

HUMANITARIAN LAW AND INTERNAL ARMED CONFLICTS

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I. INTRODUCTION

It is a singular privilege for me to be able to take part in this symposium at the University of Georgia in honor of Professor Dean Rusk, a distinguished statesman, jurist, and academic.

The subject with which we are concerned here is one of considerable complexity, uncertainty, and importance. It is no less one of contemporary relevance. In the post-1945 period, internal armed conflicts within the territory of a single state have been frequent, with much loss of life and destruction. In a number of cases these conflicts have assumed large proportions and have been waged with ferocity, often with great cruelty. During this period we have seen the erosion of the colonial system, a process not always achieved by peaceful means. We have also witnessed ideological divisions within states which on occasion have been preceded by bitter internal armed struggles followed by counter-movements. Racial tensions within states have also made their contribution by way of "liberation struggles," whether as part of the struggle against colonialism or against racist regimes. To add to the complexity of these internal armed contentions, we have experienced the "mixed" internal conflicts wherein the armed forces of third states have participated either in support of the rebel elements or in support of governments seeking to quell rebellions. These conflicts in particular have often assumed major proportions, in both the scale of the fighting and the loss of life and destruction caused thereby.

This same period has been marked by the mass production of highly sophisticated and destructive conventional weapons, readily available to government forces and to rebels alike. Ideological divisions across the world have meant that governments of third states sympathetic to the rebel cause have contributed generous supplies of this sophisticated weaponry and provided training of rebel per-

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sonnel in the use of it. These "mixed" armed conflicts, often on the scale of major civil wars, have had many of the external features of interstate armed conflicts. Sometimes the participation of the armed forces of third states has been covert, by the device of so-called "volunteers," as in the Korean conflict.

It is to such violent events that international law has to be applied if the Rule of Law in international affairs is to have any meaning. The Charter of the United Nations did not seek to provide legal principles to govern the resort to rebellion within a state. The events to which that paramount instrument of international law was directed were the international, interstate armed conflicts characterized by the Second World War of 1939 to 1945. The Charter embodied a very explicit prohibition of resort to armed force, or the threat of it, by one state or states against another state or states. It was primarily concerned with the events that had led to the six years of war that preceded it. This enabled the participation of third states in the post-1945 so-called "mixed" conflicts as a method of concealed aggression, normally for ideological purposes, and avoided the sharp impact of article 2(4) of the United Nations Charter. It may be said that the international law of our time has proved itself ill-prepared to deal with such "mixed" forms of internal armed conflicts.

It will also be apparent that the classical international law governing the conduct of government fighting forces and rebel elements in all forms of internal conflict was fragmentary and inadequate. In terms of conventional law, there was prior to 1950 no convention governing the conduct of government and dissident forces engaged in an internal conflict. In the absence of the recognition of belligerency accorded to rebel elements by third states or, more rarely, by the government of the state in which the rebellion arose, the customary law of war was not brought to bear. It was one of the conditions requisite for the according of such recognition of belligerency that the rebel elements observe the customary law of war. In many cases the physical capacity to observe the customary law of war on the part of rebel elements was not present. They lacked the capacity to attract recognition.

In the absence of such recognition of belligerency, which was conditional, *inter alia*, upon observance of the customary law of war by the rebels, the modus of conducting internal warfare was not subject to any restraints imposed by international law. This was the direct result of the principle of state sovereignty which lies at the center of the classical system of international law primarily

governing independent territorial states. Under that system, which is still with us in large part, a rebellion is not, as such, a violation of international law. Further, the question of how the government of a state quells a rebellion within its territory is a matter of the municipal law of the state concerned, *i.e.* a matter within its sovereignty. Those two principles are the points of departure from which the 19th and 20th century developments in international law have evolved in relation to internal armed conflicts.

II. HISTORICAL PERSPECTIVE

In the pre-Grotius era of international law, the law of arms, seen as part of the *jus gentium*, operated throughout the Holy Roman Empire. The absence of a society based upon the existence of sovereign, independent, territorial states precluded any juridical dichotomy between international and internal armed conflicts in our modern sense of those terms. In the Middle Ages, there were "open and public" wars to which the law of war applied, with a marked distinction between the legal position of the prince or ruler waging the "just war" and his opponent, who of necessity could be waging only an "unjust war." Such a public war admittedly required the "avowal" of a prince, although there might be some debate as to who was a prince for that purpose.

There were also "private wars," which were not wars at all, but private forays and raids, the scourge of an era in which there were many landless members of society trained for no other profession than that of arms. Such "private wars" were under the anathema of the Church. Above all, the legal rights which flowed from the law of arms did not inure to the benefit of the participants, *e.g.*, they had no right to take prisoners, to claim ransom, to take spoils, or to levy *appatis* (a form of taxation payable from the local civil population as the price of being left unmolested and undespoiled in their persons and their goods). In the case of forays by freebooters (*routiers*), there was always the risk, at least in the later Middle Ages, of being treated by their captors as brigands, murderers, and pillagers, and being summarily hanged on the spot when captured. In such a system of law and society, there was no place for a dichotomy known to the law between international and non-international conflicts. The modern state, with its armed forces, subjects, frontiers, and organization of government, did not exist.

With the breakup of the medieval system in the 16th century, a system of law had to be devised and given a theoretical sub-structure to regulate the conduct of the new sovereign, independent,

territorial states in relation to each other as part of the system of order required by the law of nature, if not by the law of God. Grotius and his immediate predecessors and successors furnished the new international society of states with such a system—the law of nations. In the century preceding his great work, *De Jure Belli ac Pacis*,¹ his own country, the United Provinces of the Netherlands, fought one of the greatest and earliest struggles for liberation against the rule of the Spanish Empire. It is curious that Grotius, with that background so close to him, was ambivalent about the right of a people to revolt against an oppressor.

In his own lifetime, Europe was absorbed in the great religious armed contest of the Thirty Years War, 1618-1648, a war fought, certainly in its later stages, with appalling ferocity. There was virtual disregard of the living needs of the civilian population to an extent that the peasants, after repeated plunderings by all belligerents, were reduced to cannibalism. This war was, in modern parlance, an international or interstate war. It was that experience that led Grotius to introduce his famous *Temperaments Belli* as an appendix to his work on the Law of War and Peace. Little attention is paid therein to the great armed struggle of the previous century in his own country, which led to the successful overthrow of Spanish rule. This is even more curious because Grotius was a sufficiently modern thinker to envisage all law as made for the benefit of man. This is seen in the humanitarian ideas displayed in his writing. Nevertheless, the desire for order, understandable in many ways, seems to have transcended his noble ideal of humanitarianism. In the final analysis, law derives from order, but law cannot establish order.

The classical law of war emerged from the older law of arms. In the post-Grotius era the law of war was essentially concerned with the conduct of belligerents in wars between states. Internal armed revolt was not the concern of international law; neither was it a violation of it. The corollary proposition was that the sovereignty of states, itself derived from international law, enabled the governments of states to quell such revolts in the manner determined by local municipal law.

By the late 18th century, writers, including Vattel in his work *The Law of Nations or the Principles of International Law*, published in 1756,² had asserted that the parties to a civil war were

¹ H. GROTIUS, *DE JURE BELLI AC PACIS* (1625).

² M. DE VATTEL, *LE DROIT DES GENS* (1758).

under an obligation to observe the customary law of war in relation to the adversary. Vattel's work had considerable influence. It preceded the two great revolutions of 1776 and 1789. As has been pointed out by Professor Albert de Lapradelle, "Grotius had written the international law of absolutism, Vattel has written the international law of political liberty." The more humane ideas of warfare, which were a symptom of 18th century rationalism, combined with the idea of individual liberty to initiate a limited intrusion of the international law of war into the conduct of rebellions and their repression by governments. This intrusion was on a modest scale, primarily in cases in which the scale and organization of the rebellion assumed the appearance of an interstate war, but without the confrontation of two states.

III. CUSTOMARY LAW AND CONVENTIONS

The fundamental principles determining the recognition of states and governments apply also to the recognition of insurgent belligerency, when one or more political entities that are not states are engaged in hostilities. Such recognition amounts to a declaration by the recognizing state that the hostilities in question are, in its determination, of such a quality and extent as to entitle the parties thereto to be treated as if they were belligerents in a war in the international law sense. Such recognition arises from the facts of a situation presented to the recognizing state. This principle is facilitated by the principle that such rebellions, evoking recognition of belligerency, are not violations of international law.

The conditions which came to be accepted by international law for such recognition of belligerency were four:

- (i) an armed conflict within the State concerned, of a general, as opposed to a local character;
- (ii) the insurgents must occupy and administer a substantial part of the State territory;
- (iii) they must conduct their hostilities in accordance with the law of war, through organized armed forces under a responsible command;
- (iv) circumstances exist that make it necessary for third States to make clear their attitude to those circumstances by a recognition of belligerency.

It follows that recognition granted by a third state when such conditions have been met constituted no international law wrong to the lawful government of the state in which such an armed rebellion occurs. These conditions find some support in the writers

upon the American Civil War, 1861-1865. Thus, Bernard, in his work *A Historical Account of the Neutrality of Great Britain During the American Civil War*, states:

It is generally expedient that the ordinary rules of war should extend, as far as possible, to civil wars. The restraints which they impose are here as wholesome, their influence in making war regular and humane and in confining its range are as useful These considerations appear to show not only that recognition may be conceded, but that it ought not to be withheld.³

A century earlier Vattel had provided a theoretical foundation for such ideas: "[W]hen a Nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect as a public war between two different nations."⁴

Such ideas were reflected in the decisions of the United States courts during the Civil War. It has, however, been pointed out that the general experience of civil struggles is that after an initial period of outraged authority and reprisal acts by the rebels, the parties to such a struggle tacitly accept and apply most of the rules of warfare that have gained general consent. This is the result of considerations of general convenience and the fear of reprisals. When the civil struggle had obtained the proportions and dimensions of an international war, there seemed no good ground for denying the application of the customary law of war, even on a transitory and contingent basis. One most important consequence was that governments felt compelled to treat captured rebels as prisoners of war and not as traitors awaiting trial who, upon conviction, faced the death penalty.

So far, the question of the observance of conventions governing civil wars does not seem to have arisen. The era of conventions relating to the law of war did not start until about 1856 with the Declaration of Paris, which governed limited aspects of warfare at sea.⁵ The first of the series of Geneva Conventions based upon humanitarian principles was concluded in 1864.⁶ It would be difficult

³ M. BERNARD, *A HISTORICAL ACCOUNT OF THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR* 115-16 (London 1870).

⁴ M. DE VATTEL, *THE LAW OF NATIONS* 427 (Chitty-Ingraham transl. 1883).

⁵ 1856 Paris Declaration Respecting Maritime Law, 15 Martens Nouveau Recueil, Series 1 at 791.

⁶ Geneva Convention of 1864, 18 Martens Nouveau Recueil, Series 1 at 607.

to claim that the first of the Geneva Conventions, dealing with the sick and wounded members of the armed forces in the field, reflected no more than the existing customary law of war. This matter becomes important in the 20th century with the increase in the number of rules of the law of war to be found in conventions. The borderline between tacit acceptance of usages and rules by the parties in a civil conflict and the sense of obligation to apply such rules is difficult to discern. The matter is not simplified by the perpetual flux between those rules in international conventions and customary rules reduced to conventional form.

IV. BELLIGERENT PRACTICE UNTIL 1950

No convention dealing with the law of war made any reference to conduct in internal armed conflicts until the four Geneva Conventions of 1949.⁷ Throughout the 19th century the observance of the customary law of war was seen as a pre-condition for recognizing the belligerency of the insurgents. Such recognition attended and was consequential upon the application and observance of the customary law of war by the rebels. More often than not this theoretical position did not prevail. If the internal armed struggle reached certain proportions and the insurgents attained a degree of organization and control compatible with the observance of the customary law of war, the parties tacitly applied that customary law if it were found that the other party was doing the same. The bases of compliance were convenience and humanity. The observance was reciprocal. If the insurgent forces treated the government forces when captured as prisoners of war according to the accepted usages of the day, the government authorities did likewise. In that event, there was no question of such captured rebel forces being held as criminals to be charged with treason. Similar considerations and practices prevailed in the treatment of the sick and wounded who fell into the hands of the adversary party. The reason is not difficult to find. Once the conditions prevailing in a civil war assume the proportions, organization, and scale of an inter-

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *done* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *done* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

state war, there was no reason why it should not be treated as such a war. Humanitarian considerations, convenience, and the interests of other states affected by the civil conflict reinforced the analogy. This idea was expressed in a judicial formula by the United States courts during the Civil War: "When the party [sic] in rebellion occupy and hold in a hostile manner certain portions of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*."⁸

It was a difficult matter to persuade governments in advance to accept international law obligations imposed by a convention in relation to rebel forces. At the time of the convention the rebel entity may not exist, and may for that matter never exist. It is difficult to find any legal entity to which such obligations may be owed or which may have belligerent rights except when the belligerency approximates two *de facto* states engaged in armed conflict. In that situation all the factors are persuasive of a tacit observance of the customary law of war by government forces and insurgents. Not least is the consideration that the rebels of today may be the lawful government of tomorrow. That situation also suits the convenience of third states in the application of prize law and the law of neutrality, particularly in relation to acts of maritime warfare, such as blockades and contraband control.

Possibly the most powerful single factor for the imposition of legal restraints upon the parties to a civil war during the 20th century has been the influence of the humanitarian movement through the active agency of the Red Cross organization, and especially through the International Committee of the Red Cross (I.C.R.C.). This latter body was created in Geneva after the battle of Solferino in 1859. The I.C.R.C. has been, and still is, concerned primarily with the relief of suffering in war and the better and more humane treatment of the victims of warfare who find themselves defenseless in the hands of the adversary. It was not likely to be impressed by the legal dichotomy between international (interstate) and internal armed conflicts so far as the imposition of norms of humanitarian conduct into warfare were concerned. On the contrary, the very nature of a civil internal conflict accentuated the need for maximum humanitarian restraint. Yet, there were for-

⁸ Prize Cases, 67 U.S. (2 Black) 635, 666-67 (1862).

midable difficulties to be overcome before the governments of states were willing to accept in advance, in a multilateral law making convention, binding obligations of restraint in quelling a rebellion which by its nature threatens the existence of the government of the state in question. Under the classical law of war, such an undertaking had been subject to the recognition of belligerency by the government, consequential upon the condition that the insurgents had the capacity to, and did in fact, observe the customary law of war. The tacit observance, without formal recognition of belligerency, was of necessity upon a reciprocal basis only. If at any time the rebel forces declined to treat humanely wounded members of the government forces, or to accord prisoner of war status upon captured members of such forces, then the like treatment or denial would be accorded to the members of the insurgent forces upon capture.

As early as 1912, in an International Red Cross conference in which governments of states that were parties to the Geneva Conventions of 1864 and 1906 took part, the I.C.R.C. sought to introduce a draft convention on the role of the Red Cross in armed rebellions into the agenda of the conference. The matter was not even discussed at that conference. However, a modest resolution enabling National Red Cross Societies, and in default, the I.C.R.C., to afford relief to the victims of internal conflicts was adopted at the Red Cross Conference of 1922. This resolution, though without any binding effect, enabled the I.C.R.C. to persuade the parties to the Spanish Civil War, 1936-1939, to accept to some extent the principles of the Geneva Conventions of 1864 and 1906, which provided for the protection and proper treatment of the sick and wounded members of the government and insurgent armed forces. A more substantial resolution was adopted at the International Red Cross Conference of 1938, devoted to "the role and activity of the Red Cross in time of civil war." Therein, the I.C.R.C. and the National Red Cross Societies were requested to endeavor to obtain:

- a) the application of the humanitarian principles . . . in the Geneva Conventions of 1929 (POW and Sick and Wounded), the Tenth Hague Convention of 1907 (Sick and Wounded in Maritime Warfare) . . . ;
- b) humane treatment for all political prisoners, their exchange, and as far as possible, their release;
- c) respect of the life and liberty of non-combatants;
- d) facilities for the transmission of news of a personal nature;
- e) effective measures for the protection of children.

This resolution enabled the I.C.R.C. at the end of the Second World War to start the long and difficult task of seeking to introduce some humanitarian provisions into the Geneva Conventions of 1949. This was the first time that express provisions relating to humanitarian conduct of the parties to a civil war were, after much debate, to find a place in an international multilateral law making convention. It is also pertinent to the history of this process that the movement for the establishment of regimes of human rights in the post-1945 era was of some assistance to the endeavors of the I.C.R.C. at this time. The United Nations Universal Declaration of Human Rights had been adopted, though not as a binding instrument of law, by the General Assembly in 1948. The Geneva Diplomatic Conference established the four Geneva Conventions of 1949 relating to the humane treatment of persons in time of war which came into force in 1950. These conventions now bind about 150 states.

From 1946, the Red Cross movement was working toward this innovation in international law as to internal conflicts. It is of interest to observe that certain of the proposals made within the Red Cross movement in the period 1946-1948 outran the position reached in the latest international law instrument on the subject of internal armed conflicts, namely, Protocol II Additional to the Geneva Conventions of 1949, adopted in 1977.^{*} It was not easy then to assess the full nature of the I.C.R.C. achievement in the Geneva Conventions of 1949, embodied, as it was, only in article 3 common to each of the four Geneva Conventions of 1949. Governments make and conclude conventions. They were being asked by the I.C.R.C. to accept binding legal obligations restraining their actions in seeking to repress an armed rebellion overtly aimed at their overthrow and supersession, or at secession. That entailed a major inroad upon the existing domain of state sovereignty. It also meant that the tacit acceptance of the principles of the customary law of war or the general principles of the Geneva (Sick and Wounded) Convention of 1864, and possibly, the two Geneva Conventions of 1929 would no longer suffice.

The Red Cross movement aimed high in humanitarian terms. A conference of National Red Cross Societies proposed in 1946 that each of the four Conventions have an opening article which provided: "In the case of armed conflict within the borders of a State

^{*} Protocol II Additional to the Geneva Conventions of 1949, *done* Dec. 12, 1977, — U.N.T.S. —, *reprinted in* 16 I.L.M. 1442 (1977).

(the Convention) shall also be applied by each of the adverse Parties, unless one of them announces expressly an intention to the contrary." The I.C.R.C. was supported to a limited extent by a subsequent conference of government experts. Eventually, at the International Red Cross Conference of 1948, the I.C.R.C. submitted the following draft:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion which may occur in one or more of the territories of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend upon the legal status of the Parties to the conflict and shall have no effect upon that status.

The second sentence of this draft marked the rejection of the requirement of any recognition of belligerency on the part of the lawful government. The former tacit acceptance of observance of the customary law of war was now outdistanced to the extent of the draft proposal. This proposal was to be expressed in a convention. It did not rely upon the conduct of the rebel elements. At the same time, and no less importantly, it precluded the rebel elements from asserting that they had received the benefit of recognition of belligerent status by the application of the Convention as between them and the lawful government. This text was accepted at the International Red Cross Conference at Stockholm in 1948 as the draft to be submitted to the Diplomatic Conference to be held at Geneva in August 1949, with one important deletion. The words "especially cases of civil war, colonial conflicts, or wars of religion" were deleted. This left the scope of the draft proposal much wider than in its original text and was, therefore, a more pronounced departure from the limited ambit of the classical law of war condition for a recognition of the belligerency of insurgents.

V. THE "COMMON ARTICLE 3" OF THE GENEVA CONVENTIONS OF 1949

This article provoked the longest single debate of any provision at the Diplomatic Conference of 1949. What was not foreseen by the redactors at the Conference was the number and intensity of the internal armed conflicts which were to be a feature of the post-1949 period. It became apparent fairly early in the debates that the governments were not prepared to accept the content of the draft article 3 with the deletion of the words above mentioned re-

lating to "civil war, colonial conflicts, or wars of religion." With that deletion, the scope of article 3 was virtually unlimited. Once the limitation was conferred solely by geographical location, much emphasis fell upon the formula "armed conflicts which are not of an international character." This lacked juridical precision and was open to much ambiguity of interpretation. As is so often the case with humanitarian law instruments, this is the outcome of the desire for maximum width for the play of the humanitarian norms, overriding the desire for that element of certainty which legal norms demand if they are to be effective. The value of the individual rules of restraint in conflict is lost if the scope provision lacks certainty. Moreover, if the scope of such a provision is limited to criteria close to those which had been the conditions for recognizing belligerency of insurgents under the classical law of war, then it is possible to embody in that provision a comparably large number of norms of restraint. If, however, the scope of such a provision allows it to apply to all exchanges of violence just above civil disturbances or political demonstrations, then, correspondingly, the number of the norms of restraint must of necessity be limited and simple in nature. Thus, in a "low level" exchange of violence, the elements opposed to the government may lack the capacity to achieve the observance of any restraints other than minimal and simple ones. If humanitarian considerations dominate to the exclusion of the capacity of the insurgents in terms of some degree of organization and capacity of control, then the proposed rules are divorced from reality.

A reversion to the classical criteria of recognition of belligerency as the necessary precondition for the application of the full Geneva Convention to the parties engaged in an internal armed conflict also failed to be adopted. Many formulas to define the scope of common article 3 were debated and rejected. The negotiating governments were not eager to incur legal obligations of detailed restraints in the quelling of undefined armed rebellions, even if such restraints were of undoubted humanitarian caliber. The scope of the article and the volume and nature of its content were manifestly related. In the end, after many failed formulas, a compromise was reached in which only the fundamental humanitarian restraints were found to be acceptable to governments, with the scope formula left vague. The method adopted was to try to make common article 3 a "microcosm" of the remainder of each Convention. This was a tall order. It required consensus as to what were the main humanitarian principles underlying many of the remain-

ing provisions in each Convention. These efforts of the Conference met with a certain measure of success. Attempts, however, to refine and give greater precision to the scope of the provision failed. The most that could be achieved was the positive geographical element in the definition "armed conflict . . . occurring in the territory of one of the High Contracting Parties," and the negative juridical element "not of an international character." It was a debate which produced the ancient dilemma between over-zealous protection of the individual and the placing of the state in peril from disintegration, discussed by Aristotle in the 4th century B.C.

Part of the difficulty is that a particular civil struggle within a state may move through many phases of expansion and diminution over a period of time. What may start as a small group of armed individuals may develop into the dimensions of a *de facto* organization engaged in a full scale civil war. How could such a situation be met? The answer was that the parties to the conflict could and should agree between themselves to apply the whole or part of the remainder of the Convention: "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." This is a useful provision, well adapted to the shifting scale and intensity of a civil conflict. The parties are placed under no legal obligation, but should they find it necessary or convenient for humanitarian or other reasons, they are free to conclude such agreements if the position and the consensus so demand and permit. The weakness of this provision is that the winning party may see no need to conclude such agreements. However, the opinion of the international community has to be taken into account, not least for the reason that successful rebellion will lead to the expectation of recognition of any succession attained or of the new government of the state concerned. It may also be said that, in a rebellion in which the scale and intensity attained renders the conclusion of agreements under common article 3 advisable, the outcome of victory or defeat is rarely certain. Accordingly, there may be great advantage gained by the government and rebel elements in concluding such agreements under common article 3 whereby the whole or part of each Convention may be brought into play. Although these instruments are essentially humanitarian, there may be other advantages of a less lofty nature for seeking to comply with them.

It is sometimes contended that the conclusion of such agreements under common article 3 will, in law, convert the armed con-

flict into one of an international character and thereby take it out of common article 3 altogether. Common article 2, controlling interstate armed conflicts, would appear to preclude such a result, at least for the purposes of the Conventions. Article 2, paragraph 3 states:

Although one of the Parties 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 relation to the said Power, if the latter accepts and applies the provisions thereof.

It is suggested that this provision has no application to insurgents, whether recognized as belligerents or not. The context dispels the contrary view, and the reciprocal basis of any obligation makes it undesirable.

Article 3 discarded recognition as the criterion for its applicability: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." Article 3 was probably the maximum that governments were prepared to accept in terms of humanitarian restraints when quelling a rebellion. The price of that acceptance was a vagueness in the scope formula. The above provision means that rebels remain rebels. What is not stated in the Conventions is the legal effect of the recognition of belligerency. Has the conflict then lost its "internal" character and ceased to be one "not of an international character"? Some writers have suggested that such recognition renders the Conventions applicable *in toto* under common article 2. Thus, Oppenheim states:

In so far as, in consequence of the recognition of the belligerency of the insurgents by the legitimate Government, the conflict has assumed an international complexion, the rules of the Geneva Conventions apply *in toto* if the legitimate Government is a party to them and if the recognised insurgents formally accept and apply the provisions of these Conventions. Failing this, the accepted customary rules of war apply in this as in other spheres.¹⁰

This may be a controversial proposition, not easy to accommodate with the content and context of common articles 2 and 3 of the Geneva Conventions. By these two articles, it may be argued that for the purpose of the full applicability of the Conventions, a scheme of distinction between international and non-international

¹⁰ 2 L. OPPENHEIM, INTERNATIONAL LAW 211-12 (H. Lauterpacht 6th ed. 1955).

armed conflicts is established. The learned editor of *Oppenheim* confines the proposition to a case of recognition of belligerency of the insurgents by the government of the state concerned being a party to the Conventions. Much will depend on the meaning to be given to the phrase "one of the Powers in conflict" in article 2. Clearly the recognized insurgent authority cannot be a "party to the . . . Convention" for the purposes of common article 2. Further, the scope formula of common article 3, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," must be taken as having excluded conflicts in which the legitimate government of the state concerned has accorded recognition to the insurgents. However, it must be admitted that the scope of article 3 is far from clear.

The rarity of recognition by the legitimate government may reduce the frequency of the invocation of the proposition under scrutiny. What can be said is that the many proposed formulas advanced in the preparatory transactions of the Diplomatic Conference of 1949 included the one advanced by the learned editor of *Oppenheim*, but that it, with a number of others, failed to secure adoption. On the basis of the classical law of war, such recognition would have meant that the customary law of war applied. The idea of applying the full contents of the Conventions as a result of such a recognition would have marked a distinct departure, even though from the humanitarian standpoint it might be a desirable novelty.

The root of the difficulty lies in the phrase "armed conflict not of an international character." Does it mean "international" by reference to the parties engaged in the armed conflict, or by reference to the legal consequences as to which rules of conduct are then brought to bear? Alternatively, are the whole of the provisions of the four Conventions less article 3 applicable, or only those rules that are contained in article 3? That matter was never resolved at the Diplomatic Conference. It would seem that the learned editor of *Oppenheim* was drawing his proposition from the text of articles 2 and 3, common to the four Geneva Conventions, and from the true juridical juxtaposition of them. That, it is suggested, is a matter of controversy which is not clarified by reference to the *travaux préparatoires*. If his proposition is to be extracted from the terms of common article 2, paragraph 3, then the humanitarian obligations that flow therefrom are reciprocal and not unilateral. The Conventions are not based upon reciprocity of obligation. One thing is reasonably clear and is not persuasive of

the proposition under scrutiny. The formula in common article 2, paragraph 3, "[a]lthough one of the Powers in conflict may not be a party to the . . . Convention . . .," is not apt for recognized insurgents. Even if they are recognized by the government to which they are opposed in conflict, they are not "parties to the Convention" and cannot become such. It is a contention of some validity that the purpose of article 2, paragraph 3, is to exclude the older idea that unless all states engaged in a conflict were parties to a Convention, that instrument did not apply to any of them engaged in the conflict. The purpose of article 2 was to block that older device, the *clausula si omnes* which had proved so debilitating to the application of the law of war in the days before humanitarian principles became paramount.

VI. THE CONTENT OF ARTICLE 3

This is the sole article in each of the four Conventions that deals exclusively with so-called "internal armed conflicts." It is the first provision in any convention on the law of war to do so. Apart from the difficulties attending its scope, other substantial juridical difficulties arise. The entities that are bound by the obligations specified in common article 3 are described as "each Party to the conflict." This appears to confer a limited persona on the government and its forces and upon the insurgent authority and its dissident forces, distinct from the individuals comprising them. Moreover, the rebel entity was normally not in existence on the dates on which the various states became parties to the Convention. Further, it is not known whether there will be, in the future, such a rebel faction. Certainly, a rebel faction, when it comes into existence, is not a party to any of the four Geneva Conventions of 1949. It is possible to advance the contention that the rebel faction enjoys that degree of persona adequate to bear the obligations imposed by article 3. This appears to have been the basis upon which recognized insurgent belligerents were considered to be bound by the customary law of war.

The content of article 3, reflecting the principles supporting the main humanitarian prescriptions in each of the four Conventions, demands a high degree of organization, administration, military command, and discipline for its observance. It is not open for rebel elements or the authority which purports to represent them to agree to or decline acceptance of such part of the obligations of article 3 as they find is within their capacity. The opening and controlling clause of article 3 makes this clear: "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” It therefore becomes critical, in arriving at the proper level of internal conflict required to bring article 3 into operation, to consider the nature and extent of the provisions that follow the opening clause. These are:

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

This is a wide humanitarian rule, sweeping up principles from the customary law of war, Hague Convention No. IV of 1907 on the Law of War on Land, the Geneva (Sick and Wounded) Convention, the Geneva (Maritime) Convention, the Prisoner of War Convention, and the Civilian Convention of 1949. It also embodies certain principles of non-discrimination derived from the then embryonic human rights regimes, and is, indeed, ahead of some of them. This provision may be called the general humanitarian rule of common article 3, and in terms of humanitarian restraint, it makes this article of fundamental importance. Accordingly, it becomes critical to ascertain whether or not a particular internal conflict falls within the scope of article 3.

Following this wide humanitarian prescription, there are a number of specific prohibitions which are considered to reflect the general principles of the four Conventions:

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 sentences without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Now this is a formidable set of humanitarian requirements. They assume a high degree of organization, discipline, and control by the

rebel faction wishing to come within the scope of article 3. It also affords a considerable opportunity for governments confronted with an armed rebellion to contend that the rebel faction does not and cannot meet the requirements of paragraph (d) above, for example. It may well be the case that the rebel authority is not in a position so to act. Nevertheless, it is a requirement placed upon it "as a minimum." The phrase "in all circumstances" in the preliminary clause cited above reinforces the stringent nature of the obligations imposed upon government and rebel elements alike under this article. It may be urged that "in all circumstances" in this context precludes any resort to reprisals in respect of any breach of the obligations imposed by article 3, although this contention may be controversial. Paragraph (d) above tends to increase the level and degree of organization of the insurgent movement almost to that of a recognized belligerent in a full scale civil war under the classical law of war. It makes manifest the intimate nexus between the scope and the content of article 3.

The other specific humanitarian prescription in article 3 embodies the principle underlying the original Geneva Sick and Wounded Convention of 1864: "The wounded and sick shall be collected and cared for." This is a brief formula and reflects the salient principles underlying the requirements of the Geneva Sick and Wounded Convention of 1949 applicable to interstate armed conflicts. This terseness in article 3 was deliberately framed in order to avoid imposing upon states a series of detailed obligations which they were prepared to accept in conflicts with other states, but not when seeking to quell an armed rebellion within the state territory.

The salient weakness of article 3 is the method of monitoring its implementation and securing its enforcement. Clearly, states, through their governments, were not prepared to accept the system of interposing a protecting power, a neutral state designated by one state belligerent and accepted by the adversary state, to look after the nationals and armed forces of the designating belligerent in the hands of the adversary. What is to be found in article 3? We find the ceiling of acceptance formulated in this clause: "An impartial humanitarian body, such as the I.C.R.C., may offer its services to the Parties to the conflict." This, it may be thought, is a frail device. Such offer may be refused if not by both, then by one or the other side engaged in the conflict. It may be asked—when is a government likely to allow even the I.C.R.C., admittedly an impartial and a humanitarian body, to enter the state territory to afford humanitarian services to rebel elements? It is true that on a num-

ber of occasions any I.C.R.C. presence has been denied by governments. In the early days after 1950, there was a tendency for governments to deny such I.C.R.C. offers on the grounds that it would be tantamount to recognition before the international community that it was confronted with an article 3 internal conflict. This can be avoided by an express declaration by the government made at the time of acceptance of an I.C.R.C. presence. Lately, this anxiety by governments has not been so apparent. On the other hand, it has been very rare that the National Red Cross or Red Crescent Society has been allowed to offer its relief and other humanitarian services to the government forces and to the rebel elements. Yet, on the majority of occasions the I.C.R.C. presence has been allowed in internal conflicts. Many lives have been saved and much suffering reduced as the direct result of an I.C.R.C. presence with medicaments and supplies of food.

The final clause of article 3 would appear to be the one upon which governments at the Diplomatic Conference of 1949 insisted as the price of acceptance of the presence of article 3 in the four Conventions. It sought to avoid the difficulties that had normally impeded any recognition of belligerency accorded to insurgents by the government or by third states. This clause, it will be recalled, provides: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This was a bold endeavor on the part of the redactors to sever the political nature of recognition from the humanitarian purposes of article 3. This clause means that article 3 operates quite separately from the accordance or denial of recognition of belligerency by the government or by third states to the insurgent elements. Does it mean in particular that rebels remain rebels, with all the municipal law consequences of that unenviable and criminal status if the rebellion should prove a failure? It would seem that in the absence of a general amnesty proclaimed by the government when it is the victor, such would be the strict legal result, although there may be many political and other reasons which may well render acting on that municipal law basis unwise if not dangerous. If the struggle is inconclusive, it may be possible for an armistice to be followed by some form of general political settlement between the government and the insurgents. A general amnesty might well find a place in such a settlement. It is normally one of the concomitants of an internal struggle that there is little intercourse of a pacific nature between the parties and little impetus to negotiate. Likewise, if the rebel faction becomes the government of the state in question,

there may be a vengeance taken. That vengeance might amount to a series of illegal acts, for example, by enactment of retroactive penal law. Such conduct is not likely to draw the benefit of recognition of the new government by third states. It must, however, be admitted that rebels may not find it persuasive to observe the obligations imposed by article 3 if the result is exposure to the full impact of the penal law of treason in the event of their defeat.

World opinion may, on occasion, have much impact upon the observance of humanitarian restraints in an internal armed conflict. The standards in article 3 may have some educational, if not cautionary, effects. All the world can see the standards and mark departures from them by governments, by rebels, or by both. Also, the presence and insistent persuasion of the I.C.R.C. is frequently not without its effect. Yet, it must be admitted that there is not only uncertainty about the scope of application of common article 3, but also an element of fragility in the very limited mechanisms for the implementation and enforcement of the fundamental humanitarian principles in the remainder of each Convention. The normal response to this debility is for humanitarian bodies to make claims that more than article 3 is applicable in internal conflicts, without regard to the poverty of machinery for monitoring application and for enforcement, within the terms of article 3 itself. This attitude does not enhance respect for the rule of humanitarian law in internal armed conflicts. Such considerations prompted the I.C.R.C., with the support of the United Nations General Assembly, to try to improve upon common article 3 at the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts held in Geneva from 1974-1977. This established two Protocols additional to the Geneva Conventions of 1949.¹¹ Originally framed for that Conference as working texts, the two Protocols preserved the dichotomy between international and non-international armed conflicts. Protocol I dealt with the former and Protocol II with the latter. As eventually established in the Final Act of the Conference, that neat dichotomy was partially eroded. It is, therefore, necessary to consider the scope of both Protocols.

¹¹ Protocol I Additional to the Geneva Conventions of 1949, *done* Dec. 12, 1977, — U.N.T.S. —, *reprinted in* 16 I.L.M. 1391 (1977); Protocol II, *supra* note 9.

VII. ADDITIONAL PROTOCOLS I AND II

It became apparent very early in the discussions at the Diplomatic Conference on the scope provision of Protocol I, which relates to international armed conflicts, that there was a strong movement to include "national liberation" armed struggles within its ambit. There was a further, but much weaker, movement to dissolve the traditional dichotomy built into the four Geneva Conventions of 1949 by common article 3, and to make one instrument serve all armed conflicts on the grounds that humanitarian principles, and to a lesser extent, human rights principles, are equally vital and properly applicable irrespective of their international or non-international character. The latter view failed, but the former movement secured a lodgement in article 1(4), reinforced by article 96(3) of Protocol I.

It is our purpose here to consider the effects of that insertion in Protocol I upon the scope of Protocol II. Article 1(4) of Protocol I as established in 1977 provides:

The situations referred to in (common article 2 of the Geneva Conventions of 1949) include armed conflicts in which people 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 U.N. and the Declaration of Principles of International Law concerning Friendly Relations . . . among States in accordance with the Charter of the U.N.

Now, Protocol I was not only additional to the Geneva Conventions of 1949, but also to section II of the Hague Regulations appended to Hague Convention No. IV of 1907 dealing with "Hostilities."¹² It was the express purpose of Protocol I to exploit the articles in section II in a humanitarian direction.

Protocol I, as established by the Final Act of the Conference, contained 102 articles, of which nine dealt with "Methods and Means of Warfare" while nineteen dealt with the "Protection of Civilians Against the Effects of Hostilities." The aim of certain governments was to include in Protocol II, which was a development of the law contained in common article 3 of the Geneva Conventions of 1949, as much as possible of the content of Protocol I, not least in regard to the conduct of hostilities in conflicts not of

¹² Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex § 2, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 539.

an international character. For the greater part of the Conference there was preoccupation with the "threshold" or level of internal conflicts with which Protocol II should seek to deal. It was realized that the "higher" that "threshold," the greater could be the similarity in the volume and content of the humanitarian norms in Protocol I that might properly find a place in Protocol II. Conversely, the "lower" the "threshold" of Protocol II, the more difficult it would be to make it bear the load of detailed and sophisticated humanitarian rules introduced into Protocol I, not least from the perspective of monitoring implementation and of enforcement.

At diplomatic conferences, the unexpected is normal. It was apparent that once "national liberation" struggles had found a critical place in Protocol I as international armed conflicts, there was a distinct falling off in the interest in, and enthusiasm for, Protocol II by the majority of states, particularly on the part of those which had secured the extension of the scope of Protocol I into what had traditionally been considered forms of conflict "not of an international character." Among some of that group of states there was evidence of hostility toward Protocol II, irrespective of the attitude toward its "threshold."

Protocol II received the full but brief attention of the Conference in its closing stages. It very nearly failed to be established. In a hurried, almost frenzied, effort to secure its survival by consensus, the Protocol suffered drastic reduction in volume of content. At the same time, the already heightened "threshold" was left undisturbed. The scope provision of Protocol II as established in the Final Act is:

(1) This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of . . . 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 organised 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.

The outcome of this formulation of scope may have added some

clarity to the application of the humanitarian rules contained in the Protocol, but at the price of rendering more numerous and complex the types of internal conflicts now known to the law.

We now consider "national liberation" struggles, as defined in Protocol I, article 1(4), as international armed conflicts insofar as the humanitarian law of war is concerned. Then we have the classical forms of civil war in which recognition of belligerency has been accorded to the rebel elements by the government of the state concerned or by third states. This category will bring down upon it the customary law of war, which includes the Hague Convention No. IV of 1907, and may possibly now include the Geneva Conventions of 1949, having regard to the fact that about 150 states are now parties to them. Also, we have Protocol II applicable to internal conflicts as defined in article 1 thereof. Therein the capacity criterion has been adopted. Further, we have common article 3 conflicts without any modification of the former application of that article. It would appear that, although this may be the strictly juridical position, article 3 will normally be overtaken in relation to the Protocol II type of internal conflicts, except to the extent that there are many norms in article 3 which cannot be found in Protocol II. Finally, we have those minor disturbances defined in article 1(2) of Protocol II which are shut off from all of the categories of internal armed conflicts. These disturbances will be governed by human rights regimes where applicable.

Different humanitarian law rules will apply in each of the different types of internal conflicts set out above. There seems to have been an augmentation of internal conflicts which overlap to some extent. In terms of humanitarianism, this may be a gain because of the cumulative increase of humanitarian norms. In terms of the simplicity of the juridical categories of armed conflicts, there seems to have been retrogression. Nothing was said in Protocol II about the "mixed" armed conflicts in which armed forces of third states participate on one side or the other in an otherwise internal conflict. Moreover, an examination of the humanitarian content of Protocol II as established displays a poverty compared with the content of Protocol I. On the other hand, there is a scope provision (article 1) in Protocol II comparable with a full scale classical civil war with recognition accorded to the rebels. This imbalance in scope and content is the outcome of the almost frantic endeavor to "save" Protocol II from being lost, and to attain a minimal analogy with the content of Protocol I.

Nevertheless, there has been a gain in the humanitarian content

of Protocol II. The instrument has now attracted about twenty-three ratifications or accessions. It had been considerably enriched by provisions for the benefit of civilian wounded and sick, on the analogy with Protocol I, and of the protection of medical and religious personnel. It has only five articles dealing with the protection from hostilities of civilians, civilian objects, cultural objects, and relief actions. These are a pale reflection of the contents of Protocol I. They are, however, an improvement upon the starkness of common article 3 of the Geneva Conventions. The provisions for supervision of implementation and for enforcement are noticeable by their absence, except that there is a modest provision, article 19, for wide dissemination of the instrument. It cannot be denied, however, that Protocol II, as established, is severely debilitated. States are not yet willing to obliterate the distinctions between internal and international armed conflicts insofar as the application of the law of armed conflicts is concerned. The inclusion of "national liberation" conflicts in Protocol I had a dissuasive influence upon the adoption of Protocol II, which was designed to echo the content of Protocol I. The certainty of application of Protocol II has been enhanced in some respects and blurred in others. The juridical nexus between the humanitarian law of internal armed conflicts and the regimes of human rights is still an uncharted area of law. The corresponding human rights rules in Protocol II are to be found mainly in Part II—"Humane Treatment," articles 4 to 6. This is an invaluable part of the instrument for setting standards in internal conflicts. Unfortunately, there is no method of supervised implementation or of enforcement to be found in the instrument. Reliance will have to be placed upon the persuasive powers of the I.C.R.C., when present, and meta-legal forces for those purposes.

VII. CONCLUSION

It is a gain that there is now an instrument of international law devoted exclusively to securing humane treatment for those engaged in an internal armed conflict within a state and for the civilians affected by such a conflict. The climate of international opinion is not yet such that the same instrument can govern both international and non-international armed conflicts, even in the area of humanitarian law confined to the treatment of war victims. Those parts of the Fourth Geneva (Civilians) Convention of 1949, and of the Hague Regulations of 1907 which deal with occupied territory, present difficulties in relation to internal armed conflicts.

It may be that the skein of humanitarian law now governing internal armed conflicts has a number of different strands, composed of the customary law of war, the general principles of the four Geneva Conventions of 1949, some borrowing by Protocol II from Protocol I, and fortified by norms of conduct borrowed from the various human rights regimes now extant. This is some progress, both in the volume and detail of substantive law. Even by making the maximum use of dissemination, devices to ensure implementation and enforcement are pitifully weak. The I.C.R.C., which was given a fragile stance under common article 3, is not mentioned in Protocol II. That stance would appear to be preserved together with common article 3 so as to enable the I.C.R.C. to offer its humanitarian services to the parties to a conflict governed by Protocol II.

International humanitarian law still lacks the strength necessary to restrain the savageries that are often the concomitant of internal armed struggles. The remedy lies with governments.

