secretary of State*, in CORRESPONDENCE EXCHANGED BETWEEN AMNESTY INTERNATIONAL AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA IN RELATION TO MILITARY ASSISTANCE TO THE GOVERNMENT OF EL SALVADOR 10, 17 (1981) (AI Index: AMR 29/56/81); *see also* AMNESTY INTERNATIONAL, EXTRAJUDICIAL EXECUTIONS IN EL SALVADOR, *supra* note 19, at 45 (citing common article 3).

26. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CURRENT CONCERNS IN EL SALVADOR, *supra* note 19, at 2.

27. AMNESTY INTERNATIONAL, MEMORANDUM PRESENTED TO THE GOVERNMENT

tary and security forces not only learn these rules, but abide by them.²⁸

C. *Reports Issued by the International Commission of Jurists*

The International Commission of Jurists (ICJ) has used humanitarian law in a sophisticated and careful fashion on some occasions and has almost ignored it on others. The degree to which the authors of the various ICJ reports understood humanitarian law or carefully assessed the distinct challenge presented by specific armed conflict situations may explain this diversity of practice. For example, in 1972 the ICJ published a staff study (Pakistan Report) of the events in East Pakistan in 1971 that led to the creation of Bangladesh.²⁹ The Pakistan Report assessed the facts presented under the provisions of the International Bill of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Geneva Conventions, the Genocide Convention, and the customary international law prohibition concerning crimes against humanity.³⁰ With respect to the noninternational armed conflict in East Pakistan, the Pakistan Report relied principally and properly on common article 3, but it also referred to other provisions of the Geneva Conventions in assessing the conduct of the very brief international armed conflict between India and Pakistan.³¹

In 1980 the ICJ published a monograph (Israel Report I) written largely by its affiliate in the Israeli-occupied territories of the West Bank (West Bank).³² The monograph, comparable both in size and complexity to the Pakistan Report, could have used the fourth Geneva Convention as a principal international standard in its assessment of the situation in the West Bank. Instead, the Israel Report only mentioned the fourth Geneva Convention briefly³³ and actually failed to use any other major

OF GUATEMALA FOLLOWING A MISSION TO THE COUNTRY IN APRIL 1985, at 34 (1986) (AI Index: AMR 34/01/86).

28. *Id.* at 37.

29. INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN, 1971 (1972).

30. *Id.* at 49-62.

31. *Id.* at 53-55.

32. INTERNATIONAL COMMISSION OF JURISTS & LAW IN THE SERVICE OF MAN, THE WEST BANK AND THE RULE OF LAW (1980) [hereinafter ISRAEL REPORT I].

33. *Id.* at 77. *See also* INTERNATIONAL COMMISSION OF JURISTS & LAW IN THE SERVICE OF MAN, EXCESSIVE SECRECY, LACK OF GUIDELINES: A REPORT ON MILITARY CENSORSHIP IN THE WEST BANK (1985); INTERNATIONAL COMMISSION OF JURISTS & LAW IN THE SERVICE OF MAN, JUSTICE? THE MILITARY COURT SYSTEM IN THE ISRAELI OCCUPIED TERRITORIES (1987); INTERNATIONAL COMMISSION OF JURISTS & LAW IN THE SERVICE OF MAN, TWENTY YEARS OF ISRAELI OCCUPATION OF

international human rights standard to assess the facts presented. The Israel National Section of the ICJ published a technically better analysis (Israel Report II) in 1981 on the rule of law in areas administered by Israel.³⁴ The Israel Report II selectively referred to the Hague Regulations,³⁵ the fourth Geneva Convention,³⁶ the European Convention on Human Rights, and other relevant sources. The Israel Report II did not, however, critically assess the legal arguments supporting or limiting the Israeli practices it discussed.³⁷

In contrast, in 1961 the ICJ Committee of Enquiry into Events in Bizerta, Tunisia published a report which carefully used the relevant provisions of the Geneva Conventions to comment on allegations that the French armed forces in Tunisia were responsible for several serious human rights violations.³⁸ Another example of the ICJ's reliance on humanitarian law is the report the ICJ published in 1979 entitled *Human Rights in Guatemala* (Guatemala Report),³⁹ which discussed the historical and contemporary violence in that country and the human rights abuses that had occurred. The Guatemala Report mentioned the American Convention on Human Rights only in passing, however, and would have been stronger had it referred more specifically to provisions of both

THE WEST BANK AND GAZA (1987).

34. ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL* (1981) [hereinafter *ISRAEL REPORT II*].

35. *Id.* at 1-2.

36. *Id.* at 71-72.

37. A somewhat better analysis of these questions appears in Playfair, *Administrative Detention in the Israeli-Occupied West Bank*, 13 *STUDIE-EN INFORMATIECENTRUM MENSENRECHTEN* 5 (Feb. 1986); see also AMNESTY INTERNATIONAL, *TOWN ARREST ORDERS IN ISRAEL AND THE OCCUPIED TERRITORIES* 5-8 (1984) (AI Index: MDE 15/16/84); A. ROBERTS, B. JOERGENSEN & F. NEWMAN, *ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION: REPORT OF A WUS/ICJ MISSION OF ENQUIRY INTO HIGHER EDUCATION IN THE WEST BANK AND GAZA* 26-37 (1984).

38. INTERNATIONAL COMMISSION OF JURISTS, *REPORT OF THE COMMITTEE OF ENQUIRY INTO EVENTS IN BIZERTA, TUNISIA, BETWEEN THE 18TH AND 24TH JULY, 1961* (1961). The International Commission of Jurists also commented thoughtfully about the application of humanitarian law to the Biafran Conflict. *Nigeria/Biafra, Armed Conflict with a Vengeance*, 2 REV. INT'L COMM. JURISTS 10 (1969). *But cf.* INTERNATIONAL COMMISSION OF JURISTS, *TIBET AND THE CHINESE PEOPLE'S REPUBLIC* (1960) (using only the Universal Declaration of Human Rights and not mentioning the fourth Geneva Convention).

39. D. FOX, *HUMAN RIGHTS IN GUATEMALA* (1979) (issued by the ICJ). See also *ISRAEL REPORT I*, *supra* note 32, at 77 (1980) (brief citation to the fourth Geneva Convention); *ISRAEL REPORT II*, *supra* note 34, at 1-2, 71-72 (a few more citations to humanitarian law without adequate analysis).

human rights law and humanitarian law.

D. *Reports Issued by Other Nongovernmental Organizations*

Other nongovernmental organizations have issued fact-finding reports on armed conflict situations that have differed considerably in their apparent awareness of international humanitarian norms. For example, the Minority Rights Group issued a report on the Western Sahara which discussed the armed conflict in that area, but the report cited only the Universal Declaration of Human Rights, other resolutions, and the Charter of the Organization for African Unity. The report omitted any reference to the Geneva Conventions or other sources of humanitarian law.⁴⁰

A review of six recent reports by the *Federation Internationale des Droits de l'Homme* (Federation) concerning situations in which armed conflicts have occurred indicates that the Federation cited the Geneva Conventions with respect to a mission to Jordan, Israel, Lebanon, and the Gaza strip,⁴¹ but failed to mention any standards of human rights law or humanitarian law with regard to missions to Afghanistan,⁴² El Salvador,⁴³ Ethiopia,⁴⁴ Guatemala⁴⁵ and Honduras.⁴⁶

III. USE BY THE UNITED NATIONS GENERAL ASSEMBLY OF THE GENEVA CONVENTIONS AND THE ADDITIONAL PROTOCOLS: 1977-1986

A review of General Assembly resolutions and decisions from 1977 to 1986 reveals that the General Assembly has been no more consistent than nongovernmental organizations in its references to the Geneva Con-

40. MINORITY RIGHTS GROUP, THE SAHRAWIS OF WESTERN SAHARA (Report No. 40, 1979).

41. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, RAPPORT DE MISSION DU 26 AOUT AU 7 SEPTEMBRE 1982 EN CISJORDANIE, GAZA, ISRAEL ET LIBAN 11 (1982).

42. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, RAPPORT DE MISSION EN AFGHANISTAN (1985).

43. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, RAPPORT DE MISSION DU 21.6 AU 7.7.1981 AU SALVADOR (1981).

44. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, TORTURE AND THE VIOLATION OF HUMAN RIGHTS IN TIGRAY, ETHIOPIA (1986).

45. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, RAPPORT DE MISSION DU 22-28 JUIN 1981 AU GUATEMALA (1981).

46. FEDERATION INTERNATIONALE DES DROITS DE L'HOMME, RAPPORT DE MISSION DU 1 AU 10 FEVRIER 1986 EN HONDURAS (1986).

ventions⁴⁷ and Additional Protocols I and II,⁴⁸ although once it began citing to the Geneva Conventions it did so consistently in subsequent years. General Assembly citations to the Geneva Conventions increased rapidly between 1977 and 1986, increasing most dramatically in its 1986 resolutions.⁴⁹ While one could undertake a similar study with respect to the United Nations Commission on Human Rights and other intergovernmental organizations, the present review of General Assembly actions provides an adequate first glimpse of the problem.

During the ten-year period from 1977 to 1986, the General Assembly adopted a number of resolutions regarding armed conflict situations. With respect to the substantive resolutions and decisions adopted during this ten-year period, eleven involved situations in which the General Assembly could have cited to the Geneva Conventions. These conflicts occurred in Afghanistan, Chad, Cyprus, East Timor, El Salvador, Grenada, Guatemala, the Israeli Occupied Territories, Kampuchea, Namibia, and Nicaragua.⁵⁰ For convenience, this Article will group together the resolutions that do not refer to the Geneva Conventions or Additional Protocols I and II. This Article will discuss in detail only those resolutions that mention the Geneva Conventions or the Additional Protocols or all these instruments.

A. *Chad, Cyprus, East Timor, Grenada, Kampuchea, and Nicaragua*

The General Assembly passed resolutions concerning conflicts in Chad,⁵¹ Cyprus,⁵² East Timor,⁵³ Grenada,⁵⁴ Kampuchea,⁵⁵ and Nicara-

47. See *supra* note 1.

48. See *supra* note 13.

49. See *infra* notes 51-76 and accompanying text.

50. The Iran-Iraq conflict is notably absent from this list. The General Assembly deferred the question of the Iran-Iraq conflict in 1985 and 1986. See G.A. Res. 39/456 (item 44), 39 U.N. GAOR Supp. (No. 51) at 310, U.N. Doc. A/39/51 (1985); G.A. Res. 40/470 (item 46), 40 U.N. GAOR Supp. (No. 53) at 332, U.N. Doc. A/40/53 (1986).

51. G.A. Res. 35/92B, 35 U.N. GAOR Supp. (No. 48) at 147, U.N. Doc. A/35/48 (1981).

52. G.A. Res. 32/15, 32 U.N. GAOR Supp. (No. 45) at 21, U.N. Doc. A/32/45 (1978); G.A. Res. 33/15, 33 U.N. GAOR Supp. (No. 45) at 14, U.N. Doc. A/33/45 (1979); G.A. Res. 34/30, 34 U.N. GAOR Supp. (No. 46) at 17, U.N. Doc. A/34/46 (1980); G.A. Res. 37/181, 37/253, 37 U.N. GAOR Supp. (No. 51) at 202, U.N. Doc. A/37/51 (1983).

53. G.A. Res. 31/53, 31 U.N. GAOR Supp. (No. 39) at 125, U.N. Doc. A/31/39 (1977); G.A. Res. 33/39, 33 U.N. GAOR Supp. (No. 45) at 181, U.N. Doc. A/33/45 (1979); G.A. Res. 34/40, 34 U.N. GAOR Supp. (No. 46) at 206, U.N. Doc. A/34/46

gua.⁵⁶ The General Assembly could have cited to the Geneva Conventions in each case, thereby alerting the parties to their obligations under the Geneva Conventions or calling on the combatants to observe the humanitarian law norms that the Geneva Conventions establish, but they did not.

B. *Afghanistan*

The General Assembly first reviewed the Afghanistan conflict in 1981.⁵⁷ Resolutions before 1986 had addressed concerns about refugees, the threat to international peace, and the withdrawal of Soviet troops from Afghanistan. In 1986 the resolutions showed increased concern about human rights violations by combatants.⁵⁸ Reviewing the question of human rights and fundamental freedoms in Afghanistan, the General Assembly issued a resolution based on the United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the humanitarian rules set out in the Geneva Conventions.⁵⁹ The resolution urged the parties to the Afghanistan conflict "to apply fully the principles and rules of international humanitarian organizations, in particular the International Committee of the Red Cross, and to facilitate their operations for the alleviation of the suffering of the people of Afghanistan."⁶⁰

(1980); G.A. Res. 35/127, 35 U.N. GAOR Supp. (No. 48) at 219, U.N. Doc. A/35/48 (1981); G.A. Res. 36/50, 36 U.N. GAOR Supp. (No. 51) at 200, U.N. Doc. A/36/51 (1982); G.A. Res. 37/30, 37 U.N. GAOR Supp. (No. 51) at 227, U.N. Doc. A/37/51 (1983).

54. G.A. Res. 38, 38 U.N. GAOR Supp. (No. 47) at 19, U.N. Doc. A/38/47 (1984).

55. G.A. Res. 34/22, 34 U.N. GAOR Supp. (No. 46) at 16, U.N. Doc. A/34/46 (1980); G.A. Res. 35, 35 U.N. GAOR Supp. (No. 48) at 13, U.N. Doc. A/35/48 (1981); G.A. Res. 36, 36 U.N. GAOR Supp. (No. 51) at 13, U.N. Doc. A/36/51 (1982); G.A. Res. 37, 37 U.N. GAOR Supp. (No. 51) at 16, U.N. Doc. A/37/51 (1983); G.A. Res. 38, 38 U.N. GAOR Supp. (No. 47) at 14, U.N. Doc. A/38/47 (1984); G.A. Res. 39, 39 U.N. GAOR Supp. (No. 51) at 16, U.N. Doc. A/39/51 (1985); G.A. Res. 40/7, 40 U.N. GAOR Supp. (No. 53) at 18, U.N. Doc. A/40/53 (1986).

56. G.A. Res. 33/76, 33 U.N. GAOR Supp. (No. 45) at 58, U.N. Doc. A/33/45 (1979).

57. G.A. Res. 35/37, 35 U.N. GAOR Supp. (No. 48) at 17, U.N. Doc. A/35/48 (1981).

58. G.A. Res. 40/137, 40 U.N. GAOR Supp. (No. 53) at 246, U.N. Doc. A/40/53 (1986).

59. *Id.*

60. *Id.*

C. *El Salvador*

The General Assembly first examined the conflict in El Salvador in 1981.⁶¹ Its 1981 resolution concerning El Salvador did not mention the Geneva Conventions, although it could have. In the 1982 resolution the General Assembly cited to the Geneva Conventions in its resolution on the Salvadoran conflict:

The General Assembly, . . . 4. Draws the attention of all parties concerned to the fact that international rules of law, as contained in common article 3 of the Geneva Conventions of 12 August 1949, are applicable to armed conflicts not of an international character and requests the parties involved to apply a minimum standard of protection to the affected population.⁶²

The General Assembly repeated this language in its 1983 resolution on El Salvador.⁶³

In 1984 the General Assembly began to include references to the Additional Protocols in its resolutions on El Salvador, admonishing the combatants to apply the standards in both the Geneva Conventions and the Additional Protocols as "a minimum standard of protection of human rights and of humane treatment of the civilian population."⁶⁴ The preamble and paragraph nine of the 1985 El Salvador resolution cited the Geneva Conventions and the Additional Protocols. Paragraph nine stated that the General Assembly:

Welcomes the fact that the Government of El Salvador and the insurgent forces have agreed through indirect talks to exchange prisoners-of-war and allow the International Committee of the Red Cross to evacuate wounded combatants of the opposition in exchange for the release of government officials captured in combat, appeals to all States to do what they can to support operations of that kind and urges the Government of El Salvador and the insurgent forces to continue those practices, which humanize the conflict, and to agree as early as possible to respect the medical personnel and all military hospitals as required by the Geneva Conventions.⁶⁵

61. See G.A. Res. 35/192, 35 U.N. GAOR Supp. (No. 48) at 206, U.N. Doc. A/35/48 (1981).

62. G.A. Res. 36/155, 36 U.N. GAOR Supp. (No. 51) at 187, U.N. Doc. A/36/51 (1982).

63. G.A. Res. 37/185 (para. 2), 37 U.N. GAOR Supp. (No. 51) at 204, U.N. Doc. A/37/51 (1983).

64. G.A. Res. 38/101 (para. 3), 38 U.N. GAOR Supp. (No. 47) at 204, U.N. Doc. A/38/47 (1984).

65. G.A. Res. 39/119 (para. 9), 39 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/39/51 (1985).

In 1986 the General Assembly issued an even stronger statement regarding the applicability of the Geneva Conventions and the Additional Protocols to the Salvadoran conflict. The resolution cited the Geneva Conventions in the opening of the preamble. In addition, the resolution included the following:

Considering that, while the armed conflict not of an international character continues, the Government and the insurgent forces are obliged to apply the minimum standards of protection of human rights and humane treatment set out in article 3 common to the Geneva Conventions of 12 August 1949, as well as Additional Protocol II, to which the republic of El Salvador is a party, . . . The General Assembly, . . .

3. *Expresses* . . . its deep concern at the fact that serious and numerous violations of human rights continue to take place in El Salvador owing above all to non-fulfillment of the humanitarian rules of war and therefore requests the Government of El Salvador and the insurgent forces to adopt measures conducive to the humanization of the conflict by observing scrupulously the Geneva Conventions of 1949 and the Additional Protocols [of 1977].⁶⁶

D. *Guatemala*

The General Assembly has reviewed the Guatemala conflict since 1983.⁶⁷ In its resolutions concerning Guatemala, the General Assembly has never cited the Geneva Conventions or the Additional Protocols. Beginning in 1984, however, General Assembly resolutions on Guatemala began referring to the Guatemalan conflict as "an armed conflict not of an international character."⁶⁸ Hence, while the General Assembly did not officially cite to common article 3 of the Geneva Conventions or to Additional Protocol II, as it could have, it did use the language of those instruments, thereby expressing concern about the applicability of humanitarian law norms to the armed conflict.

66. G.A. Res. 40/139 (preamble, para. 3), 40 U.N. GAOR Supp. (No. 53) at 248, U.N. Doc. A/40/53 (1986).

67. See G.A. Res. 37/184, 37 U.N. GAOR Supp. (No. 51) at 204, U.N. Doc. A/37/51 (1983); G.A. Res. 38/100, 38 U.N. GAOR Supp. (No. 47) at 203, U.N. Doc. A/38/47 (1984); G.A. Res. 39/120, 39 U.N. GAOR Supp. (No. 51) at 203, U.N. Doc. A/39/51 (1985); G.A. Res. 40/140, 40 U.N. GAOR Supp. (No. 53) at 249, U.N. Doc. A/40/53 (1986).

68. See *supra* note 67.

E. *Israeli Occupied Territories*

The General Assembly has continuously cited the fourth Geneva Convention⁶⁹ in its resolutions entitled "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories."⁷⁰ The General Assembly began citing the fourth Geneva Convention in its resolutions entitled "The Situation in the Middle East" in 1982.⁷¹ The General Assembly began citing the fourth Geneva Convention in its resolutions on Palestinian refugees only in 1986.⁷² Hence, citation to the Geneva Conventions in the various General Assembly resolutions on the Israeli occupation of Palestinian territories has increased over the past ten years.

F. *Namibia*

The United Nations General Assembly has reviewed the situation in Namibia every year since 1977,⁷³ although it did not cite to the Geneva

69. Fourth Geneva Convention, *supra* note 1.

70. G.A. Res. 31/106, 31 U.N. GAOR Supp. (No. 59) at 50, U.N. Doc. A/31/59 (1977); G.A. Res. 32/91, 32 U.N. GAOR Supp. (No. 45) at 69, U.N. Doc. A/32/45 (1978); G.A. Res. 33/113, 33 U.N. GAOR Supp. (No. 45) at 70, U.N. Doc. A/33/45 (1979); G.A. Res. 34/90, 34 U.N. GAOR Supp. (No. 46) at 80, U.N. Doc. A/34/46 (1980); G.A. Res. 35/122, 35 U.N. GAOR Supp. (No. 48) at 89, U.N. Doc. A/35/48 (1981); G.A. Res. 36/147, 36 U.N. GAOR Supp. (No. 51) at 88, U.N. Doc. A/36/51 (1982); G.A. Res. 37/88, 37 U.N. GAOR Supp. (No. 51) at 34, U.N. Doc. A/37/51 (1983); G.A. Res. 38/79, 38 U.N. GAOR Supp. (No. 47) at 94, U.N. Doc. A/38/47 (1984); G.A. Res. 39/95, 39 U.N. GAOR Supp. (No. 51) at 102, U.N. Doc. A/39/51 (1985); G.A. Res. 40/161, 40 U.N. GAOR Supp. (No. 53) at 112, U.N. Doc. A/40/53 (1986).

71. G.A. Res. 36/226, 36 U.N. GAOR Supp. (No. 51) at 47, U.N. Doc. A/36/51 (1982); *see also* G.A. Res. 37/123, 37 U.N. GAOR Supp. (No. 51) at 36, U.N. Doc. A/37/51 (1983); G.A. Res. 38/180, 38 U.N. GAOR Supp. (No. 47) at 49, U.N. Doc. A/38/47 (1984); G.A. Res. 39/146, 39 U.N. GAOR Supp. (No. 51) at 50, U.N. Doc. A/39/51 (1985); G.A. Res. 40/168, 40 U.N. GAOR Supp. (No. 53) at 57, U.N. Doc. A/40/53 (1986).

72. G.A. Res. 40/165, 40 U.N. GAOR Supp. (No. 53) at 127, U.N. Doc. A/40/53 (1986).

73. G.A. Res. 31/146, 31 U.N. GAOR Supp. (No. 39) at 130, U.N. Doc. A/31/39 (1977); G.A. Res. 32/9D, 32 U.N. GAOR Supp. (No. 45) at 14, U.N. Doc. A/32/45 (1978); G.A. Res. 33/182, 33/206, 33 U.N. GAOR Supp. (No. 45) at 21, 34, U.N. Doc. A/33/45 (1979); G.A. Res. 34/42A, 34 U.N. GAOR Supp. (No. 46) at 22, U.N. Doc. A/34/46 (1980); G.A. Res. 35/227A, 35 U.N. GAOR Supp. (No. 48) at 40, U.N. Doc. A/35/48 (1981); G.A. Res. 36/121A, 36 U.N. GAOR Supp. (No. 51) at 29, U.N. Doc. A/36/51 (1982); G.A. Res. 37/233, 37 U.N. GAOR Supp. (No. 51) at 40, U.N. Doc. A/37/51 (1983); G.A. Res. 38/36A, 38 U.N. GAOR Supp. (No. 47) at 25, U.N. Doc. A/38/47 (1984); G.A. Res. 39/50, 39 U.N. GAOR Supp. (No. 51) at 28, U.N.

Conventions in its reviews until 1984. In that year the General Assembly asked the United Nations Council for Namibia to "accede to the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto."⁷⁴ The next year, the General Assembly declared,

that the liberation struggle in Namibia is a conflict of an international character in terms of article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 and, in this regard, demands that the Conventions and Additional Protocol I be applied by South Africa, and in particular that all captured freedom fighters be accorded prisoner-of-war status as called for by the Geneva Convention relative to Treatment of Prisoners of War and the Additional Protocol thereto.⁷⁵

The General Assembly repeated this declaration in the same or substantially similar form in 1985 and 1986.⁷⁶

G. The General Assembly's Use of Humanitarian Law

The General Assembly has cited the Geneva Conventions and Additional Protocols in resolutions relating to a number of armed conflicts since 1977. Although these references have been inconsistent and often inaccurate, the General Assembly has begun to cite to the Geneva Conventions and Additional Protocols with increasing frequency. This recent practice may represent a trend in which the United Nations will use the Geneva Conventions and Additional Protocols increasingly as a tool to raise combatants' respect for the human rights of people directly or indirectly at risk in armed conflict situations.

IV. SHOULD NONGOVERNMENTAL ORGANIZATIONS AND THE UNITED NATIONS CITE INTERNATIONAL HUMANITARIAN LAW IN SUPPORT OF THEIR HUMAN RIGHTS CONCERNS?

International human rights organizations and the General Assembly ordinarily refer in their actions, reports, and resolutions to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and occasionally, for the principle of nonrefoulement, to

Doc. A/39/51 (1985); G.A. Res. 40/97A, 40 U.N. GAOR Supp. (No. 53) at 44, U.N. Doc. A/40/53 (1986).

74. G.A. Res. 37/233C (para.12), 37 U.N. GAOR Supp. (No. 51) at 42, U.N. Doc. A/37/51 (1983).

75. G.A. Res. 38/36A (para. 56), 38 U.N. GAOR Supp. (No. 47) at 29, U.N. Doc. A/38/47 (1984).

76. G.A. Res. 39/50A (para. 66), 39 U.N. GAOR Supp. (No. 51) at 33, U.N. Doc. A/39/51 (1985); G.A. Res. 40/97A (para. 72), 40 U.N. GAOR Supp. (No. 53) at 49, U.N. Doc. A/40/53 (1986).

the Convention and Protocol Relating to the Status of Refugees.

When the United Nations and nongovernmental organizations confront human rights violations in the context of armed conflicts, international humanitarian law often provides an additional legal foundation for their concerns. In some cases, international humanitarian law may even offer a stronger basis for human rights work than the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights.⁷⁷

The principal multilateral treaties that govern international humanitarian law apply more broadly than the main human rights treaties. As of December 31, 1986, 162 nations had ratified the Geneva Conventions; 55 nations had ratified Additional Protocol I; and 48 nations had become party to Additional Protocol II.⁷⁸ In contrast, only 83 nations had ratified the International Covenant on Civil and Political Rights of 1966 while 86 had accepted the International Covenant on Economic, Social and Cultural Rights.⁷⁹

77. Scholars have begun to comment on the convergence of humanitarian and human rights law. See, e.g., *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* (A. Cassese ed. 1979); Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW* 345 (T. Meron ed. 1984); Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326 (1972); Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts*, in 1 *THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS* 175, 193-94 (K. Vasak ed. 1982); Meron, *Human Rights in Time of Peace and in Time of Armed Conflict*, in *CONTEMPORARY ISSUES IN INTERNATIONAL LAW* (T. Buergenthal ed. 1984); Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 15-18 (1978); Robertson, *Humanitarian Law and Human Rights*, in *STUDIES IN HONOUR OF JEAN PICTET*, *supra* note 8, at 793; Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM. U.L. REV. 935 (1982); L. Sohn, *Fundamental Guarantees, Human Rights, Seminario Interamericano Sobre Seguridad del Estado, Derechos Humanos y Derecho Humanitario*, San Jose, Costa Rica, 27 September - 2 October, 1982; see also M. EL KOUHENE, *LES GARANTIES FONDAMENTALES DE LA PERSONNE EN DROIT HUMANITAIRE ET DROITS DE L'HOMME* 8-12 (1986); *INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, MODERN WARS: THE HUMANITARIAN CHALLENGE* 143 (1986); *LES DIMENSIONS INTERNATIONALES DU DROIT HUMANITAIRE* 345 (1986); T. MERON, *HUMAN RIGHTS IN INTERNATIONAL STRIFE: THEIR INTERNATIONAL PROTECTION* 3-17 (1987). At the same time many scholars and significant actors in the field of human rights have ignored humanitarian law. See, e.g., *HUMAN DIGNITY, THE INTERNATIONALIZATION OF HUMAN RIGHTS* (A. Henkin ed. 1978).

78. *INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1985*, at 87 (1986).

79. *AMNESTY INTERNATIONAL, UNITED NATIONS COVENANTS ON HUMAN RIGHTS AND CONVENTION AGAINST TORTURE: CHARTS OF STATUS* (1986) (AI Index:

Generally, the international legal community recognizes the Hague Conventions of 1899 and 1907 as restatements of international humanitarian law applicable to all countries.⁸⁰ Respected scholars believe that the Universal Declaration of Human Rights, with the two International Covenants on Human Rights, constitutes an authoritative interpretation of the human rights obligations of all United Nations members and may contain provisions that qualify as customary international law.⁸¹

Some principles of international humanitarian law are more specific or more exacting than the provisions of international human rights law. Humanitarian law applies specifically to emergency situations; international human rights law permits significant derogations during these same periods.⁸²

Article 4 of the International Covenant on Civil and Political Rights provides that in situations threatening the life of the nation, a government may suspend most human rights protections as long as (1) the exigencies of the situation strictly require such a suspension, (2) the suspension does not conflict with the nation's other international obligations (such as the Geneva Conventions), and (3) the government informs the United Nations Secretary General immediately. Article 4 does not permit any derogation from the right to be free from discrimination on the basis of race, color, sex, language, religion, or social origin. It also permits no derogation from the rights to be free from arbitrary killing; torture, or cruel, inhuman or degrading treatment or punishment; slavery; imprisonment for debt; retroactive penalties; or the failure to recognize a person before the law.⁸³

In the eighty-three countries that have ratified the International Covenant on Civil and Political Rights, some of the most important human rights would be protected as nonderogable rights. Such protection would encompass prohibitions against torture, inhuman treatment, and extrajudicial executions. Other rights, such as the right to be free from arbitrary

IOR 51/01/86).

80. See, e.g., S. MALLISON & W. MALLISON, *ARMED CONFLICT IN LEBANON*, 1982; *HUMANITARIAN LAW IN A REAL WORLD SETTING* 67-68 (1983).

81. See, e.g., E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 50-55 (1964); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 15 (1982).

82. See Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L L. 859 (1984).

83. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1 (1981). Although war was the scenario that figured most prominently in the minds of the drafters of the derogation clauses, derogations have been invoked because of internal disturbances. *Id.* at 13.

arrest or detention and the right to a prompt and fair trial, would be subject to derogation in times of public emergency.⁸⁴

Many governments are not parties to the International Covenant on Civil and Political Rights and, therefore, do not even have to take the formal steps to derogate from the obligations set forth in that treaty. Although these governments may still be bound to respect such nonderogable rights as freedom from torture and arbitrary killing, one must question whether they are bound by all the nonderogable rights that the Covenant on Civil and Political Rights identifies. In this respect, human rights organizations rely on the rights defined in the Universal Declaration of Human Rights, which contains no derogation clause similar to article 4 of the International Covenant on Civil and Political Rights, and which is applicable to all governments. But article 29 of the Universal Declaration of Human Rights contains a general limitation clause for all the rights contained in that instrument, including even the prohibitions against torture, arbitrary killing, and similar acts. Article 29 states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁸⁵

The terms "morality," "public order," and "general welfare in a democratic society" are quite vague. Broadly interpreted, they could undermine all the rights in the Universal Declaration on Human Rights. Several considerations support the proposition that one should not interpret these limitations so broadly. First, a standard tenet of treaty construction

84. The American Convention on Human Rights is more protective of human rights than is the International Covenant on Civil and Political Rights during periods of public emergency. Article 27 of the American Convention on Human Rights makes nonderogable rights to juridical personality, to life, to humane treatment, to nationality, to a name, and to participate in government as well as rights of the family and of the child, freedom of conscience and religion, and freedom from slavery and ex post facto laws. In addition, the American Convention on Human Rights protects the right to judicial guarantees essential to the protection of these rights, from which a government cannot derogate during periods of war, public danger, or other emergency. Common article 3 of the Geneva Conventions and article 6 of Additional Protocol II protect guarantees for fair procedure in periods of noninternational armed conflict. See INTERNATIONAL COMMISSION OF JURISTS, *STATES OF EMERGENCY, THEIR IMPACT ON HUMAN RIGHTS* 426-27 (1983). Article 75 of Additional Protocol I provides extensive procedural protections for the accused during periods of international armed conflict. Protocol I, *supra* note 13, art. 75.

85. G.A. Res. 217A (art. 29), U.N. Doc. A/810, at 71 (1948).

is that one should interpret limitation and exception clauses narrowly in order to preserve the substantive rights granted. The European Court and the European Commission on Human Rights have interpreted similar exception clauses in the European Convention on Human Rights narrowly.⁸⁶ Second, one must question whether morality, public order, or general welfare could ever justify torture, arbitrary killing, or similar actions. Third, many countries cannot claim to be democratic societies and cannot make use of the broad limitations of article 29. Fourth, one might find in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights an authoritative interpretation of what the Universal Declaration of Human Rights, and article 29 in particular, means. Hence, one might read article 4 of the International Covenant on Civil and Political Rights into the rather vague limitations of article 29 of the Universal Declaration of Human Rights and thus make at least certain rights (such as the right to be free from torture and arbitrary killing) nonderogable even in times of public emergency. But other rights, such as the right to be free from arbitrary arrest or detention or the right to receive a prompt and fair trial, would still be subject to general limitation, or at least limitation in times of public emergency.

In any case, neither the International Covenant on Civil and Political Rights nor the Universal Declaration of Human Rights constitutes a completely satisfactory legal basis for the human rights concerns of non-governmental organizations and the United Nations, particularly when these concerns arise during armed conflicts or other public emergencies. At a minimum, humanitarian legal principles constitute an important body of international law that human rights organizations have used and can continue to use in appropriate situations.

Several impediments to the use of international humanitarian law exist. First, international humanitarian law includes a relatively unfamiliar body of principles. Human rights organizations must communicate their concerns in a sufficiently simplistic fashion in order to attract media attention and to benefit from the pressure of public opinion. Humanitarian law adds to the complexity of the legal principles that human rights organizations must communicate to the media, the public, and human rights activists. The staff and members of human rights organizations have only begun to understand humanitarian law norms sufficiently to use these norms in their reports and campaign work. At first glance, international humanitarian law may appear dauntingly complex and,

86. See Hartman, *supra* note 83, at 23-29.

therefore, difficult for human rights organizations to use. Most of the articles of the Geneva Conventions are not directly relevant to the principal concerns of human rights organizations, but a few provisions, such as common article 3, are quite brief, straightforward, easily explained, and directly applicable to the concerns of most human rights organizations.⁸⁷

The second obstacle to the use of international humanitarian law is the most problematic: to apply humanitarian law, one must ordinarily determine what sort of armed conflict is occurring and, thus, which set of humanitarian principles is relevant.⁸⁸ This determination is often difficult, involving issues that are politically sensitive, facts that are outside

87. For example, common article 3 reads:

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

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

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

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

Geneva Conventions, *supra* note 1, common art. 3.

88. The Helsinki Watch report on Afghanistan cites various provisions of humanitarian law but fails to analyze adequately the nature of the conflict and the consequent application of particular instruments of humanitarian law. HELSINKI WATCH, "TEARS, BLOOD AND CRIES" HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION 1979-1984 (1984). Compare the far more careful approach of AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985, *supra* note 16, at 11-34 and the somewhat less complete approach of AMERICAS WATCH, THE MISKITOS IN NICARAGUA 1981-1984, at 49 (1984).

the normal research competence of human rights organizations, and decisions that may conflict with ICRC judgments.

A. *The Four Types of Armed Conflict*

International humanitarian law was specifically designed to limit human rights violations against protected persons, such as soldiers who are wounded or otherwise *hors de combat* and the civilian population, during periods of armed conflict. International humanitarian law distinguishes four types of armed conflict and applies different legal principles and instruments to each type.⁸⁹ International human rights law, rather than international humanitarian law, applies when sporadic violence, internal disturbances, and tensions are present.⁹⁰

Commentators have suggested that yet a fifth category of armed conflict exists: internal armed conflicts that have become "internationalized" by virtue of the foreign assistance provided to one side or the other.⁹¹ The Geneva Conventions and other humanitarian law instruments do not contain specific provisions dealing with an internationalized civil war. Accordingly, one must analyze such conflicts from a legal standpoint as falling within one of the other four categories. For example, as between any two foreign states intervening on behalf of opposing sides in a civil war, international humanitarian law would apply in its entirety. Similarly, as between the established government of a country and another government that is aiding the insurgents in a civil war, the humanitarian law of international armed conflict would apply, although there may be some practical difficulties in application.

As between the two sides in a civil war, common article 3 and Addi-

89. The four categories are: (1) international armed conflicts to which the four Geneva Conventions, Additional Protocol I, the Hague rules, and other legal principles apply; (2) wars of liberation or self-determination, which are principally defined by and subject to Additional Protocol I; (3) noninternational armed conflicts subject to the regulation of common article 3 and to some customary norms; and (4) noninternational armed conflicts, which are narrowly defined and regulated by Additional Protocol II.

90. See, e.g., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 49-50 (J. Pictet ed. 1952) (discussing criteria for deciding whether an internal conflict constitutes a noninternational armed conflict to which common article 3 applies) [hereinafter COMMENTARY (1952)].

91. See, e.g., Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1123-25 (1966); Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 INT'L REV. RED CROSS 255 (1982). This category might include the civil war in Spain during the 1930s, Vietnam (1945-1975), Chad (sporadically, 1968-present), Lebanon (1976-present) and Afghanistan (1979-present).

tional Protocol II might apply if the various conditions for armed conflict not of an international character are met. Finally, as between the insurgents and a state assisting the established government, an analysis would be necessary to determine whether the conditions existed to fulfill a noninternational armed conflict, because the insurgents would lack the requisite status in international law. The assisting government may still wish to apply the full panoply of international humanitarian law because it is fighting on the territory of another country, although by invitation. Other possible relationships and circumstances may arise in the context of an internationalized civil war, but one must assess any such conflict, in any case, under the four categories previously identified.

1. International Armed Conflict or Occupation

Most of the provisions of the four Geneva Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."⁹² In addition, the Geneva Conventions apply to partial or total occupation of the territory of a High Contracting Party.⁹³ Even if one or more of the parties to the armed conflict have not ratified the treaties, the ratifying parties are nevertheless bound to obey the Geneva Conventions.⁹⁴

The authoritative ICRC commentary on the Geneva Conventions defines international armed conflict as any "difference arising between two States and leading to the intervention of members of the armed forces . . . even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or . . . the number of victims."⁹⁵

2. Wars of National Liberation or Self-Determination

Additional Protocol I states that international armed conflicts include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the

92. Geneva Conventions, *supra* note 1, common art. 2.

93. *Id.*

94. *Id.*

95. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST, 1949, at 28 (J. Pictet ed. 1960) [hereinafter COMMENTARY (1960)].

Charter of the United Nations.⁹⁶

3. Noninternational Armed Conflict Under Common Article 3

Common article 3 applies a limited number of very basic protections to "armed conflict not of an international character."⁹⁷ Common article 3 does not define noninternational armed conflict, however, so as to distinguish it from unorganized and short-lived insurrection or a mere act of banditry.

Nevertheless, the authoritative ICRC commentary mentions a number of nonobligatory but convenient criteria for applying common article 3.⁹⁸ Even if some of these criteria are not met, the ICRC believes that parties should apply common article 3 as widely as possible. Common article 3 was intended to reflect the "few essential rules" that governments should follow in peacetime and in war as well as in dealing with common criminals or rebels.⁹⁹ The drafters intended that common article 3 would

96. Protocol I, *supra* note 13, art. 1, para. 4.

97. Geneva Conventions, *supra* note 1, common art. 3.

98. Proposed during the discussion preparatory to its adoption, they provide:

(1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or

(b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.

(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

COMMENTARY (1952), *supra* note 90, at 49-50. See generally E. ROSENBLAD, *supra* note 1.

99. See *supra* note 87.

protect those basic and fundamental rights that deserve respect at all times. A precise definition of noninternational armed conflict is, therefore, not critical.

One might argue that if a government is willing to derogate from its responsibilities under article 4 of the International Covenant on Civil and Political Rights for an "emergency that threatens the life of the nation," the government should be willing to acknowledge in appropriate circumstances the existence of a noninternational armed conflict under common article 3. Governments are, nevertheless, often unwilling to accept the application of common article 3. A number of international conflict situations have arisen, however, in which the government involved has acknowledged the application of common article 3. These situations include those in Guatemala (1954), French-Algeria (1956), Lebanon (1958), Cuba (1958), the Congo (1960-1964), Yemen (1962-1967), the United States in Vietnam (1964), the Dominican Republic (1965), Nigeria (1967-1970), Uruguay (1972), Chile (1973) and Cyprus (1974).¹⁰⁰ There have been, of course, many other armed conflicts that might have qualified for common article 3 treatment, but the governments involved failed to acknowledge its application.

4. Noninternational Armed Conflict Under Additional Protocol II

Additional Protocol II attempts to define more precisely than common article 3 the sorts of "armed conflicts not of an international character" to which Additional Protocol II applies. Hence, article 1(l) of Additional Protocol II specifies several of the criteria that the ICRC suggested solely for the interpretation of common article 3:

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

100. See Veuthy, 65 *Conflicts armes de Caractere non International et le Droit Humanitaire*, in CURRENT PROBLEMS OF INTERNATIONAL LAW 179 (A. Cassese ed. 1976); cf. E. ROSENBLAD, *supra* note 1, at 171-72 (listing armed conflicts from 1945-1974). See generally M. VEUTHY, *GUERRILLA ET DROIT HUMANITAIRE* (1976).

*implement this Protocol.*¹⁰¹

Additional Protocol II thus establishes a higher threshold of applicability than the plain words of common article 3 by specifying several requirements, which the ICRC included only as suggestions, for interpreting common article 3. It also added some new elements. These new elements include requirements that armed forces of a High Contracting Party be involved in the conflict and that dissident armed groups must exercise a degree of territorial control to enable them to "carry out sustained, concerted military operations."¹⁰² Additional Protocol II thus appears to require for its application what one would ordinarily consider to be a civil war.

Nevertheless, because Additional Protocol II does not replace common article 3 but rather develops and supplements it, the broader terms of common article 3 would still cover conflicts that fall short of Additional Protocol II requirements, so long as there is more than internal disturbance and tensions to which only international human rights law apply. Thus, instead of clarifying the concept of noninternational armed conflict, Additional Protocol II adds another tier of protection to certain kinds of internal conflict.

B. *Is There a Need to Distinguish Among the Four Types of Armed Conflict?*

The factors that might indicate the application of humanitarian law¹⁰³ are based on objective factual determinations. Yet governments, insurgent groups, the ICRC, the United Nations, and human rights organizations may interpret those provisions and the relevant facts in quite different ways. Obviously, governments will not implement some of the provisions of humanitarian law if they refuse to acknowledge their international responsibilities, but in such circumstances the government is the party who violated its treaty obligations.

The ICRC does not generally indicate publicly whether it classifies a particular situation as involving (1) an international armed conflict to which the Geneva Conventions and Additional Protocol I apply, (2) a war of self-determination to which Additional Protocol I applies, (3) a noninternational armed conflict to which common article 3 applies, (4) a

101. Protocol II, *supra* note 13, art. 1(1) (emphasis added).

102. *Id.*

103. *E.g.*, the Geneva Conventions on international armed conflict, common article 3 for noninternational armed conflicts, and the requisites for triggering Additional Protocol II.

noninternational armed conflict to which Additional Protocol II applies, or (5) merely internal disturbances or tensions not subject to regulation under the Geneva Conventions and Additional Protocols. Instead, the ICRC usually bases its actions on article VI of the Statute of the ICRC, which provides for a right of humanitarian initiative: "It takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution."¹⁰⁴ While the Geneva Conventions and the Additional Protocols may provide the ICRC with a stronger legal basis for its activities, the ICRC has found it easier to obtain access to prisoners without requiring the government concerned to acknowledge, even implicitly, that a certain kind of armed conflict might be occurring.¹⁰⁵ For example, the ICRC has invoked its right of humanitarian initiative when visiting prisoners in El Salvador, despite the fact that El Salvador has ratified Additional Protocol II. By its terms, Additional Protocol II probably applies to the situation, and at least common article 3 applies. Indeed, the ICRC might have concluded in an internal analysis that Additional Protocol II should apply. But it is easier to obtain access to prisoners by continuing to approach El Salvador under the vague and pragmatic right of humanitarian initiative.

Another reason exists for the ICRC's general practice of not making public legal assessments of the precise sort of armed conflict that might be occurring. Although legal distinctions exist among these different sorts of armed conflicts, the ICRC, governments and others often refer to the more detailed provisions of the Geneva Conventions applicable to international conflicts as a source of interpretation and guidance with regard to the less exacting provisions applicable to other sorts of armed conflicts. For example, as to the internment in Switzerland of Soviet soldiers captured by an Afghan opposition group, the ICRC referred specifically to Article 111 of the third Geneva Convention, even though that convention might not apply to the armed conflict because the provision itself relates only to prisoners of war held by another state party.¹⁰⁶

It is interesting to note that the ICRC's policy of not discussing its analysis of the application of the Geneva Conventions to specific situations does not prevent the ICRC Annual Report and Review from pub-

104. Statute of the International Committee of the Red Cross, art. 6. *See also id.* art. 4(2).

105. *See* Veuthy, *Pour une politique humanitaire* 12-13 in *STUDIES IN HONOUR OF JEAN PICTET*, *supra* note 8.

106. *See* ICRC, *External Activities: Asia*, 22 *INT'L REV. RED CROSS* 231, 234 (1982).

lishing statements which imply that certain preliminary conclusions must have been made. For example, in a section of its 1982 Annual Report describing the work of the ICRC in Southern Africa, the ICRC mentions 114 Angolan "prisoners of war" held in Namibia, two "prisoners of war" (a Russian and a Cuban) held in South Africa, and "two Soviet citizens detained by UNITA."¹⁰⁷ The use of the term "prisoners of war" indicates that the ICRC has concluded that the third Geneva Convention applies. The failure to use the same terminology for the two Soviet citizens held by UNITA indicates, correctly, that the third Geneva Convention could not apply because UNITA is a nongovernmental entity not party to the Geneva Conventions.

The ICRC has developed another exception to its normal practice for particularly grave and long-standing problems. Hence, the ICRC was prompted by a resolution of the International Red Cross Conference in 1981 to acknowledge that the Geneva Conventions, or at least common article 3, apply to the Western Sahara, Ogaden, and Afghanistan.¹⁰⁸ The International Red Cross Conferences and the ICRC had previously stated that the fourth Geneva Convention applies to the Occupied Territories of the Middle East.¹⁰⁹

If human rights organizations other than the ICRC are to apply humanitarian law principles, they must necessarily make conclusions about the classification of a particular armed conflict. But should these organizations announce their categorization of armed conflicts, particularly when the ICRC is so reticent about such pronouncements?

International nongovernmental and intergovernmental organizations need not announce publicly every logical step leading to their decision to cite a particular provision of humanitarian law. Experts will understand that these organizations must have made the necessary preliminary analysis. These international organizations should not be diverted from their principal attention to human rights violations.

For example, a human rights organization might simply observe that the Government of Country A has, by torturing prisoners, violated article 5 of the Universal Declaration of Human Rights, article 7 of the

107. ICRC, ANNUAL REPORT 1982, at 14-16 (1983).

108. *Humanitarian [A]ctivities of the International Committee of the Red Cross for the [B]enefit of [V]ictims of [A]rmed [C]onflicts*, res. 4, TWENTY-FOURTH INTERNATIONAL CONFERENCE OF THE RED CROSS (1981), reprinted in 21 INT'L REV. RED CROSS 321 (1981) [hereinafter *Humanitarian [A]ctivities*].

109. See *Application of the Fourth Geneva Convention of 12 August 1949 in the [O]ccupied [T]erritories in the Middle East*, res. 10, TWENTY-THIRD INTERNATIONAL CONFERENCE OF THE RED CROSS (1977), reprinted in 17 INT'L REV. RED CROSS 518 (1977).

International Covenant on Civil and Political Rights, and common article 3. The human rights organization might amplify this observation by stating that Country A had ratified the International Covenant on Civil and Political Rights in 1974 and the Geneva Conventions in 1964. It would not be necessary to state further that the human rights organization had concluded that common article 3 applied because an armed conflict not of an international character was occurring in Country A.

The current situation in Israel provides a concrete example of this process. Although Israel has generally denied that the fourth Geneva Convention applies to the Occupied Territories, it nonetheless frequently proceeds to defend its conduct as complying with the substance of humanitarian law, including the fourth Geneva Convention.¹¹⁰ Although the United Nations, the ICRC, the United States Department of State, and most other authorities reject Israel's position on the application of the fourth Geneva Convention to the Occupied Territories, the human rights organization need not take a position on this issue. Indeed, if the human rights organization's principal purpose is to persuade Israel to prevent human rights violations, adopting a potentially controversial position might be both unnecessary and unwise. The human rights organization need do only what Amnesty International has done in its recommendations to the government of the State of Israel.¹¹¹ When Israeli authorities have justified their use of administrative detention or restriction orders on the basis of article 78 of the fourth Geneva Convention, Amnesty International has simply maintained that no government should restrict individuals without charge or trial.¹¹² Amnesty International did not always refer to the fourth Geneva Convention, but when the Israeli government cited the provisions of the fourth Geneva Convention to defend its actions, Amnesty International responded on the basis of that treaty.¹¹³

110. See, e.g., AMNESTY INTERNATIONAL, REPORT AND RECOMMENDATIONS OF AN AMNESTY INTERNATIONAL MISSION TO THE GOVERNMENT OF THE STATE OF ISRAEL, 3-7 June 1979, at 61 (1980) (AI Index: MDE/15/02/80) [hereinafter ISRAEL REPORT AND RECOMMENDATIONS] (justifying deviation from the ordinary rules of evidence in the military courts as consistent with the fourth Geneva Convention).

111. See, e.g., *id.*; TOWN ARREST ORDERS IN ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 37.

112. See TOWN ARREST ORDERS IN ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 37, at 5-8; see also ISRAEL REPORT AND RECOMMENDATIONS, *supra* note 110, at 30 (discussing Israeli government's justification of trying security suspects before military tribunals as consistent with article 66 of the fourth Geneva Convention and Amnesty International's response).

113. See ISRAEL REPORT AND RECOMMENDATIONS, *supra* note 110, at 54-57 (Is-

It should be clear that intergovernmental and nongovernmental organizations are not required to cite provisions of humanitarian law except where such citation would appear useful in protecting human rights. In addition, consideration should be given to the use of humanitarian law not as a primary source of applicable norms but as a point of reference. For example, a human rights organization should not say: "These trial procedures violated common article 3." Instead, the report might observe: "Such trial procedures are forbidden even in periods of civil war under common article 3." Such a use of humanitarian law would obviate the need to characterize a situation as a certain type of armed conflict, or to state that humanitarian law applied. Rather, this more subtle way of citing humanitarian law would make use of the public perception that the Geneva Conventions and Additional Protocols establish the most basic, minimum standard of conduct for governments.

V. RED CROSS WORK IN PERIODS OF ARMED CONFLICT

Because the Red Cross has long held a leading role in the protection of human rights in armed conflict situations, other organizations should study the work of the Red Cross to learn from its experience and to appreciate how other organizations can supplement the work of the Red Cross. The Red Cross is a movement with three constituent parts: (1) the ICRC, a private institution subject to Swiss law that acts primarily for the benefit of victims of armed conflicts, but which may undertake humanitarian interventions on behalf of prisoners detained as a result of internal disturbances; (2) the 130 National Red Cross and Red Crescent Societies, voluntary organizations auxiliary to public authorities, which give assistance to victims of natural disasters or armed conflicts and which engage in various humanitarian activities related to medical care, public health, and social welfare; and (3) the League of Red Cross Societies, the federation of the National Societies that coordinates their activities in peacetime.¹¹⁴

raeli government's use of article 5 of the fourth Geneva Convention to justify denying suspected terrorists immediate access to lawyers and Amnesty International's response).

114. See generally ICRC, *THE RED CROSS AND HUMAN RIGHTS* (1983) (ICRC Doc. CD/7/1, prepared for the Red Cross Council of Delegates, 13-14 Oct. 1983) [hereinafter *THE RED CROSS AND HUMAN RIGHTS*]; see also Dominice, *The Implementation of Humanitarian Law*, in 2 *THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS* 427, 439-43 (K. Vasak & P. Alston eds. 1982); Forsythe, *Present Role of the Red Cross in Protection* in *FINAL REPORT: AN AGENDA FOR THE RED CROSS* (1975); J. MOREIL-LON, *LE COMITE INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES DETENUS POLITIQUES* (1973); J. PICTET, *RED CROSS PRINCIPLES* (1956).

Article 6, paragraph 4 of the Statute of the International Red Cross prescribes three categories of tasks for the ICRC in armed conflicts: "[1] To undertake the tasks incumbent on it under the Geneva Conventions, [2] to work for the faithful application of these Conventions and [3] to take cognizance of any complaints regarding alleged breaches of the humanitarian conventions."¹¹⁵

A. Fulfilling the ICRC's Tasks Under Humanitarian Law

The tasks in the first category relate to the specific provisions of the Geneva Conventions and Additional Protocols that authorize ICRC action. First, the ICRC visits prisoners of war and civilian internees, interviews them without witnesses, and repeats such visits under article 126 of the third Geneva Convention and articles 76 and 143 of the fourth Geneva Convention.¹¹⁶ The principal purposes of the visits are to assure that prisoners are not killed or mistreated and, in some cases, to provide prisoners with items such as blankets, medicines, soap, warm clothing, food, educational material, medical care, and recreational material.¹¹⁷ Second, the ICRC provides relief to the inhabitants of occupied territories under articles 50, 59, and 61 of the fourth Geneva Convention.¹¹⁸ Third, pursuant to article 123 of the third Geneva Convention and article 140 of the fourth Geneva Convention, the ICRC has established a Central Tracing Agency (CTA) that collects information on prisoners of war and civilians in occupied territories (particularly those who are interned) so the CTA can establish and maintain contact with the prisoners' families.¹¹⁹ Fourth, the CTA also searches for missing persons in the event of armed conflicts, pursuant to article 33(3) of Additional Protocol I.¹²⁰ Fifth, if children are evacuated under article 78(1) of Additional Protocol I, the ICRC monitors the relocation to assure the return of the children to their families.¹²¹ Sixth, the ICRC helps to establish and identify clearly hospitals and safety areas protected from international armed conflict under article 23 of the first Geneva Convention and article 14 of the fourth Geneva Convention.¹²² Finally, in the event of noninterna-

115. Statute of the International Committee of the Red Cross, *supra* note 104, art. 6, para. 4.

116. See THE RED CROSS AND HUMAN RIGHTS, *supra* note 114, at 31.

117. *Id.* at 31-32.

118. *Id.* at 32.

119. *Id.* at 32-33.

120. *Id.* at 33.

121. *Id.* at 34.

122. *Id.*

tional armed conflict, and pursuant to common article 3, the ICRC may take humanitarian initiatives to offer its services to the parties to assist victims and to engage in activities similar to those it performs in international conflicts.¹²³

B. *Encouraging Faithful Application of Humanitarian Law*

The second category of tasks that article 6 of the Statute of the International Red Cross identifies requires the ICRC to "work for the faithful application of" the four Geneva Conventions and presumably the more recent Additional Protocols. The ICRC thus monitors the compliance of parties to armed conflicts to assure that they implement all the provisions of the four Geneva Conventions and the Additional Protocols.

The ICRC's three principal techniques for assessing the fulfillment of these humanitarian law norms are: (1) visiting places of detention; (2) making official or unofficial approaches to the authorities; and (3) making use of its right to take humanitarian initiatives.¹²⁴

1. Visiting Places of Detention

In connection with visits to places of detention, ICRC delegates may check if detainees are being treated in accordance with the provisions of humanitarian law, draw the attention of the authorities to any problems, and ascertain through repeated visits whether the parties have taken appropriate remedial measures.¹²⁵

2. Approaches to Authorities

Whenever it has reason to believe that a violation of humanitarian law has occurred or may be prevented, the ICRC may approach the relevant authorities. In principle, it makes such representations without any publicity because its primary task is to aid the victims of armed conflicts. The ICRC thus communicates its concerns in confidence to the authorities because it does not wish to become engaged in public controversies that might jeopardize its assistance and protection work for victims.¹²⁶

While the ICRC's efforts to end violations of international humanitarian law or to prevent such violations are in principle confidential, the

123. *Id.* at 35.

124. See *infra* notes 126-41 and accompanying text.

125. See THE RED CROSS AND HUMAN RIGHTS, *supra* note 114, at 31.

126. See ICRC, *Action by the ICRC in the Event of Breaches of International Humanitarian Law*, 21 INT'L REV. RED CROSS 76, 77-78 (1981) [hereinafter ICRC, *Action*].

ICRC takes a different approach when necessary. The ICRC reserves the right to publicly denounce violations of international humanitarian law when the violations are significant, confidential efforts have not ended the violations, public statements will benefit the threatened persons, and ICRC delegates witnessed the violations or otherwise verified the existence of the violations through reliable sources.¹²⁷

The actual effect of the ICRC's techniques is far more subtle. Although the ICRC approaches governments in confidence, the mere fact that it has become aware of certain information presents government authorities with an implicit threat that the information will somehow become more broadly known, particularly if the government takes no remedial action. The ICRC publishes far more information than many people realize. In its monthly newsletter, its Annual Report, its Review, and occasional press releases, the ICRC often publishes information about the places of detention it has visited, the prisoners it has interviewed, the times the visits occurred and the number of detainees.

When a situation becomes particularly grave the ICRC rarely publishes full reports, as the policy statement quoted above and the ICRC's public statements on Iran and Iraq of May 1983 and February 1984 indicate.¹²⁸ The ICRC has previously issued public appeals concerning such issues as the killings in the refugee camps of Lebanon and the conflict that occurred in Southern Rhodesia.¹²⁹ In the context of civil wars, the ICRC has called on the parties to refrain from attacking civilian populations, as it did, for example, in the conflicts in the Congo (1964), Nigeria (1967) and Vietnam (1965 and 1968).¹³⁰

In May 1983 the ICRC issued a public appeal to both Iran and Iraq to honor their obligations under the Geneva Conventions.¹³¹ The appeal described Iran's failure to permit the registration of 15,000 to 20,000

127. *Id.* at 81.

128. ICRC, *External Activities: Middle East*, 23 INT'L REV. RED CROSS 220 (1983) [hereinafter ICRC, *External Activities 1983*]; ICRC, *External Activities: Middle East*, 24 INT'L REV. RED CROSS 113 (1984) [hereinafter ICRC, *External Activities 1984*].

129. See ICRC, *External Activities: Middle East*, 22 INT'L REV. RED CROSS 360 (1982) (Lebanon); ICRC, *Appeals of the International Committee of the Red Cross*, 17 INT'L REV. RED CROSS 74 (1977) (Rhodesia/Zimbabwe).

130. See ICRC, *An Appeal by the International Committee*, 4 INT'L REV. RED CROSS 520 (1964) (Congo); ICRC, *External Activities: In Nigeria*, 7 INT'L REV. RED CROSS 591 (1967) (Nigeria); ICRC, *The Requirements of Humanity in Vietnam*, 8 INT'L REV. RED CROSS 138 (1968) (Vietnam); ICRC, *Request for the Rules of Humanity in Vietnam*, 5 INT'L REV. RED CROSS 417, 418 (1965) (Vietnam).

131. ICRC, *External Activities 1983*, *supra* note 128.

prisoners of war; its failure to transmit family correspondence for prisoners; its failure to allow ICRC access to prisoners; its failure to repatriate wounded or sick prisoners; and the intimidation, death, or injury of prisoners of war. The appeal described in less detail the situation of 6,800 Iranian prisoners held by the Iraqi government. It discusses Iraq's satisfactory registration of prisoners, its satisfactory transmission of family correspondence, its failure to permit access to certain prisoners, some ill-treatment, and a few instances of brutality against prisoners.

The appeal concluded with the statement that both Iran and Iraq have committed "grave breaches" of human rights law by summarily executing captured or wounded soldiers, by abandoning the wounded on the field of battle, and by bombing civilian targets.¹³² The ICRC repeated this public reproach of Iran and Iraq in February 1984.¹³³ This public disapproval apparently made both Iran and Iraq less willing to accept the humanitarian assistance of the ICRC, but the situation possibly marked the limits of ICRC willingness to cooperate with governments that gravely breach their legal responsibilities.

Despite the fact that the ICRC rarely issues such public appeals, the Iran-Iraq case is useful in assessing the ICRC's methodology, designed essentially to use the balance of humanitarian law violations as a means to encourage compliance. If each side in a given conflict can assure the other side of its compliance with its treaty obligations, the Geneva Conventions will function more successfully. The balance is somewhat less successful when public criticism of the countries arises, because the criticism demonstrates to each country that the other side is not fulfilling its treaty obligations and also because inevitably one side will appear "better" than the other when the accounting is published.

If a government partially reveals a confidential ICRC report, the ICRC reserves the right to release the complete report.¹³⁴ Accordingly, the ICRC has released reports on prison visits in Greece under the Colonels after Greece divulged information contained in ICRC reports on the visits.¹³⁵ Likewise, when the present Government of Iran disclosed information about ICRC prison visits during the reign of the Shah, the ICRC

132. *Id.* at 79.

133. ICRC, *External Activities 1984*, *supra* note 128, at 220.

134. See THE RED CROSS AND HUMAN RIGHTS, *supra* note 114, at 31.

135. See *Comité International des la Croix-Rouge Aus Detenus Politiques en Greece, Mai 1967-Mars 1968*, in J. BECKET, *BARBARISM IN GREECE* 99-102 (1970); see also Veuthy, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Noninternational Armed Conflicts: The Role of the International Committee of the Red Cross*, 33 AM. U.L. REV. 83, 93 (1983) [hereinafter Veuthy, *Implementation*].

released several pertinent reports documenting these visits.¹³⁶

Periodic ICRC Conferences express concern about, and even strong disagreement with, grave and long-standing violations of humanitarian law. The ICRC Conference in 1981 adopted such a resolution concerning conflicts in the Western Sahara, Ogaden, and Afghanistan.¹³⁷

3. Humanitarian Initiative

To work for the faithful application of the Geneva Conventions and the Additional Protocols, the ICRC also reserves the right to take humanitarian action (a) in all situations under article 4(2) of its own statute;¹³⁸ (b) in international armed conflicts under article 9 of the first three Geneva Conventions, article 10 of the fourth Geneva Convention, and under articles 5 and 81 of Additional Protocol I;¹³⁹ and (c) in noninternational armed conflicts under common article 3.¹⁴⁰ The ICRC's right to take humanitarian initiative is designed to assist persons protected under the Geneva Conventions and Additional Protocol I, as well as all others who may become the victims of armed conflict or internal strife, subject to agreement of the authority concerned. Under its right of humanitarian initiative, the ICRC may provide relief to persons not protected under the Geneva Conventions, organize the exchange of prisoners, reunite families, ask for truces to bring care to the wounded, and help refugees.

4. Receiving Complaints Concerning Alleged Breaches of International Humanitarian Law

In receiving complaints about alleged breaches of international humanitarian law, the ICRC has distinguished between two categories of complaints: "The first category includes complaints or communications concerning the non-application or inadequate application of one or several provisions of the Conventions by the responsible Power in respect of persons protected by those Conventions, in circumstances where the ICRC can take direct action in favour of such persons."¹⁴¹ The ICRC then approaches the authorities to prevail on them to correct any short-

136. See *Red Cross Found Jail Better in Shah's Last Year*, Wash. Post, Jan. 10, 1980, at A23, cols. 1-4; see also Veuthy, *Implementation*, *supra* note 135, at 93.

137. See *Humanitarian [A]ctivities*, *supra* note 108, at 321.

138. See THE RED CROSS AND HUMAN RIGHTS, *supra* note 114, at 35-38; Veuthy, *Implementation*, *supra* note 135, at 87.

139. See THE RED CROSS AND HUMAN RIGHTS, *supra* note 114, at 35-38.

140. *Id.*

141. ICRC, *Action*, *supra* note 126, at 78-79.

comings notified on the spot and reported by its delegates.

"The second category includes protests against grave breaches of international humanitarian law committed in circumstances where the ICRC is unable to take direct action to help the victims."¹⁴² The breaches may, for example, have taken place on the scene of hostilities to which the ICRC has no access. The procedure followed by the Committee is not to forward the protests, unless there is no other regular channel for doing so, a neutral intermediary is necessary, and where such protests do not come from third parties.

In the case of the first category of complaints, it is indisputable that the actions taken by the ICRC, for example, to put an end to ill-treatment inflicted on protected persons, represent a contribution to respect for human rights in the same way as the action taken by the Committee on its own initiative and mentioned in the previous section. And for the second category of complaints, the ICRC plays a very limited part, as noted by the International Conference of the Red Cross, after it has recognized that the procedure laid down between the two world wars had given no appreciable result.¹⁴³ The function of the ICRC as forwarding agent seems rarely to lead to any improvement in the situation, since the complaints usually refer to events in the past which can no longer be put right.¹⁴⁴

In addition, the four Geneva Conventions contain provisions that permit parties in conflict to establish ad hoc commissions of inquiry where alleged violations of the Geneva Conventions have occurred.¹⁴⁵ To date, no two parties to a conflict have accepted such an ad hoc commission of inquiry. Article 90 of Additional Protocol I envisions the establishment of an International Fact-Finding Commission when twenty states parties have acknowledged the competence of such a commission to investigate allegations of grave breaches or other serious violations of the conventions and Additional Protocol I.¹⁴⁶ It is unlikely that an International Fact-Finding Commission will come into existence for a long time. As of 8 June 1987 only eight states out of twenty-seven parties to Protocol I had declared their acceptance of the International Fact-Finding

142. *Id.* at 79.

143. *Protests [R]egarding Alleged Violations of the Humanitarian Conventions*, res. 27, TWENTIETH INTERNATIONAL CONFERENCE OF THE RED CROSS (1965).

144. THE RED CROSS AND HUMAN RIGHTS, *supra* note 115, at 38-39.

145. First Geneva Convention, *supra* note 1, art. 52; Second Geneva Convention, *supra* note 1, art. 53; Third Geneva Convention, *supra* note 1, art. 132; Fourth Geneva Convention, *supra* note 1, art. 149.

146. Protocol I, *supra* note 13, art. 90.

Commission.¹⁴⁷

5. The ICRC and Other Organizations

The preceding discussion of the ICRC's work in periods of armed conflict and internal strife raises two essential questions: first, what can other organizations learn from the ICRC's long experience in dealing with human rights violations in periods of armed conflict and internal strife? and second, what should be the relationship between the ICRC and other organizations with regard to fact-finding and other actions?

a. What Other Organizations May Learn from the ICRC Experience

Other organizations can clearly learn from the ICRC's effective techniques. The ICRC's skillful use of the implicit threat of publicity might help all other human rights organizations. Other organizations must consider at least whether to follow the ICRC's general policy of not relying on international law when pursuing humanitarian objectives.

If a human rights organization intends to comment on human rights violations committed by a government on one side of an armed conflict, the organization should include some statements in its reports detailing the abuses that the other party has perpetrated, since those misdeeds may be the cause of, or at least the excuse for, any repression. In many cases, failure to do so may leave the organization open to charges of prejudice in favor of one side of the conflict—both at the time of the report and in the future. Nevertheless, such efforts to balance human rights reporting may help one party to the conflict justify its previous human rights violations or future reprisals. This paradox demonstrates the difficulty of any effort to balance reporting and the extremely hazardous character of any increased activity in periods of armed conflict.

If a human rights organization were to publish information condemning only one side of a conflict, the international community would probably criticize the organization for taking sides or for having purveyed enemy propaganda. Because the ICRC attempts in many ways to serve as an intermediary between belligerent parties, such as by facilitating the exchange of prisoners, assisting wounded soldiers, and transmitting prisoner of war correspondence, an accusation of bias would be very damaging. Other human rights organizations do not attempt to serve in any such intermediary role. If human rights organizations wish to pursue

147. See ICRC, *States [P]arty to the Protocols of 8 June 1977*, 27 INT'L REV. RED. CROSS 344 (1987).

their concern for human rights impartially by criticizing government violations even in times of armed conflict, these organizations must at least be aware that governments will be particularly quarrelsome and sensitive at these times.

In considering these lessons one must understand the important differences between the ICRC and other organizations in structure, principles, and techniques. Such a full comparison between the ICRC and other organizations is, unfortunately, beyond the scope of this Article. Nevertheless, a few observations seem necessary.

The ICRC and other human rights organizations differ in that most human rights organizations apply human rights law at all times and, in addition, may refer occasionally to humanitarian law principles where relevant to their work. The ICRC applies humanitarian law during armed conflicts and may take humanitarian action pursuant to its statute at any time. The ICRC has occasionally referred to human rights law, but it does not generally use any legal principles publicly in its work.

Such a formulation leaves a considerable area of overlap between the work of the ICRC and other organizations. Significant differences exist, however, in the techniques the ICRC employs ordinarily and those that other human rights organizations employ. As discussed more fully above, the ICRC makes most of its approaches to governments in confidence.¹⁴⁸ Most human rights organizations use a range of tactics to approach governments, including direct contacts, membership appeals, and publicity campaigns. The ICRC has both regional offices and a large central staff that regularly visits places of detention, provides relief, and works with National Red Cross and Red Crescent Societies.¹⁴⁹ Amnesty International has a very diverse membership that provides financial support for the organization and assists with appeals to governments.¹⁵⁰ Amnesty International's research and fact-finding work is centralized in London.¹⁵¹ Americas Watch and most of the other human rights organizations identified in this Article have central offices, but lack effective membership and grass roots campaigning capacity. Americas Watch is unique in that it has experimented with the use of "stringers" as informants who remain on-site for extensive periods.¹⁵² The United Nations General Assembly, the Human Rights Commission, and other United Nations de-

148. See *supra* note 126 and accompanying text.

149. See ICRC, ANNUAL REPORT 1986, at 11-12 (1987).

150. See AMNESTY INTERNATIONAL ANNUAL REPORT 1986, *supra* note 10, at 9-10.

151. *Id.* at 11.

152. See, e.g., THE CIVILIAN TOLL, *supra* note 15, at ix (listing sources of information for the report).

liberative bodies have the ability to adopt resolutions, but must rely principally on the Secretary General to pursue more diplomatic approaches. The United Nations is generally not very effective at mustering media attention or grass roots campaigns.

A report of an Amnesty International mission to Vietnam noted one major difference between the approaches available to the ICRC and those available to other human rights organizations: "Amnesty International is not professionally equipped to carry out prison visits in the manner that the International Committee of the Red Cross (ICRC) can. Thorough camp inspections necessitate lengthier visits to more camps and would require medical expertise among the inspection team."¹⁵³ Such efforts also require repeated visits to the same institution.

b. The Relationship Between the ICRC and Other Organizations
During Periods of Armed Conflict

Bearing in mind the important differences between the ICRC and other human rights organizations, the question remains as to how these organizations might continue to work without unduly interfering with each other. One possible approach would be to recognize the ICRC's long-standing and very successful efforts in periods of armed conflict and internal strife. One might argue that other organizations should generally leave this field to the ICRC. Other human rights organizations have found, however, that human rights violations have occurred in times of armed conflict. Since these organizations cannot ignore these human rights violations, they may complement the ICRC's work with their fact-gathering capacity and diverse methods of action. Indeed, the ICRC has indicated its acceptance of, and appreciation for, the role of other human rights organizations in bringing human rights violations to the attention of the ICRC and the public—especially when the ICRC must remain quiet. In this regard, it is interesting to note a statement by Hans-Peter Gasser, Legal Adviser, to the ICRC:

The aim of a number of non-governmental organizations is to promote respect for human rights. Some of these organizations have also undertaken to exercise their activity in situations covered by the Geneva Conventions (for example the International Commission of Jurists and Amnesty International). The reports published by these two organizations, exposing violations committed in armed conflict may help influence public opinion. The activity of non-governmental organizations may be able to

153. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE SOCIALIST REPUBLIC OF VIET NAM, 10-21 DECEMBER 1979, at 13 (1980).

promote respect for humanitarian law by the belligerents. Their independence of any State power guarantees them considerable freedom of action and at the same time creates the conditions necessary for judgments free of any political influence—advantages which have to go hand in hand with impartiality and a keen sense of responsibility.¹⁵⁴

The discreet approach of the ICRC complements the activity of other human rights organizations, in that generally the ICRC avoids publicity and thus preserves its access to prisoners. Most other human rights organizations publicize violations, but such publicity may prevent them from having much access to prisoners.

All human rights organizations must protect their separate identities, however. The ICRC would not want to appear to be a collaborator with more outspoken human rights organizations because statements by unrelated organizations might result in a denial of access to prisoners. The ICJ may have particularly easy access to the authorities of a particular country and may be able to influence those officials toward the protection of human rights, while Amnesty International might lack such access after publicly criticizing the same country. For the effectiveness of each organization and for the overall effectiveness of human rights efforts, each organization must preserve its independence and separate identity.

VI. THE IMPACT OF ARMED CONFLICT ON THE FACT-FINDING WORK OF HUMAN RIGHTS ORGANIZATIONS

In order to work effectively and credibly against violations of human rights, organizations must be able to gather and assess relevant facts. Armed conflict situations may hinder the fact-finding work of human rights organizations and thus impair their ability to respond to human rights violations during periods of armed conflict.

A. *Circumstances Affecting Fact-Finding in Periods of Armed Conflict*

Several factors ordinarily affect a human rights organization's ability to gather information on human rights violations from any particular country.¹⁵⁵ Situations of armed conflict may have a significant impact on

154. Paper presented by Hans-Peter Gasser to a Seminar on International Humanitarian Law for Representatives of Governments and Academic Institutions in the Asian and Pacific Area, Canberra, Australia (Feb. 12, 1983).

155. Stephanie Grant identified most of these factors in the testimony she prepared for *Human Rights in Africa: Hearings Before the Subcomms. on Africa and on International Organizations of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. (1979) (She prepared the testimony for Amnesty International USA, but her views obvi-

several of these factors.

1. The existence of a general climate of fear.

Armed conflict and internal strife will certainly increase the level of fear in a society and make more individuals afraid to report human rights violations. As violence increases, the fear of arbitrary detention or killing makes it less likely that individuals will impart information. Indeed, parties to the conflict may interpret certain information as being defense secrets or security matters; they could conceivably view release of such information as espionage.

2. The existence of a popular awareness of human rights norms and an expectation that the government will not violate basic rights.

With armed conflict and internal strife, a breakdown of legal constraints on violence often arises and citizens' expectations that anything can be done to prevent or redress human rights violations decrease.

3. The existence of an independent judiciary that can respond to reports of human rights violations from an independent bar.

Court proceedings and lawyers are ordinarily a significant source of information about human rights violations. An increase in the general level of lawlessness may adversely affect the independence of the legal profession.

4. The existence of domestic organizations that concern themselves with human rights.

Domestic organizations that ordinarily provide information may become the subject of government opposition or repression, preventing them from functioning properly. These organizations may also become so involved in the conflict that their information becomes suspect.

5. The ability of the local media to report human rights matters freely.

On the one hand, press censorship ordinarily increases during war-time, thereby reducing the free flow of human rights information. On the other hand, the war may attract certain foreign journalists, focusing international attention on the country and undermining attempts at censorship.

6. The reliability of human rights information.

Human rights data can become suspect or less available during periods of armed conflict or internal strife if a government chooses to use it as propaganda. For example, Amnesty International's 1984 report on El Salvador observed that because of the armed conflict, all parties were attempting to place responsibility for violent deaths on opposition forces, often using intentionally biased medical and forensic evidence of dubious

ously reflected her considerable experience as head of research at the International Secretariat.).

authenticity to support such accusations.¹⁵⁶ In addition, a considerable risk exists that much of the information gathered during periods of armed conflict may have been filtered through one of the parties to the conflict. Indeed, a party to the conflict may have been publicizing the same information through several channels other than human rights organizations, such as the media. In these circumstances the credibility of the information may be questionable and the public may perceive it to be propaganda. In the absence of a human rights organization's own authoritative and independent research, the organization's role might be reduced to that of a rubber stamp or a supporter for one party's propaganda campaign.¹⁵⁷

For example, representatives of America's Watch and the Lawyer's Committee for International Human Rights described difficulties they encountered in determining the number of civilians affected by indiscriminate attacks by government forces in El Salvador, problems that are common to many armed conflict situations, including: the fact that the attacks took place in combat zones, making it difficult for human rights monitors to reach the site of alleged abuses; the fact that eyewitnesses were generally more preoccupied with their own safety than with recording details of abuses; the fact that civilian eyewitnesses may not always be aware when opposition forces are in their vicinity provoking governmental attacks; and the fact that some eyewitnesses may deliberately misinform human rights observers.¹⁵⁸

7. The existence of a common language easily understood by foreigners.

Armed conflict will not significantly affect this factor, but if foreigners cannot ordinarily understand the language of the country, thereby inhibiting the flow of information, armed conflict will diminish the information flow even further.

8. The existence of a communication infrastructure linking the country to the outside world.

Normal means of communication such as telephone lines, mail service, and business travel may become impaired during periods of armed con-

156. EXTRAJUDICIAL EXECUTIONS IN EL SALVADOR, *supra* note 19, at 15. Americas Watch apparently encountered similar difficulties in assessing evidence regarding human rights violations in Nicaragua. AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA 1985-1986 (1986).

157. See the problems discussed in AMERICAS WATCH, MANAGING THE FACTS: HOW THE ADMINISTRATION DEALS WITH REPORTS OF HUMAN RIGHTS ABUSES IN EL SALVADOR (1985).

158. FREE FIRE: A REPORT ON HUMAN RIGHTS IN EL SALVADOR, *supra* note 15, at 5-6.

flict and thus reduce the sources of useful information. With fewer sources of information, the researcher cannot easily cross-check material and assure reliability.

9. The existence of a substantial refugee or expatriate community with access to human rights information and human rights organizations abroad.

Wars ordinarily increase the flow of refugees, but refugees may not have access to international human rights information and organizations for a long time after their departure.

10. The possibility of sending a fact-finding mission to the country or to places where refugees may be found.

During periods of armed conflict, it may be difficult to obtain permission from a government to enter a country for research missions. Travel in some areas may be hazardous without government or opposition group assistance, which may in turn undermine the credibility of the fact-finding exercise.

All human rights organizations employ researchers who are assigned to monitor human rights developments in a region of the world. The ICJ divides its staff so that each employee covers a specific region of the world. For example, one jurist is responsible for Asia and another is responsible for Latin America. Because of its small staff, the International League for Human Rights can only turn its attention from one country to another without maintaining continual monitoring. Despite its very large staff in London, even Amnesty International must require nearly all its researchers to investigate violations in several countries at once. The United Nations serves largely as a passive receptacle for information that other organizations have produced, conducting little factual research itself.

Rarely can researchers for any of these organizations do more than collect and sift information acquired from press reports, texts of laws and decrees, international organization reports, and unpublished testimony from relatives of victims, former prisoners, lawyers, opposition groups, church members, journalists, and academics. In certain countries where research is particularly difficult, an organization must develop a more active research strategy, including visits to refugee camps, border areas, expatriate groups in countries that have received refugees, and diplomats who have been stationed in the country. Such a concentrated effort may be very difficult for a researcher assigned to several countries. This problem is aggravated even further if no other international human rights organization has undertaken significant fact-gathering efforts.

Americas Watch and the Lawyers Committee for Human Rights have pursued activist research strategies with regard to El Salvador and other

countries by using short-term employees and "stringers" located in the subject countries to prepare their reports.¹⁵⁹ Amnesty International has similarly employed a more activist information-gathering approach for its research on Afghanistan and Albania by visiting refugees in neighboring countries.¹⁶⁰

Of course, one cannot consider the problems of research without taking into account the available fact-finding means. The situation in the Western Sahara illustrates some of the difficulties in undertaking an activist research strategy in the highly visible and politically sensitive context of an armed conflict. A considerable store of information on human rights issues should probably exist among the inhabitants of the refugee camps that the Polisario Front organized around the Tindouf in Algeria. Unfortunately, human rights researchers cannot visit these camps independently. Even if a researcher were to visit the camps under the auspices of the Polisario, everything he would see and hear would be orchestrated, creating doubt as to the accuracy of the information. Indeed, the Polisario would probably use a visit by a human rights organization as propaganda, which might be counterproductive to human rights objectives.

Despite these difficulties, human rights research is possible during armed conflict situations, particularly if organizations use a more activist fact-gathering approach. Moreover, in some cases armed conflicts may make research easier by drawing world attention to the situation. The conflict in El Salvador, for example, has attracted foreign journalists, members of the United States Congress, international human rights organizations such as Americas Watch and the Lawyers Committee for Human Rights, and even tourists. While fighting, disruptions of war, and the repression of domestic human rights organizations have impeded the flow of specific information on the events in El Salvador, the increased level of international attention has partially compensated for these impediments.

B. *Problems of Research Concerning the Existence of Various Sorts of Armed Conflict*

Another difficulty inherent in research concerning human rights violations during periods of armed conflict relates to the various categories of armed conflict. The application of humanitarian law hinges on the char-

159. See *supra* note 152.

160. See AMNESTY INTERNATIONAL, *AFGHANISTAN: TORTURE OF POLITICAL PRISONERS* 4 (1986) (AI Index: ASA/11/04/86); AMNESTY INTERNATIONAL, *ALBANIA: POLITICAL IMPRISONMENT AND THE LAW* 4 (1984) (AI Index: EUR 11/04/84).

acterization of the armed conflict. One must distinguish between international armed conflicts, wars of liberation, noninternational armed conflicts under common article 3, noninternational armed conflicts under Additional Protocol II, and other situations. In trying to apply humanitarian law to human rights violations occurring during the above-described situations, human rights groups will not only have to make political and highly contestable conclusions about the existence of certain sorts of armed conflict, but they will also need to base their decisions on factual information of a kind not previously customary for human rights research.

Numerous human rights organizations normally collect information about matters such as torture and ill-treatment, judicial and extrajudicial executions, "disappearances," fair trial and due process rights for detained prisoners, and the detention of political prisoners. Human rights organizations do not normally collect information about the sort of facts necessary to determine the existence or non-existence of an armed conflict. For example, some of the factors one must consider when applying common article 3 include whether insurgents possess an organized military force (that is, an authority responsible for its conduct) acting within a determinate territory and having the means to respect humanitarian law; whether the government has recognized the insurgents; and whether the United Nations has recognized the conflict as a threat to peace. In the ordinary course of their work, human rights researchers may collect facts and make tentative conclusions only about some of these subjects.¹⁶¹ The additional requirement of collecting this information in order to apply international humanitarian law would distract researchers from their principal research tasks and would be beyond their information base and expertise.

VII. THE EFFECTIVENESS AND IMPARTIALITY OF INTERNATIONAL ORGANIZATIONS IN COMBATting HUMAN RIGHTS VIOLATIONS IN ARMED CONFLICT SITUATIONS

During periods of armed conflict, human rights organizations may encounter problems with the effectiveness of their traditional approaches to governments. Many international organizations focus primarily on human rights violations and seek to persuade governments to fulfill their

161. The Amnesty International Annual Report of 1986 commented on the territory controlled by armed opposition groups in Angola, Chad, Kampuchea, and Lebanon, but made no observation on this subject with regard to armed conflicts in Afghanistan, Colombia, El Salvador, Guatemala, Morocco, Mozambique, and the Philippines. AMNESTY INTERNATIONAL ANNUAL REPORT 1986, *supra* note 10.

human rights and humanitarian law obligations. The organizations employ various means to accomplish these persuasive goals: diplomatic contacts with the government; appeals through the media; letter-writing campaigns; communications to intergovernmental organizations; and efforts to encourage other governments to intercede. Some organizations such as Amnesty International, the United Nations, and the ICRC also assist human rights victims. International Alert is a relatively new organization that seeks to remedy not only human rights violations but also the underlying causes or conflicts that engender the violations.¹⁶²

Just as situations of armed conflict or internal strife have an impact on the research efforts of human rights organizations, they also have implications for the effectiveness of these organizations in halting human rights abuses. Indeed, a significant correlation exists between the ability to collect relevant human rights information and the ability to take effective action. Armed conflict situations may disrupt or distort normal government functions so as to impede any approach by a human rights organization to the government.

A. *Impartiality*

The problem of maintaining impartiality is one of the most difficult issues posed for human rights workers in situations of armed conflict and internal strife. Armed conflicts polarize the climate of public opinion. In a polarized climate, the public will almost certainly call on a human rights organization to express itself on numerous issues outside the organization's mandate. This problem may in turn affect the organization's ability to act consistently in armed conflict situations. Such situations create severe problems for a human rights organization's image of impartiality because governments that are engaged in armed conflict with one another or with a strong opposition group are particularly sensitive to what is perceived to be one-sided criticism. Concern for the image of impartiality may, in armed conflict situations, place pressure on human rights organizations to balance their criticisms—an approach that organizations have had difficulty maintaining and which may result in reduced effectiveness in curbing human rights abuses.¹⁶³

162. See, e.g., SURINAME: AN INTERNATIONAL ALERT REPORT, at i (1988) (describing International Alert and its purposes).

163. For example, Americas Watch attempted to catalogue human rights abuses by both sides to the Nicaraguan conflict from 1981 to 1985. The group noted that while the Permanent Commission on Human Rights, an independent human rights organization in Nicaragua, could supply reliable, continuously monitored information about abuses by the Nicaraguan government, no similar organization was available to monitor the *Con-*

When a human rights group comments on the human rights violations committed by a government involved in an armed conflict, the public expects the organization to include some statements concerning the abuses perpetrated by the other party to the conflict, whose misdeeds may be the cause of, or at least the excuse for, the repression. Failure to do so may leave the human rights group open to charges of prejudice in favor of one side—both at the time of the report and possibly in the future. Nevertheless, such efforts to balance reporting may help one party to the conflict justify its previous human rights violations or future reprisals. To obtain reliable information simultaneously about human rights violations by both sides is often difficult. If the human rights organization cannot balance its reports for lack of sufficient timely information about both sides, it may not be able to issue any. This paradox demonstrates the difficulty of any human rights organization's effort to balance its reporting and, indeed, the extremely hazardous character of any increased activity by these groups in periods of armed conflict.

B. *Approaches Used by Human Rights Organizations to Halt Human Rights Abuses*

Human rights groups use several different approaches to stop abuses in a given situation. They may approach a particular government or entity privately with evidence of abuses and request that the authorities act to stop the violations. Human rights groups may also publish reports and issue press releases about human rights violations. Publication serves the dual purpose of informing the international community about human

tras. VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985, supra note 16, at 7. Due to this lack of symmetry in information, the impartiality of Americas Watch was questioned.

A similar experience occurred when Amnesty International issued its report on Israel and Syria in 1974. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO ISRAEL AND THE SYRIAN ARAB REPUBLIC TO INVESTIGATE ALLEGATIONS OF ILL-TREATMENT AND TORTURE, 10-24 OCTOBER 1974 (1975). The Israel-Syria report received severe criticism both inside and outside the Amnesty International movement. The report's effort to bracket Israel and Syria demonstrated the risks of seeking to establish balance by placing violations of two countries in one report. Those who politically favored Israel noted that the Israeli violations were much less serious than the Syrian violations and they resented, therefore, the discussion of Israel in the same report. It is doubtful that the report served to ameliorate human rights conditions in the area. Indeed, the report may have had the unanticipated effect for some partisans of justifying the brutality of one side by reference to the brutality of the other. Although the report fully indicates the fact-finding problems the mission encountered, the report was criticized for its methodology and, perhaps correctly, for its decision to make findings of fact on the basis of the flawed evidentiary base available.

rights abuses in the hope of enlisting widespread pressure on the violating country, while possibly embarrassing the country into ending its violations. Finally, human rights organizations and their membership may place pressure on outside governments to induce the violating country to stop abusing human rights.

Human rights organizations may still use these approaches in periods of armed conflict. These approaches may be less effective at these times, however, for a number of reasons. A government may ignore the private approach or give it less weight if the country is more concerned about fighting a war. This difficulty is particularly great in situations involving an internal conflict or war of liberation. Human rights groups may only be able to monitor abuses by one party to the conflict, usually the government. Unfortunately, governments will be particularly sensitive to questions of a balanced approach and impartiality at these times, and they will be less receptive to private appeals.

Publication of information on human rights abuses may also backfire in times of armed conflict. Although publicity will often help to mobilize pressure on a government to stop abuses of human rights, during times of armed conflict it can become a two-edged sword. One party to a controversy may use the other party's publicity about human rights violations to justify its own abuses. This difficulty does not occur in times of peace, when authorities are responsible for violations of human rights and must answer for them.

Approaches by members of human rights groups to their own governments may also be less effective during times of armed conflict. Sovereign states may be less willing to interfere with government decisions when the country is at war. Human rights groups should be aware of these problems that are inherent when they apply traditional approaches to armed conflict situations. Human rights groups may have to alter their traditional operations in order to prevent human rights abuses effectively at these times.

C. *Assisting Victims in Domestic and International Tribunals*

Human rights organizations have invoked the assistance of international and judicial bodies in attempting to aid victims of human rights violations during periods of armed conflict. For example, Disabled Peoples' International (DPI) filed a complaint with the Inter-American Commission on Human Rights of the Organization of American States on behalf of residents of the Richmond Hill Insane Asylum who were killed or injured by the United States bombardment during the 1983

conflict in Grenada.¹⁶⁴ The complaint alleged violations of articles 1 and 11 of the American Declaration of the Rights and Duties of Man (American Declaration)¹⁶⁵ and the fourth Geneva Convention.¹⁶⁶ DPI argued that the right to life was nonderogable in time of war and that, because there were no domestic remedies to exhaust, the Inter-American Commission had jurisdiction. The Inter-American Commission accepted the petition as admissible and found at least a *prima facie* violation of the American Declaration's protection for the right to life.¹⁶⁷ Although the Commission has not yet heard the case on the merits, it must eventually decide whether the American Declaration prohibits killings during periods of armed conflict—particularly killings that humanitarian law might also forbid.¹⁶⁸

In domestic courts human rights groups have argued as *amicus curiae* in a number of areas. Human rights advocates have invoked international human rights law and humanitarian law in many cases.¹⁶⁹ For example, some have argued that the United States has an obligation to ensure respect for the Geneva Conventions by granting temporary refuge to Salvadorans fleeing the killing of civilians in the armed conflict ravaging El Salvador.¹⁷⁰

164. DPI v. U.S., *supra* note 7.

165. "Every human being has the right to life, liberty and the security of his person." OAS Res. XXX, adopted by the Ninth International Conference of American States (Mar. 30-May 2, 1948), Bogota, OAS Off. Rec. OEA/Ser.L/V/1.4 Rev. (1965), art. 1. "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." *Id.* art. 11.

166. Fourth Geneva Convention, *supra* note 1.

167. DPI v. U.S., *supra* note 7, at 13.

168. The Inter-American Commission on Human Rights relies generally on the provisions of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights for its operative human rights standards, but the Inter-American Commission has found violations of common article 3 of the Geneva Conventions. See, e.g., Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Guatemala*, OAS Doc. OEA/Ser.L/V/II.61, Doc. 47 rev. 1, at 69-70 (1983).

169. See, e.g., Brief for Amicus Curiae, Human Rights Advocates, in Support of Plaintiffs-Appellants at 10-11, *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985) (citing provisions of Protocol I).

170. See, e.g., *In the Matter of Jesus del Carme Medina*, before the U.S. Dept. of Justice, Board of Immigration Appeals, No. A26 949 415 (slip op.) (1985); cf., e.g., Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

VIII. CONCLUSION

International organizations, aside from the International Committee of the Red Cross, play an important role in assessing whether governments and armed opposition groups respect their human rights and humanitarian law obligations. Americas Watch, Amnesty International, the International Commission of Jurists, the United Nations General Assembly, and other organizations have for some time been using humanitarian law and human rights law in armed conflict situations. These organizations need to become more consistent and careful in using humanitarian law; they can also learn from the experience of the ICRC in how to be more effective in safeguarding human rights during periods of armed conflict.

