THE APPLICABILITY OF THE LAW OF WAR IN INTERNAL CONFLICT

A Selective Study of the Geneva Conventions of 1949 and Additional Protocols of 1977.

by

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ABBREVIATIONS

AJIL : American Journal of International Law

BYIL : British Yearbook of International Law

SALJ : South African Law Journal

SAYIL : South African Yearbook of International Law

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INTRODUCTION

To most people in the Western world the term "the Geneva Conventions" is familiar but vague; it dimly connotes a body of rules established to regulate the conduct of nations in waging war and is most commonly associated with the protection of prisoners of war during the First and Second World Wars. In fact, the four Geneva Conventions of 1949 constitute an exclusive, minutely detailed and sophisticated area of international law. Their origin may be directly traced to the humanitarian sentiment of a Swiss citizen, Henri Dunant, who, shocked by the human suffering which he witnessed during the Battle of Solferino in 1863, resolved to mitigate the horror of war as far as possible. The formation of the Red Cross society followed. In 1864 the first Geneva Convention, providing merely for the most elementary measures to protect wounded and sick in war, was drawn up, to be replaced successively by the Geneva Convention of 1906, the Geneva Conventions of 1929 and finally the four Geneva Conventions of 1949 which separately accord protection to wounded and sick on land (Convention I), wounded, sick and shipwrecked at sea (II), prisoners of war (III), and civilians (IV).

Virtually every nation in the world has become a party to the Geneva Conventions of 1949 which, probably on this ground alone, constitute the most significant part of that body of rules which comprises the law of war. Ironically, their greatest strength is also their greatest weakness. Fashioned out of the experience of warfare fought between States on a world-wide scale, the Conventions have increasingly come to be seen as irrelevant to regulation of conduct in the form of

warfare overwhelmingly predominant since the Second World War, viz. low-intensity or guerilla warfare, most commonly waged by a rebel group within a country against the established authority in that country. Furthermore the Conventions have emerged from a Western tradition of humanitarianism and for this reason, among others, have been regarded as ill-suited to the conflict situations prevalent in the developing countries of the Third World and since 1945 it is in these countries that almost all conflicts have occurred.

It would be surprising, therefore, if some attempt had not been made to revise the law of war as represented by the Conventions of 1949 to accommodate both the changing forms of warfare and the aspirations of newly independent Third World countries. Four sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva between 1974 and 1977, which itself was preceded by a conference of government experts and an International Red Cross Conference on the same topic, produced the so-called Additional Protocols.\ These consist of two separate sets of rules, Protocol I relating to international conflicts, Protocol II to non-international, and are supplementary to the Conventions of 1949 which remain intact.

The purpose of this thesis is to assess, with specific reference to the South African situation, the possible impact and influence which the Additional Protocols may have in situations of conflict traditionally regarded as internal in the sense of being waged, not between States, but between insurgent and government forces within a State. The means for arriving at this desired assessment are, of necessity, circuitous and

involve a close examination of aspects of the 1949 Conventions themselves.

Firstly Chapter I of this thesis places the so-called Geneva law, viz that body of law comprising the Conventions of 1949 and, since 1977, the Additional Protocols, within the context of the law of war as a whole. Of particular importance for the purpose of this thesis is an understanding of the general principles of the law of war for without such an understanding no assessment of any merit can be made of innovatory and revisionary law, which Protocol I certainly comprises in the form of certain provisions.

The Conventions of 1949 were themselves innovatory in instituting in the form of common Article 3, a measure, extremely limited in scope and content, of regulation of conduct in non-international conflicts. Chapter II deals largely with the role of common Article 3 and seeks to define the conflict situations in which common Article 3 may be said to apply. It is abundantly clear, however, that common Article 3 is possessed of fundamental shortcomings and has made little impact in the mitigation of human suffering in situations of non-international conflict. An attempt is made in Chapter III to place this innovatory provision in context and to demonstrate its strengths and weaknesses and to present some alternatives to common Article 3.

Common Article 3 is important because it represents the first attempt by the international community to impose a basic humanitarian standard of conduct in the waging of internal war. Article 1 (4) of Protocol I, which provides that wars waged against colonial domination and alien occupation, and against

racist regimes will be regarded as international for the purposes of applying the Conventions of 1949 and Protocol I of 1977, represents a revolutionary step in the trend initiated by common Article 3. Protocol II is applicable in situations of internal conflict and extensively elaborates upon the elementary provisions of common Article 3. Given South Africa's particular standing in international law, Article 1(4) clearly poses enormous difficulties.

In Chapter IV the law of war, traditional and as revised by the Additional Protocols of 1977, is examined in relation to one particular category of protected persons, viz. prisoners of war. The law created by the Additional Protocols radically departs from the traditional approach as contained in the Third Geneva Convention of 1949 (Prisoners of War). Obviously such law, and claims as to its applicability, are highly relevant to South Africa's immediate position. It is essential therefore to assess the value of such new law and to anticipate the difficulties which its application will hold for South Africa.

Since there is no doubt that South Africa will not become a party to the Additional Protocols, it must be determined whether South Africa can become bound by them in any other way. This involves a discussion, in Chapter V, of the position in international customary law which the Additional Protocols may or may not assume in time.

It must be only too apparent that this thesis has focused upon highly selective areas of the humanitarian law of war and does not in any way presume to give an overview of the 1949 Conventions and 1977 Protocols as a whole. Far the greater part of the substantive law contained therein is left entirely

untouched. Even where the discussion tends to be more specific and restricted, as in dealing with the law relating to prisoners of war, it must be borne in mind that the law relating to other categories of protected persons, notably civilians, deserves detailed analysis given the increasing involvement of the civilian population in conflict.

This thesis then is primarily concerned with the applicability of the humanitarian law of war in Southern Africa. It is an attempt to determine what humanitarian law South Africa, as a party to the Conventions of 1949, is obliged to apply in the conflict situations which have developed and are likely to develop on her borders. It is an attempt further to assess the value as law of certain radical provisions contained in Protocol I particularly and to formulate a rational response, founded on a discussion of the law of war as law, to the demands that South Africa regard conflicts waged against her as international.

C H A P T E R I

THE CLASSIFICATION AND GENERAL PRINCIPLES OF THE HUMANITARIAN LAW OF WAR

INTRODUCTION

The humanitarian law of war (hereinafter referred to simply as the law of war) in its developed and mature form as we possess it is a relatively modern phenomenon, having aspired to the sophistication it now comprises only in the period which has elapsed since the first Red Cross Convention of 1864 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field). However certain basic rules, it appears, may be said to have originated in primitive civilizations of several thousand years ago.(1) Despite the increasing complexity of the rules which constitute the law of war the elementary principles remain crucially important since they are universally accepted as fundamental and law in the making which fails to take account of them will thereby be reduced in effectiveness at its very inception.

Such principles form part of the customary law of war which continues to develop, albeit gradually and in increasingly restricted areas, parallel to the revision and extension of law as embodied in numerous multilateral treaties. In assessing the possible influence of emerging law it is necessary to consider at what stage, if at all, and by what process such law

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(1) Edward Kossoy Living with Guerilla 9 states that the prohibition against killing women and children can be traced to the Old Testament (Exodus 22 v 21-24; 23 v 6-7; 20 v 13-14) and appears at the latest in the Middle Ages.

will be constituted customary international law binding on all nations generally, with possible exceptions. This will be dealt with at length in Chapter V.[2]

This Chapter therefore is devoted to the classification of the law of war whereby the so-called Geneva law is placed in context and to the general principles of the law of war since these form a touchstone for an appraisal of new law.

CLASSIFICATION OF THE HUMANITARIAN LAW OF WAR

It is fairly generally recognized that the law of war may be divided into two related but distinct branches, one dealing with the actual regulation of the conduct of hostilities, the other concerned with the protection of war victims and the mitigation of their suffering. This describes the dichotomy between the so-called Geneva and Hague Law, the former consisting of the law as developed by the successive Geneva Conventions, and the latter consisting of the St Petersburg Declaration of 1868, the Hague Regulations of 1907, the Geneva Gas Protocol of 1925 and the Hague Convention on Cultural Property of 1954. This formulation may, however, be regarded as too narrow and thus Forsythe[3] in addition to Hague (here restricted to the law as contained in the Hague Regulations of 1907) and Geneva Law includes two further categories: Nuremburg Law (viz. that law which has developed from the judgments handed down in the trials of war criminals held at Nuremburg after the Second World War) and Other Law (by which is meant customary law, the Lieber Code of 1865,[4] the St Petersburg Declaration

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(2) Infra 148.

(3) D P Forsythe Humanitarian Politics 110.

(4) The Lieber Code was drawn up in 1865 by an American academic Francis Lieber as a field guide on how to wage war in

of 1868, the Geneva Protocol on Poison Gas of 1925 and national military manuals).

The classification of Hague and Geneva Law need not be followed; a different result is obtained by dividing the law of war into

1. restraints on the use of force, which are to be found in "pure" international law; and
2. "game rules" which are in turn divided into law governing the protection of non-combatants (Geneva Law) and law governing the conduct of warfare itself (Hague Law).(5)

This approach merely reflects the traditional distinction between the jus ad bellum and the jus in bello.

A different classificatory approach has been adopted by Schwarzenberger(6) who distinguishes four categories of rules of warfare:

1. Those rules which are effective without limiting or coming into conflict with the necessities of war. "Sadistic acts of cruelty, which do not purport to have terrorisation as their object, or wanton acts of destruction of property, which cannot even claim to form part of a 'scorched earth' policy, belong to this category". Such rules are therefore prohibitive of acts which do not in any event possess direct or even indirect military relevance.

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(5) See J E Bond The Rules of Riot 110.

(6) G Schwarzenberger International Law vol 2 9-14.

2. Those rules in terms of which humanitarian considerations take absolute priority over military demands and so limit the means of waging warfare. Such a rule is the blanket prohibition on the use of poison and poisoned weapons.

3. Those rules which embody a true compromise between the requirements of military necessity and of humanitarianism. Thus Schwarzenberger quotes the example of the St Petersburg Declaration of 1868 which prohibited the use of explosive or inflammable projectiles below 400g in weight (the so-called dum-dum bullet); if, however, "owing to greater weight, these weapons were more likely to attain their appointed object of disabling or killing the greatest possible number of the military forces of the enemy, their use did not run counter to the 'laws of humanity' as enunciated in the Declaration". Explosive or inflammable projectiles heavier than the stipulated weight were therefore permissible.

4. Those rules which provide a mere token or formal compromise between military necessity and humanitarianism but in fact allow complete preponderance of the demands of war through the insertion of "as far as possible" clauses, ie humanitarian principles are to be followed as far as possible. Since the determination of what is and is not possible will invariably be made by military personnel, it is unlikely that any sacrifice will be made in the cause of humanitarianism.

For the purposes of this thesis the classification of Geneva and Hague Law is important since the merging of the two categories presages a growing tend. The distinction between

Geneva and Hague Law is endorsed by Marxist writers, but on the rather perverse ground that Hague Law is to be distinguished as wholly without value. Herczegh, for example, denies that Hague Law can be accorded any place whatsoever in international humanitarian law because in regulating warfare by implication and by its very nature it legitimizes warfare as a legally recognised and accepted means of settling disputes.(7) Herczegh appears thus to identify the law of war with Hague Law alone and would suggest that Geneva Law ("genuinely humanitarian law") falls within the ambit of human rights law but Hague Law not.(8) The humanitarian considerations which initially prompted the development of Hague Law are now "obsolete" and Herczegh proposes that Hague Law should give way to Geneva Law.(9) Hague Law stands discredited. The grounds upon which Herczegh seeks to distinguish Hague and Geneva Law are essentially false since both have as their fundamental purpose the limitation of suffering of individuals. Moreover the fact of war can hardly be willed away simply by abolishing those rules which seek to restrict its destructiveness. In any event, Hague Law certainly now forms part of the body of customary international law and as such is generally binding.

Kunz(10) has argued not that Hague Law should concede its place to Geneva Law but rather that they cannot be objectively differentiated. He bases this proposition upon the important

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(7) G Herczegh "Recent Problems of International Humanitarian Law" in G Haraszti (ed) Questions of International Law 77 at 83.

(8) See generally on human rights and the law of war K D Suter "An Enquiry into the Meaning of the Phrase 'Human Rights in Armed Conflict'" 1976 Military Law and Law of War Review 393.

(9) Op cit (n 6) at 85.

(10) J L Kunz "The Laws of War" (1956) 50 A J I L 312 at 322.

consideration that the two branches of the law of war are both founded upon fundamental principles of the law of war (the principles of military necessity and humanitarianism) which co-exist in an uneasy state of equilibrium and tension. Kunz further points out that the clear distinction which the use of the terms Hague and Geneva Law indicates is in fact misleading since there are undoubtedly areas in which humanitarian protection of war victims and the humanitarian regulation of the conduct of war overlap. For example, the law of belligerent occupation, which traditionally would be regarded as forming part of Hague Law, is surely shaped in some small measure by Geneva Law in the form of the following provisions: the prohibition of reprisals against protected persons, the prohibition of the taking of prisoners, the prohibition of individual or mass transfer of civilians being protected persons, the prohibition of the deportation of protected persons from occupied territory, the granting of prisoner of war status to members of organized resistance movements under certain conditions, even in occupied territory, etc.

The above argument is lent substance by the emergence in international law of the Additional Protocols of 1977 which would appear to have eroded considerably the distinction between Hague and Geneva Law. For example, the provision embodied in Article 56 of Protocol I (and repeated in a drastically expurgated form in Article 15 of Protocol II) to the effect that

> "(1) Works or installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population",

would certainly place a significant restriction upon a means of

conducting warfare, viz the destruction of installations vital to the enemy. (One should note in this connection Article 56(2) of Protocol I does specify restricted circumstances in which the protected works and installations may be attacked).

The merging of Hague and Geneva Law is discernible in an area of law which constitutes probably the most visible and effective example of the protection the humanitarian law of war has afforded in the past, ie the protection of prisoners of war.(11) The Third Geneva Convention of 1949 grants broadly prisoner of war status to two categories of individuals:(12)

1. those who form part of the regular forces belonging to a State; and
2. those not falling under (1) but who satisfy several conditions, viz
   a. being commanded by a person responsible for his subordinates;
   b. having a fixed sign recognisable at a distance;
   c. carrying arms openly; and
   d. conducting their operations in accordance with the laws and customs of war.

In the light of the modern approach to the humanitarian law of war as typified by the Additional Protocols of 1977 it is now clear that particularly Third World countries regard the retention of the conditions precedent to the conferral of prisoner

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(11) The law relating to prisoners of war is dealt with in detail in Chapter IV infra 118.

(12) It must be emphasized that this categorization is a gross over-simplification but serves for the discussion at this point.

of war status as a Western ploy to weaken their potential military strength since obviously such conditions necessarily exclude the strategies and tactics (possibly the only strategies and tactics) available to them in waging a conflict. Low intensity conflict is waged not by armies but insurgents or rebels whose greatest advantage commonly lies in the fact that they are not distinguishable from the civilian population. In being required to observe the four conditions upon which prisoners of war status is granted or withheld, this military advantage is lost.

Thus a provision of humanitarian law has come to be contentious and regarded as favouring Western nations which have regularly constituted armies. Humanitarian law is now regarded as an area in which military advantages are gained or lost. Humanitarian law, both Geneva and Hague, is increasingly being used to regulate the waging of war, not because of any humanitarian benefit to be gained, but because such law is no longer regarded as neutral. If the rules governing prisoners of war status favour the developed nations of the West, they can also be changed to redress the balance (and a little more) in favour of the Third World.

The distinction between Hague and Geneva Law is thus becoming increasingly irrelevant. Geneva Law can be used to regulate warfare, as the issue of prisoner of war status shows. The significance of Geneva Law is no longer restricted simply to the protection of war victims, that of Hague Law is no longer restricted to the banning of certain practices (the use of dum-dum bullets, for example). Rather both as a whole are seen increasingly as a means to obtaining political and military advantage.

GENERAL PRINCIPLES OF THE HUMANITARIAN LAW OF WAR

An understanding of the fundamental principles of the law of war is essential for an evaluation of emerging rules, and may be of value in developing rules where none exist.(13)

The law of war, it is generally agreed, is founded upon the two opposing principles of military necessity and humanitarianism which exist in a state of constant tension and to each of which due significance must be attached. In an imperfect society where war is an ever present reality, the law of war must seek to establish as far as possible the predominance of humanitarian considerations ("the standard of civilization") over the necessities of war. Clearly, however, this will not always be achieved. Where a rule fails to take account of military necessities, then compliance with that rule is likely to be minimal. The policy of deforestation employed by the Allied forces in Vietnam in order to deprive the Vietcong of shelter and a food supply may certainly be regarded as inhumane in its effect on the civilian population. But prohibition of such a practice is likely to be meaningless if it is the only effective means of depriving guerilla forces of shelter and food supplies. The use of napalm presents similar difficulties.

On the other hand, where negligible inroads are made upon the necessities of war, then it is likely that humanitarian considerations will prevail since no conflict with the strategic object of war arises.(14) A party to a conflict will invariably

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(13) See D P O'Connell International Law vol 2 6.

(14) G Schwarzenberger op cit (n 6) 171-172.

prefer to follow a humane policy where the publicity value of that policy outweighs the possible military advantage to be gained from it. The humanitarian law of war, then, is very much the art of what is possible in given circumstances. It must seek to gain the maximum concessions to the principles of humanitarianism. But where rules are created which are not capable of practical implementation because they set too strict a limitation upon what is military necessary, then the general failure to comply with such rules will diminish the effectiveness of humanitarian law in war as a whole. The rules that do exist must be observed; if new rules will not be observed then it is better not to introduce them at all since the resulting non-compliance will almost certainly call the validity of existing rules into question.

The duality of humanitarianism and military necessity in the law of war has not always existed, and whatever the underlying principles of that law may presently be, various rules have frequently arisen from motives not in themselves especially commendable. In regard to the distinction between combatant and non-combatant, for example, the law of war is derived from the so-called Law of Arms, which was not primarily or even at all concerned with humanitarian considerations:

> "Both by reason of honour, which weighed heavily with the knightly classes and professional men-at-arms, and for the great profit that could be obtained by ransom and spoils, warmaking was a strictly limited activity so far as the class of participants was concerned. The Law of Arms is an amalgam of honour and commercium .... Humanitarian considerations are not in point."(15)

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(15) G I A D Draper "Combatant Status : An Historical Perspective" (1972) XI Military Law and Law of War Review 135 at 137.

Similarly, practices among the Greeks and Romans which are now characterised as humanitarian (prohibition of poison and poisoned weapons, truces to allow the burial of the dead, exchange of prisoners, ransom, sparing of non-combatants and their property) were motivated by reasons of self-interest, for example, the need to assimilate a conquered people within an empire, the expectation of reciprocal treatment, etc.(16) While he suggests that the only criteria in waging war are military advantage and effective fighting, Stowell(17) concedes that there remain certain principles which are effective to a certain extent in mitigating the cruelty of war, although even these rules are mostly founded not upon humanitarian considerations but rather self-interest and mutual advantage:

1. Rules of warfare which make for military advantage - eg the prohibition of pillage, since pillage disrupts military discipline, alienates local inhabitants, unnecessarily burdens military transport, etc.

2. Unnecessary cruelty, which does not have a military object nor aids in securing a victory and which must be avoided in the interests of efficiency.

3. Rules of warfare recognized as mutually beneficial to both contestants.

4. Restraining influence of popular sentiments and traditions; there are, however, certain restrictions which are essentially humanitarian in character and are based upon an innate sense of rightness and chivalry.

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(16) J E Bond op cit (n 5) 10-12.

(17) E Stowell "Military Reprisals and the Sanctions of the Laws of War" (1942) 36 A J I L 643 at 644-649.

5. Punishment and retaliation; the threat of these act as a deterrent to those who would in the absence of such threat violate the laws of war.

Certainly the effectiveness of the law of war rests upon several diverse motives and Stowell is probably correct in assigning self-interest a major share. But to ascribe the implementation of humanitarian law to self-interest alone is surely an over-simplification. For example, a party to a conflict may implement humanitarian principles and yet be so overwhelmingly powerful in relation to its adversary that it need have no cause to require a reciprocal implementation of humanitarian law by that adversary. Nevertheless the motive of self-interest is strong and probably underlay, for example, the unconditional release of prisoners taken by Castro rebels in their struggle against the Batista regime in Cuba, since this would contribute to winning the support of the local population.

Schwarzenberger,(18) however, discerns in the Geneva Conventions of 1949 a movement away from the de-emphasis of humanitarian imperatives which might detract from the necessities of war. In his view the Conventions represent a tendency

> "towards situations where there is a conflict [between humanitarian and military imperatives] but, by general consent, the standard of civilization is intended to prevail."(19)

Whatever the motive behind the implementation of humanitarian law, the formulation of rules promoting humanitarian principles at the expense of military efficacy must obviously

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(18) G Schwarzenberger op cit (n 6) 541.

(19) Ibid.

proceed by way of consensus. Such consensus will be forthcoming only if the proposed rules embody values which are generally recognized to be absolutely good and if such rules are applied equally to and by all parties. The corollary of consensus is reciprocity which may operate positively or negatively; where one party fails to comply with a particular provision which has humanitarian value but which is militarily restrictive, the other is virtually compelled to disregard that rule likewise if it is not to suffer a military disadvantage.(20) The rule against the destruction of dams, dykes and nuclear electrical generating stations(21) is unlikely to be observed by one party to a conflict when his adversary disregards it and thereby secures for himself a substantial military advantage.

Rules which do not materially limit military necessity are likely to function without difficulty on the basis of reciprocity; where, however, the necessities of war have to any significant extent been sacrificed to humanitarian considerations, the likelihood of breach will increase in proportion to the inroads made by humanitarianism. The more parties forego in respect of the necessities of war, the greater temptation to one or all to take advantage thereof and breach the relevant rule in order to make some military gain or prevent some defeat.(22) Reciprocity may almost be taken for granted in areas where there is no conflict between the principles of humanity and necessity; where such conflict does exist, reciprocity,

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(20) F C Kalshoven The Law of Warfare 108.

(21) Article 56 of Additional Protocol I of 1977.

(22) G Schwarzenberger op cit (n 6) 453.

the only basis upon which the law of war can function,[23] becomes increasingly tenuous and endangered.

R A Falk[24] proposes four general principles of limitation which serve to establish the balance between humanitarian imperatives and the necessities of war:

1. Principle of Necessity

   - "a prohibition upon methods, tactics and weapons calculated to inflict unnecessary suffering". Necessity cannot therefore be used to justify every decision or action; the principle of necessity denies the concept of total war free of regulation and affirms that what is militarily advantageous may not always be militarily necessary.

2. Principle of Proportionality

   - "a requirement that the military means used bear a proportional relationship to the military end pursued". It is often difficult to distinguish the principles of necessity and proportionality for it may often occur that where the intended means to attain a given military objective are not justified by the end itself, the objective in question may also be excluded as a legitimate goal on grounds of absence of military necessity. Kalshoven[25] finds in the principle of proportionality (the principle that "bel--ligerents shall not inflict on their adversaries harm out of proportion to the legitimate goals of warfare") the

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(23) Id 452: "the laws of war constitute a typical illustration of the international law of reciprocity".

(24) R A Falk in P D Trooboff (ed) Law and Responsibility in Warfare 37.

(25) F C Kalshoven op cit (n 20) 27.

fundamental principle of international humanitarian law applicable in armed conflicts. Intrinsic to the law of war, therefore, is the principle that parties to a conflict do not possess any inherent right to adopt unlimited means of injuring the enemy.

3. Principle of Humanity

- "an absolute prohibition upon methods, tactics and weapons that are inherently cruel in their effects and violate minimal notions of humanity". The principles of necessity and proportionality are both relative in implementation; neither is absolutely prohibitory, but rather establish a criterion whereby behaviour which may be permissible in certain circumstances is not so in others. The principle of humanity does not discriminate thus but declares certain behaviour at all times and under any circumstances impermissible.

4. Principle of Discrimination

- "a requirement that methods, tactics, and weapons generally discriminate between military and non-military targets and between combatants and civilians." It is probably this principle which offers the greatest potential for humanitarian practice. Whether particular behaviour has conformed in law to the principles of necessity and proportionality is generally an ex post facto judgment. By placing certain classes of people and property wholly outside the arena of warfare, protection of such does not depend upon the subjective decisions of commanders in the field but provides an absolute criterion of who and what are legitimate objects of attack.

The principle of discrimination may be divided as follows:[26]

a. The distinction ratione loci: "the exclusion of geographically defined areas and individual buildings from the region of war".

b. The distinction ratione instrumenti: "the prohibition of weapons which are considered to be incompatible with the standard of civilization". This point is probably more relevant to the consideration of humanity.

c. The distinction ratione personae: this distinction is made between combatants and non-combatants, members of the armed forces and civilians, lawful and unlawful combatants. This distinction is important not only because it totally excludes civilians from the objectives of attack,[27] but also because it is relevant in determining the status and treatment of particular classes of participants: lawful combatants are entitled to prisoner of war status, the Geneva Conventions of 1949 regulate the status of medical personnel, etc.

CONCLUSION

Schwarzenberger[28] asserts that pre-1914 rules (in which the necessities of war prevailed) have been replaced with a law of war in a wider sense which practically and functionally

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(26) Schwarzenberger op cit (n 6) 109-110.

(27) Cf the Preamble to the Declaration of St Petersburg of 1868 which states that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy."

(28) G Schwarzenberger The Dynamics of International Law 34.

manifests the principle of humanity. However, it is probably more likely that the law of war is moving in another direction; it is seen as a whole with political and military advantages and not merely as sets of rules to protect certain people and to outlaw certain weapons and practices. It is essential therefore that the basic principles be reaffirmed since the cause of humanitarianism in situations of internal and other conflicts will be lost where they are absent.

Before discussing the most recent developments in this field it is first necessary to trace the first steps in the regulation of internal conflicts. This follows in Chapter II.

CHAPTER II

CONFLICTS INTERNAL AND INTERNATIONAL

INTRODUCTION

The scope of application of the Geneva Conventions of 1949 is governed by Article 2 ("Application of the Conventions") and Article 3 ("Conflicts not of an international character"), both articles being common to all four Conventions. Article 2 is fairly unambiguous and so by far the greater part of this chapter is devoted to a discussion of Article 3. It is necessary to develop the theme of this thesis in this way for the following reasons:

1. Conflicts not of an international character are obviously most relevant to the South African situation and South Africa, being a Party to the Conventions of 1949, is bound in this respect by the provisions of Article 3; and
2. Article 3 constitutes the first step of the development in international law which has increasingly focussed attention on the regulation of internal conflicts and which has finally resulted, in terms of Additional Protocol I of 1977, in the full regulation of certain types of conflict previously regarded as internal.

Traditionally international law has been denied any influence (apart from the very limited doctrines of insurgency and belligerency) in those conflict situations which fall entirely within the jurisdiction of a single State. At the time of its inception in law Article 3 therefore represented

an innovatory and significant departure from previous practice. As shall be seen, Article 3 merely provides for a handful of extremely elementary humanitarian safeguards. Nevertheless it constituted an implicit recognition that increasingly warfare would be conducted on a low intensity level and that international law must accordingly take account of this phenomenon.

It may be helpful at this point to note that three distinct conflict situations must be differentiated in considering the extended jurisdiction of international humanitarian law which the appearance of Article 3 created:

1. international conflicts, governed by Article 2;
2. internal conflicts, governed by Article 3; and
3. internal conflicts of insufficient magnitude to warrant any attention in international law at all.

Article 3 has given rise to a number of difficulties and these are dealt with at length below. Firstly, and most importantly, it has proved to be all but impossible to classify a conflict as falling into one of the above three categories, given the usual reluctance by a State to allow any encroachment upon its so-called domestic affairs. Secondly, the substantive content of Article 3 is so general and unspecific that it has little practical value. Thirdly, the provisions of Article 3 have been superimposed upon the traditional, albeit largely ineffectual, methods in international law of dealing with non-international conflicts, viz recognition of a party to the conflict as a belligerent or insurgent. That Article 3 has not been successful is clearly demonstrated by the fact that it has had no effect in practice. Some thirty years after its inception it has been outstripped by far more radical developments.

THE PROVISIONS OF ARTICLE 2

Although extensive revision of the Geneva Conventions of 1949 has taken place in the period since their inception, the Republic of South Africa has neither ratified nor acceded to the Additional Protocols of 1977 (which amplify the Conventions by some 130 articles plus appendices) and therefore remains bound by the original texts of the 1949 Conventions alone. The application of the Conventions is controlled by the common Article 2, which provides that they

> "shall 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".

THE NATURE OF THE CONFLICT

It would appear that a minimum scale of confrontation and violence will suffice to render the Conventions applicable as between two or more Parties (bearing in mind that for "High Contracting Parties" may be read "States"[1]). The following are the basic types of conflict which may be defined as international:[2]

1. unauthorized incursion by soldiers;
2. authorized small-scale incursion or border incident;
3. permitting hostile activity by private persons or persons acting on behalf of a third state;
4. hostile short-term expedition for a limited purpose;
5. full-scale violence between States;

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(1) It is nowhere expressly stated that High Contracting Parties are by definition States but it is abundantly clear that the drafters of the Conventions worked upon this basic premise and it has been accepted as self-evident by commentators. See John F DePue "The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949 - Its Impact upon Humanitarian Constraints Governing Armed Conflict" (1977) 75 Military Law Review 71 at 79-80.

(2) R I Miller (ed) The Law of War 17.

6. occupation of territory of another State without combat but through the threat or use of force.

Thus, even though the intensity of the hostilities might be so low as to enable one Party to deny the existence of a state of war, the effect of Article 2 is to obviate the requirement that a legal state of war be declared.(3) It is important that the humanitarian purpose of the Conventions should not be frustrated by mere political expediency which may be shown by a Party in denying a state of war:

> "It is inadvisable that a State should be entitled to disregard treaty stipulations simply by opening hostilities without previous notification to the adversary or by giving such proceedings any other name."(4)

Thus the Conventions will enter into force where de facto hostilities occur, despite the refusal by one or presumably more(5) States to recognize the existence of a conflict. The phrase "any other armed conflict" is nowhere defined and probably should be given as broad a meaning as possible in order to further the admittedly humanitarian purpose of the Conventions. However, clearly it is ludicrous to expect the implementation of the Conventions in cases of mere incidents of conflict (ie very limited and localised exchanges of force) and thus Draper(6) suggests that there

> "may be some force in the contention that the application of the Conventions requires the existence of that kind of armed conflict which would otherwise have amounted to a 'war' had there been an intention, expressed by declaration or otherwise, to wage war."

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(3) For a brief discussion of the legal concepts of war and peace see Jeremy D Morley "Approaches to the Law of Armed Conflicts" (1971) 9 Canadian Yearbook of International Law 269.

(4) J Pictet "The New Geneva Conventions for the Protection of War Victims" (1951) 45 A J I L 462 at 468.

(5) J Pictet (ed) ICRCC Commentary vol 4 21.

(6) G I A D Draper "The Geneva Conventions of 1949" (1965) 1 Recueil Des Cours 63 at 73.

However, this would seem to set the level of conflict required to bring the Conventionsinto force too high; armed conflict cannot simply be equated with war, even if undeclared. Pictet's[7] formulation is probably preferable: armed conflict in terms of Article 2 is

> "(a)ny difference arising between two States and leading to the intervention of members of the armed forces".[8]

THE PARTIES TO THE CONFLICT

As is apparent from the above discussion, all conflict situations (with the exception of the trivial and brief) between States fall within the regulation of Article 2. The factual element which brings the Conventions into operation is not so much the level of the conflict as the waging of hostilities between States (viz High Contracting Parties). This distinction is important because in conflicts not of an international character, governed by Article 3, the sole criterion for determining when that provision is applicable consists of an assessment of the intensity of the conflict, an assessment which is extremely difficult to make and which once made is invariably disputed in some quarters. Both these approaches are beset with difficulties and these are discussed below.

The primary test then, of whether a conflict is to be regarded for the purposes of Article 2 as international or not is the question of the statehood of the parties to that conflict. In the case of Military Prosecutor v Omar Mahmud

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(7) Op cit (n 5) 21.

(8) See also DePue op cit (n 1) 76: "the Conventions are intended to cover any situation in which a difference between two states leads to the employment of armed forces."

Kassem and Others[9] an Israeli Military Court stated that the Geneva Conventions are applicable

> "to relations between States and not between a State and bodies which are not States and do not represent States".

If this distinction is not maintained then the distinction between international and internal conflicts, as reflected in Articles 2 and 3 will similarly be lost. The criterion of statehood possesses this advantage that it is self-evident and thus it is difficult for a State engaged in hostilities with another to deny the application of the Conventions to that situation. While the intensity of a conflict will always be a matter of opinion it should be a question of fact whether two States are engaged in conflict. Nevertheless difficulties may arise. For example, where Rhodesian forces have made incursions into Zambia and engaged guerilla forces, can it be said that Rhodesia and Zambia were in a situation of armed conflict and that the Conventions should have come into force, even though Rhodesian and Zambian forces did not make contact?[10] Theoretically yes, but in practice it would appear that no serious attempt was made to enforce the Conventions between Rhodesia and Zambia (and it is unlikely that the fact of Rhodesia being technically a non-Party to the Conventions was the cause).

STATES NOT BOUND BY THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

Article 2(3) provides as follows:

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(9) 42 International Law Reports 470 at 475.

(10) It should be noted incidentally that the purported accession of the Smith government to the Conventions was unsuccessful.

> "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions hereof."

As is consistent with their avowedly humanitarian intent, the Conventions in Article 2(3) reject any form of general participation clause, as found in most of the Hague Conventions of 1907, whereby the implementation of those Conventions in any given situation falls away if one State engaged in hostilities is not a Party to those Conventions. The Conventions of 1949, however, are applicable as between those States which are Parties, and may further apply also in relation to non-Parties where the latter signify their willingness to observe and be bound by the Conventions. While Article 2(3) does not make clear whether the provisions of the Conventions must be applied by a Contracting Party thereto even pending the non-Party's acceptance or rejection of its corresponding obligations, Pictet(11) suggests that

> "the spirit and character of the Conventions lead perforce to the conclusion that the Contracting Power must at least apply their provisions from the moment hostilities break out until such time as the adverse Party has had the time and an opportunity of stating his intentions."

However, it is submitted that a prior reasonable belief that the non-Party concerned is either unwilling or unable to implement the provisions of the Conventions will entitle the Contracting Party to require clear and conclusive evidence of implementation before it can itself be held bound under a reciprocal duty. There are grounds for suggesting that the

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(11) Pictet op cit (n 5) 23. See also Draper op cit (n 6) 74.

acceptance by the non-Party must consist in an explicit and formal declaration to that effect.(12) However, a strict and literal imposition of this requirement may have anomalous results, as, for example, where the non-Party does in fact apply the provisions of the Conventions but neglects to communicate this compliance in the form of a formal and explicit declaration. It can hardly be argued that in these circumstances so technical an omission will entitle the Contracting Party to escape liability for fulfilling the corresponding obligations which arise by virtue of the non-Party's de facto compliance.(13) Accordingly, it appears that a de facto application of the provisions of the Conventions will in itself be regarded as a declaration of intent, albeit tacit and implied by the conduct of the non-Party. Nevertheless, for such declaration of intent to be so implied, the conduct of the non-Party must not in any serious respect be so deficient as to give rise to doubt as to the bona fides of that Party. Accordingly, the non-Party must accept and apply the provisions of the Conventions; to the extent that it does not satisfactorily fulfil its obligations, Contracting Parties are not bound by the Conventions in respect of such non-Party.

It is convenient to consider the position of non-Parties under the Additional Protocols. Here rather different considerations are operative because, unlike the Geneva Conventions, parties to a conflict other than States may become Parties to the Protocols and Conventions taken as a whole.

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(12) Id 23-24.

(13) Id 24.

Article 96(2) of Protocol 1 merely restates the provisions of Article 2(3) of the Conventions of 1949:

> "When one of the Parties to the conflict is not bound by this Protocol, the parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof."

However, national liberation movements cannot be regarded as Parties to the Protocols which are now open for accession only by Parties to the 1949 Conventions.(14) Accordingly, Article 96(3) regulates the position of national liberation movements:

> "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1(4) may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to the conflict the following effects.
>
> (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict."

Thus the scope of application of the Conventions and Additional Protocols may be summarized as follows:

1. Where the parties to a conflict are all Parties to the Conventions and the Protocols, then these instruments will be applicable in their entirety.

2. Where one party is a Party to the Conventions only, and the other parties to the conflict Parties to both Conventions and Protocols, Article 96(2) of Protocol 1 is

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(14) The Conventions of 1949 presuppose that only States may be Parties: see note 1 supra.

applicable. The Conventions are applied generally but the Protocols only between those parties to the conflict which have ratified or acceded to them.

3. Where a Party to the Conventions only and a national liberation movement are involved in a conflict, Article 3 of the Conventions may apply, depending upon the level of the conflict.

4. Where a Party to both the Conventions and the Protocols is engaged in a conflict with a national liberation movement, and such conflict is one which falls within the definition as set out in Article 1(4) of Protocol 1 (ie a conflict fought against colonial domination and alien occupation and against racist regimes) then Article 96(3) makes provision for an authority representing the liberation movement concerned to make a declaration of intention to apply the Conventions and Protocols. This provision gives rise to some difficulty and lays bare a major stumbling block in the successful application of Additional Protocol I. It is naïve in the extreme to expect that governments likely to be classified as colonial, alien or racist will become High Contracting Parties to the Protocols in the first place. Furthermore no government having become a High Contracting Party would concur in a description of itself as colonial, alien or racist. This consideration prompted a spokesman for the Israeli delegation to the Diplomatic Conference of 1974-1977 to state that

> "draft Article 1, paragraph 4 had within it a built-in non-applicability clause since a party would have to admit that it was either racist, alien or colonial - definitions which no State would ever admit to."(15)

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(15) Official Records of the Diplomatic Conference on the

Article 96(3) clearly anticipates that a declaration of intention by a liberation movement to apply the Conventions and Protocols will follow upon the commencement of a struggle against a High Contracting Party. However, as is only too apparent, the situations most likely to arise are those in which either the established government is not a Party to the Protocols or, if a Party, would deny that Article 1(4) of Protocol I is applicable. If read literally, Article 96(3) makes no provision for a liberation movement to make a declaration of intent in any struggle against a non-Contracting Party. Given the humanitarian purpose of the Protocols, it is unlikely that liberation movements were intended to be denied the opportunity of making a declaration of intent in a struggle against a non-Contracting Party. Where a declaration is so made, it is submitted that a situation analogous to that envisaged in Article 96(2) will come into being, and the onus will be shifted to the non-Contracting Party against whom the liberation struggle is being waged, to accept and apply the Conventions and Protocols. If such is not forthcoming, it is difficult to see why the liberation movement should be bound by the Conventions and Protocols in its relations to that Party, unless, of course, it continues to bind itself out of purely humanitarian motives.

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(15) (continued)

Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977 vol VI 42.
Similarly DePue op cit (n 1) 77 states that abandonment of humanitarian safeguards must ensue since "no state would recognize the legality of its opponent's cause and concede the illegality of its own".

The position where a declaration of intent is made by a liberation movement in a struggle against a Contracting Party which denies the application of Article 1(4) is also somewhat uncertain. Article 96(3) quite unequivocally states that the making of the declaration shall have the effect that the Conventions and Protocol I "are equally binding upon all Parties to the conflict". Thus the fact that the Contracting Party disputes the application of Article 1(4) would appear to be irrelevant. Yet it is scarcely credible that States will consent to be bound to apply the Conventions and Protocol I in any conflict waged against it by a liberation movement which considers Article 1(4) to be applicable and makes a declaration of intent in terms of Article 96(3).

Having considered the scope of Article 2 of the Conventions of 1949 and considered the scope of application of the Conventions and Protocols as a whole, it is now possible to take up the main thesis of this work, viz the determination and critique of the humanitarian law applicable in situations of internal conflict.

THE PROVISIONS OF ARTICLE 3

Common Article 3 provides, inter alia, that:

> "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 ... shall in all circumstances be treated humanely .... 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.

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."

THE INNOVATORY NATRUE OF ARTICLE 3

The inclusion of Article 3 in the Conventions of 1949 was hailed as a major advance in furthering humanitarian ends within armed conflict; it has been described as "an almost unhoped-for extension of Article 2".(16) The move to introduce humanitarian regulation of internal armed conflicts began in 1912 with the submission for the first time to the International Red Cross Conference of a draft Convention on the role of the Red Cross in civil wars or insurrection; the subject was not even discussed. The fact that Article 3, itself a much reduced provision compared to the original draft produced by the ICRC, which provided for the application of the Conventions in their entirety, was adopted only after much debate and compromise demonstrates the reluctance with which States agreed to brook interference, be it in even so

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(16) Pictet op cit (n 5) 26.

limited a form as Article 3, in affairs which had previously been regarded strictly as domestic. The traditional view was reflected in customary international law which

> "(i)mposed no requirements with respect to the treatment of the participants in a civil conflict, of whatever degree of intensity. International law was envisaged in its orthodox rôle as the law governing the relations of States."(17)

Fundamental reservations were expressed with particular regard to the cloak of respectability and legitimacy which Article 3 may possibly be construed as conferring upon rebel forces. Above all, fears were expressed as to the wisdom and legitimacy of in any way placing fetters upon the actions which a government in power may take in order to maintain its position in the face of a subversive attack (although Article 3 requires so low a standard of humanitarian conduct that it is difficult to see in what way a State's military effectiveness would be materially diminished by adherence thereto). The fears that Article 3 aroused, therefore, were two-fold:

1. That rebel groups would acquire a form of unmerited status in practice, even if not in law; and
2. that it is unjustifiable to restrict the means available to an imperilled government in suppressing subversion.

The realization of these fears would almost certainly be regarded by the State concerned as an unacceptable infringement upon its rights to protect itself against attempts to destroy its stability and ultimately its existence. Thus, while it has been universally recognized that the ends which Article 3 is intended to promote are undoubtedly humanitarian, it is simply realistic to acknowledge that individual rights are not permitted to compete with those of the State where the existence of the latter is in any way threatened. Clearly,

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(17) Miller op cit (n 2) 21.

then, and this is substantiated by practice since 1949, the effectiveness of Article 3 depends almost entirely upon the willingness of the State concerned to allow its full implementation, and such willingness is itself dependent upon the degree to which a State is impregnable against subversive attack. In other words, humanitarian standards, as always in the field of humanitarian law in armed conflict, will be more readily applied by the entrenched authority where it can afford to be so expansive and does not consider that such application will diminish its military resourcefulness. This is merely a restatement of the conflict between the fundamental principles of humanity and necessity. Expediency subordinates the interest of the individual to that of the State and Article 3 is relevant to that extent alone.

Nevertheless, Article 3 represents a major step in the development of the law which has resulted in the formulation of the Additional Protocols. Article 3 has served to emphasize the distinction between international and internal armed conflicts but is not innovatory in this respect; this distinction had certainly existed before. Rather the novelty of Article 3 consisted in the international regulation of internal conflicts: "the concept of regulating such conflicts through an international agreement was revolutionary".(18) Thus Article 3 is in a sense the breach which made possible the acceptance of the principle of international regulation of internal conflicts and certainly from this initial step may be traced the development of the law as represented by the

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(18) DePue op cit (n 1) 81.

Additional Protocols. Moreover Article 3 is significant for the implicit recognition which it contains that increasingly internal armed conflict has become a focus of interest for the community of States at large, since increasingly it is internal conflict in its ever more sophisticated form which poses the most real threat to the peace and stability of the world order. Article 2 implies a clear criterion for the determination of what constitutes an international conflict: it must be a conflict fought between States. This criterion fails in regard to Article 3; it cannot be construed so as to apply to "all other types of conflict" for then it would cover "all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage".(19) The deficiency inherent in Article 3 is not that it has concentrated international attention upon internal conflicts; the vast majority of conflicts to have taken place since the end of World War II may be classified as non-international and it is therefore of crucial importance that humanitarian law applicable in armed conflict take account of this phenomenon. Rather its fault lies in the fact that perversely what it gives with one hand it takes back with the other. Thus the innovatory step of subjecting internal conflicts to international purview is virtually negated by an omission to provide any clear and unambiguous guideline for determining its (Article 3's) application. Because this lacuna facilitates any State in its attempt to avoid the application of Article 3 to a conflict in which it may be involved, it is essential to arrive at a workable definition of the circumstances in which Article 3 applies. This is discussed below.(20)

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(19) Pictet op cit (n 5) 81.

(20) Infra 41*ff*.

Once it is accepted that non-international conflicts are rightfully accorded some measure of attention in international law, then there seems to be no reason in logic why the distinction between international and non-international conflicts should be maintained.(21) It would appear difficult to justify the application of Article 3 only in a case of civil war which in terms of the scale of the conflict is equivalent to a conventional international war; to argue thus means one has to deny the application of the full force of humanitarian law in armed conflict on the solitary ground that only one of the parties participating in the conflict possesses full capacity in international law.(22) In theory, then, the distinction is difficult to maintain and the criterion should be the intensity of the struggle alone; if this view were adopted then three situations would be distinguishable:

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(21) Schwarzenberger International Law vol 2 states at 673: "In a sociological view, the distinction between international and internal armed conflicts is artificial and, at most, one of emphasis. In any age, the areas of international society and those of its constituent national or multinational communities do not constitute self-contained compartments: they interact. The more widespread and protracted an internal struggle, the more it tends to affect other members of the international society, and the more likely it is that they will find it necessary to intervene".
However it should not be thought that an internal conflict resembles an international war only when other States are involved: the intensity of the Biafran war, for example, in which no other States were involved, would surely have been ground enough for requiring the implementation of the conventions of 1949 as a whole. See also Jacques Freymond "Confronting Total War : A 'Global' Humanitarian Policy" (1973) 67 A J I L 672 at 675.

(22) Edward Kossoy Living with Guerrilla 38.

1. Situations of domestic tension (riots, etc) which do not warrant the intervention of humanitarian law.
2. Conflict situations the intensity and duration of which warrant the application of minimum humanitarian provisions.
3. Conflict situations the intensity and duration of which warrant the full application of humanitarian law in armed conflict.

Such a classification would inevitably give rise to a number of difficulties:

1. It will be difficult to arrive at workable objective criteria which differentiate between each class of conflict with sufficient clarity that a judgment may be made beyond dispute;
2. It will be difficult to determine at what point an escalating conflict moves from one category to another.

Given the unworkability of Article 3 in practice and given the inordinate difficulty of defining, so as to distinguish, various levels of conflict (for which see below) it might make more practical sense to devise only one category of conflict to be subject to humanitarian regulation at all, and to pose criteria for its operation which would set the minimum level of conflict somewhere between an Article 3 situation and a full-scale war. This would entail sacrificing humanitarian regulation, of perhaps little value, in low intensity conflicts for certainty of regulation in <u>all</u> conflicts above a prescribed level. The major difficulty with this approach is that in border-line cases parties may very well not possess the facilities or resources to comply with the complex and sophisticated requirements which international humanitarian

law insists upon.

Whatever the merits of the above approaches may be, it is clear that the distinction between international and non-international conflicts is not about to be discarded as defunct. The Additional Protocols have entrenched the distinction more firmly than ever before but have sought to adapt humanitarian law to changing circumstances by means of the simple fiction of regarding wars fought against colonial, alien or racist regimes as international conflicts and therefore competent to be regulated by the full implementation of the Conventions and Protocol I. The Protocols have set the development of humanitarian law upon a course which could not easily be retraced. It is therefore probably not helpful to propose an alternative which has at this stage no hope of fruition.

PROBLEMS OF DEFINITION

The identification of a conflict as either internal or international is essential to the correct application of the relevant legal norms, given the distinction between international and internal conflicts as embodied in the Conventions and reinforced in the Protocols. Article 3 of the Conventions has been largely superceded by Protocol II but while only a few States have ratified or acceded to the Protocols and while there are States such as South Africa which are unlikely to become Parties to the Protocols but are involved in conflict situations, Article 3 will still be the only means of implementing some form, however crude and unsatisfactory, of humanitarian safeguards in such situations. There still remains, therefore a pressing need to define the bounds within which Article 3 will operate.

Not surprisingly an inconclusive debate has arisen over the crucial question of what constitutes "an armed conflict not of an international character". Higgins[23] isolates two main factors which complicate any assessment of a conflict as internal or non-international:

1. the international community may be divided as to whether the territory concerned is a single political unit or State, or two;[24] and
2. it may be claimed that what appears ostensibly as a civil war is in fact violence formented externally; should this be so, different considerations of both law and policy will ensue.

But generally speaking this has been to approach the problem from the wrong side. In the majority of cases of internal conflict the critical issue is to distinguish the conflict as genuinely falling within the ambit of Article 3 from mere "civil disturbances". It is the natural response of any government in dealing with an internal conflict to refuse to regard it as anything more than a mere civil commotion well within its (the government's) jurisdiction. Initially an internal conflict may be no more than this; but some criteria must be found by which it can be judged when an internal conflict falls to be regulated by Article 3.

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(23) Rosalyn Higgins "Internal War and International Law" in C Black and R A Falk (ed) The Future of the International Legal Order 81 at 85.

(24) This factor would appear to have been at the heart of the problem of applying humanitarian law in the Vietnam conflict. See R R Baxter "Ius in Bello Interno : The Present and Future Law" in John Norton Moore (ed) Law and Civil War in the Modern World 518 at 524:

> "The nature of the conflict between the two governments in Vietnam turns of course on the answer to the questions whether war across a provisional demarcation line is international conflict and when a provisional demarcation line hardens into what amounts to an international

The 1949 Diplomatic Conference, from which emerged the Conventions of 1949, decided against incorporating in Article 3 any conditions to define the situations in which Article 3 is applicable, but the various suggestions may be summarized as follows:(25)

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 Conventions.
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 purpose of the Conventions only; 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 peace or an act of aggression.
4. a. That the insurgents have an organization purporting to have the characteristics of a State;

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(25) Pictet op cit (n 5) 35-36.

b. that the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory;

c. that the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war; and

d. that the insurgent civil authority agrees to be bound by the provisions of the Conventions.

The above criteria postulate some measure of recognition of the insurgent party on the grounds of its military strength, territorial occupation, the reality of existing or intended governmental infrastructure based upon responsible authority, a degree of international acceptance, and both the ability and willingness to abide by the fundamental tenets of international humanitarian law. Clearly, however, while some basic grounds may be isolated upon which to implement Article 3, there exists little unanimity and for the following reason:

> "So far as the identification of a situation as an internal war is concerned, the horizontal authority whereby it is left to each state to appraise the facts leads inevitably to the pursuit of different practices consequential upon such appraisals."(26)

In a decentralized system, such divergence of appraisal will be unavoidable in the absence of clearly defined and generally accepted criteria. Accordingly, Higgins(27) suggests that greater attention should be given to the considerations of the causes, domestic or international, of a conflict, and further suggests that this role might be successfully undertaken by

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(26) Higgins op cit (n 23).

(27) Ibid.

the United Nations. However, it is submitted that objective appraisals are unlikely to be given by any body essentially political and not judicial.

BELLIGERENT AND INSURGENT STATUS

Before proceeding to a discussion of the criteria which must be present to render Article 3 applicable, it is necessary to view the development of Article 3 in the light of the traditional methods in international law of dealing with conflicts in which only one party enjoyed the status of Statehood. Traditionally major domestic violence has been classified as rebellion, insurgency or belligerency.(28) Rebellion comprises sporadic violence capable of suppression by the national police or militia. International law accords no protection to those in rebellion. Rebellion thus constitutes a state of domestic violence below the threshold of intensity being the minimum level required to attract the jurisdiction of international law.

More recently the concepts of belligerent and insurgent status have fallen into complete disuse.(29)

Indeed, there is some doubt as to whether the status of insurgency actually exists in law, and, if it does then only

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(28) Id 86.

(29) Id 88. See also Dietrich Schindler "State of War, Belligerency, Armed Conflict" in Antonio Cassese (ed) The New Humanitarian Law of Armed Conflict 3 at 19. But see Eldon van Cleef Greenberg "Law and the Conduct of the Algerian Revolution" (1970) Harvard International Law Journal 37 for discussion of a recent conflict in which a claim of belligerent status was made.

in an imprecise and ill-defined fashion.(30) The recognition of insurgency, implied or express, constitutes an acknowledgment by the recognizing State that the insurgents are legal contestants and not mere lawbreakers; it may constitute

> "an expression of belief by a foreign power that the insurgents should not be executed as rebels if captured by the legitimate government."(31)

Recognition of insurgency consists in recognition by a foreign power of the fact that a state of political rebellion exists in a particular country;(32) it appears that the granting of insurgent status is appropriate where the level of the conflict jeopardizes "the sovereignty of the parent State over the rebelling community"(33) or foreign intercourse is seriously affected. For the purposes of humanitarian law, the institution of recognition of insurgency, even were it still a viable concept in international law, is largely irrelevant since it embraces no concrete guarantees of humane treatment; it merely entitles insurgents to exercise, in relation to the recognizing State, some of the rights of a belligerent within the area of conflict - eg the obstruction of supplies to the legitimate government.(34)

Of far greater significance is recognition of an adversary as a belligerent, whereupon the rules of war come into full legal effect. Article 3 is relevant only in cases in which

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(30) M Greenspan The Modern Law of Land Warfare 619.

(31) Id 621.

(32) Id 620.

(33) Lord McNair Selected Papers and Bibliography 135.

(34) Greenspan op cit 620.

there has been no recongition of belligerency.(35) Thus where recognition of belligerent status has been granted, the conflict assumes the character of an international armed conflict and should the party accorded belligerent status be sufficiently possessed of the attributes of a State presumably the provisions of Article 2 would be applicable. Assuming that the parent State is a signatory to the Conventions of 1949, the full provisions of the Conventions come into operation when the belligerent party indicates that it accepts the binding force of the Conventions in the particular situation and when there is evidence that such belligerent in fact applies the provisions of the Conventions.

There are various criteria which have traditionally governed the granting of belligerent status and these may be summarized as follows:

1. Extent of the Conflict

   There must exist within the State an armed conflict of a general character,(36) beyond the scope of mere local revolt.(37)

2. Territorial Control

   The insurgents must occupy and administer a substantial proportion of national territory.(38)

3. Observance of the Rules of War

   The insurgents must conduct the hostilities in accordance with the rules of war and through organized armed forces responsible to an identifiable authority.(39)

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(35) L Oppenheim International Law vol 2 370.

(36) Higgins op cit (n 23) 88; J E Bond The Rules of Riot 34.

(37) Gerhard von Glahn Law Among Nations 552.

(38) Bond op cit 34; Higgins op cit 88; McNair op cit (n 33) 120; G Schwarzenberger International Law vol 2 691; Von Glahn op cit 552.

(39) Higgins op cit 88; McNair op cit 120; Schwarzenberger op cit 691; Von Glahn op cit 522

4. Stable and Effective Administration

The insurgents must have the elements of a regular and stable government exercising in fact the manifest rights of sovereignty over the areas under its control.(40)

5. Attitudes of Third States

There must exist a need on the part of other States to take a stand on the existence of the internal conflict, and to define and classify their attitudes and policies towards it.(41)

Recognition of an insurgent group as a belligerent before the above conditions have been met may constitute interference in the affairs of another State and thus an international wrong to that State.(42) Where the status of belligerency may be legitimately accorded then such recognition implies recognition of all governmental acts of the insurgent party within the territory it controls and administers.(43) In the absence of recognition by the parent State, recognition of belligerency by a number of other States will be adequate;(44) in such a case, those States will impliedly assume the rights and duties of neutral Powers. Recognition of belligerency in no way, however, implies recognition of the insurgent group as de jure government:

> "It does not transform the authority thus recognized into an independent government of a foreign sovereign State."(45)

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(40) Bond op cit (n 36) 88; Greenspan op cit (n 30) 19; McNair op cit (n 33) 120; Schwarzenberger op cit (n 38) 691; Von Glahn op cit (n 37) 522.

(41) Higgins op cit (n 23) 88; Von Glahn op cit 522.

(42) Greenspan op cit 19.

(43) Schwarzenberger op cit 691.

(44) Oppenheim op cit (n 35) 320.

(45) H Lauterpacht "Recognition of Insurgents" (1939) 3 Modern Law Review 1 at 20.

This view would appear to conflict with the view that under certain circumstances the full application of the Convention may follow upon recognition of belligerent status. The truth is simply that the concept of belligerency was not developed in the context of humanitarian law and that its legal significance related to areas of the law of war such as the law of neutrality, not humanitarian law at all.

Moreover, the circumstances in which a participant in a conflict will be entitled to demand recognition as a belligerent are less than clear. It would appear that belligerent status would be appropriate in a civil war situation which resembles an international conflict except for one party's lack of status in the international system. At the same time however, certain commentators have identified Article 3 as embodying the concept of belligerent status.(46) Certainly in drafting Article 3 some delegates to the 1949 Diplomatic Conference were under the impression that Article 3 merely reaffirms the traditional belligerency concept.(47) Yet the differences are real. The full legal effects of war are attendant upon a recognition of belligerency while Article 3 merely provides elementary humanitarian safeguards. The fact that the effects of belligerent status and Article 3 are able to be confused suggests the complex problem Article 3 has posed of defining in workable terms the area of conflict to which it is intended to apply. This consideration and the demise of the belligerency concept are attributable to one

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(46) See for example DePue op cit (n 1) 83: "a list of objective criteria gathered from various antecedent proposals and enumerated in the 'Final Record of the [1949] Diplomatic Conference of Geneva' suggests that the framers were simply alluding to classic forms of belligerency".

(47) Bond op cit (n 36) 52.

factor above all: the extreme reluctance of States to admit external regulation of domestic conflicts.[48] To overcome this clearly defined criteria must be devised for the application of Article 3.

CRITERIA FOR THE APPLICATION OF ARTICLE 3

A legacy perhaps of the belligerency concept is the argument[49] that the humanitarian purpose of Geneva Law in itself is sufficient ground to require the application of such law to internal conflicts. This is, of course, a statement of the ideal, and does not represent the ever present balance of humanity and necessity, the latter in the case of internal conflicts being the powers a State may feel entitled to maintain untrammelled in dealing with subversive and revolutionary elements. It is simply no solution to demand that humanitarian law be applied in all circumstances; practical questions of a legal and political nature (eg the fact that one party is not in traditional terminology a full subject in international law, or the fact that rebels are regarded as criminals under the law of the country concerned) must be given due attention. The following statement is cited in support of the argument for the universal application of humanitarian law in armed conflicts:

> "A clearly ascertained state of hostilities on a sufficiently large scale, willed as war at least by one of the parties creates a condition in which the rules of warfare become operative .... Once a situation has been created, which but for the constitutional law of the state concerned, is indistinguishable from war, practice suggests that international law ought to step

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(48) Id 61.

(49) Higgins op cit (n 23) 89.

> in to fulfill the same function which it performs in wars between sovereign states, ie to humanize and regularize the conduct of hostilities as between the parties."(50)

However, it is readily apparent that even the above excerpt stipulates various minimum criteria (a clearly ascertained state of hostilities on a sufficiently large scale, willed as war at least by one of the parties; situation indistinguishable from war). There must exist minimum criteria to determine at what level Article 3 will become applicable.

There has been little conformity of approach and the criteria to emerge from the 1949 Diplomatic Conference range from lenient to strict. Generally, what has to be determined is the intensity, duration and extent of the conflict; it is by no means clear how these may be measured. Zacklin(51) reports the opinion of an ICRC Commission of Experts sitting in 1962 as being that

> "the existence of (an armed conflict not of an international character) cannot be denied if the hostile action directed against a legal government is of a collective character and consists of a minimum amount of organization. In determining whether these primary conditions exist the factors to be considered include the length of the conflict, the number and framework of the rebel groups, their installation or action in a part of the territory, the degree of insecurity, the existence of victims and the methods employed by the legal government to re-establish order." (my italics)

On the basis of these criteria, Zacklin concludes that the type of conflict with which Article 3 deals is broader than that of civil war and that to limit the application of Article 3 civil war situations is too restrictive. It is submitted that this conclusion is correct. More recent proposals of the ICRC (1972) state:

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(50) H Lauterpacht Recognition in International Law vol 3 246 quoted in Higgins op cit 89.

(51) R Zacklin "International Law and the Protection of Civilian Victims of Non-International Armed Conflicts" in M K Nawaz (ed) Essays on International Law 282 at 288-289.

> "The following situations, among others, will be considered non-international armed conflicts ... when they occur on the territory of one of the High Contracting Parties and they involve military or civilian victims:
>
> 1. A hostile organized action:
>
> a. which is directed against the authorities in power by armed forces; and
>
> b. which constrains the authority in power to have recourse to their regular armed forces to cope therewith.
>
> 2. Hostile organized actions which take place between the armed forces of two or more factions, whether or not these hostile actions entail the intervention of the authorities in power."(52)

The criterion suggested here is no more than the existence of a conflict in which the authority in power employs its regular armed forces. That the scope of the application of Article 3 was initially at least regarded as being far more restricted is demonstrated by the following commentary:

> "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front."(53)

Bond(54) proposes the following specific criteria for the classification of a conflict as non-international in terms of Article 3:

1. The use of regular combat troops.
2. The duration of the conflicts.
3. Foreign troop participation.
4. Intensity of the conflict.
5. Imposition of emergency measures.

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(52) Quoted in Zacklin op cit.

(53) Pictet op cit (n 5) 36.

(54) Op cit (n 36) 182-184.

The difficulty with the above and other criteria is that they remain hopelessly unspecific. With regard to Bond's proposals it is precisely the duration and intensity of the conflict which are required to be measured and even having been measured for how long must a conflict be waged and at what intensity before it can be said to come within the ambit of Article 3? Is the criterion of "hostile action of a collective character and a minimum amount of organization"(55) helpful? The conflict in Northern Ireland can surely be so described and yet the call for the implementation of Article 3 in that situation has not been widely made, if at all.

An example of how detailed criteria may be specified is provided by the Institute of World Polity in a document "The Law of Limited International Conflict"(56) which lists the following as indications that internal conflicts should not be regarded as purely domestic:

> "1. Imposition of martial law or a state of siege generally or in certain areas over a long period of time.
>
> 2. Organization of emergency military or paramilitary security agencies, inter-departmental committees or councils operating with extraordinary powers similar to those exercised in wartime.
>
> 3. Enforcement of laws and institutions commonly associated with wartime such as high draft calls, extraordinary measures with respect to food and other necessities, transportation and the like.
>
> 4. Drastic increase in detentions and other deprivations of civil rights for political or security reasons, detentions over long periods without trial, increase in trials not characterised by minimal due process, or at least, due process as it was supposed to exist in the state in normal times."

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(55) Supra 51.

(56) Quoted in Bond op cit 183-184.

From the wide ranging proposals discussed above, is it possible to arrive at a workable generally acceptable yardstick for the application of Article 3? This issue may have been rendered a little less difficult by the inclusion in Protocol II (relating to the protection of victims of non-international armed conflict) of certain criteria governing the scope of application of that Protocol. Article 1 provides as follows:

> "1. 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 Protocol (I) ... and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

Article 1 of Protocol II therefore postulates the following criteria in respect of insurgent forces:

1. A measure of organization.
2. Responsible command.
3. Territorial control sufficient to enable those forces:
   a. to carry out sustained and concerted military operations; and
   b. to implement the provisions of Protocol II.

Does Article 1 of Protocol II take one any further in attempting to establish the parameters within which Article 3 is intended to function?

Firstly, it is submitted that the above criteria should be used to govern Article 3 situations. Forsythe[57] suggests that the scope of Article 3 is broader and that "there are two general types of internal war, legally speaking a Protocol II situation and a Common Article 3 situation". This is no doubt true but to require such an interpretation will be to introduce yet another factor into an already over-complex set of laws. In terms of this approach one would have to distinguish five distinct conflict situations:

1. international armed conflicts in the traditional sense;
2. international armed conflicts as defined by Article 1(4) of Protocol I;
3. non-international armed conflicts as defined by Article 1 of Protocol II;
4. non-international armed conflicts under Article 3 of the Conventions of 1949 which are not covered by Article 1 of Protocol II; and
5. purely domestic conflicts which are not subject to any external regulation whatsoever.

To successfully distinguish each level and type of conflict will certainly prove to be an insuperable task. In any event a government which is sufficiently honest and humane to admit the applicability of Article 3 is extremely unlikely to quibble over the application of the greatly watered-down provisions of Protocol II. Therefore as a matter of practical good sense it must be assumed that the scope of Article 3 will be more or less the same as that of Protocol II. The achievement of even so small a modicum of certainty in the application

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(57) David P Forsythe "Legal Management of Internal War : The 1977 Protocol on Non-international Armed Conflicts" (1978) 72 A J I L 272 at 286.

of Article 3 would be a small price indeed to pay for a somewhat narrower scope of application.

Furthermore, while it is admitted that the threshold for the application of the Protocol is set rather higher than is desirable there is no reason to suggest that it is applicable only in civil war situations, as was apparently the opinion of several delegates to the 1974-1977 Diplomatic Conference.(58) It is clear that such an interpretation is too strict. The advantage in identifying the scope of Article 3 with that of Protocol II is that no State could realistically assert that Article 3 does not apply where the conditions for the application of Protocol II are present. Such conditions undoubtedly refer to a category of conflict situations well beyond mere riots, civil disturbances and acts of urban terrorism but certainly not limited to civil war situations. Some sacrifice is made in limiting the scope of Article 3 by identifying it with the scope of Protocol II but in postulating a set of minimum criteria a recalcitrant government is deprived of the loophole of denying the applicability of Article 3 at all.

Article 1 of Protocol II constitutes progress in this sense that it attempts to define, however loosely, the limits of the application of that Protocol.(58a) However ultimately it is open

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(58) Id 285. See also G.I.A.D. Draper "Humanitarian Law and Human Rights" 1979 Acta Juridica 193 at 202, 205.

(58a) Contra Asbiorn Eide "The New Humanitarian Law of Non-International Armed Conflict" in Cassese (ed) op cit (n 29) 277 at 299 where it is argued that the "threshold" provision of Article 1 (stipulating the level which an armed conflict must attain before Protocol II is applicable) is irrelevant:

> "(I)t must be immaterial what level the conflict has reached - these provisions contain nothing more than what follows from the general law of human rights, which today must be considered part of the jus cogens."

This may be true but in practical terms is unlikely to

(continued on the next page)

to the same crucial objection as Article 3. Protocol II fails to provide "for authoritative resolution by third parties of competing claims arising under the instrument".(59) Thus it is left in fact to the established government to decide whether the conflict in which it is involved has escalated to the point where it falls to be regulated by Protocol II. The drafting history of Protocol II demonstrates clearly that no reliance can be placed upon States to make an objective and humane appraisal of a situation of internal conflict. Protocol II was only adopted after the original draft had been considerably cut down at the insistence of States which, having ensured the definition of conflicts fought against colonial, alien or racist regimes as international, then obstructed as far as possible any attempt at regulation of internal conflicts which might occur in their own territories.(60)

THE OBLIGATIONS OF THE PARTIES

The issue of the application of Article 3 is concerned not only with which parties are bound but also how they are bound. In the light of the overwhelming practical problem of the delineation of Article 3 conflicts this problem may appear largely theoretical but it is important nonetheless.

(58a) (continued)
persuade States susceptible to possible domestic conflicts to adopt a liberal and enthusiastic approach to applying Protocol II. See L C Green "The New Law of Armed Conflict" (1977) 15 Canadian Yearbook of International Law 3 at 40.

(59) Forsythe op cit (n 57) 286.

(60) Id 277-282.

Article 3 provides that in the case of armed conflict not of an international character the parties to the conflict shall be bound to apply the provisions contained in the Article. This immediately raises the problem of how parties which were not signatories to the Conventions can be bound by them. To overcome this logical difficulty, recourse must be had to one or more of a number of legal fictions. Obviously, the obligation of the established Government, as a Contracting Party to the Conventions of 1949 is clear; moreover such obligation is absolute in the absence of any reciprocity clause. With regard to the locus standi of the insurgent group, several solutions have been proposed:(61)

1. Parties sufficiently established and organized to form a belligerent community possess sufficient personality to make them bound by the treaty obligations of the State and to be responsible to third States for violations of these obligations.
2. The above solution is only relevant if the insurgent group fulfills the requirements for recognition as a belligerent party (for which see above); the formal nature of belligerent status and the degree of recognition involved invariably precludes the granting of such status to mere insurgent groups. Recognition as a belligerent is, for the purposes of humanitarian law at least, outmoded. Therefore, weightier consideration should perhaps be given to the suggestion by Draper that for the purose of the Conventions a new kind of personality has come into being, formed "with individuals

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(61) See generally D P O'Connell International Law vol 2 973-974.

grouping themselves in a particular way so that they become a party to an internal conflict."(62)

3. A further approach is to argue that Article 3 will bind parties who are without personality. There are several grounds upon which this contention may be based:

   a. Such parties will be bound on the basis that the original adherence of the established government binds all the subjects of the State even though some of them may rebel against that government - i e treaties made on behalf of the State bind the State as a whole and therefore all treaties already in existence when the civil dispute commenced are necessarily binding on the insurgent parties also.(63) However this theory is inconsistent with the traditional view that rebels are not subject to international law until they are accorded belligerent status.(64)

   b. Article 3 may be regarded as setting the established law independently of contractual obligation.(65) This then is to argue that Article 3 is merely a statement of law which has already come into being as custom. It is certainly possible to state that Article 3 now reflects the true position in customary law, but given the innovatory nature of the provision at the time of its inception, it is highly

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(62) G I A D Draper The Red Cross Conventions 17.

(63) Greenspan op cit (n 30) 623-624).

(64) See generally "The Geneva Convention and the Treatment of Prisoners of War in Vietnam" (Note from the Harvard Law Review) reprinted in R A Falk (ed) The Vietnam War and International Law vol 2 398.

(65) Greenspan op cit (n 30) 624.

unlikely that the above argument can be sustained. As has been pointed out above, the rules of warfare traditionally govern only hostilities between States or civil wars in which the rebel party has been recognised as a belligerent.

c. It may be argued that "if the responsible authority at [the head of an insurgent or rebel group] exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country."(66) The essence of this argument is that any body which claims to be a government and demands to be recognized as one must, in order to substantiate its claim, act as one. However, it is unlikely that an insurgent authority, which merely claims to represent the people, therefore necessarily assents to the obligations of a government. The assertion that consent is present is probably normative rather than descriptive in the circumstances of an internal conflict.

O'Connell(67) points out that the arguments falling under 3. above, that personality of the parties in law is not required for insurgent groups to be bound by Article 3, are not supported by the Conventions themselves; these do clearly assume personality in the parties for Article 3 itself stipulates that the parties to the conflict should endeavour, by means of special agreements, to bring into operation all or part of the other provisions of the Conventions as a whole.

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(66) Pictet op cit (n 5) 87.

(67) Op cit (n 61) 973.

This view is probably correct; furthermore, the fact that an insurgent group must have attained a certain level of "status", as an indication of the intensity of the conflict (eg a measure of organization, territorial control, responsible command, etc, as set out in Article 1 of Protocol II), further indicatesthat some form of personality is required, in which case the contention by Draper above would appear to be the most logical. As a practical issue, however, the following submission is probably the most realistic:

> "By definition, insurgents cannot adhere to a treaty prior to the commencement of hostilities, and if the applicability of Article 3 were made to turn on accession afterwards, there would be too great a risk of non-adherence merely as a short-sighted response to the pressures of the moment .... Accordingly it does not seem unfair to bind insurgent groups without their consent."(68)

RECIPROCITY

Considerable difficulty is posed by the question of reciprocity. Higgins(69) states that:

> "Article 3 calls for humanitarian rules to be applied irrespective of whether the insurgents have been recognised by the legitimate government or by third parties."

This approach is correct in that clearly application of Article 3 is not dependent upon recognition of the parties. Furthermore, it is generally agreed that Article 3 is binding on all parties (see above) and is not subject to reciprocity. Thus where Article 3 is admitted to be of application, then the obligation upon all the parties to implement its provisions is absolute and does not depend upon the actual implementation thereof by any other party. However, this situation

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(68) Op cit (n 64) 405.

(69) Op cit (n 23) 90.

should not be confused with that in which the entrenched authority refuses to admit the applicability of Article 3 on the grounds that the insurgent party is unable or unwilling to implement the provisions of Article 3, and such lack of compliance is in itself an indication that such party does not exercise sufficient control to implement these provisions. If the insurgent party does not apply the provisions of Article 3 then "it will prove that those who regard its actions as mere acts of anarchy or brigandage are right".(70) It is therefore apparent that the absoluteness of the obligation contained in Article 3 is all but meaningless; it may be avoided on the ground that the conflict does not come within the ambit of the Article. In practice, if not in theory, a form of reciprocity will inevitably arise if Article 3 is to be applied at all.(71) Furthermore, it is submitted that even such reciprocity will be difficult to arrive at, since Article 3 leaves unaffected the legal status of the parties:

> "it does not limit in any way the Government's right to suppress a rebellion by all the means - including arms - provided by its own laws; nor does it in any way affect the Government's right to prosecute, try and sentence its adversaries for their crimes, according to their own laws."(72)

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(70) Pictet op cit (n 5) 37.

(71) But DePue op cit (n 1) 84 argues that precisely because the implementation of Article 3 is not dependent upon reciprocity there will exist "no incentive to assure continuing adherence by the insurgent". This may well be true but in such a case the established authority is extremely unlikely to continue to hold itself bound and thus a form of negative reciprocity will be established.

(72) Pictet op cit 44.

Accordingly, where a member of an insurgent group does not hold himself morally bound to observe the basic humanitarian principles contained in Article 3, there will exist no restraint upon his actions since upon capture he will face prosecution in any event for treason or for some offence in terms of security legislation. It is incorrect to assume Article 3 creates categories of war crimes; it is further incorrect to suggest[73] that in terms of common Article 49(I), 50(II), 129(III) and 146(IV) a Government is required to introduce some form of legislation to punish persons who violate Article 3. Breaches of prohibitions contained in Article 3 therefore fall to be dealt with in the normal way under the criminal law of the State concerned. However, it must be borne in mind that all acts so prohibited constitute war crimes in terms of international customary law and grave breaches of the Conventions themselves. Consequently, "any derogation from this law by way of reprisal or agreement is as illegal in relation to these provisions as in relation to other obligations of this type under the Geneva Conventions."[74] Moreover, it would appear that any Party to the Conventions may demand of any other Party that the latter, where engaged in an internal armed conflict, act in compliance with the minimum standards laid down in Article 3.[75]

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(73) See for example F J Berber "Some Thoughts on the Laws of War and the Punishment of War Crimes" in Nawaz op cit (n 51) 260 at 264.

(74) Schwarzenberger op cit (n 21) 717.

(75) Id 719.

THE PROVISIONS OF ARTICLE 3 IN PRACTICE

> "It is premature ... to dismiss the relevance of Common Article 3. That law, 'warts and all', is more important and has received more attention than has been generally realized. First of all, it is treaty law, universally adhered to in the sense of being formally adopted. It establishes beyond doubt the legitimacy of the concern of modern international law with internal war. Moreover, Common Article 3 was in 1949, and remains, revolutionary in content, being the first piece of globally accepted international law requiring a state to treat its own nationals according to community standards."(76)

The above statement reflects the significance of Article 3 in the development of the law relating to internal armed conflicts but Article 3 must stand or fall on the basis of the extent to which it has been effectively implemented in the past. Forsyth(77) argues that "considerably more attention has been paid to the 'initial question' of the applicability of Common Article 3 than has been generally recognised. He summarizes the initial relevance of Article 3 between the years 1949 to 1975 as follows:(78)

> In the following conflict situations the applicability of Article 3 was explicitly acknowledged by government officials: Guatemala (1954), France in Algeria (1956), Lebanon (1958), Cuba (1959), Yemen (1962), United States in Vietnam (1964), Dominican Republic (1965), Uruguay (1972), and Chile (1973). In the cases of France, Lebanon, Cuba and Yemen the applicability of Article 3 was acknowledged by the insurgent forces as well. In a number of other conflict situations the applicability of Article 3 was not acknowledged but the ICRC was permitted to visit detainees.(79)

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(76) Forsythe op cit (n 57) 274.

(77) Ibid.

(78) Id 275-276.

(79) These were: Algeria (France; 1955), Cyprus (UK; 1955-1958), Hungary (1956), Malaysia (1956), Kenya (UK; 1956-1959), South Vietnam (1957-1966), Rhodesia (UK; 1959-1980), Laos (1961-1972), Indonesia (1966-1969), Aden (UK; 1966-1967), Bolivia (1971), Northern Ireland (UK; 1971-present), Guinea Bissau (Portugal; 1971-1974), Mozambique (Portugal; 1971-1974), Burundi (1972), Phillipines (1972-present), Angola (Portugal; 1973-1976), Thailand (1973-1975), Iraq (1974-1975), Ethiopia (1974-1979), Lebanon (1975-present).

Given the fact that by one estimate over a thousand internal armed conflicts have taken place in the period since the formulation of the Geneva Conventions of 1949[80] the above survey can hardly be regarded as convincing evidence of the widespread application of Article 3. It may be instructive to examine very briefly by way of example the role of Article 3 in the Algerian conflict of 1954-1960.[81] The Algerian conflict is one of five or six conflicts in which the parties involved on both sides have acknowledged the applicability of Article 3. In June 1956 the French government (Algeria being French territory) authorized the International Committee of the Red Cross (ICRC) to send a mission to Algeria after the ICRC had offered its services in conformity with Article 3. The rebel group (FLN) was anxious to avoid any attempt to characterize the conflict as internal because it claimed belligerent status but was nevertheless prepared to accept Article 3 as the minimum law applicable.

Despite the willingness by the French and FLN to apply the provisions of Article 3 (and therefore the initial obstacle of obtaining consensus on the need and obligation to apply Article 3 was overcome), the record of compliance with the provisions of Article 3 by both sides left much to be desired. Terrorism and torture were employed extensively and indiscriminately. By January 1957 the death rate for civilians had reached some 200 a month. Prisoners taken by both sides were often summarily executed. Truncated judicial procedures were instituted by the government in cases against individuals

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(80) See DePue op cit (n 1) 72.

(81) For a comprehensive discussion see Greenberg op cit (n 29).

charged with committing an act of civil war.

That the regulation of the conflict by humanitarian law was not more effective may be attributed in part at least to the failure of the parties to conclude a general agreement providing for the implementation of some of the provisions of the Geneva Conventions applicable to international conflicts. The government declined to do so through fear that the status of the FLN could thereby be enhanced, the rebel authority because the conflict could thereby be labelled as internal and so preclude the recognition of the FLN as a belligerent. Status was for both parties the crucial issue and since this is a political goal, political rather than humanitarian considerations governed the responses of the parties. This amply demonstrates the argument that regulation of internal conflicts is effective only in so far as the established authority allows.

Yet it would be inaccurate to describe the operation of Article 3 in the Algerian conflict as ineffective, even without the conclusion of a general agreement. As Greenberg(82) points out

> "the laws of war were still very much in evidence: both sides accused the other of breaches, while denying their own alleged contraventions; officials and others spoke - and acted - as if they mattered."

Thus the willingness to admit the applicability of Article 3 created an awareness of applicable humanitarian restraints which in turn was translated into practical benefits. In the closing stages of the conflict there appeared to be a tendency in the judgments of the judiciary to admit the distinction between terrorists and regular rebel forces, and possibly to

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(82) Id 71.

imply that such regulars could be accorded prisoner of war status.(83) It is submitted that without the initiative constituted by Article 3 the possibility of such ad hoc treatment of prisoners (in advance of the law since Article 3 makes no provision for prisoner of war status) would have been excluded altogether.

Nevertheless it cannot be denied that the Algerian conflict is an example of the practical application of Article 3 at its best, simply because it has been so rarely acknowledged that Article 3 is applicable. The defects(84) of Article 3 are clear even in the Algerian situation and no amount of polemics can disguise the fact that Article 3 is all but irrelevant to most instances of internal conflict. Firstly, Article 3 fails to define the conflicts to which it is intended to apply; this poses an insuperable problem in all but exceptional cases such as the Algerian conflict. Secondly no provision is made for the independent adjudication of when Article 3 is applicable and when not. Thirdly, the provisions contained in Article 3 are superficial, they do not, for example, attempt to regulate the actual conduct of hostilities. The safeguards which Article 3 supposedly embraces are entirely inadequate and do not prevent many forms of abuse and maltreatment prevalent in internal conflicts. The principles set out in Article 3 are so general as to be susceptible of broad interpretation.(85) Fourthly, little

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(83) Forsythe op cit (n 57) 277; Greenberg op cit (n 79) 64.

(84) See generally Miller op cit (n 2) 275-277; Bond op cit (n 36) 33-61.

(85) For a valiant attempt to put flesh on the bones of Article 3 see James E Bond "Application of the Law of War to Internal Conflicts" (1973) 3 Georgia Journal of International and Comparative Law 345.

or no pressure can be brought upon the established government to conform to the requirements of Article 3.

The inadequacy of Article 3 is universally acknowledged, although some spots (eg the Algerian conflict) in the history of Article 3 are less dismal than others. Protocol II of 1977 was devised to remedy the defects of Article 3 and so the future of Article 3 is now inextricably bound up with that of Protocol II. It is valuable, however, to consider alternative courses which the development of Article 3 could have taken.

PREVIOUSLY PROPOSED ALTERNATIVES TO ARTICLE 3

There are essentially two approaches which may be taken. Firstly, the scope of application of Article 3 may be left unchanged but its substantive provisions extended to give adequate humanitarian protection to those involved in the conflict. Thus it has been suggested that Article 3 be amended to include more specific details relating to judicial punishment for combatants captured in internal conflicts.(86) Such submissions include the following:

1. combatants or civilians should not be punished solely for taking part in the conflict;
2. executions should be deferred during hostilities;
3. a general amnesty secured at the end of hostilities;
4. relief consignments of medical and hospital supplies, essential foods, clothing and other items intended for

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(86) L J Chimango "The Relevance of Humanitarian International Law to the Liberation Struggles in Southern Africa - the Case of Mozambique in Retrospect" (1975) 8 Comparative and International Law Journal of Southern Africa 287 at 302.

categories of civilians should be provided for;

5. arrangements should be made for relief supplies to captured personnel while a status analogous to Prisoner of War Status might be granted to captured combatants.

The alternative approach is that suggested by Rubin.(87) Writing in 1972, Rubin concludes that because of the fairly stringent threshold qualification contained in any interpretation of Article 3, little success has been enjoyed in implementing humanitarian provisions in terms of that Article and that therefore no strengthening of the substantive provisions of Article 3 is likely to have humanitarian results. Moreover, Rubin correctly points out that where one lowers the threshold of intensity beyond which international interest and concern ("international purview") is admitted and approved, one diminishes the possibility of agreement as to substantive safeguards. Therefore Rubin suggests that it would be possible to render Article 3 more effective by broadening its scope, without either lowering the threshold or including further substantive provisions:

> "For example, there seems very little reason why Article 3 should not be made applicable to all armed conflicts, whether or not of an international character, to which no more specific Conventional regime applies, ie Article 3 could be made to fill entirely the set of armed conflicts not within the scope of Article 2."(88)

However, it is submitted that ultimately in following this approach, if any material advance is to be made, the

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(87) A P Rubin "Status of Rebels under the Geneva Conventions of 1949" (1972) 21 International and Comparative Law Journal 472 at 486.

(88) Ibid.

lowering of the threshold of intensity cannot be avoided. Rubin himself recognizes that it might "be possible even to lower the threshold of international purview over internal political turmoil by using looser terminology than the phrase "armed conflict". This approach has the disadvantage that it will inevitably give rise to problems of recognition.

Rubin suggests(89) that mere legal argument will not suffice to persuade an insurgent party to abide by the provisions of humanitarian law unless some self interest is offered to it other than an interest in maintaining internal stability, security, etc, or any other value which will be advantageous and therefore persuasive to an established authority. Thus the insurgent must be granted some legal incentive to induce it to comply with the provisions of humanitarian law. It would require protracted negotiation to arrive at the formulation of such an incentive but it should not prove impossible. Rubin suggests that one answer could be to vest rebels with international status (but not POW status) from the moment they appear, thus giving such rebels at least some interest in maintaining humanitarian values. More specifically:

> "It might be possible to conclude an agreement by which all States bound themselves to offer asylum to members of any political movement declaring Article 3 of the Conventions (or, indeed, Article 2) applicable as far as its own actions were concerned. This inducement to public declaration and actions under the Conventions could be coupled with a specific reminder that individuals guilty of grave breaches of the Conventions are subject to penalties in any State."(90)

Had this proposal been implemented in practice it would surely have proved unworkable and therefore one can probably be

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(89) Id 495.

(90) Ibid.

thankful that it has not been taken up in Protocol II. The greatest difficulty has been encountered in persuading even the government involved to honour its obligations under Article 3; this task could only be rendered more onerous if neighbouring States which will often have conflicting interests are involved as well.

Baxter[91] adopts a via media, proposing both a revision of the scope of Article 3 and the insertion of specific provisions. Thus according to Baxter's formulation, the relevant portion of Article 1 Protocol II would read:

> "This Protocol shall apply to any case of armed conflict not of an international character which is carried out in the territory of a High Contracting Party and in which:
>
> (1) organized armed forces, subject to a system of military discipline, carry on hostile activities in arms against the authorities in power, and
>
> (2) the authorities in power employ their armed forces against such persons.
>
> This Protocol has no application to situations of internal disturbance or tension."

The merits of this approach are, apparently, that it is founded upon objective criteria and would be easier to apply than if based upon subjective factors such as the motive, purpose or cause of the rebel group. Baxter further recommends provisions requiring the humane treatment (without going so far as to grant prisoner of war status) of those who have engaged in belligerent acts and are hors de combat, and provisions guaranteeing the due process of law in the prosecution of rebel members.

Ironically, Protocol II really follows neither of the two approaches discussed above nor the via media suggested by

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(91) Op cit (n 24) 518 at 533.

Baxter. If anything, it has restricted the scope of application of humanitarian law in internal conflicts and its substantive provisions do not amount to a great deal, certainly not as far as prisoners are concerned. It would seem that for at least the foreseeable future Protocol II will be taken as the norm; the hoped-for broadening in scope and content of Article 3 is now a dim prospect indeed.

CONCLUSION

Article 3 is still relevant if only because for most States it remains the only humanitarian law applicable in internal armed conflicts. Its continued relevance is inextricably bound up with the future of Protocol II since it must be accepted, for reasons stated above, that both must be taken to refer to essentially the same conflict situations. Article 1 of Protocol II sets the threshold of application high and presumably this approach will be followed with regard to Article 3. The drafting history of Protocol II reaffirms only too clearly the reluctance of States to admit international regulation of internal disputes. Thus there remains considerable doubt as to whether the application of Protocol II will avoid the pitfall of Article 3 viz the ease with which States have been able to refute suggestions that Article 3 applied to their domestic conflicts. And there seems to be no good reason to believe that States who evade the application of Protocol II will be disposed to apply Article 3.

These considerations are, of course, relevant only to some of those conflicts which traditionally have been regarded as internal. Article 1(4) of Protocol I has cut across such

delineations and as such represents a radical change. The implications of Article 1(4) are considered in the following chapter.

C H A P T E R III

CONFLICTS WAGED AGAINST COLONIAL, ALIEN AND RACIST REGIMES.

INTRODUCTION

Common Article 3 of the Geneva Conventions of 1949, it has been seen, represented an innovation in that never before had international regulation of a domestic conflict gained recognition in an international instrument. Protocol I of 1977 has retained the distinction between international and non-international conflicts but has in the form of Article 1(4) restated the definition of the former. This Chapter is an examination of the policy underlying Article 1(4), why it has arisen, and its strengths and weaknesses.

The Protocols of 1977 represent a major shift in the direction of humanitarian law and as such reflect the increasing influence of the Socialist and emerging Third World blocs. However, probably the most crucial issue which the Protocols raise is the question of to what extent political considerations may be permitted to intrude in the formulation of humanitarian law. Armed conflict has, of course, always constituted a means towards a political end; any attempt, therefore, to regulate that means must contain some political element, and the attempt by States to promote military necessity at the expense of humanitarian imperatives undoubtedly constitutes an overt political manoeuvre by States to retain for themselves a political weapon, warfare, with the minimum loss of effectiveness possible. It should not, therefore, be surprising when Third World States embark upon the same exercise. Because humanitarian law in armed conflict has

historically been a Western development,[1] and because the International Committee of the Red Cross (ICRC) is also founded upon Western ideals, the humanitarian policies in war demanded by developing States appear to be crude and ill-fitting. Yet such policies reflect the reality, in a sense, of prevailing forms of warfare; in the period since World War II, the ideological bases of warfare had been expanded to justify conflict waged against colonial or racist governments, and out of this ideology arose the new concept of "wars or national liberation".[2] The traditional Western concept of war fought between States has become rapidly outmoded and the relevance of humanitarian law designed to deal with such conflict has thus also been eroded. Account must be taken of developing forms of conducting war and it would be naive to imagine that the process whereby any new formulation is worked out would not be political. But in this regard two important factors should be borne in mind:

1. The political process by which humanitarian law must evolve if it is to be effective is one of consensus, given that there exist no absolutely effective forces for compliance; any law which does not enjoy the support of virtually all parties will be worth little.

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(1) See, for example, Lewis F Shull "Counter-insurgency and the Geneva Conventions - Some Practical Considerations" (1968) 3 International Lawyer 49 at 51:
"(T)he Conventions of 1949 very clearly reflect that the balance of power lay, at the time the treaties were negotiated, with the North Atlantic community of nations. Thus all of the basic concepts very strongly reflect the tactics and organizational concepts of an American/European orientated armed force."

(2) R R Baxter "Humanitarian Law or Humanitarian Politics?" (1975) 16 Harvard International Law Journal 1 at 4.

2. The purpose of humanitarian law is to alleviate suffering, not to further political objectives; it is in this crucial sense that humanitarian law must be a-political.

Accordingly Protocols I and II stand to be judged on the following grounds:

1. do they further humanitarian ends?
2. do they constitute effective and enforceable[3] law?

THE DIPLOMATIC CONFERENCE 1974-1977

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the Swiss Federal Council, held four sessions[4] in Geneva from 1974 to 1977. The object of the Conference was to study two draft Additional Protocols prepared, after official and private consultations, by the ICRC and intended to supplement the four Geneva Conventions of 1949. "In view of the paramount importance of ensuring broad participation in the work of the Conference, which was of a fundamentally humanitarian nature, and because the progressive development and codification of international humanitarian law applicable in armed conflicts is a universal task in which the national liberation movements can contribute positively",[5] the Conference invited the national liberation

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(3) Effective and enforceable in the sense of being capable of practical implementation. In this respect the tests of new humanitarian law have been stated to be feasibility and clarity (George S Prugh "Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflict" (1974) 8 International Lawyer 262 at 264).

(4) South Africa was represented only at the first.

(5) Extract from the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International

(continued on the next page)

movements recognized by the regional intergovernmental organizations concerned to participate fully in the deliberations of the Conference and its Main Committees, although only delegations representing States were entitled to vote. National liberation movements which accepted the invitation and were represented at the Conference included the African National Congress (SA), the African National Council of Zimbabwe, Frelimo, the Panafricanist Congress (SA), SWAPO, the Zimbabwe African National Union, the Zimbabwe African People's Union, and others.

On the basis of its discussions, the Conference drew up the following instruments : Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International and Armed Conflict (Protocol I), and Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The Additional Protocols were adopted by the conference on 8 June 1977 and were open for signature by States for a period of one year from 12 December 1977, and since the end of that period have been open for accession.

Article 1(3) and (4) of Protocol I provides as follows:

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(5) (continued)
Humanitarian Law Applicable in Armed Conflicts 1974-1977, reproduced in (1978) 42 (2) Law and Contemporary Problems at 309. See also F R Ribeiro "International Humanitarian Law:'Advancing Progressively Backwards'" (1980) 97 SALJ 42 at 43.

"3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to those Conventions.(6)

4. The situations referred to in the preceding paragraph 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 Co-operation among States in accordance with the Charter of the United Nations."

The above may be compared with Article 1 of the Draft Additional Protocol submitted by the ICRC to the Diplomatic Conference for consideration; Article 1 thereof consisted simply of the following provision:

> The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situation referred to in Article 2 common to these Conventions.

A majority of the experts attending the ICRC conference which formulated the Draft Additional Protocols did not support the introduction of a second paragraph stipulating that the situations referred to in common Article 2 include armed struggles waged by peoples in the exercise of their right of self-determination. This view was adopted on the ground that it was inconsistent with the system embodied in the Conventions to qualify particular conflicts, and that further there was no need to include a specific provision concerning such struggles in Protocol I, since in the majority of cases they would

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(6) The situations referred to in Article 2 are:

a. All cases of declared war or of any other armed conflict which may arise between two or more of the Contracting Parties even if the state of war is not recognized by one of them; and

b. all cases of partial or total occupation of the territory of a Contracting Party, even if that occupation meets with no armed resistence. See Ch 2 supra.

be covered by Article 3 common to the Conventions or by Protocol II. Alternatively, it was suggested that either such armed struggles be declared in the Preamble to be international in character or that members of national liberation movements should be brought within the ambit of a broader definition of those entitled to prisoner of war status.(7) However, these reservations were overruled by the Diplomatic Conference of 1974-1977 and Article 1(4) of Protocol I came into being. This was not achieved without considerable legal and political debate; academic opinion as to the worth of the Protocols is divided, and the absence thus far of widespread support in the form of ratification or accession by a significant number of States places some doubt upon the practical relevance of the Protocols. Probably, however, it is premature to disregard the Protocols on this basis and their general acceptance is still more than possible.

THE BACKGROUND TO ARTICLE 1(4) : GUERILLA WARFARE(8)

Virtually all commentators are agreed that the Conventions of 1949 are inappropriate and thus inadequate for the regulation of modern conflicts. Revision of the law of war (which came to fruition in the form of the Protocols of 1977) has therefore been urgently required for some time. The difficulty of such revision has been to arrive at the regulation of low intensity conflicts which have invariably been

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(7) See generally ICRC Commentary on the Draft Additional Protocols 6.

(8) See generally Peter Cornelius Mayer-Tasch "Guerrilla Warfare and International Law" (1973) 8 Law and State 7. See also Shull op cit (n 1) for examples of specific practical problems in humanitarian law arising from guerilla war tactics.

fought by means of guerilla warfare. As a tactic employed by regular combatants recognizable as such, guerilla warfare is of course legitimate; however, the concept of guerilla warfare has increasingly become identified with that form of conflict in which irregular troops, indistinguishable from the civilian population and with little regard for humanitarian rules of war, conduct subversive operations against a State.

The dominance of guerilla tactics as a means of waging war is undisputed and this cannot be regarded, in the light of the unwillingness of States to wage war by conventional means for fear of escalation and use of nuclear weapons, as a mere phase. Draper(9) describes the suitability of guerilla tactics to modern conditions as follows:

> "The guerilla fighter's substantial role of sabotage has become the more pronounced in our own time when the scale and speed of destruction and disruption are communsurate with the technology which has produced the systems and installations exposed to sabotage .... The sensitive nature of much of our modern communications systems, urban organization generally and power and food supply enhances the effectiveness of the guerilla fighter at an increasing rate to which the contemporary law of war has not yet adapted itself."

The difficulties in revising the law of war to take account of the phenomenon of guerilla warfare have been twofold:

1. The totally different local conditions of guerilla operations, different historical and cultural backgrounds, and the widely divergent political, ideological and social structure of States and societies involved in guerilla conflicts render problematical the formulation of general rules to govern those conflicts.(10)

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(9) G I A D Draper "The Status of Combatants and the Question of Guerilla Warfare" (1971) 45 BYIL 173 at 178.

(10) Edward Kossoy Living with Guerrilla 144.

2. Guerilla warfare generally, but not necessarily, tends to negate the distinction between combatant and civilian which the traditional law of war has always upheld. Guerilla warfare has been most successfully waged where the guerilla forces have been indistinguishable from the local population and in this way have avoided detection. But as Draper[11] points out, the rationale of the limitation of the right to bear arms and to kill in combat to the armed forces of a State or other recognized belligerent entity is that such limitation is of benefit both to the armed forces themselves and to the civilian population. Regarding the first, the armed forces of a belligerent know their opponents and are able to identify them. In humanitarian terms, the civilian population is disqualified as a lawful object of attack and capture. By virtue of "restricting the activity of military engagement, both as to the actor and victim, military and humanitarian needs are met within a rough principle of balance".[12] How is the revised law of war to maintain this balance while at the same time adapting to the present reality?

In fact, as a study of the Protocols of 1977 reveals, the first difficulty has been met by simply reclassifying certain conflicts (which in the past have typically been waged with guerilla warfare tactics) as international, thereby bringing the full weight of the law of war into force, and the second, by relaxing the requirement that combatants must

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(11) Op cit (n 9) 177.

(12) Ibid.

distinguish themselves at all times from the civilian population.(13)

The merits of these solutions have, of course, been much debated. At this point, however, it is important to note that the decision to undertake guerilla warfare has frequently been a political one. More recently guerilla activities have been conducted as a means of securing specific political objectives by groups or organizations disassociated from States or other belligerents, and directed at particular governments, their nationals and property.(14) Accordingly any revision of the law of war to take account of the predominance of guerilla warfare as a means of waging war must inevitably appear at least outwardly to further the political objectives for which guerilla wars are generally fought. This certainly is a major criticism levelled against the Protocols of 1977.(15) But it should be borne in mind that the revision of the law of war to accommodate specific phenomena is not unprecedented. Article 44(3) of Geneva Convention III of 1949 extends prisoner of war status to members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. This provision originates directly from the case of the Free French forces fighting in World War II who were technically not eligible for prisoner of war status upon capture. While it is unlikely that the achievement of overt political ends was the object of this provision, nevertheless it arose to meet largely the interests of the Western community of States.

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(13) See Article 44(3) of Protocol I; Ch IV infra 137*ff*.

(14) Draper op cit (n 9) 184.

(15) Infra 99*ff*.

It is agreed that law, particularly humanitarian law, should be impartial and consistently applied. Accepting, therefore, the need to take account of guerilla warfare, and the fact it has become a highly political tool, the criterion of revision of the law of war is simply whether the law as revised is impartial and consistently applied. The politicization of guerilla warfare tends to blur these issues but it is submitted that the test of impartiality and consistency must always apply. If the need for revision of law objectively exists, and the law as revised is still impartial and consistently applied, then the overtly political objectives for which guerilla warfare is used should not be relevant.

THE RATIONALE OF ARTICLE 1(4) OF PROTOCOL I

The emergence of Article 1(4) represents the culmination of a lengthy process, begun, probably, even before the Conventions of 1949 since Article 3 common to those Conventions was at its inception almost outdated, already overtaken by the growing predominance of guerilla warfare. Soviet legal theory has long maintained that wars fought to gain or retain colonial possessions are truly international conflicts since a liberation movement, whatever its technical legal status, is legitimately a full actor in the international context by virtue of its possessing "national sovereignty", ie "the sum total of those inalienable rights of a given human group which stamp it as a nation".(16)

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(16) George Ginsberg "'Wars of National Liberation' and the Modern Law of Nations - The Soviet Thesis" (1964) 29 Law and Contemporary Problems 910 at 913.

The rationale for asserting Article 1(4) type conflicts to be international armed conflicts tends to encompass several aspects, as the following statement demonstrates:(17)

> "A colonial conflict within a State assumes an international outlook if it is rooted in an action which is condemned or supported by a jus cogens rule of international law for other states have a legal interest in such conflicts. A colonial war is, in essence, an international war because:
>
> a. Colonialism offends the jus cogens rules of non-aggression and self-determination. A war waged to maintain colonial order is fundamentally condemned in international law.
>
> b. On the other hand a war fought to remove colonialism provided it involves the use of reasonable or commensurate force is fundamentally backed by international law. Other states have a legal obligation to help colonised people to defend themselves against colonial aggression.
>
> c. By its nature colonisation is imposed by an alien people on an indigenous population. Consequently, the conflict is between two peoples having different political and social backgrounds and invariably, a racial one as well."

It is submitted that the above statement embraces the following considerations:

1. political;
2. factual; and
3. legal.

Consequently for the sake of convenience it is proposed to discuss the rationale of Article 1(4) in terms of this division.

Political

The process whereby one arrives at the development and formulation of law, be it humanitarian or other, must necessarily be political and this is, of course, generally accepted.

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(17) U O Umozurike "The Geneva Conventions and Africa" 1971 East African Law Journal 275 at 282.

However in the recent development of the humanitarian law of war, of which Article 1(4) is merely a single aspect, two quite distinct elements of the political process are evident:

1. "The legislative process is inherently a political process, in the sense that conferences to develop humanitarian law entail struggles to make public policy."(18)

2. "Beyond this inherent political element, the legislative process has been heavily politicized in that elements of real politik have been interjected directly into the process. States not only struggle because of disagreements over such things as extent of legitimate governmental control compared to rights of international organizations or transnational movements; they struggle also in an effort to strengthen the power of their group and weaken the power of an opponent."(19)

Few would deny that the motivation of a number of States at least in supporting Article 1(4) was blatantly political. More particularly humanitarian law was regarded as a means by which greater legal restrictions could be placed upon South Africa, Rhodesia and Israel, and increased status conferred upon liberation movements, thereby strengthening the cause of those movements in their struggles against the above States in particular.(20) Article 1(4) to a greater or lesser extent

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(18) D P Forsythe Humanitarian Politics 127.

(19) Id 128.

(20) D P Forsythe "Support for a Humanitarian 'Jus in Bello'" (1977) 11 International Lawyer 723 at 725-726; see also D E Graham "The 1974 Diplomatic Conference on the Law of War; A Victory for Political Causes and a Return to the 'Just War' Concept of the Eleventh Century" (1975) 32 Washington and Lee Law Review 25 at 53; Charles Lysaght "The Attitude of Western Countries" in Antonio Cassese (ed) The New Humanitarian Law of Armed Conflict 349.

reflects the predominance of these political concerns and interests. The logical and obvious basis for selecting only conflicts waged by national liberation movements against colonial, alien or racist regimes for classification as international conflicts is simply that the justness of their cause demands that they be regarded and treated as such. A war of national liberation is "a bellum justum which deserves the support of all countries attached to the idea of justice."(21)

The prevalence of political considerations are defended on the ground that such considerations "express the present trends and political orientations of the majority of States";(22) similarly "(t)he rules of any legal system inevitably reflect the preferences of the dominant group(s) in that community, and the international legal system is no exception".(23) However, it is submitted that the international legal system does require special consideration in that the effectiveness of international law depends entirely upon as broad as possible an acquiescence therein by members of the international community. It is therefore imperative that selective and partisan

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(21) Dan Ciobanu "The Attitude of the Socialist Countries" in Cassese (ed) op cit 399 at 413. For a discussion of Article 1(4) in relation to the just war doctrine see infra. However it should be noted that commentators are not unanimous in ascribing to the just war doctrine an important role in the emergence of Article 1(4); see, for example, Charles Lysaght "The Attitude of Western Countries" in Cassese (ed) loc cit 349 at 351.

(22) Antonio Cassesse "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict" in Cassese (ed) op cit (n 20) 461 at 470.

(23) J E Bond "Amended Article 1 : The Coming of Age of the Guerilla" (1975) 32 Washington and Lee Law Review 65 at 67.

measures should not be permitted so to alienate members of the world community that in areas where it is desired to improve humanitarian safeguards the result will be entirely opposite. Possibly the only effective means of securing the compliance of States in the implementation of the laws of war is the element of reciptocity(24); States recognize certain humanitarian methods to be valuable and apply them where such application is reciptrocated. A partisan rule, representing the interests of a sector only, lacks the appeal to the interests of other sectors which is vital if rules of humanitarian law are to be practically implemented.(25) It is clear that humanitarian law which is not acceptable to a significant majority of States, including the major military powers,(26) will be of little practical use in that it will fail to obtain general application.(27) Such a situation will have the

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(24) See infra 109*ff*.

(25) See R R Baxter "The Geneva Conventions of 1949 and Wars of National Liberation" (1974) 57 Rivista di Diritto Internazionale 193 at 199-200:

> "One of the most powerful inducements to compliance with the law of war is that both sides equally participate in its benefits and burdens. A belligerent is encouraged to comply with the law because it hopes that this will encourage its adversary to do the same. To the extent that the law of war imposes burdens, each belligerent knows that in legal, if not in factual terms its burdens are no more onerous than those borne by its enemy."

See further R R Baxter "Forces for Compliance with the Law of War" (1964) 58 Proceedings of the American Society of International Law 82; Ribeiro op cit (n 5) 49.

(26) At the Final Session of the Diplomatic Conference in 1977 Article 1 was adopted by 87 votes in favour, 1 against and 11 abstentions. This might suggest that Article 1 has in fact found widespread acceptance. The conciliatory attitude of Western delegations has been ascribed to the absence of any vital interest affected: "With colonial disengagement almost complete, they were unlikely to be involved in wars of self-determination, as defined, in future" (Charles Lysaght op cit (n 20) 354). However the test is, of course, the number of States which have acceded to or ratified the Protocols. As at 1.1.80 only 11 States had done so, none of them significant powers. See infra 148 (n 1).

(27) Baxter op cit (n 2) 25.

following repercussions:[28]

1. Where there exists significant disparity in the commitments of States to humanitarian law, as would occur if a large number of States became parties to the Protocols and a large number did not, then consensus as to previously existing law would be threatened. The present universality of the Geneva Conventions of 1949 would not of course be lost since the Protocols are merely supplementary, but certainly that universality would be effectively diminished in practice where different groups of States are bound by different treaty obligations.
2. The representation of partisan and sectional interests in any body of humanitarian law will act as a deterrent to the subscription by other States to that law, thus inhibiting the development of new law.

Whereas many commentators have criticised Article 1(4) precisely on the ground that it relies upon the overtly political purpose, goal or objective of the insurgent party as the sole criterion for determining the applicability of the Protocol, Bond would suggest that the value of Article 1(4) resides in this very characteristic.[29] He justifies this proposition by arguing that such political goal, objective, or purpose is in itself a highly relevant indicator of the likely duration and intensity of the conflict, and he presupposes that where wars of national liberation are fought in

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(28) Ibid.

(29) Op cit (n 23) 72-74.

the cause of self-determination, such conflicts are likely to be of so protracted and fierce a nature as to render imperative the implementation of the full provisions of humanitarian law. This is a valid point but there seems to be no good reason for assuming that only conflicts waged against colonial, alien or racist regimes reach the proportions which would require the implementation of the full humanitarian law relating to international conflicts. Bond concedes that while the purpose or objective of the participants in a conflict is a useful criterion, other factors must also be given due consideration, although none is in itself conclusive:

> "Other criteria must be identified: the duration of the conflict, the use of regular troops and the invocation of emergency governmental powers all measure the intensity of the conflict. As with the purpose criterion none of these is by itself an adequate indicator."(30)

On this basis it cannot therefore be feasibly suggested that wars of national liberation are invariably of such intensity and scale as to justify the bringing into force of the full provisions of humanitarian law.

Factual

Bond's observations discussed immediately above may equally be discussed under this heading and the same objections may be raised. Apart from the objective assessment of the intensity of the conflict, a war of national liberation may be regarded as factually international in the sense of involving the interests (legal or other) of other States.(31) Colonialism, for example, is asserted to be "an international process in

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(30) Id 74.

(31) See, for example, Umozurike op cit (n 17).

fact".[32] Similarly, writing in 1964, Falk[33] correctly observes that the traditional role of non-interference in domestic conflicts is incompatible with the revolutionary ideology of Communist nations and the anti-colonial stance of the Afro-Asian bloc. Ideological wars have been and are being increasingly fought in the guise of civil wars. Thus Falk states:[34]

> "The facts of external participation are more important than the extent or character of insurgent aspirations as the basis for involing transformation rules designed to swing from the normative matrix of domestic jurisprudence to the normative matrix of international concern."

The fact of external participation is probably the most convincing ground for regarding wars of national liberation as international conflicts. However, it must be again noted that external participation is not necessarily confined to wars of national liberation and therefore, it would appear arbitrary to exclude other conflicts traditionally regarded as domestic but possessing the characteristics of an international conflict (eg civil war).[35] Furthermore, the objection may be raised that to regard wars of national liberation on the basis of external participation as international conflicts might well have the effect of promoting greater external involvement and so result in an escalation of the conflict.[36]

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(32) Forsythe op cit (n 20) 725.

(33) R A Falk "Janus Tormented : The International Law of Internal War" in James Rosenau (ed) International Aspects of Civil Strife 185 at 207.

(34) Id 223.

(35) See Ciobanu op cit (n 21) 412.

(36) See 108 infra.

Legal

The attitude of the majority of States (as represented by the Socialist and Third World blocs) participating in the Conference appears to have centred upon the need to develop the law and not merely affirm it.(37) Accordingly, in respect of Article 1(4) in particular, the Conference was not bound to maintain the traditional distinction between conflicts fought between States and conflicts waged within the territory of a single State. Rather the proper perspective "was to place the body of international humanitarian law within the framework of general international law"(38) and this involved taking account of the development of international law through the United Nations. Accordingly recourse was had to the United Nations Charter, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, and the Declaration on the Right of Peoples to Self-determination. On the basis primarily of these instruments it is asserted that "(t)he practice of the United Nations is strong evidence that general international law has recognised the international character of the armed conflicts between peoples from colonies and other non-self-governing territories, and the forces belonging to colonial powers."(39)

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(37) Ciobanu op cit 404.

(38) Id 410.

(39) Id 411. The question of how a rule becomes part of the body of customary international law and therefore binding on all States is extensively treated in Ch V infra. Here the suggestion apparently is that the practice of the United Nations contributes to the formation of such customary law.

Even prior to the 1974-1977 Diplomatic Conference reliance has been placed upon United Nations "law" in order to establish a legal basis for the classification of wars of national liberation as international conflicts. Abi-Saab[40] has argued that while the term "Power" as used in Article 2(3)[41] of the Geneva Conventions of 1949 ordinarily refers to a State it may sometimes be used to refer to other entities and draws support for this proposition from, inter alia, the Declaration on Friendly Relations and Co-operation among States which provides as follows:

> "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of a State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination."

Since in Abi-Saab's view the right of self-determination has crystallized into an established legal principle, it follows that recognition of the insurgent or rebellious group by the entrenched government or any other State is not required. All that is necessary is that the liberation movement should express its willingness and intention to be bound by the provisions of the Conventions.

However, the objection which may be made to Abi-Saab's analysis is that it fails to fit the practical situations. Can the liberation movements in Southern Africa be said to

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(40) Georges Abi-Saab "Wars of National Liberation and the Laws of War" (1972) 3 Annales d'Etudes Internationales 93.

(41) Article 2(3) provides: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

be possessed of territory which in terms of the Declaration on Friendly Relations and Co-operation among States is "separate and distinct from the territory of a State administering it"? There may have been grounds for applying this analysis to a genuine colonial situation, as in the case of Portugal and her African possession; but it cannot, for example, really have been and be appropriate to the Rhodesian and South African situations, respectively.(42)

Moreover is it true that the right of self-determination has crystallized into "an established legal principle" with the legal consequences that Abi-Saab argues for? It is often simply presumed that there does exist a right of self-determination and that further it confers upon a people the right of force in order to exercise their principal right. Far-reaching consequences could be argued to follow upon recognition of such rights:

> "(I)t would be illegal for the government in power to use force in suppressing the right of self-determination of a people subjugated by it; moreover, it could not avail itself of the help of third States (the latter could, on the contrary, legitimately intervene in favour of the national liberation movement) and, lastly, it would be obliged to recognize freedom fighters (those who fight alongside the liberation movements) as legitimate belligerents."(43)

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(42) Baxter op cit (n 2) 14. See also John F DePue "The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949 - Its Impact upon Humanitarian Constraints Governing Armed Conflict" (1977) 75 Military Law Review 71 at 90: "[The Declaration on Friendly Relations and Co-operation among States] appears to be directed to persons suffering from alien subjugation or other externally imposed interference and to offer no benefit to the subjects of domestic mistreatment." For other grounds of criticism of Abi-Saab's interpretation of Article 2(3) see L J Chimango (1975) 8 Comparative and International Law Journal of Southern Africa 287.

(43) Natalino Ronzitti "Wars of National Liberation - A Legal Definition" (1975) 1 Italian Yearbook of International Law 192 at 193.

But it is frequently impossible to determine whether a conflict is being waged in the cause of self-determination or not, for "one man's war of national liberation can be another man's war of national secession".(44) While this uncertainty exists it diminishes considerably the force of arguments which propose the effective translation of the right to self-determination into practice, as, for example, conferring the ancilliary right of an oppressed people to the use of force, the resultant conflict to be regarded as an international conflict for the purposes of humanitarian regulation.

Alternatively the Charter of the United Nations may be relied upon as a legal basis for the recognition of wars of national liberation as international conflicts. The Charter unequivocally prohibits a State from employing a threat, or the use of armed force, except in instances of legitimate individual or collective self-defence or in support of Security Council action pursuant to Article 39 of the Charter, and no specific article of the Charter establishes a positive right to use force on a self-help basis in order to achieve any of the enumerated purposes of the Charter, including that of self-determination.(45) Accordingly, the only ground upon which it may be asserted that force is permitted to be used to achieve self-determination is that such force is employed as a means of self-defence, as permitted by Article 51 of the Charter. Colonialism, the argument runs, is itself a form of

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(44) Baxter op cit (n 24) 195; see also John Dugard "Swapo: The Jus ad Bellum and the Jus in Bello" (1976) 93 SALJ 144 at 149-150; Lysaght op cit (n 20) 353-354.

(45) Graham op cit (n 20) 38.

aggression and therefore the use of force to remove the colonial shackles is merely a form of self-defence, a response to the earlier and initial aggression. However, it is doubtful whether self-defence against colonial domination in the exercise of the right of self-determination can be identified with self-defence as described in Article 51 of the Charter:

> "Self-defence is the right of one State acting individually, or the right of several States acting collectively, to resort to force as a result of an attack on one of them by an aggressor. A sine qua non for such a right is an 'aggressor State' and a 'victim State'. In the case of self-defence against colonial domination this necessary requirement is absent. It is possible to identify the aggressor State (the colonial power) but it is not possible to identify the victim State. .... As there is no unlawful use of force against another State by the colonial aggressor the question of self-defence does not arise."(46)

Accordingly there appears to be some considerable support for the contention that public international law envisages that where the use of force is permitted, then such force is confined to use by States as qualified and recognised members of the international community.(47)

On the various grounds discussed above it is possible to conclude that the Charter and the Declaration on Friendly Relations and Co-operation among States in particular do not support the argument that it is the intent of these documents to sanction the resort to force by peoples fighting for self-determination.(48)

Even were it to be conclusively demonstrated (as has not yet been(49)) that the Charter and various other United

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(46) Dugard op cit (n 43) 149.

(47) Graham op cit (n 20) 38.

(48) Ibid.

(49) Dugard op cit 148.

Nations resolutions permit the use of force by national liberation movements in an international war against colonial or racist regimes, it would be necessary to establish that such a rule formed part of the body of customary international law(50) if all States were sought to be bound irrespective of their assent or lack of it. Resolutions of the Geneva Assembly of the United Nations do not as a rule constitute binding law; nor are they necessarily definitive and authoritative statements of positive international law.(51) They may, of course, be important in establishing the usage element in custom.(52)

It deserves to be stressed, however, that the final outcome of the 1974-1977 Diplomatic Conference has rendered almost superfluous arguments which invoke the Charter and certain resolutions to justify in law the resort to force by peoples fighting for self-determination, and thus superfluous counter-arguments raised by opponents of this approach. Article 1(4) as adopted by the Diplomatic Conference would perhaps appear to infer a right of peoples to the use of force in fighting "against colonial domination and alien occupation, and against racist regimes in the exercise of their right of self-determination". In any event, it is expressly provided that for the purposes of humanitarian regulation at least such conflicts are international. Article 1(4) is the

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(50) See Ch V infra.

(51) For a more complete exposition see H W A Thirlway International Customary Law and Codification Ch 5 : "International Legislation through the United Nations".

(52) See Ch V infra. In respect of wars of national liberation, it has been suggested that the declarations and resolutions of the General Assembly have a "confirmatory function" (Ciobanu op cit (n 21) 410 n 53) but clearly Article 1(4) was an innovatory development and so even if the scope of the declarations and resolutions in question were not disputed, they could at most have possessed a "stimulatory function".

new law. Clearly the Conference did not consider itself bound to formulate rules in conformity with traditional concepts of the law of war; its function was also to develop the law.(53) Nor was it (or at least a significant section) restricted to "the letter of the Charter" in construing the declarations and resolutions of the General Assembly of the United Nations.(54) Accordingly "(i)rrespective of whether customary international law recognised wars of national liberation or self-determination as inter-national conflicts or recognised the right to wage war in the cause of self-determination, it was still legitimate and appropriate to propose that the treatment of such wars should be assimilated to wars between States for the purpose of the particular humanitarian treaty under consideration at the Conference."(55) Article 1(4) is now the legal basis, previously sought in the Charter and Declaration on Friendly Relations and Co-operation among States, for the classification of wars of national liberation as international conflicts for the purposes of humanitarian regulation at least. Recourse need no longer be had to the Charter and various resolutions. However, this assertion must be qualified by two important considerations:

1. The Additional Protocols are binding only upon those States which have ratified or acceded to them.(56) In the absence of widespread ratification or accession, the declarations and resolutions of the General Assembly (and thus the legal disputes to which they have given rise) remain highly relevant.

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(53) Ciobanu op cit (n 21) 404.

(54) Id 410.

(55) Lysaght op cit (n 20) 352.

(56) See Ch V infra.

2. Article 1(4) specifically refers to conflicts waged in the exercise of the right of self-determination, as enshrined in the Charter of the United Nations, and the Declaration on Friendly Relations and Co-operation among States. Thus the uncertainty of the scope of the doctrine of self-determination is incorporated in Article 1(4) itself.(57)

ARGUMENTS AGAINST ARTICLE 1(4)(58)

Article 1(4) in its draft form was vigorously and vociferously opposed by most Western delegations to the 1974-1977 Diplomatic Conference who had apparently anticipated that wars of national liberation would be covered by a draft Protocol II and not assimilated to international armed conflicts.(59) The fact that Article 1(4) was ultimately adopted by the Conference in 1977 with only one vote against (Israel) suggests that the lapse of time had somewhat muted the initial opposition.(60) Article 1(4) has, however, been criticized by numerous commentators and it is proposed to discuss such criticisms according to the following classification:

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(57) See Lysaght op cit (n 20) 353.

(58) To avoid repetition it is not proposed to deal separately with arguments in favour of Article 1(4). Those which have not already been canvassed in the preceding section ("The Rationale of Article 1(4) of Protocol I") are discussed in reference to the arguments here raised against Article 1(4).

(59) Lysaght op cit 350. The arguments propounded by Western delegates are briefly summarized by Ciobanu op cit (n 21) 406-409.

(60) See supra 87 (n 26).

1. Article 1(4) ignores and contradicts the traditional norms and distinctions inherent in the law of war;
2. it constitutes a return to the 'just war' doctrine;
3. it undermines the principle of reciprocity;
4. wars of national liberation are only temporarily relevant; and
5. the language of Article 1(4) lacks clarity.

Article 1(4) ignores and contradicts the traditional norms and distinctions inherent in the law of war.(61)

It has been stated that traditionally international law has distinguished between international and non-international armed conflicts on the basis of a "geo-military" scale.(62) Accordingly a conflict can only be classified as international when it has attained a particular threshold of intensity or a geographical boundary has been crossed. It is not, of course, entirely accurate to assert as above that international law has traditionally used a geo-military scale to distinguish international and international armed conflicts; the criterion has always been whether the conflict is one waged between States. But in the past it has invariably occurred that only conflicts waged between States resulted in particular intensity or fighting (although in the period since World War II it has become manifestly clear that this is no longer the case).

> "A certain level of violence had to be produced (a level that only states could produce) or regular troops of a foreign state had to enter an internal conflict before the conflict became an international armed conflict in law."(63)

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(61) Ciobanu op cit (n 21) 406.

(62) D P Forsythe "The 1974 Diplomatic Conference on Humanitarian Law" (1975) 69 AJIL 77 at 80.

(63) Ibid.

It might, therefore, be more precise to state that the logical basis upon which the distinction between international and non-international conflicts should be founded is that of a geo-military scale;[64] any development in the law of war which does not recognize this argument merely compounds the error of a previous approach.

Similarly Forsythe[65] criticizes Article 1(4) on the ground that it fails to preserve the distinction between those norms governing the initiation of war and those norms regulating the process of war (the traditional distinction between jus ad bellum and jus in bello). Thus into the body of rules regulating conduct during the conflict itself Article 1(4) has introduced rules for determining whether the cause of a conflict is valid or not:

> "[Article 1(4)] requires a normative judgment about the cause of fighting alien to jus in bello and traditional humanitarian law; some wars (are) to be international in law because of the justness of the cause and the nature of the target regime, not because of any geo-military scale of violence."[66]

But of course the counter argument (already discussed above[67]) which may be raised in this regard is simply that any development of the law need not necessarily incorporate traditional distinctions and norms.

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(64) See supra 40.

(65) Op cit (n 61) 80. Contra the view of Forsythe op cit (n 20) 725 that the distinction between jus in bello and jus contra bellum is maintained in Protocol I. It should be noted, incidentally, that Forsythe's view of Article 1(4) seems to have been somewhat modified in comparison with his arguments set out in (1975) 69 AJIL 77 (supra n 61).

(66) Ibid.

(67) Supra 91.

Yet the rejection of a geo-military criterion for classifying a conflict as international or non-international has certain consequences which prompt some doubt as to Article 1(4)'s credibility as good law. Firstly, the criterion which Article 1(4) embodies is arbitrary:

> "It is this element of arbitrariness in selecting one particular, politically determined, category of non-interstate armed conflicts which to my mind is most in conflict with proven principles of legislation."(68)

Kalshoven points out that Amended Article 1(4) is inconsistent in so far as it fails to make any provision for the case of civil wars, and yet it is clearly more logical to assimilate civil wars of sizeable proportions to the category of international armed conflict than wars of national liberation. This has not been proposed. It has been asserted that wars of national liberation may be defined in distinction to inter-State conflicts and civil wars;(69) yet if a war of national liberation cannot be assimilated to one of these, then it would appear difficult to objectively justify the classification of such wars as always international.(70)

Moreover, even if it were assumed not arbitrary to assimilate only wars of national liberation to international conflicts,

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(68) F C Kalshoven "Reaffirmation and development of international humanitarian law : the first session of the Diplomatic Conference" (1974) 5 Netherlands Yearbook of International Law 3 at 32. See also DePue op cit (n 41) 75: "The determination as to when [the protections of Protocol I] shall be accorded the members of insurgent movements is [in terms of Article 1(4)] exclusively a function of the movement's ostensible political or ideological aspirations."

(69) See generally Ronzitti op cit (n 42).

(70) This is not to say that some wars of national liberation cannot be objectively regarded as international (see 89*ff* supra). But it is arbitrary to assert, without reference to a geo-military scale, that all wars of national liberation are per se international.

Article 1(4) is arbitrary in another respect. There appears to be no good reason for excluding from the protection of Protocol I wars fought in the exercise of self-determination but not fought against colonial, alien or racist regimes, and yet certainly this is one possible interpretation of the effect of Article 1(4).(71)

Secondly, it is argued that the criterion which Article 1(4) embodies for determining which conflicts are to be assimilated to international conflicts is subjective. Article 1(4) makes no provision for the final and impartial determination of the existence of the types of conflict to which it refers.(72) This could have the crippling result of allowing a loophole by which a party to a conflict may evade its humanitarian obligations by choosing a classification of that conflict which precludes the applicability of the measures sought to be applied and alleging that the adversary party or parties has or have misinterpreted the law and the facts.(73)

Nevertheless, it is urged that Article 1(4) does not in fact contain an element of subjectivity; colonial regimes, racist governments or governments occupying the territory of another country are capable of objective identification.(74) For the same reason Forsythe has argued that Article 1(4) can be understood without reference to subjective considerations such as just wars, aggression or self-defence.(75) These are academic points. In practice it is unthinkable that South

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(71) Ciobanu op cit (n 21) 412.

(72) Id 413.

(73) Baxter op cit (n 2) 16. This refers to the so-called "built-in non-applicability clause" for which see 147 infra.

(74) Cassese op cit (n 22) 467.

(75) Op cit (n 20) 725.

Africa will allow herself to be labelled as racist, the Soviet Union herself as an alien regime in Afghanistan or any other State itself as a colonial, alien or racist regime. The effectiveness of humanitarian law in conflict depends upon consensus between the parties as to the necessity for humanitarian regulation; to make the implementation of such humanitarian determinate upon attributing the fault of the conflict to one side, as Article 1(4) does, is to preclude ab initio any possibility of consensus.

It would appear difficult to refute the assertion that Article 1(4) provides no legally satisfactory basis for defining the situations sought to be regulated by Protocol I but rather relies upon subjective and arbitrary criteria. This has prompted the suggestion that a case may be made out for the contention that, so far from being an international conflict, a war of national liberation is in fact a civil or internal conflict.(76) Because a people fighting for self-determination has not yet achieved its independence, the conflict wherein that people is engaged cannot be classified as international. Such classification should only be available upon independence, and that independence is itself dependent upon recognition by other States of the liberation movement as a State, and upon that authority's becoming a party to the Geneva Conventions of 1949. Until that point has been reached, the insurgent authority lacks international personality. This approach possesses the considerable advantage of eliminating dispute as to what law applies to which conflicts:

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(76) R R Baxter in John Norton Moore (ed) Law and Civil War in the Modern World 518 at 521.

> "The characterization of all wars of national liberation waged in pursuit of self-determination as internal conflicts avoids well-nigh insoluble problems of characterization of internal conflict. For if a conflict fought within a State in the cause of self-determination is governed by international law but a conflict not legitimately in pursuit of self-determination is governed by Article 3 alone, then a decision concerning what body of law to apply turns on highly subjective value judgments about the nature of the conflict."(77)

However, this solution is unacceptable for to classify wars of national liberation as invariably non-international conflicts is surely as arbitrary as classifying them as always international?

Article 1(4) constitutes a return to the 'just war' doctrine(78)

The just war doctrine presupposes that recourse to war is permissible where the cause therefor is just. This doctrine is in direct opposition to the rationale of the humanitarian law of war which regards war in any form as absolutly evil and undesirable, but nevertheless recognizes that it is not possible to eliminate it and so seeks to mitigate its effects. Article 1(4) may be construed as reviving the just war doctrine(79) for, although it does not in any sense justify the recourse to arms in the cause of national liberation, it does promote wars of national liberation to a privileged position in international law. Article 1(4) would appear to place considerable emphasis upon the cause of a conflict for determining the law applicable:

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(77) Ibid.

(78) Ciobanu op cit (n 21) 407-408. See generally Antony Shaw "Revival of the Just War Doctrine" 1977 Auckland University Law Review 156; Dugard op cit (n 43) 145-147; Graham op cit (n 20).

(79) Contra Lysaght op cit (n 20) 351 who maintains that the case of the proponents of Article 1(4) was "founded on the nature of the conflict rather than its justification or motivation".

> "If the war (is) just, the law of international armed conflict applie(s), ipso facto. If the war (is) not just, the application of the law depend(s) upon the geo-military scale of the conflict."(80)

However, the assertion that Article 1(4) constitutes a revival of the just war doctrine must be treated with some caution for clearly, as a provision in a humanitarian document, Article 1(4) does no more than confer certain rights and impose certain obligations upon all parties to the conflict, without regard to the justness of cause. This is in accordance with the traditional view of the role of the law of war: "the efficacy of the laws of war depends upon their being supported regardless of who started the war or for what reason".(81) Nevertheless the allusion to the just war doctrine arises because it is seemingly the justness of the causes for which conflicts waged against colonial, alien or racist regimes in the exercise of self-determination which requires that such conflicts be treated as international conflicts without reference to a geo-military scale of their intensity.

The concern exists that the hint of the just war doctrine which may be discerned in Article 1(4) could result in a selective and impartial application of the humanitarian law of war. The issue in question is whether Article 1(4) implies "a better treatment for the members of the liberation movements and conversely a diminished protection for the combatants enlisted in forces fighting against this sort of movement".(82)

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(80) Graham op cit (n 20) 80.

(81) Forsyth op cit (n 20) 723.

(82) Ciobanu op cit (n 21) 413.

Such an implication would be developed in the following way:[83]

1. the freedom fighter, by virtue of the inherent justness of his cause, must be accorded special consideration;[84]
2. such consideration demands that the means which the freedom fighter may employ (ie his methods of combat) should not be subject to such restrictions as may diminish the possibility of attaining the desired end, the justness of which is not questioned;
3. restrictions embodied in traditional legal concepts have in any event been largely formulated by the colonialist, imperialist and racist States against whom the wars of liberation are waged; these restrictions may therefore be amended and rejected with impunity.

Ciobanu[85] concludes that in respect of socialist States (who were after all strongly in favour of Article 1(4)) there is insufficient evidence that the law of war was to be developed and applied in this way. While Protocol I remains untested in practice the fear of unequal and selective application of the law can be no more than a fear; whether that concern will be justified remains to be seen.

A second ground for the concern which has been expressed in consequence of the tentative re-emergence of the just war doctrine is that wars of national liberation will now tend to

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(83) Graham op cit (n 20) 41.

(84) This is at least inferred by Ronzitti op cit (n 42) in suggesting that "it would be illegal for the government in power to use force in suppressing the right of self-determination of a people subjugated by it."

(85) Op cit 413-414.

Such an implication would be developed in the following way:[83]

1. the freedom fighter, by virtue of the inherent justness of his cause, must be accorded special consideration;[84]
2. such consideration demands that the means which the freedom fighter may employ (ie his methods of combat) should not be subject to such restrictions as may diminish the possibility of attaining the desired end, the justness of which is not questioned;
3. restrictions embodied in traditional legal concepts have in any event been largely formulated by the colonialist, imperialist and racist States against whom the wars of liberation are waged; these restrictions may therefore be amended and rejected with impunity.

Ciobanu[85] concludes that in respect of socialist States (who were after all strongly in favour of Article 1(4)) there is insufficient evidence that the law of war was to be developed and applied in this way. While Protocol I remains untested in practice the fear of unequal and selective application of the law can be no more than a fear; whether that concern will be justified remains to be seen.

A second ground for the concern which has been expressed in consequence of the tentative re-emergence of the just war doctrine is that wars of national liberation will now tend to

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(83) Graham op cit (n 20) 41.

(84) This is at least inferred by Ronzitti op cit (n 42) in suggesting that "it would be illegal for the government in power to use force in suppressing the right of self-determination of a people subjugated by it."

(85) Op cit 413-414.

escalation. There are two considerations involved. Firstly, the fact that Article 1(4) extends increased protection to participants in wars of national liberation may encourage greater participation in, and more widespread use of such forms of conflict, where previously participants would have been deterred from participating by a lack of protection.(86) Secondly, in a real sense, the classification of wars of national liberation as international conflicts almost implies that such conflicts should be international in scale. Thus Graham argues that the effect of a return to the just war doctrine is to largely vitiate current conflict management norms and so legitimize "through positive international law a unilateral resort to armed force in order to achieve self-determination".(87) Article 1(4) does not, of course, confer any right to the use of force, nor does it confer rights upon only certain parties to a conflict; Graham's point of view is probably over-stated. Article 1(4) does, however, exclude from assimilation to international conflicts, conflicts (eg civil wars) which may more properly be so assimilated than wars of national liberation. Fear of escalation is real because attempts to contain hostilities might be construed as a device to thwart aspirations of self-determination, and because third parties may consider the justness of the liberation cause entitles or even requires them to intervene in support of the liberation movement.(88)

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(86) Id 411.

(87) Op cit (n 20) 43.

(88) Graham op cit 43; see also Ciobanu op cit 413.

The Principle of Reciprocity

It is argued that the law relating to international armed conflict should not regulate non-State parties, as this eliminates "that reciprocity between judicially equal States which is one of the primary inducements for obedience to law".(89)

It cannot be disputed that the element of reciprocity constitutes probably the single most important factor in inducing compliance with the law of war.(90) Given the cardinal importance of the role which reciprocity plays, it follows, therefore, that for the law of international armed conflict to be effective, much depends upon the resources, capabilities and willingness of the parties thereto to implement, and abide by, the provisions of humanitarian law so as to minimize the suffering in conflict. Two considerations are important in this respect:

1. Ability. The point has frequently been made that the very nature of struggles fought for national liberation preclude the implementation of the full conventions and Protocols. Liberation movements lack the material and organizational means of giving effect to that law,(91) furthermore a substantial part of that law will in any event not be relevant to the type of conflict being waged.

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(89) Forsythe op cit (n 51) 80.

(90) DePue op cit (n 41) 78.

(91) Baxter op cit (n 2) 16; see also DePue op cit 113-114 on the question of whether implementation by insurgent movements of the law relating to prisoners of war in view of the fact that Geneva Convention III (Prisoners of War) "contemplates the existence of a stabilised battle area and parties with sophisticated administrative and logistical infrastructures" (id 113).

However, as has been pointed out,[92] a similar objection could have been raised against the inclusion in Geneva Convention III of 1949 of members of resistance movements who are hardly likely to be in a materially better position than members of liberation movements to implement their obligations. Yet the body of humanitarian law as represented by the Geneva Conventions and Additional Protocols is now inordinately complex and it cannot be realistically supposed that liberation movements will be able to comply with it in all respects. Such non-compliance will detrimentally affect the reciprocity principle and so probably result in compliance by both sides considerably short of full implementation of the law.

2. Willingness. Historically, liberation movements have not demonstrated overmuch regard for humanitarian imperatives (although it would be naïve to imagine the liberation movements are alone in respect of their brutal methods) and in particular have not failed to make the civilian population a prime object of attack. Because the majority of States apparently regard the causes for which liberation movements are currently fighting as just, the fear has been expressed that the law will be applied selectively.[93] Thus Graham[94] asserts that the doubtful ability and willingness of liberation movements to apply the humanitarian law of war, by which they are now bound

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(92) Lysaght op cit (n 20) 352.

(93) Supra 106.

(94) Op cit (n 20) 45.

in terms of Article 1(4)

> "has led many observers to the conclusion that [Article 1(4)] would in reality severely limit the defensive efforts of a government while offering assistance to those individuals engaged in a struggle against it."

As has been argued above,(95) it is unlikely that Article 1(4) goes this far, but whether liberation movements will be induced by the benefit of increased humanitarian protection to abandon inhumane methods and tactics is a crucial question and one which does not suggest an optimistic answer.

Bond,(96) however, takes a contrary and more positive view of future compliance by members of liberation movements with humanitarian law, and this view is founded upon the effect of Article 1(4). Bond states that Article 1(4) possesses the merit of placing a conflict of national liberation under the scrutiny of world opinion and this will bring pressure to bear upon the parties to the conflict to conform to humanitarian standards:

> "Article 1 forces particpants to act in a less parochial context: they must act their drama of horror on the stage of the world."(97)

Bond correctly states that Article 1(4) does have the effect of shifting emphasis from the question of the applicability of law to that of the permissibility and legitimacy of the conduct:

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(95) Supra 106.

(96) Op cit (n 23) 78.

(97) Ibid.

> "Guerillas and governors have almost never claimed that they had the right to violate the Geneva rules, instead, they have argued that the Geneva rules did not apply to them. By expanding and clarifying the scope of coverage, Article 1 will preclude claims of non-application. For the first time participants will have to justify their often outrageous conduct in terms of the Geneva principles."(98)

Support for the rationale of this view is to be found in the recommendation that "provisions be made to assure that in war-time, violations of the laws of war will be observed and made public as much as possible", thus contributing to a "'mobilization of shame'".(99)

The difficulty of this approach is that it relies upon world opinion which has repeatedly shown itself to be biased and fickle. The shooting down of two civilian Viscount aircraft in Rhodesia, for example, seems to have roused world opinion as a whole not at all in comparison, say, to bare allegations of South African military strikes into Zambia. Moreover it is possible (although Article 90 of Protocol I may make it less so) for one side simply to deny allegations of atrocities or inhumane methods or alternatively hold the other side responsible. For example, in response to an appeal by the President of the ICRC to all parties involved in the Rhodesian conflict to respect at least the minimum humanitarian rules in the course of

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(98) Ibid.

(99) Bert V A Röling "Aspects of the Criminal Responsibility for Violations of the Laws of War" in Cassese (ed) op cit (n 20) 199 at 207. Article 90 of Protocol I makes provision for an International Fact-Finding Commission and such Commission, in terms of Article 90(2)(c)(i) is specifically stated to be competent "to inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol". But the role of the Commission is not primarily to publicize grave breaches or serious violations but to mediate between the parties to the conflict (Röling loc cit).

their struggle, Mr Joshua Nkomo, joint leader of the Patriotic Front, stated on 16 June 1977 that the ANC/ Zimbabwe would have "no difficulty in declaring its intent to abide by such principles for they have always guided our action since the beginning of our struggle".(100)

Wars of National liberation are only temporarily relevant(101)

Graham(102) suggests that wars of national liberation are likely to be a significant phenomenon only for a short period of time and therefore an approach which alters the basis of the law to accommodate such a phenomenon should be treated with caution:

> "(T)he now popular 'wars of national liberation' are a temporally and geographically limited phenomenon and ... the entire structure of the law should not be knowingly and eagerly distorted in order to accommodate them."(103)

Objectively there appear to be good grounds for regarding wars waged against colonial, alien or racist regimes in the exercise of self-determination as an anachronism shortly to disappear. In Africa only the struggle against South Africa on her own borders and in South West Africa is likely to be characterized as falling within Article 1(4). Thus Article 1(4) is "'dated', in that it only refers to three situations that are bound to disappear in the near future".(104) Article 1(4) is dated in a further sense as well: G I A D Draper has rather cynically observed that self-determination "is by definition a 'once for

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(100) Reported in the ICRC Bulletin No 18-19 July-August 1977 7.

(101) Ciobann op cit (n 21) 406.

(102) Op cit (n 20) 54.

(103) Ibid.

(104) Cassese op cit (n 22) 468.

all' exercise".(105) States which have evolved by this process are unlikely to permit its use against them. Cassesse suggests that Article 1(4) should have been broader in scope so as "to include wars for self-determination conducted by peoples or minorities who are gravely and systematically oppressed by authoritarian regimes" generally and not necessarily regimes which are colonial, alien or racist.(106) The likely objection to be made against the broadening of Article 1(4) is that it could then be used against the proponents of Article 1(4), the socialist and Third World countries, many of which are authoritarian.(107) Article 1(4) is designed, it would appear, to regulate specific conflicts and none others.

The language of Article 1(4) lacks clarity(108)

Commentators, whether in favour of Article 1(4) or not, have generally criticized the provision for a lack of clarity and unambiguity. How, for example, is the phrase "in the exercise of the right to self-determination" to be interpreted?(109) The terminology of Article 1(4) is imprecise and could possibly be so interpreted as to include within its scope of application "a wide range of conflicts going far beyond what was contemplated by those states which have led the campaign for application of the whole of the law of war in wars of national liberation".(110) Thus a call has been made for the amendment

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(105) "Humanitarian Law and Human Rights" 1979 Acta Juridica 193 at 203.

(106) Op cit (n 20) 468.

(107) See 116 infra.

(108) Ciobanu op cit (n 21) 408.

(109) See Lysaght op cit (n 20) 354 where he argues that Article 1(4) would be improved if it contained a definition of the conflicts to which it applies rather than referring to "a rather diffuse United Nations Resolution".

(110) Baxter op cit (n 2) 16.

of Article 1(4) to eliminate ambiguities and inconsistencies.(111)

An allied criticism but one which may be levelled against the whole body of the humanitarian law of armed conflict, comprising the Geneva Conventions and Additional Protocols, is that it has become so complex and legalistic as to be difficult of practical implementation.(112)

CONCLUSION

Revision of the law of war is not often or easily achieved. Almost thirty years elapsed between the Geneva Conventions of 1949 and the final emergence of the Additional Protocols in 1977. The political motivation which, while it would be wrong to give it greater emphasis than it deserves, at least partly underlies Article 1(4), although understandable in the sense of being inevitable, is, it is submitted, to be regretted.

Firstly, it has set the law of war upon a course which will prevail until the next revision of the law, and even then there is no guarantee that the law will revert to a completely a-political stand. The result could be a stalemate between States on the one hand unwilling to allow further politicization of the law of war and on the other States unwilling to concede the political benefits gained thus far.

Secondly, although consensus of sorts was reached at the 1974-1977 Diplomatic Conference, this consensus must, if the law is to be effective, be translated into a widespread commitment by States to the implementation of this law. This has not been forthcoming.

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(111) Bond op cit (n 23) 65.

(112) David P Forsythe "Three Sessions of Legislating Humanitarian Law : Forward March, Retreat or Parade Rest?" (1977) 11 International Lawyer 131 at 133.

Thirdly, commitment by States, if forthcoming, is likely to be selective. States more likely to be involved in international rather than domestic conflicts will probably accept Protocol I only with reservations, while States more susceptible to internal conflict may be unwilling to accept Protocol II or even Protocol I since

> "many of these States are themselves confronted with tribal peoples already asserting their right to 'self-determination', and receiving encouragement from neighbours who are opposed to the existing government."(113)

Does Article 1(4) measure up to the criteria stated above(114) of:

1. advancing the humanitarian cause? and
2. effective and enforceable law?

Ad 1: Article 1(4) extends increased protection to certain combatant groups and therefore prima facie advances the humanitarian cause. But it is submitted that it is unfortunate that some neutral a-political criterion was not used to extend such increased protection to all combatants in conflicts, internal or international, above a certain geo-military scale. The selectiveness of Article 1(4) is difficult to justify.

Ad 2: Doubt has been cast upon the willingness and ability of liberation movements to implement humanitarian law at the level and on the scale required by the Conventions of 1949 and Protocols of 1977. An even greater obstacle and one which, it is submitted, is insuperable, is how States, against whom wars of liberation are being waged, are to be persuaded to acknowledge the relevance of Article 1(4) when to do so is at the

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(113) L C Green "The New Law of Armed Conflict" (1977) 15 Canadian Year Book of International Law 3 at 41.

(114) Supra 76.

same time to acknowledge that they are colonial, alien or racist regimes? Without the co-operation of all parties involved in a conflict situation humanitarian law is absolutely meaningless.

The fear of this writer is that in time the conflicts to which Article 1(4) refers will have been fought without the implementation of any humanitarian law. Such conflicts will be fought in a vacuum of humanitarian law which would have been avoided if a more realistic and practical approach had been adopted.

CHAPTER IV

PRISONERS OF WAR

INTRODUCTION

The traditional approach in determining who is entitled to prisoner of war status has been to limit such status to the regular armed forces of parties to international armed conflicts and by definition such parties must be States. Protocol I does not in fact deviate from this approach but merely enlarges the definition of those who may be considered as parties to an international conflict. Article 1 of Protocol I cannot be seen in isolation but rather as the complement of Articles 43, 44 and 45 of the same Protocol, which govern the question of prisoner of war status. The object in bringing wars of national liberation within the category of international armed conflicts is primarily to afford greater protection in law to those who fight for such liberation movements. Therefore the immediately practical effect of Article 1 will depend for the most part upon the feasibility of those provisions which further define prisoner of war and combatant status. Since the most significant departure from previous practice to follow upon the implementation of Article 1 is the extension of prisoner of war status to freedom fighters upon capture, Article 1 will be meaningless if the additional provisions governing prisoners of war are shown to be unworkable and defective. These provisions must be judged not only upon the validity of their content but also upon the degree to which they are effectively integrated with existing rules as embodied in Geneva Convention III of 1949.

PRISONERS OF WAR UNDER GENEVA CONVENTION III OF 1949

Article 4 of the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War provides as follows:

"A. Prisoners of war, in the sense of the present Conventions, are persons belonging to one of the following categories, who have fallen into the power of the enemy.

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) ....

(5) ....

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

B. ...."

The object of the law of war is to contain all suffering within the narrowest limits possible and this is most effectively done by designating a class of persons as wholly outside the operation of war. Thus there arises the fundamental

distinction between combatants, who are legitimate objects of armed attack, and non-combatants, who are not. There is a further distinction to be made between privileged[1] and unprivileged belligerents and the rationale of such a distinction is to determine whether belligerents are entitled to the status of prisoner of war.[2] Thus Baxter contends that hostile conduct consisting of spying, guerilla warfare and sabotage is not in itself violative of the rules of war. Similarly those who use such means of conducting war are not unlawful belligerents, but merely unprivileged in the sense that such belligerents cannot claim protection under international law. The concept of the protection to which the prisoner of war is entitled is based upon the supposition that war is fought between disciplined forces according to the minimum dictates of humanity. To statehood is attributed certain capabilities of conducting warfare in this way; a consequence of war between States therefore, is that captives are accorded the status of prisoners of war and treated accordingly. The evolution of the prisoner of war concept has thus depended largely upon the ability and willingness of States to commit to battle identifiable and disciplined forces bound by certain rules; a corollary of this observance of law is the right of prisoners to be treated in a particular manner, which has likewise the foundation of law. Prisoner of war status is therefore granted to those who are presumed to conduct the waging of warfare in a legitimate manner, and this presumption is invariably made in favour of the regular armies of States.

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(1) R R Baxter "So-called 'Unprivileged Belligerency' : Spies, Guerillas and Saboteurs" (1951) 28 B Y I L 323.

(2) G Schwarzenberger International Law and Order 224.

In cases where the presumption cannot be made, then the forces in question are required to meet prescribed conditions, ie:

1. that of being commanded by a person responsible for his subordinates. This requirement is designed to establish the element of control without which observance of the laws of war will be at best haphazard. It has been suggested that this condition

> "is fulfilled if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority, or if the members are provided with certificates or badges granted by the government of the State to show that they are officers, or soldiers, so that there may be no doubt that they are not partisans acting on their own responsiblity."(3)

It does not appear that any particular level of command is required; any group, of whatever size, under the responsible authority of a leader, meeting the other conditions, will be entitled to prisoner of war status upon capture.(4) Miller(5) argues that given the nature of military operations, effective leadership and control should be present in almost all instances.

2. that of having a fixed distinctive sign recognizable at a distance. There is little clarity regarding the practical implementation of this provision. The assertion in the British Manual of Military Law that

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(3) British Manual of Military Law (The Law of War on Land) Part III.

(4) See Schwarzenberger op cit (n 2) 229 where he states that individual terrorists will be excluded from the protection of the Convention on the ground of lack of responsible command.

(5) R I Miller (ed) The Law of War 29.

> "it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant and this by the naked eye of an ordinary observer from a distance at which the form of an individual can be determined",(6)

is clearly wholly impractical and unrealistic; it is surely not required that the uniform of combatant must be different in shape to the clothing of civilians?

The requirement of a fixed distinctive sign will be best met by the adoption of a distinctive uniform, and this would presumably include camouflage dress, which is, after all, distinctively military. However, some form of head-gear "completely different in outline from civilian head-dress",(7) would suffice, particularly if some form of badge or brassard is also worn. A distinctive sign will be fixed if "worn regularly and not taken off to permit concealment of the character of the individual".(8) To be distinctive, the sign must be generally worn by members of the group and by members of that group only.(9)

3. that of carrying arms openly. This provision should not be misconstrued as requiring the carrying of arms "visibly" or "ostensibly".(10) Surprise is a legitimate method of attack and the requirement that forces should carry arms openly is not intended to restrict such tactics.

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(6) Op cit (n 3) 33. See also Schwarzenberger op cit (n 2) 229.

(7) British Manual of Military Law op cit (n 3) 33.

(8) Miller op cit (n 5) 29.

(9) J Pictet (ed) ICRC Commentary vol III 60.

(10) Id 61.

Rather, its purpose is to exclude from privileged belligerency (and so to encourage compliance) forces which take up arms intermittently and then conceal themselves as non-combatants - ie civilians. Arms, probably more so than any fixed and distinctive sign, identify the combatant. Thus Miller[11] states that "a farmer who works nights as a soldier and hides his weapon by night" does not qualify as a privileged belligerent.

4. that of conducting their operations in accordance with the laws and customs of war, especially the prohibition upon "the employment of treachery, maltreatment of prisoners, wounded and dead, improper conduct towards flags of truce, pillage, and unnecessary violence and destruction".[12] Bond[13] argues that whether irregulars (guerillas) obey the laws and customs or war is irrelevant:

> "Desirable as it may be for all parties to a conflict to obey the laws and customs of war, why should one's failure to do so affect his status or even his subsequent treatment other than the severity of punishment should he be prosecuted for violating the law of war?"

This approach has been largely adopted in the provisions of Protocol I of 1977 dealing with prisoners of war but the requirement in Article 44(2) of Geneva Convention III of 1949 that the laws and customs of war be observed in order to qualify for prisoner of war status is probably based on the argument that the law of war is most successfully implemented where some real inducement is

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(11) Op cit (n 5) 30.

(12) British Manual of Military Law op cit (n 3) 34.

(13) J E Bond The Rules of Riot 114.

evident. Prisoner of war status is such an inducement. Were compliance waived as Bond suggests it should be, the effectiveness of that law would be diminished. Of course, this is not to argue that non-compliance by individual members precludes the recognition of members of the group as a whole as privileged belligerents. Rather, compliance must be general and substantial but "there can come a time when the level of compliance is so low that all members of the organization or unit will be denied prisoner of war treatment and those individually guilty of violations of the law of war will be subject to trial for their war crimes".(14)

5. A fifth condition, not expressly mentioned as such, is that irregular forces must belong to a Party to the conflict. This is clearly necessary for otherwise the Conventions would not come into operation at all. This question was raised in a case which came before the Israel Military Court in 1969, Military Prosecutor v Kassem and Others.(15) The defendants, members of the Popular Front for the Liberation of Palestine, crossed into Israel armed in uniform. The court found that this organization was illegal in Jordan, did not fall under the authority of the Jordanian Government, nor did any other State with which Israel was in a state of war accept responsibility for the acts of the Popular Front. The court held that

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(14) Miller op cit (n 5) 30.

(15) 42 International Law Reports 470 at 475.

> "the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset they do not possess the right to enjoy the status of prisoners of war upon capture."

Schwarzenberger(16) suggests that given the humanitarian purpose of the Conventions, the interpretation given by the court in the above case to the words "belong to a Party to the conflict" was too strict and that

> "an organisation can 'belong' to a country, irrespective of whether it is recognized by the government or whether, under the law of a particular State, it is legal or illegal."

It is difficult to see how, on the basis of Schwarzenberger's interpretation, any group of irregular forces could be excluded from protection under the Geneva Conventions of 1949 on the ground that it does not belong to a party to the conflict. It is unlikely that this was the intention of the drafters of the provision. The requirement of belonging to a Party to the conflict presupposes that thereby irregular forces will be subject to a measure of control and order. Therefore it is submitted that the decision in Military Prosecutor v Kassem and Others is correct. The position is quite different, of course, in terms of Protocol I.

Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Powers are also entitled to prisoner of war status and treatment upon capture. The origin of this provision can

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(16) Op cit (n 2) 227.

be traced to the particular situation of the Free French Forces participating in World War II against Germany on the side of the Allied Forces. In no sense are the forces in question irregular: therefore their compliance with the four requirements of being under responsible command, etc, is presumed. Such forces are distinguishable on the ground alone that in the view of their adversary, they are not operating or are no longer operating under the direct authority of a Party to a conflict in accordance with Article 2 of the Convention.(17) The government or authority to which these forces owe allegiance must purport to act on behalf of a Party to the Conventions, which are otherwise not applicable.(18) Alternatively, such authority or government should declare in terms of Article 2(3) that it accepts and intends applying the obligations contained in the Conventions. Given the legislative background of this provision, it is unlikely that it could be used by a national liberation movement to gain prisoner of war status for its members. States would probably be unwilling to overtly and manifestly associate themselves with liberation movements for fear of retaliatory action against themselves. Therefore it is probable that in practice this provision would come into force only when a government or authority not recognized by the Detaining Power is associated with another belligerent party, as was indeed the case in respect of the Free French Forces.

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(17) Pictet op cit (n 9) 63.

(18) Miller op cit (n 5) 31.

ALTERNATIVE FORMULATIONS

It is now universally recognised that the conditions prescribed in Article 4 of Geneva Convention II of 1949 for the granting of prisoner of war status are far too restrictive and in any event do not take into account the reality of modern forms of warfare. The criterion of Statehood upon which Article 4 is founded is simply no longer valid since the vast majority of conflicts in the past thirty years have been fought not between States but on a low intensity scale within a single State.

The traditional starting point for determining prisoner of war status has been the distinction between combatants and civilians. The latter are ineligible for such status in any circumstances, the former eligible in certain circumstances. However, even this criterion, as with the Statehood criterion, has been eroded by evolving forms of warfare to the point that it is often difficult to distinguish between combatant rebel forces and the civilian population. Furthermore, the distinction ignores differences among participants whithin each category.(19)

In the light of the increasing irrelevance of Article 4 to present day conflict situations it is not surprising that even prior to the emergence of the Additional Protocols of 1977 there should have been attempts to find alternative formulations of the conditions to be complied with in qualifying for prisoner of war status. The simplest approach is simply to define a combatant as one "who resists the opposing force

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(19) Bond (n 13) 150-152.

by directly participating in military operations" and a prisoner of war as a former combatant.(20) Prisoner of war status, then, follows upon determination as a combatant, an approach which "eliminates the restrictive and excessively formal Article 4 criteria".(21) In a sense this approach is followed in Protocol I, although in defining a combatant some of the Article 4 criteria are retained.(22)

A more conventional approach is that adopted by Miller(23) who suggests that the definition of persons entitled to treatment as prisoners of war under Article 4 of Geneva Convention III of 1949 should be broadened to include irregular forces which

1. are organized as military units,
2. are commanded by a person responsible for his subordinates, and
3. conduct open warfare against legitimate military objectives.

The weakness of such an approach is that it is not free of the classification of a conflict as either international or non-international. Where a conflict is defined as the latter then participants cannot upon capture claim prisoner of war status notwithstanding strict compliance with the Article 4 conditions. It is unfortunate that the Additional Protocols of 1977 perpetuate this flaw.

It is probable that the nature of prisoner of war status will vary from conflict to conflict and that in each such

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(20) Id 165-166.
(21) Id 166.
(22) Infra 134*ff*.
(23) Miller (n 5) 286.

status will be approached on an ad hoc basis. Strict rules regulating who qualifies in law as a prisoner of war are unlikely to be granted much attention; rather practical considerations will over-rule purely legalistic categorizations. This pragmatic approach is well illustrated by that adopted by the Allied forces in Vietnam in the following form:

1. Prisoners of War. Detainees are classified as prisoners of war when determined to be qualified under one of the following categories:
   a. a member of a regular unit;
   b. a member of an irregular unit who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage or spying;
   c. a member of an irregular unit who admits of or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage or spying.
2. Non-Prisoners of War. Detainees are not entitled to the classification of prisoner of war when determined to fall within one of the following categories:
   a. civil defendants:
      i. a detainee who is not entitled to prisoner of war status but who is subject to trial by domestic courts for offences against domestic law;
      ii. a detainee who is a member of an irregular unit and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or a belligerent act under arms;

iii. a detainee who is suspected of being a spy, sabateur or terrorist.

b. returnees - ie those previously disaffected members of regular and irregular units who voluntarily submit to governmental control and undergo a process of rehabilitation;

c. innocent civilians - ie those persons not members of any unit, regular or irregular, and not suspected of being civil defendants.

The above categorization demonstrates how irrelevant the classical Article 4 conditions were in determining the status of detainees in Allied hands. To some extent this approach reflects Bond's formulation above that captured combatants equal prisoners of war,(24) but this is not unqualified since terrorists, spies and saboteurs are excluded. The concern is essentially to separate genuine participants who observe the laws and customs of war at least to the extent of not being spies, saboteurs and terrorists, from those who clandestinely participate. The requirement of engaging in combat or a belligerent act under arms presupposes at least a measure of open identification with the opposing regular forces.

Humanitarian regulation of conflict depends ultimately upon what is practically possible in a given set of circumstances and this will not always accord strictly with the legal position. Thus an entrenched authority may, even without being legally obliged to do so, accord a de facto if not de jure prisoner of war status to captured rebels if it regards its position strong enough to do so. This may be prudent

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(24) Supra 127-128.

for another reason: to avoid inflaming latent sympathy among the local populations by harsh treatment of captives. This may well be an important factor in the South African context. On the other hand, where an authority is particularly threatened it may consider harsh treatment of captives an effective deterrent against possible support for the rebel cause.

It is clear from the Vietnam experience that the trend has been to regard prisoner of war status increasingly as a loosely defined ad hoc concept, depending to a large extent upon the strengths and attitudes of the parties to the conflict. It is submitted that Additional Protocol I of 1977, so far from having served to harness this trend in a workable legal framework, has combined the weakness of Article 4 of Geneva Convention III with a glaring defect of its own.(25)

THE PROVISIONS OF PROTOCOL I OF 1977

Article 43(1) and (2) provide as follows:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

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(25) Infra 186.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. ....

Article 44(1), (2), (3), (4) and (6) provides as follows:

1. Any combatant, as defined in Article 43 who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that in such situations he carries his arms openly:

   a. during each military engagement, and

   b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

....

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. ....

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

THE CONTENT OF ARTICLES 43 AND 44

In terms of Geneva Convention III of 1949, the regular forces of Parties to a conflict (by definition States) are presumed to qualify for prisoner of war status, while irregulars attached to a Party to a conflict are required to comply with the four conditions discussed above (26) in order to be granted such status upon capture. In a sense Articles 43 and 44 of Protocol I follow this approach by simply making a presumption of eligibility for prisoner of war status in favour of all forces involved in a recognised international conflict (international in the extended sense of Article 1(4) of Protocol I).

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(26) 121 *ff*.

This is achieved by defining the armed forces of a Party to the conflict in Article 43(1), conferring combatant status in Article 43(2) upon such forces and stating in Article 44 that any combatant who falls into the power of an adverse Party shall be a prisoner of war. It might even appear that the conditions for conferral of prisoner of war status upon irregular forces have been retained in some form. Article 43(1) defines the armed forces of a Party to a conflict in terms of

1. an element of organisation, and
2. subjection to responsible command,

and apparently prescribes the subjection of such forces to "an internal disciplinary system which ... shall enforce compliance with the rules of international law applicable in armed conflict". In addition Article 44(3) states that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". Although a great deal less stringent it might be thought that these requirements approximate very roughly to the four conditions governing irregulars in Article 4A(2) of Geneva Convention III. In fact, it is clear that the requirement of subjection to an internal disciplinary system at least is not prescriptive but merely descriptive:(27) in terms of Article 44(3) and (4) a combatant (ie a member of the armed forces of a Party to the conflict) cannot forfeit his status of prisoner of war upon capture, with one important exception. However, what of the

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(27) W Thomas Mallison and Sally V Mallison "The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts" (1978) 42(2) Law and Contemporary Problems 4 at 20. Contra F R Ribeiro "International Humanitarian Law : 'Advancing Progressively Backwards'" (1980) 97 SALJ 42 at 58.

position where the armed forces of a Party to a conflict simply do not display the characteristics of organization and subjection to responsible command? A literal interpretation of Article 43(1) would preclude the conferral upon capture of prisoner of war status upon such forces. In terms of the definition of armed forces in Article 43(1) only forces which display such characteristics qualify and so constitute combatants (Article 43(2)) and prisoners of war upon capture (Article 44(1)). It is probable that the extent and level of command and organization would not be required to be in any way great. Moreover, because the Diplomatic Conference 1974-1977 apparently considered that only those liberation movements attending the Conference would in fact be able to avail themselves of the extended definition of international conflicts in Article 1(4) of Protocol I,[28] this problem may well never arise since the armed forces of such movements almost invariably display a measure, if no more, of organization and command. However the provision is ambiguous and for that reason unsatisfactory.

Furthermore it is a great deal less than clear how the approach embodied in Articles 43 and 44 is to be reconciled with that embodied in Article 4A(2) of Geneva Convention III. The following hypothetical example may illustrate the difficulty involved. South Africa enters a war being waged by UNITA against Cuban and Angolan government forces. The three States (South Africa, Cuba, Angola) involved are all parties to both the Conventions and Protocols. The question which arises is this: to qualify as prisoners of war upon capture

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(28) Mallison and Mallison op cit 16-17.

are UNITA forces obliged to fulfil the four conditions laid down in Article 4A(2) or do they qualify in terms of Articles 43 and 44? (It is likely that UNITA forces would not be regarded as sufficiently regular to qualify under Article 4(3) of Geneva Convention III of 1949). The answer is provided in Article 96(3) of Protocol I which states:

> "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, [ie armed struggles against alien, colonial or racist regimes] may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary ...."

Assuming the above hypothetical situation, the only means by which UNITA could bring the Protocols and Conventions into operation with regard to themselves is the unilateral declaration as provided for in Article 96(3). For purely political reasons, given the international support the Angolan government enjoys as a popular and representative government, the conflict as it relates to UNITA forces would not be classified as an Article 1(4) conflict. UNITA could therefore not deposit a unilateral declaration in terms of Article 96(3) and so UNITA forces could qualify for prisoner of war status only in terms of Article 4A(2). Thus is can be seen that overtly political considerations will determine conferral of prisoner of war status. Such partiality and inconsistency make a mockery of the apparently humanitarian purpose of the new law.

What of the position where in an Article 1(4) conflict irregular forces assist a High Contracting Party in a war waged against it by a liberation movement? Article 96(3) clearly envisages that only the authority representing a liberation movement may make a unilateral declaration undertaking to apply the Conventions and Protocols. Will such

irregular forces be required to comply with the Article 4A(2) conditions while the liberation forces qualify for prisoner of war status? Again such a situation is very far from desirable.

Even greater difficulties are to be encountered in the interpretation of Article 44(3) and (4). These are apparent from the comments made in committee by delegates to the Diplomatic Conference in explanation of the votes on Articles 43 and 44.(29) A number of problems of interpretation arise.

1. "combatants are obliged to distinguish themselves"

The first sentence of Article 44(3) thus establishes the general rule applicable at all times in all circumstances and to all combatants. It is not stipulated how combatants should so distinguish themselves but since in exceptional circumstances discussed below combatants are obliged to carry arms openly as a minimum requirement, normal circumstances would presumably require the carrying of arms openly and more.(30) To the general rule contained in the first sentence of Article 44(3) there is one exception, as described in the second sentence of that Article. A different interpretation was placed upon the provision as a whole by the Syrian delegate.(31) In his view there exists no general obligation upon members of resistance or liberation movements to distinguish themselves from the civilian population (ie regular armies are required to so distinguish themselves but members of liberation or resistance movements not) but these last have to comply with

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(29) Official Records vol XV 155-188.

(30) Mallison and Mallison op cit (n 26) 21-22.

(31) Official Records vol XV 160.

the single condition of carrying arms openly (a) during each military engagement and (b) during such time as they are visible to the adversary while engaged in a military deployment preceding the launching of an attack in which they are to participate. Such an interpretation is clearly unfounded. However, note must be taken of the views of the Norwegian delegate that the situations in which combatants are unable to distinguish themselves are those of guerilla warfare generally - ie it is presumed that distinction is not possible in any guerilla conflicts.(32) This accords with the Egyptian approach that a guerilla is a legitimate incognito combatant, who should be given the benefit of the doubt whenever freedom of manoeuvre requires disguise at any stage of the combat.(33) Nevertheless, it would appear that a cautious approach must be adopted in determining those situations of armed conflict in which a combatant cannot distinguish himself from the civilian population. In the view of the New Zealand delegate(34) such situations could seldom arise. Several delegates (United Kingdom, Greece, Germany, the Netherlands, United States, New Zealand) stated that such a situation could only arise in occupied territory, ie territory occupied by the Adverse Party. Such an interpretation would considerably limit the applicability of the exception to Article 44(3) but whether the provision will eventually be so interpreted is more than a little doubtful. The position of the United States, for example, in voting in favour of Article 44 in the Plenary session in 1977

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(32) Id 157.
(33) Id 159.
(34) Id 185.

when the Diplomatic Conference as a whole adopted the provisions of Protocols I and II, had changed considerably from the position taken in committee previously. Explaining the vote of the United States in the Plenary session, Ambassador Aldrich stated:

> "As regards the second sentence of (Article 44(3)), it was the understanding of his delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I ...."(35)

Article 44 was adopted by seventy-three votes in favour, and one against, with twenty-one abstentions. It is likely therefore that the interpretation to be given to the second sentence of Article 44(3) will be substantially the same as that of the United States delegation in the Plenary session. Again, this is hardly desirable. Firstly, as Ribeiro(36) points out, the phrase "owing to the nature of the hostilities" as found in the second sentence of Article 44(3) surely means that "(t)he decisive element is ... the nature of the hostilities not the cause of the conflict". The position outlined by Ambassador Aldrich above cannot be reconciled with this view; to state that the situations in which combatants cannot distinguish themselves are those conflicts described in Article 1(4) of Protocol I is to make the criterion precisely the cause of the conflict. Secondly, where a rule detracts from the protection of civilians, as Article 44(3) must be held to do, then such a rule should be interpreted as restrictively

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(35) Official Records vol VI 149. See also Mallison and Mallison op cit (n 27) 23-24.

(36) Op cit (n 27) 61.

as possible. In any event it should be possible to argue for the qualification of the exception in the following respect: impossibility of distinction does not refer to the fact that to so distinguish himself would jeopardise the safety of a combatant or the success of his operation.(37)

2. "during such time as he is visible to the adversary"

There is no indication to what extent a combatant must consider himself visible - whether to the naked eye alone or visible in terms of any form of surveillance, electronic or otherwise, which is used to observe adversary forces. The Syrian delegate(38) asserted that the test must be whether the combatant knew or ought to have known that he was visible to the enemy. Given the fact that the second sentence of Article 44(3) detracts in some measure from the humanitarian absolute that "the civilian population must at all times be able to be distinguished from combatants", it should be interpreted restrictively and thus it may be contended that a combatant is obliged to display his arms if, while engaged in a military deployment, he should realize that he is under electronic surveillance. However, it would appear that the "concept of visibility to the adversary seems most likely to refer to natural visibility by eye, since electronic or special means are not indicated."(39) More relevant is the fact that no guerrilla would ever consider himself bound to carry his arms openly while under electronic surveillance.

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(37) Official Records vol XV 173 (Swedish delegate). See also Ribeiro op cit 61 who states that "an individual may not refuse to distinguish himself for reasons of self-preservation."

(38) Official Records vol XV 162.

(39) Mallison and Mallison op cit (n 27) 24. See also Ribeiro op cit (n 27) 62.

Such an obligation would undoubtedly be construed as an attempt by developed nations to use humanitarian law to suit their own purposes, since in all likelihood the technology in question would not be available to developing Third World States and liberation movements. Nothing would be achieved therefore, by extending the concept of visibility to include electronic surveillance.

3. "while he is engaged in a military deployment"

The definition of the term "deployment" similarly poses problems of interpretation. The various interpretations given in committee included "any movement towards a place from which an attack was to be launched" but excluding movements of a strategic nature,(40) "any uninterrupted tactical movement towards a place from which an attack was to be launched",(41) and "the last step in the immediate and direct preparation for an attack when the combatants are taking up their firing positions".(42) The wide divergence between these approaches will provide a Party to a conflict with ample grounds for denying prisoner of war status to adversaries should it wish to do so. Unless substantial and real agreement is reached on how the exception to Article 44(3) is to be applied, the inevitable disputes over its implementation will much reduce its potential effectiveness.

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(40) Official Records vol XV 156 (British delegate).

(41) Id 166 (delegate of the German Federal Republic).

(42) Id (Egyptian delegate).

PROTECTION OF NON-PRISONERS OF WAR

In terms of Article 44(2) of Protocol I, a combatant cannot be deprived, for violations of the rules of international law, of his right upon capture to be a prisoner of war except as provided by Article 44(3) and (4). A combatant can be denied prisoner of war status on the sole ground of failing to meet the conditions as set in the second sentence of Article 44(3). Even where a combatant is so denied prisoner of war status he is, nevertheless, in terms of Article 44(4) entitled to protections equivalent in all respects to those accorded prisoners of war. Thus three categories of prisoner may be found:

1. prisoners of war;
2. prisoners who in terms of Articles 43 and 44 do not qualify as prisoners of war but retain equivalent protection;
3. prisoners who fall under neither (1) nor (2) above. This last category would consist of those participants who for some reason or another (most probably the failure of an authority representing a liberation movement to make a declaration under Article 96(3), but possibly in exceptional cases the failure of a liberation movement to comply with the minimum elements of organisation and responsible command and so qualify for combatant status in terms of Article 43(1)) do not qualify as combatants prior to capture.

A prisoner falling under (2) above will be entitled to the same procedural and substantive protections accorded to prisoners of war under Geneva Convention III of 1949.(43)

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(43) Mallison and Mallison op cit (n 27) 25.

Baxter[44] states the position in the following terms:

> "(T)he armed combatant who meets the requirements [of Article 43(3)] is entitled to the status of a prisoner of war, while the combatant who does not meet those requirements gets the treatment of a prisoner of war. A technical difference, concededly, but the combatant who does not meet the requirements and is entitled only to the treatment of a prisoner of war may also be tried and punished for not carrying arms openly at the stipulated times, so the actual treatment of the two types of combatant is actually quite different."

Of course, mere failure to carry arms openly at the prescribed times merely deprives a combatant of the right to prisoner of war status and renders him an unprivileged belligerent. Failure to carry arms cannot in itself render a combatant liable to prosecution. Presumably what is meant is that acts of combat executed while not carrying arms openly can be punished.[45] On the other hand, an extreme but opposite view is that reflected by the statement by the Libyan delegate in committee that the protection guaranteed by Article 44(4) was

> "similar from all points of view to that prescribed by the third Geneva Convention of 1949 and ... Protocol I concerning prisoners of war, which meant that the status of members of national liberation movements was no different from that of regular soldiers as regards their right to the status of prisoners of war except perhaps in name."[46]

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(44) R R Baxter 'Modernizing the Law of War' (1977) 78 Military Law Review 165 at 176.

(45) It is submitted that this is not correct. Failure to carry arms does not deprive a participant of his combatant status, but merely his right to prisoner of war status. Thus Hercules Booysen Volkereg 457 would seem to suggest that such a combatant could be prosecuted for war crimes ("oorlogsmisdade") but not for mere acts of combat and in this respect constitutes a departure from the Geneva Convention III in terms of which a so-called unprivileged combatant is liable for prosecution for his acts of combat (see Baxter op cit (n 1)).

(46) Official Records vol XV 174.

The true position is probably closer to Baxter's point of view. Thus the protection envisaged in Article 44(4) shall be equivalent in the procedural and formal sense and that a participant who has forfeited his right to be a prisoner of war will be subject to the usual penal laws of the country of jurisdiction. Several delegates contended that in such situations a combatant would be liable for prosecution for acts which, if committted by someone who had complied with the conditions prescribed in Article 44(3), would be regarded as lawful acts of combat.(47) This must be taken as accurate since Article 44(3) unequivocally states the right to combatant to status, which automatically follows upon membership of the armed forces of a Party to a conflict, will be lost if a combatant does not comply with the Article 44(3) conditions. Where an individual thus loses his combatant status but is subsequently captured while complying with the Article 44(3) conditions, it is submitted he must be accorded prisoner of war status but will remain liable (subject to the safeguards of Geneva Convention III and Protocol I) for prosecution for acts committed while an unlawful combatant.(48) He will be entitled to prisoner of war status because in terms of Article 44(5) of Protocol I, it is clear that a combatant who upon capture is denied prisoner of war status in terms of Article 44(4) can only be so treated if failing to meet the prescribed criteria at the time of capture and not for any previous similar omission.(49)

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(47) Id. 170 (Netherlands); 178 (United States).

(48) Booysen op cit (n 45).

(49) Ibid. See also Ribeiro op cit (n 27) 63; Booysen op cit 456-457.

While it is fairly clear (as regards procedure for prosecution) what protections are afforded to captured combatants some attention must be given to Article 45(1) of Protocol I which provides as follows:

> "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal".

It would seem that all prisoners must be presumed to be prisoners of war and where doubt arises then the status of a prisoner must be determined by a competent tribunal. For example, a belligerent who is captured while failing to comply with the Article 44(3) conditions and claims that he is a prisoner of war must be presumed, in terms of Article 45(1), to be a prisoner of war, although he is quite clearly disqualified. Since the doubt as to whether he is entitled to prisoner of war status must be overwhelming, his status must be determined by a competent tribunal. Thus it appears that in every individual case prisoner of war status must be presumed until otherwise determined by a competent tribunal. A corresponding provision is found in Article 5(2) of Geneva Convention III which states:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the Present Convention until such time as their status has been determined by a competent tribunal."

The scope of this provision is far from clear; the official commentary states that if "would apply to deserters and to persons who accompany the armed forces and have lost their identity card".(50) It is clear, at any rate, that no general presumption of prisoner of war status was intended to be made and that belligerents who were clearly not entitled to prisoner of war status could not claim the operation of the provision. Thus Article 45(1) of Protocol I would appear to constitute a rather radical departure from the previous position.

The cumulative effect of Articles 43, 44 and 45 of Protocol I remain to be considered in the following section.

CONCLUSION

It has been asserted above in respect of prisoners of war that Additional Protocol I of 1977 has combined the weakness of Article 4 of Geneva Convention III of 1949 with a glaring defect of its own. The applicability of the Conventions of 1949 is restricted, with the single exception of Article 3, to conflicts fought between States. This has proved, in the light of post-World War II conflicts, to be a major fault, since in very few instances could such conflicts be described as international in the accepted sense. Protocols I and II, in maintaining the distinction between international and non-international conflicts, do not extend the protection of prisoner of war status to combatants who are not involved in an international conflict in the traditional sense nor in a conflict against a colonial, alien or racist regime. The already problematical question of which rules to apply in

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(50) Pictet op cit (n 9) 77.

in which conflicts is aggravated by the fact that Protocol I introduces a subjective and selective criterion (conflicts waged against colonial, alien or racist regimes). As has been stated above,(51) this amounts to a built-in non-applicability clause since no State or power against which the Protocol is sought to be implemented, would admit to be being colonial, alien or racist. (This leads to the subject of the following and final chapter which attempts to evaluate how States may be bound by international customary law and the relation of the Additional Protocols to such customary law). Not only do the new provisions of Protocol I have to be reduced to some certainty (no easy task, judging by the divergence of views apparent in the drafting process) but they have to be reconciled with the provisions of Geneva Convention III. There is a growing fear (particularly among those who are required to implement the humanitarian law of war in the field) that the law is becoming unwieldly and over-complex. This apprehension seems increasingly to be well-founded.

As far as South Africa(52) is concerned, it is unlikely that the provisions in Protocol I regarding prisoners of war will have any practical effect. In the absence of international armed conflict situation, South Africa is entitled to prosecute prisoners taken under the criminal law. The lack of such prosecutions indicates that South Africa has adopted an ad hoc approach, probably not dissimilar to that of the Allied Forces in Vietnam, whereby SWAPO soldiers are sought to be rehabilitated where possible.

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(51) 32.

(52) For a statement of the South African position see H Booysen "Terrorists, Prisoners of War and South Africa" (1975) 1 South African Yearbook of International Law 14.

CHAPTER V

THE ADDITIONAL PROTOCOLS AND CUSTOMARY INTERNATIONAL LAW.

INTRODUCTION

It is perhaps not profitable to attempt a prediction of the impact which the Additional Protocols of 1977 will or will not come to have. In theory they represent a radical step in the humanitarian law of war. In practice their significance will depend on the number of States willing to implement them and with only a handful of States [1] (none of them militarily of foremost importance) committed to applying the Protocols, it is likely that for the foreseeable future there will be at least a large minority of States not so committed. It might be thought that such States will be free to adopt an independent attitude for as long as they wished, and there is little doubt that South Africa would wish to do so. However, the position is rendered rather less simple by an aspect of international law which tends to be over-looked, viz customary international law. Because Article 1(4) and those provisions extending the definition of prisoners of war have a moral content for the nations of the Third World and Communist Bloc, in so far as a just cause (the liberation of oppressed peoples) is upheld, it will be logical to assert in time that the new law of war should be implemented by all nations. Were this conviction of righteousness to be supported

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(1) As at 1. 1.80 these are Botswana, Ecuador, El Salvador, Ghana, Jordan, Libya, Niger, Sweden, Tunisia and Yugoslavia.

by accession to the Additional Protocols by a large number of States including leading powers, the claim would undoubtedly be made that the law contained in the Protocols constituted customary international law and as such was binding on all nations whether parties to the Protocols or not. It is probable, for example, that many of the more important rules provided for in the Geneva Conventions of 1949 have passed into customary international law and as such are universally binding. It is extremely unlikely that in a war between a State bound by the Conventions and a State not so bound, either party could in law deny prisoner of war status to captured members of the enemy forces where they would have been entitled to such status had the Conventions been applicable.

The interaction between treaties and customary international law is important and is dealt with in some detail below.(2) This aspect is reflected in an historical analysis of the evolution of the law, as found in both custom and treaty law:(3)

1. the Articles of War phase, in which "rules of military law and discipline are formulated which benefit prisoners of war, worthy of ransom, and privileged classes of enemy civilians";
2. the Manual phase, viz the use of manuals for the guidance of armed forces in the field;
3. the Codification phase, in which "rules unilaterally evolved in the two previous phases and found generally

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(2) Infra 159*ff*.

(3) G Schwarzenberger International Law and Order 172.

acceptable are transformed into multilateral treaty law and the uncontroversial parts of such codifications tend to be treated as being declaratory of international customary law";

4. the Development phase, in which "further efforts are made to strengthen and extend the application of the law [of war] by way of multilateral treaties".

Clearly the Additional Protocols are characteristic of the latter but it is possible that in time they may come to be regarded as the codification of established law. However the continuing relevance of custom to the law of war is by no means undisputed. Miller(4) suggests that the potential for the development or reaffirmation of customary international law is negligible in those areas of the law which have been thoroughly defined by way of treaties:

> "The most recent evidence of the customary law may date from the nineteenth century and may have doubtful relevance to the relations of belligerents in the second half of the twentieth century."

In respect of the law contained in the Geneva Conventions, which have acquired virtually universal acceptance, this may well be true. The Protocols, on the other hand, are unlikely to enjoy such acceptance since their effect is to prefer one class of combatant against others. This partiality will therefore preclude general application. But it is conceivable in time that although a party to a conflict has not acceded to the Protocols and is unwilling to apply them he may be bound to do so on the ground that they constitute customary international law, much as the Conventions of 1949 do now. Where there exists a dispute as to the law applicable in a particular

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(4) Richard I Miller The Law of War 14.

conflict situation, and certain parties deny that their actions fall to be regulated by any law, then the question arises of determining whether such parties are bound by customary law or not, ie whether or not the legal provisions sought to be avoided have passed into the body of customary law and are therefore binding on all parties, their assent thereto being no longer relevant. This issue is important in assessing the legal position of States opposed to the application of the Protocols. Because of the clearly innovatory nature of Article 1(4) of Protocol I in particular the position of that provision in customary international law must be established. Claims, even prior to the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, have for some time been made that wars of liberation conducted against racist or colonial regimes are international conflicts.(5) Can then, Article 1(4) be said to reflect a development in customary law? Has the provision regarding the extended definition contained in that Article of international conflicts already passed into custom or is the incorporation thereof in Protocol I merely an indication that that provision is undergoing the process, gradual and as yet incomplete, of being absorbed into customary law?

Accordingly this thesis would be incomplete without an attempt to describe the means by which the Additional Protocols could become binding as customary international law. While the claim that the Protocols constitute customary law has not been widely proposed, it is almost certain that in time it will be and depending upon State practice this claim may not be without

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(5) See for example U O Umozurike "The Geneva Conventions and Africa" 1971 East African Law Journal 275 at 282.

foundation. It is also highly relevant therefore to consider how a State can avoid the binding effect of such law.

FORMATION OF CUSTOMARY INTERNATIONAL LAW

Schwarzenberger[6] distinguishes in international law three law-creating processes, viz customary international law, treaty law and general principles of law recognized by civilized nations. (He further suggests that the Charters and Judgments of the International Military Tribunals of Nuremburg (1946) and Tokyo (1948) may possibly have given rise to a fourth law-creating process). Thus for a rule to be incorporated into the body of international law it must have arisen via at least one of the above law-creating processes. Evidence of a rule of custom may be found in the following:

> "Diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, eg manuals of military law, executive decisions and practices, orders to naval forces etc, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly."[7]

But to acquire the status of a legally binding rule of general application the existence of such rule must be proved and it is this aspect of proof which is of most concern to this study. Thus in a sense it is illogical to speak of custom as a source of international law since custom is the substance of international law, ie is the rule itself, the existence of which is required to be proved.[8] But as Brownlie[9] points out, in

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(6) G Schwarzenberger International Law vol 2 14.

(7) Ian Brownlie Principles of Public International Law 5.

(8) D P O'Connell International Law vol 2 7-8.

(9) Op cit 7.

international law there is no such thing as a formal source of law, in the sense of a law-creating body. Brownlie continues:[10]

> "As a substitute, and perhaps an equivalent, there is the general principle that the general consent of States creates rules of general application. The definition of custom in international law is essentially a statement of this principle (and not a reference to ancient custom as in municipal law)."

The material sources of custom are more or less those outlined by Brownlie above although clearly some are a great deal more significant than others. But it is necessary to prove the existence of rule as rules indicated by the material sources of custom. Such proof is achieved by demonstrating a form of consensus about the application of such rules. This gives rise to another logical difficulty. Proof inevitably involves reference to those sources providing evidence of the rules sought to be proved. Thus the distinction is made between "the practice of States, which constitues the material element of custom, and evidence of the practice of States which is not itself practice".[11] However this distinction is commonly almost impossible to make[12] and it may be preferable to accept that custom is both evidenced by and manifested in international conventions, judicial decisions, academic opinions, military manuals, etc.

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(10) Ibid.

(11) H W A Thirlway International Customary Law and Codification 57.

(12) See Michael Akehurst "Custom as a Source of International Law" (1974-75) 47 B Y I L 1 at 4: "The distinction between acts which are constitutive of practice and acts which are only confirmatory of it is singularly thin." See also 4, 8.

O'Connell[13] states that customary international law comprises two basic elements:

1. "a generalized repetition of similar acts by competent State authorities"; and
2. "a sentiment that such acts are juridically necessary to maintain and develop international relations."

It is submitted that together these elements constitute the consensual foundation upon which customary international law is established.

USAGE

Starke[14] defines usage as "an international habit of actions that has not yet received full legal attestation". Usage constitutes that practice which necessarily precedes the emergence of a customary rule. As such it must be distinguished from custom itself. Custom represents the whole, practice the process:

> "The term 'practice' is used to indicate the aggregation of steps which are formative of law, whereas the term 'custom' is reserved for the law itself ... the word 'practice' is descriptive of the fact of an aggregation of juridically significant acts. The word 'custom' stands for the proposition that the practice is actually productive of law .... Perhaps it may be said that 'practice' is evidence of the act of creation, 'custom' is the result."[15]

Usage is not restricted to physical acts of States[16] but includes claims and other statements as State practice.[17]

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(13) Op cit (n 8) 15.

(14) J G Starke Introduction to International Law 38.

(15) O'Connell op cit (n 8) 8.

(16) Akehurst op cit (n 12) 1-3.

(17) Id 4.

Nor is it generally relevant whether such claims are made in abstracto or in the context of some concrete situation.(18) State practice can also include omissions and silence on the part of States.(19) However the degree of proof required to demonstrate that a customary rule has been created by abstention, rather than positive usage, is high and such proof must be overwhelming. Furthermore it must be shown that such abstention is motivated "by the consciousness of a duty to abstain".(20) Mere neglect on the part of a State to act or make some claim or statement will not qualify as usage.

It is submitted that usage or practice must embrace the following elements:

1. Consistent and Uniform. The conduct in question must be identical under similar external circumstances.(21) It is not required that uniformity exist absolutely; "the law is dependant, not upon unanimity, but only

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(18) Contra Thirlway op cit (n 11) 58 where he states that the practice required must be concrete in the sense that "each State does not merely assert the desirability, or even the existence of the rule of law in question, but by a definite and formal decision accepts the rule for the regulation of its own interests ...." The difference is probably only one of emphasis. Concrete acts will carry more weight than abstract statements. See O'Connell op cit (n 8) 19 where he states that "overt actions count for more than abstract claims, declarations and municipal legislation". However this does not preclude reference to such practice for evidence of the emergence of a customary rule in the absence of evidence less easily rebutted.

(19) Akehurst op cit (n 12) 10; Michael Virally "The Sources of International Law" in Max Sorensen (ed) Manual of Public International Law 116 at 130-1.

(20) O'Connell op cit 17.

(21) Id 15; judgment of Justice R B Pal, Tokyo War Crimes Trial, November 1948, International Military Tribunal for the Far East, reproduced in Leon Friedman (ed) The Law of War vol 2 1171.

upon generality of will".[22] The asserted rule must be consistently applied. In the Justice case[23] the court approved the proposition that the nature of the rule must be such that it is unable to be destroyed or altered by the actors individually. It does not necessarily follow, however, that customary international law is static but simply that its binding force and content cannot be negated, diminished or changed by the practice of single parties. Of course a new rule can displace an old but must then be established in the normal way. Material departures from a practice recognised in a customary rule may serve to negative such a rule.[24]

No particular duration of time is required.[25] Akehurst[26] states:

> "(T)he requirements of time is very much bound up with the requirement of repetition.[27] If many acts are needed to establish a rule of customary law, time will almost certainly also be needed, if only because it is most unlikely that many acts will occur simultaneously. Conversely, if a single act is sufficient to establish a customary rule, the requirement of time falls by the wayside."

Once consensus has been achieved on the establishment of a rule as custom, then it is law and it is not necessary to stipulate that the passage of time is required before this occurs (although in practice it is most infrequent that a customary rule would emerge without the effluxion of time).

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(22) O'Connell op cit (n 8) 15.

(23) Judgment of the United States Military Tribunal at Nuremburg in United States v Josef Altstoetler, et al (The Justice Case, December 1947) reproduced in Friedman op cit (n 21) 1196 at 1202.

(24) Starke op cit (n 14) 41.

(25) Brownlie op cit (n 7) 6.

(26) Op cit (n 12) 15.

(27) Infra.

2. General. The usage sought to be established as custom must be general; if such practice is restricted to one particular region or a particular group of States, then it may qualify only as regional or special. Usage must be general in the additional sense that it must constitute a repetition or recurrence of practice. O'Connell[28] argues that a single act is insufficient for the creation of a rule of custom since "the common conscience [being the foundation of law] can only be formed by constant and reciprocal practice". Akehurst,[29] however, submits that "it is possible (although very unusual) for a single act to create a rule of customary law". A more important criterion than either duration of time or repetition of practice is the number of States which participate in a relevant act.[30] Thus widespread and representative participation in a practice might be sufficient without repetition or effluxion of time to establish a rule of custom. Of course it is not possible to prescribe the extent of such participation; this must be judged in each case.

OPINIO JURIS SIVE NECESSITAS

The usage element must be accompanied by the acknowledgment of the States engaged in the practice in question that their acts (or possibly omissions) derive from a sense of right or obligation.[32] Starke[33] suggests that this

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(28) Op cit (n 8) 16.

(29) Op cit (n 12) 13.

(30) Id 14.

(31) Ibid.

(32) Miller op cit (n 4) 10; the Justice case op cit (n 21) 1203; Starke op cit (n 14) 41; Brownlie op cit (n 7) 7-8; P D Trooboff (ed) Law and Responsibility in Warfare 5.

(33) Ibid.

element is not essential but that it "is a convenient if not invariable test that a usage or practice has crystallized into custom". However, it is submitted that this view understates the importance of opinio juris; it is difficult to conceive how custom can otherwise be distinguished from practices which are adhered to consistently and generally but for reasons of comity, courtesy, moral conviction, fairness or through arbitrary choice.(34)

It has been stated that the opinio juris requirement is satisfied if it is proved that the alleged rule "is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it".(35) This might be taken to suggest that both usage and opinio juris need not be proved, but that proof of the former raises a rebuttable presumption as to the existence of the latter. Brownlie(36) suggests that proof of both is not required but there is authority to the effect that continuous conduct is not prima facie evidence of a legal duty.(37)

It appears reasonable then to adopt as accurate the view of the International Court of Justice that "the creation of a rule of customary international law postulates two constitutive elements: (1) a general practice of States and (2) the acceptance by States of the general practice as law".(38)

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(34) Akehurst op cit (n 12) 33.

(35) West Rand Central Gold Mining Co v R (1905) 2 KB 391 at 407.

(36) Op cit (n 7) 8.

(37) The Lotus, Ser A., no 10, 28 (Permanent Court of Justice); North Sea Continental Shelf Cases ICJ Reports (1969) 3. See also Akehurst op cit 50.

(38) Quoted in Thirlway op cit (n 11) 46.

THE RELATION OF TREATIES TO CUSTOM

A complex issue is the effect which the development of treaty law may have upon the state of customary law. This is required to be dealt with separately since it is complicated by the fact that the act itself of entering into a treaty by a State may qualify as at least an incident of the usage element.

Baxter distinguishes three types of treaty which in varying degrees contribute to the formation and delineation of customary law:(39)

1. Those treaties of codification in which it is expressly stated that the treaty is intended to set out the relevant customary internationl law.
2. Those treaties the express object of which is not to reflect customary international law but which in any event have not at their inception created new international law only subsequently acquiesced in by States.
3. Those treaties or parts thereof which at their inception constitute innovatory law but which in the course of time come to be accepted as an accurate statement of the position of the existing law.

Thus, a multilateral treaty, being declaratory of customary international law, is distinguishable according to whether it succeeds State acquiescence (in which case it codifies in the true sense - ie incorporates, defines and recognizes a pre-

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(39) R R Baxter "Multilateral Treaties as Evidence of Customary International Law" (1965-1966) 41 B Y I L 275 at 278.

existing rule) or precedes such acquiescence (in which case it constitutes the source or origin of that rule, State acquiescence following thereupon and so ensuring the reception of the rule into customary international law).(40)

It is submitted that the effect of any treaty on the formation of custom must be evaluated in the light of the contribution it does or does not make to the usage element. Thus the distinction that is sometimes drawn between treaties which give rise to mere contractual obligations and the so-called law-making treaties is not particularly relevant in this context. Nor is the debate as to whether or not a treaty can be a source of binding customary law. It is true, of course, that "it can never be the treaty which makes law, but a custom which adopts the treaty as the rule of law".(41) What is important is that an act of treaty-making falls somewhere within the sequence of usage. Where participation in a treaty is so widespread that evidence of exclusive practice is not required the resultant treaty will probably be regarded as a source of customary law, but where such participation is so limited that it cannot be regarded as more than a mere incident of practice, it will probably be adduced simply as evidence of the customary rule sought to be established. A distinction which must be drawn, however, is that between a treaty which is evidence or declaratory of a custom (in which case the treaty itself can have no creative influence, the custom being already established)

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(40) Id 277.

(41) O'Connell op cit (n 8) 21.

and a treaty which is evidence of a practice or usage (in which case such treaty may constitute a definitive step in establishing such usage as a custom, depending of course upon factors such as the extent of State participation, etc).

The usage element being thus all important, it is important to classify treaties according to the contribution made to the usage element:(42)

1. Stimulate

The conclusion of a treaty between a limited number of parties may prompt the generalization of a rule"by subsequent independent acceptance or imitation".(43) Such a treaty thus constitutes the initial and stimulatory stage in the process of usage.

2. Crystallize

The act of treaty-making, if sufficiently widespread, may itself constitute the last stage in the usage process necessary to establish a rule contained in a treaty or series of treaties as a rule of customary international law.

3. Formalize

A rule of customary international law may be formulated by a treaty in the sense that such treaty will provide irrefutable evidence of the reception of such rule by an independent process of development.(44) The most obvious example of such a treaty will be one which states that it is declaratory, or a codification, of existing customary law.

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(42) See Starke op cit (n 14) 49.
(43) Id 49-50.
(44) Id 50.

It thus remains to determine the effect a particular treaty will have as an incident of the usage element. Practice comprises habitual consistent behaviour in conformity with an asserted rule. The act itself of entering into a treaty may constitute an incident of such practice, and it is thus important to determine the value of such single item of usage. D'Amato states that -

> "... generalizable provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states";(45)

and

> "if treaties do at any point in time pass into customary law, they pass at the moment they are ratified."(46)

The claim, then, is that not only do "generalizable provisions" in treaties become binding on all States, but that they do so immediately upon ratification. This contention is apparently based upon d'Amato's argument that simply because it is not possible to stipulate precisely the period which must elapse before a rule gains recognition as a rule of custom, then that is itself a valid ground for asserting that there is no dividing line in time. But, as Thirlway points out -

> "the fact that we cannot say precisely how many straws make a heap does not lead us to deny the possible existence of a heap of straw."(47)

If one accepts d'Amato's theory of the immediate passage into customary law of certain rules contained in treaties, then the mere act of treaty-making will satisfy the usage requirement.

Is it possible then that an entirely innovatory provision, embodied in a multilateral treaty, may pass immediately into

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(45) Anthony d'Amato The Concept of Custom in International Law 104.

(46) Id 107.

(47) Op cit (n 11) 83.

customary law on the basis that the treaty itself constitutes sufficient practice? O'Connell suggests that there do exist circumstances in which the immediate passange into custom of rules contained in a multilateral treaty can take place:

> "The moral persuasiveness of the rules, and the political pressure underlying their acceptance, may be such that their translation from conventional to customary law is immediate, or almost so."(48)

In a similar vein, Baxter(49) states that -

> "(t)he adherence of the great majority of the nations of the world might be taken as having established standards which even non-parties would be required to observe only if the international community were prepared to accept the existence of true international legislation."

This position must be distinguished from that in which a treaty itself crystallizes aspects of rules which by virtue of that crystallization become custom, such a treaty will be binding on all States to the extent that it embodies those rules. However, the concept of international legislation is in principle "untenable" and has no basis in practice. Nevertheless, Baxter suggests that humanitarian law could conceivably bind parties and non-parties alike on the basis of a multilateral treaty alone (not being declaratory of custom nor the crystallization thereof, but being new law) -

> "by reason of (such treaties) laying down restraints on conduct that would otherwise be anarchical."(50)

It is unlikely that an exception in favour of humanitarian law whereby such law enjoys immediate passage into custom will be of any value, for such an exception would also ensure the

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(48) Op cit (n 8) 23.

(49) Op cit (n 39) 285.

(50) Ibid.

passage of provisions such as Article 1(4) which has arisen primarily out of political and not humanitarian motives. Baxter's proposition has in any event no foundation in State practice whatsoever. He continues:

> "The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention such as the Regulations annexed to Convention No IV of the Hague."(51)

There may be some merit in this submission if by it is meant the mere amplification of conventions; but this can hardly be applicable where a treaty embodies a rule (such as Article 1(4)) which constitutes a radical departure from all prior treaty and customary law.

The discussion thus far has related only to treaties as forming part of the usage element but it must be borne in mind that treaties must apparently be accompanied by opinio juris in order to create customary law.(52) The point is not conclusive. Thirlway,(53) for example, suggests that opinio juris may be presumed from widespread and universal participation in a treaty and that express evidence of opinio juris is not required. Akehurst(54) rejects this view and states that evidence of opinio juris is an additional requirement. It may be proven in the following ways:

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(51) Ibid.

(52) Akehurst op cit (n 12) 44.

(53) Op cit (n 11) 86.

(54) Op cit 50.

1. statements made about customary law in the text of a treaty or in the course of negotiations preceding the act of treaty-making, eg a statement that a rule or rules contained in a treaty codify or are declaratory of existing customary law;

2. statements subsequent to the conclusion of the treaty which may allege that the rules contained in the treaty coincide with the customary law at the time of the act of treaty-making or that customary law has in some way and at some time come to reflect such rules.

THE INFLUENCE OF THE ADDITIONAL PROTOCOLS ON THE FORMATION OF CUSTOMARY INTERNATIONAL LAW(55)

It is inordinately difficult to speculate as to the influence of the Protocols upon the development of customary law. While it is clear that the elements of usage and opinio juris must be proven in order to establish a practice or custom, it is far less clear what constitutes sufficient proof of such elements. The position is somewhat complicated by the fact that the Protocols have themselves not been given uniform emphasis. In explanation of their vote on Article 1(4) for example, several countries seemed to assert that this provision merely reflected international law.(56)

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(55) For the relation of international customary law to South African municipal law see A J G M Sanders "The applicability of customary international law in South African law - the Appeal Court has spoken" (1978) 11 Comparative and International Law Journal of Southern Africa 198.

(56) See, for example, the statement by the Nigerian delegate to the effect that his delegation had voted for Amended Article 1 "because it embodied the present state of international law applicable in armed conflict"; Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, Geneva (1974-1977), vol VI, 47. See also

(continued on the next page)

It is also apparent, however, that many others have regarded Article 1 (4) as an innovatory development in the law of war and by no means one which formalizes for the law of war a legal development already well-founded in international law generally.(57) It would seem more probable that customary law has not developed nor will develop independently of the Protocols. Rather it is likely that the Protocols will act as a stimulus to the formation of custom and in this respect constitute an incident of usage. Further conclusive proof of the usage element as consistent and general will have to be adduced and it must further be shown that such practice is accompanied by opinio juris. To some extent evidence of both is already available, viz the mere signing of the Protocols in the belief that they reflect international law. But such evidence is limited and it is submitted that the signing of the Protocols is merely an incident of usage. It must be borne in mind that States are not bound by the commitment of the delegations to a multilateral treaty such as the Protocols and it is only by a process of ratification (initially) and

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(56) (continued)
the statement of the Egyptian delegate that the purpose of Article 1 (4) "had not been to introduce a new and revolutionary provision, but to bring written humanitarian law into step with what was already established in general international law, of which humanitarian law was an integral part"; (Official Records vol VI 44).

(57) See for example statements by inter alia the delegates of Hungary, Czechoslovakia, Yugoslavia to the effect that Article 1 (4) constitutes an important development and step forward in international humanitarian law (Official Records vol VI 45, 50, 52 respectively). See too the statement by the Syrian Arab Republic (Official Records vol VI 51) that Article 1 (4) fills a lacuna which had hitherto existed in international humanitarian law. The effect of such statements is certainly not to suggest lex lata but at most lex ferenda. At the other extreme the Israeli delegate expressed the view that Article 1(4) "was in clear contradiction to the spirit and accepted norms of international humanitarian law" (Official Records vol VI 41).

later accession to such a treaty that a State can become bound. To date such ratification or accession has been confined to some eleven States. Akehurst[58] states that "the fact that a treaty has received few ratifications is not necessarily an argument for not regarding it as declaratory of customary law" since delay in ratification will frequently be due to "inertia and lack of Parliamentary time". But while lack of ratification in the years immediately succeeding the conclusion of a treaty may not be significant, "the persuasive value of a treaty as evidence of customary law" will diminish in time if general ratification is still not forthcoming.[59] It would thus seem premature to assert or deny that the Protocols have acted as a catylyst to the development of customary law. It is certain, however, that it will only by widespread accession to, or at least application of, the Protocols in the belief that they reflect law that customary law in line with the Protocols will emerge. There is no possibility that the conclusion of the Protocols, without more, constitutes an example of how custom may develop on the basis of a single act. The absence of opinio juris on the part of many States ensured that. Thus the Protocols constitute at most an incident of usage and to stand as customary law will have to be proven in the normal way.[60] But in view of the widespread dissatisfaction with the law of war as it existed prior to the conclusion of the Protocols it would be surprising if their place in

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(58) Op cit (n 12) 49.

(59) Ibid.

(60) See W Thomas Mallison and Sally V Mallison "The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts" (1978) 42 (2) Law and Contemporary Problems 4 at 18 where they state that Article 1(4) of Protocol I "is widely regarded as a law-making rather than a law-declaratory provision".

custom was not sought to be proven.[61] In time this may well be achieved.[62]

THE POSITION OF NON-PARTIES

Where a rule has become recognized as embodied in custom, that rule will be binding on all States, whether they assent thereto or not:

> "The passage of the rule of a treaty into customary international law may have certain consequences for the parties as well as non-parties. For example, if the treaty is accepted as a sound statement of customary international law, denunciation of the treaty by a party cannot absolve that State from its obligation to observe the rules of customary international law, proof of the existence of which is to be found in the treaty."[63]

However, it appears that a customary law is binding only on States which do not dissociate themselves from it - ie it will be binding on those States which expressly assent to such a rule or which do not expressly dissociate themselves from it. Thus where a State has:

1. consistently and openly; and
2. before the emergence of a rule as custom,

rejected a particular rule, then that State may claim that the

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(61) Akehurst op cit (n 12) 52.

(62) See Mallison and Mallison op cit (n 60) 18: "If Protocol I becomes a widely ratified multilateral convention, and the major military powers are included among the state-parties, there is strong reason to believe that article 1(4) will be accepted as prescribing a standard or norm in international law. States that flout the standard should expect to be subjected to political as well as other forms of sanctions, even if article 1(4) cannot be applied to them immediately as a matter of law. Over a period of time, the treaty standard, which has been prescribed, may well be enforced as law."

(63) Baxter op cit (n 39) 300. See also Schwarzenberger op cit (n 6) 19.

rule, if part of customary international law, does not apply to it;[64] by thus constituting itself as a persistent objector, a State may in effect "contract out of a custom in the process of formation".[65] Brownlie states:

> "Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted."[66]

There is authority to the effect that where a State departs from an established custom and other States acquiesce in such revocation, then that State may be regarded as no longer bound. However, there is some doubt whether this authority will be of much weight.[67] Where objection to a proposed customary rule is sufficiently general and vociferous, such dissent may prevent the emergence of a rule as custom through lack of usage. Note, however, that because a dissenting State is required to express such dissent in relation only to those of its own interests which may be affected, and because a treaty does not purport to affect non-parties, a dissenting State may not be able to avail itself of an opportunity to convey its explicit non-acquiescence.[68] Where dissent has not been effectively expressed before the emergence of a rule as custom, it will be binding on all States, including those which dissent.

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(64) Thirlway op cit (n 11) 109.

(65) Brownlie op cit (n 7) 10.

(66) Ibid.

(67) Id 10-11.

(68) Thirlway op cit (n 11) 115.

CONCLUSION

As a signatory to the 1949 Conventions alone, South Africa would probably be justified in determining the conflict situations on her borders as falling to be regulated in terms of Common Article 3. Yet South Africa has implicitly acknowledged the inadequacy of Article 3 and clearly, in relation to prisoners of war, has adopted a flexible ad hoc approach.

Had the revision of the humanitarian law of war adopted a purely objective basis and attempted to seek more effective regulation of a broader spectrum of conflicts to be determined according to a geo-military scale, it is quite likely that South Africa would have supported such revision. Regrettably, such a course has not been followed. The result, as far as the conflict situations in Southern Africa are concerned, will probably be a vacuum of humanitarian law. The political implications of the application of Protocol I are great, more than sufficient to deter South Africa from ever becoming a Party thereto while the present Government is in power, and more than sufficient to preclude South Africa's opponents from settling for anything less.

The result, it is feared, will be greater suffering in the ensuing conflict. The course of humanitarian law is now set but the warning contained in the following words may in time become to be regarded as grimly prophetic:

> "The future of the right to war and also of the laws of war, periodically challenged, is dependent on a natural law transcending political claims, which are increasingly multiplied and wild, and which ignore the individual obligations that are a necessary counterpart to the rights demanded. It is not enough

to acclaim and proclaim human rights to justify granting them without thought of requital. International law and order is here the necessary yardstick with which the claims for rights and the boundaries for such demands may be measured."(1)

(1) P de G de La Pradelle International Review of the Red Cross No 199 (October 1977) 402 at 406.