

COPING WITH NON-INTERNATIONAL ARMED CONFLICTS: THE BORDERLINE BETWEEN NATIONAL AND INTERNATIONAL LAW*

*Bart De Schutter** and Christine Van De Wyngaert****

It has become almost commonplace to observe that in the decades following the Second World War non-international armed conflicts have become more numerous than interstate armed conflicts.¹ Of the armed conflicts which have occurred during this period, non-international wars accounted for approximately eighty percent of the victims.² Most of these internal conflicts have occurred in developing countries. They include not only colonial and post-colonial wars,³ but also the more traditional internal conflicts such as authority conflicts, minority conflicts, and wars of secession.⁴ Western countries have been confronted with these latter types of conflicts on a much smaller scale. However, they have

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**Rector, Vrije Universiteit Brussel, Belgium; Director, International Criminal Law Center.

***Senior Research Associate, National Fund of Scientific Research; Member of the Academic Board, International Criminal Law Center, Vrije Universiteit Brussel, Belgium.

¹ 2 G. SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 673 (1968). *But cf.* Veuthy, *Some Problems of Humanitarian Law in Non-International Conflicts and Guerilla Warfare*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 427 (1973).

² Forsythe, *Legal Management of International War: The 1977 Protocol on Non-International Armed Conflicts*, 1978 *AM. J. INT'L L.* 272 [hereinafter cited as Forsythe].

³ According to article 1(4) of the 1977 Protocol I Additional to the Geneva Conventions of 1949, these conflicts now have the status of *international armed conflicts*. The present authors, however, share the position of those who consider this characterization to be artificial. Although the conflicts referred to in article 1(4) are undoubtedly matters of international concern, they nevertheless bear most of the factual characteristics of internal wars. F. KALSHOVEN, *THE LAW OF WARFARE* 16 (1973). *See also* Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 1975 *HARV. INT'L L. J.* 1. *But cf.* 3 *ANNALS OF INT'L STUD.* 93 (1972).

⁴ Different classifications of internal wars have been suggested. *See* Veuthy, *supra* note 1, at 428; R. OGLESBY, *INTERNATIONAL WAR AND THE SEARCH FOR NORMATIVE ORDER* 124 (1971). *See also* Falk, *International Law and the United States' Role in the Vietnam War*, 75 *YALE L. J.* 1122 (1966).

been faced with the emergence of another "conflict" situation which some have characterized as a new form of warfare: terrorism.⁵ Although terrorism may be classified as a kind of "criminality,"⁶ some governments have used military or paramilitary machinery to combat terrorists.⁷ Another kind of conflict which has arisen in the post-World War II era is internal disturbances in Socialist countries that lead the governments of these countries to take exceptional measures.⁸

In all of these cases, incumbent governments have invariably considered the "conflict" to be an exclusively domestic matter and, therefore, outside the scope of international law. This position is in conformity with traditional international law which leaves the management of internal conflict to the exclusive jurisdiction of the national authorities of the state on whose territory it occurs. Accordingly, insurgents are traditionally dealt with according to the ordinary criminal law. Unlike soldiers belonging to foreign military forces, they owe allegiance and are liable to the country against which they have taken up arms. When captured, insurgents are treated as common criminals and are not entitled to Prisoner of War status under the Fourth 1949 Geneva Convention.⁹ Except where they could benefit from treatment as "political offenders," the punishment and penitentiary treatment of insurgents as common criminals will usually be much harsher than their treatment as military personnel.¹⁰ Some countries have issued extraordinary penal legislation which may apply to insurgents. An example is the anti-terrorist legislation issued in some Western European coun-

⁵ See generally B. JENKINS, *INTERNATIONAL TERRORISM: A NEW MODE OF CONFLICT* (1975). See also *High Technology Terrorism and Surrogate War: The Impact of New Technology on Low-level Violence*, THE RAND PAPER SERIES, No. P-5541 (1975). See also G. SCHAMIS, *WAR AND TERRORISM IN INTERNATIONAL AFFAIRS* (1980).

⁶ The "criminal" character of certain acts of terrorism has been debated at length, *inter alia* by reference to their qualification as acts of war or as political offenses under extradition law. For a discussion of the different arguments, see David, *Le Terrorisme en Droit International*, in *REFLEXION SUR LA DÉFINITION ET LA REPRESSION DU TERRORISME* 114 (1974). C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING BETWEEN THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* 154 (1980) [hereinafter cited as C. VAN DEN WIJNGAERT]. See also Ferencz, *When One Person's Terrorism is Another Person's Heroism*, 9 *HUM. RTS.* 39-43 (1981).

⁷ For example, the raids at Entebbe by Israeli commandos and at Mogadishu by the West-German paramilitary unit CGS 9.

⁸ A non-armed variant of internal conflicts in some Socialist countries is the opposition of the incumbent government to so-called dissidents.

⁹ 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.

¹⁰ See C. VAN DEN WIJNGAERT, *supra* note 6, at 29.

tries within the past few years.¹¹ Non-penal measures also may be used to neutralize internal political opponents.¹² In extreme cases, where a certain threshold of internal disorder is reached, the constitution may be suspended and martial law proclaimed.

While domestic law, in principle, governs the right of incumbent governments to defend themselves against insurgents, international law has increasingly tended to interfere with this kind of conflict management. Although theoretically the United Nations is primarily concerned with the prevention and peaceful settlement of international armed conflicts, it has shown a preoccupation with domestic conflicts as well. The idea that there should be a minimum standard of ethics in both national and international politics has led to an increased emphasis on two branches of international law: human rights and humanitarian law. Because of the Charter's emphasis on the necessity of respect for human rights to the preservation of international peace and security,¹³ human rights have ceased to be a matter of exclusive domestic concern.¹⁴ There has been "a growing awareness that even the archetypal 'internal affair' of the State, viz., the treatment of its own subjects, may under certain circumstances become a legitimate concern of the international community."¹⁵ Nevertheless, these ideas have been transformed into positive international law only to a very limited extent. While many governments have been willing to declare their support for the application of human rights principles to internal conflicts, the support has lagged when it came to further specifying those principles and laying them down in international instruments subject to signature and ratification. Consequently, a rather ambiguous situation has developed in which provisions in interna-

¹¹ France, Greece, the United Kingdom, Spain, and Italy are among the countries that have recently "sharpened up" their penal laws for dealing with terrorists. See C. VAN DEN WIJNGAERT, *supra* note 6. See also Bonifacio, *Limitation des Droits Individuels Dans la Lutte Contre le Terrorisme*, in Conseil de l'Europe, Conférence sur la Défense de la Démocratie Contre le Terrorisme en Europe: Tâches et Problèmes, AS/Pol. Coll/Terr. (32), at 4 (1980).

¹² These measures include the use of psychiatric treatment to compel the resocialization of political dissidents. Cf. Van Den Wijngaert, *Repressive Violence: A Legal Perspective*, in REPRESSION AND REPRESSIVE VIOLENCE 51 (1977); DeMeeus, *Psychiatrie Répressive et Séquestrations Arbitraires*, in LA PROPHYLAXIE DU TERRORISME ETUDES INTERNATIONALES DE PSYCHOSOCIOLOGIE CRIMINELLE 30 (1972).

¹³ U.N. CHARTER preamble.

¹⁴ 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 740 (H. Lauterpacht 7th ed. 1965).

¹⁵ Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 8 NETH. Y. B. INT'L L. 109 (1977).

tional human rights conventions or in humanitarian conventions ostensibly contain a number of fundamental protections for victims of non-international armed conflicts. However, in reality the protection granted is extremely restricted, either because the conditions for applying the rules are very severe or because there are exceptions to the rules which leave the power of the incumbent government to deal with domestic conflicts almost unaffected.¹⁶

Positive rules dealing with non-internal conflicts are laid down in human rights law and humanitarian law. The 1948 Universal Declaration of Human Rights,¹⁷ which now has the status of customary international law, has little practical value because of its lack of precision and the absence of an effective international enforcement system.¹⁸ The 1966 International Covenant on Civil and Political Rights,¹⁹ although it contains a number of precise rules which could be applicable in non-international armed conflicts, creates an enforcement mechanism;²⁰ nevertheless, it has the drawback that most of the rights contained in it can be suspended in time of public emergency threatening the life of the nation.²¹ Furthermore, the Covenant has only been ratified by a relatively small number of states,²² most of which have not yet recognized the Human Rights Committee's competence under article 41 of the Covenant nor the right of individual application contained in the Optional Protocol to the Covenant.²³ Nevertheless, the Covenant's

¹⁶ See *infra* text accompanying notes 19-21, 42-46.

¹⁷ G.A. Res. 217A, 3 U.N. GAOR Resolutions Part 1 at 71, U.N. Doc. A/810 (1948).

¹⁸ David, *Droits de l'Homme et Droit Humanitaire*, in *MÉLANGES FERDINAND DEHOUSSE* 175 (1979).

¹⁹ G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) [hereinafter cited as *Covenant on Civil and Political Rights*].

²⁰ See *id.* arts. 28-45 (establishing the Human Rights Committee). The main task of this committee is to control the application of the Covenant on Civil and Political Rights. It is composed of 18 persons elected by the states who have signed the Covenant. The Covenant itself does not provide for a right of individual application. This right was laid down in the Optional Protocol to the Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967). Individual applications can be lodged with the Human Rights Committee. However, it does not give its opinion with respect to possible violations of the Covenant, but only communicates its views to the state and the individual concerned. The right to individual application can only be enforced against states who have ratified the Optional Protocol. H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 41 (1972).

²¹ *Covenant on Civil and Political Rights*, *supra* note 19, art. 4.

²² As of June 1982, the International Covenant on Civil and Political Rights had been ratified or acceded to by 70 of the 157 members of the United Nations. 19 U.N. CHRON. June 1982, at 68.

²³ The following states have accepted the competence of the Human Rights Committee

importance is its emphasis on those inalienable rights from which no derogation may be made, not even in time of public emergency threatening the life of the nation. These inalienable rights are: the right to life,²⁴ the prohibition of torture and cruel, inhuman, or degrading treatment or punishment,²⁵ the prohibition of slavery,²⁶ the prohibition of imprisonment for inability to fulfill a contractual obligation,²⁷ the presumption of innocence,²⁸ the right to be recognized as a person before the law,²⁹ and the right to freedom of thought, conscience, and religion.³⁰ Unfortunately, the procedural minimum rights contained in article 14³¹ have not been included among the inalienable human rights.

The inalienable rights enumerated in the Covenant correspond to a certain extent to those which have been included in common article 3 of the four Geneva Conventions of 1949.³² Since these Conventions have been ratified by most of the member states of

under article 41: Austria, Canada, Denmark, Finland, Federal Republic of Germany, Iceland, Italy, the Netherlands, New Zealand, Norway, Senegal, Sri Lanka, Sweden, and the United Kingdom. The following states have ratified the Optional Protocol: Barbados, Canada, Central African Republic, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, Iceland, Italy, Jamaica, Madagascar, Mauritius, the Netherlands, Nicaragua, Norway, Panama, Peru, Saint Vincent and the Grenadines, Senegal, Suriname, Sweden, Trinidad and Tobago, Uruguay, Venezuela, and Zaire. *Id.* at 69.

²⁴ Covenant on Civil and Political Rights, *supra* note 19, art. 6.

²⁵ *Id.* art. 7.

²⁶ *Id.* art. 8(1)-(2).

²⁷ *Id.* art. 11.

²⁸ *Id.* art. 15.

²⁹ *Id.* art. 16.

³⁰ *Id.* art. 18.

³¹ *Id.* art. 14.

³² According to article 3, the following acts are and shall remain prohibited at any time and in any place whatsoever when committed against protected 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 people. 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 [hereinafter cited as Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the 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 [hereinafter cited as Geneva Convention II]; 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 [hereinafter cited as Geneva Convention III]; 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 [hereinafter cited as Geneva Convention IV].

the United Nations,³³ the "convention in miniature" contained in common article 3,³⁴ from the viewpoint of positive international law, is of much greater importance than the Covenant on Civil and Political Rights. The final redaction of common article 3, which was the most debated of all the articles considered by the conference,³⁵ is a considerably weakened version of the original proposal of the International Committee of the Red Cross (I.C.R.C.), which contemplated the full application of the four Conventions to non-international conflicts.³⁶ Nevertheless, the article as it stands is an enormous improvement. It has deprived incumbent governments of the possibility of sheltering certain criminal acts and practices under the veil of emergency domestic law. However, the effectiveness of common article 3 has been limited by the absence of precise guidelines for determining to which factual situations it applies. It refers to "non-international armed conflicts," but does not define a threshold for its application in those conflicts. These and other practical problems in applying common article 3 have been abundantly commented upon during the past three decades.³⁷

The 1977 Protocol II to the Geneva Conventions³⁸ was intended to reaffirm and further develop the principles enshrined in common article 3.³⁹ The frustration associated with the drafting of Protocol II is an indication of the waning enthusiasm for, and in the case of some states, outright opposition to it.⁴⁰ The "convention in miniature" of 1949, which was revolutionary at that time, would be even more revolutionary if drafted today. Many states which subscribed to it in 1949 would probably no longer be willing

³³ Of the 157 member states of the United Nations, 146 have ratified the four Geneva Conventions of 1949.

³⁴ See J. PICTET, COMMENTAIRE SUR LA CONVENTION DE GENÈVE POUR L'AMÉLIORATION DU SORT DES BLESSÉS ET DES MALADES DES FORCES ARMÉES EN CAMPAGNE 51 (1952) [hereinafter cited as J. PICTET].

³⁵ Gulbvandsen, *A Commentary on the Geneva Conventions of August 12, 1949*, in 1 M. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 368, 373 (1973).

³⁶ J. PICTET, *supra* note 34.

³⁷ For recent summaries of this discussion see Bothe, *Conflicts Armés, Internes et Droit International Humanitaire*, 1978 *REVUE GÉNÉRALE DE DROIT INT'L PUBLIC* 82 [hereinafter cited as Bothe]; Forsythe, *supra* note 2, at 45; Kalshoven, *supra* note 15, at 107; Recent Development, *Law of War—Geneva Convention Signatories Clarify Applicability of Laws of War in Internal Armed Conflict*, 8 *GA. J. INT'L & COMP. L.* 941 (1978) [hereinafter cited as Recent Development, *Geneva Convention Signatories*].

³⁸ Protocol II to the Geneva Conventions of 1949, Dec. 12, 1977, — U.N.T.S. —, reprinted in 16 *I.L.M.* 1442 (1977).

³⁹ *Id.* preamble.

⁴⁰ See Kalshoven, *supra* note 15, at 110; Bothe, *supra* note 37, at 101.

to accept it under present circumstances. Developing countries have lost their interest in Protocol II since anti-colonial and anti-racist wars have become accepted as international conflicts.⁴¹ They have turned the originally proposed text of the I.C.R.C. into "a document which, although moulded in the form of an international instrument complete with a ratification procedure and all its trappings, bears a far closer resemblance to a non-binding declaration of principles for non-international armed conflicts."⁴² The conditions of applicability of Protocol II are much more severe than those of common article 3 of the 1949 Conventions. The threshold for application is very high,⁴³ and internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature are excluded.⁴⁴ Although Protocol II does not modify the existing conditions of application for common article 3,⁴⁵ many governments at the 1977 Diplomatic Conference apparently read the conditions of application of Protocol II into common article 3.⁴⁶ If these conditions were read into common article 3, then Protocol II, although it contains several improvements vis-à-vis common article 3,⁴⁷ may well be a restriction rather than an improvement. The importance of Protocol II as an instrument of positive international law is likely to be very modest since many states have expressed a hesitation about its acceptance, and consequently, the rate of ratification has been low⁴⁸ (although this may be a premature conclusion in view of the fact that the Protocol is but five years old).

In the words of the Vatican, Protocol II may be termed a "gentlemen's embarrassment" rather than a gentlemen's agreement,⁴⁹ because of the sharp differences between the views of the various governments present at the Diplomatic Conference in Geneva, and

⁴¹ See Bothe, *supra* note 37, at 82; Bretton, *Remarques Générales sur les Travaux de la Conférence de Genève sur la Réaffirmation et le Développement du Droit International Humanitaire Applicable Dans les Conflits Armés*, 23 ANNUAIRE FRANCAIS DROIT INTERNATIONAL 197, 208 (1977). See also E. ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 29 (1979).

⁴² Kalshoven, *supra* note 15, at 115.

⁴³ See Protocol II, *supra* note 38, art. 1(1).

⁴⁴ *Id.* art. 1(2).

⁴⁵ *Id.* art. 1(1).

⁴⁶ See Recent Development, *Geneva Convention Signatories*, *supra* note 29, at 949.

⁴⁷ For a summary see Bothe, *supra* note 37, at 100.

⁴⁸ The following states have ratified Protocol II: Bahamas, Bangladesh, Botswana, El Salvador, Ecuador, Finland, Gabon, Ghana, Jordan, Libya, Mauritania, Nigeria, Sweden, Yugoslavia, Norway, Republic of Korea, and Switzerland.

⁴⁹ See Forsythe, *supra* note 2, at 282.

the resulting impossibility of drafting general rules acceptable to all states. In light of this difficulty in reaching an agreement on acceptable rules, the question may be whether it is at all possible to legislate internationally in this matter, and, concomitantly, whether the formula of an international convention is the most appropriate technique for elaborating rules dealing with non-international armed conflicts. It has been suggested that a code for military action should be elaborated which will automatically apply whenever military or paramilitary forces are called out to maintain order, whether the conflict is national or international.⁵⁰ Forsythe's suggestion is consistent with the recent trend to draft codes of conduct in areas where compliance with norms is difficult to obtain through the traditional conduit of international conventions. Recent examples are the different codes of conduct for transnational enterprises⁵¹ and the code of conduct for law enforcement officials.⁵² Just as the Declaration on Friendly Relations is used as a guideline for state conduct, this kind of "soft law" could be used in those situations where the conventional rules do not succeed because of an insufficient number of ratifications or the lack of compliance mechanisms. Unlike the formula used for the management of non-international conflicts so far, namely international treaties, the rules laid down in a code of conduct would not be legally binding. The obligation would be moral rather than legal compliance, and this obligation would be sought through the so-called "mobilization of shame:" embarrassing the government concerned by turning public opinion against it.

In practice, however, codes of conduct would probably be no more effective in forcing compliance with recognized norms than legally binding international treaties. The advantage would be that states may be willing to accept norms established in a code of conduct that they would find difficult to adhere to were they established in a legally binding international treaty. The legal form of a code of conduct for internal conflicts could be crucial to its effectiveness. If it were drafted as an international convention, subject

⁵⁰ *Id.* at 295.

⁵¹ See Sanders, *The Implementation of International Codes of Conduct for Multinational Enterprises*, 28 NETH. INT'L L. REV. 318-22 (1981).

⁵² See Draft Code of Conduct for Law Enforcement Officials: Note by the Secretary General, 32 U.N. GAOR Annex 2 (Agenda Item 80), U.N. Doc. A/32/138 (1977). See also Code of Conduct for Law Enforcement Officials, 32 U.N. GAOR Annex 2 (Agenda Item 80), U.N. Doc. A/32/138 annex (1977). The Draft Code was adopted by G.A. Res. 34/169, 34 U.N. GAOR Supp. (No. 46) at 185, U.N. Doc. A/34/46 (1980).

to signature and ratification, then very likely it would be no more satisfactory than Protocol II. If it were incorporated in a resolution of the United Nations General Assembly, the substantive content of the code could potentially be farther reaching than the norms established in Protocol II. However, considering that the objections to the originally proposed draft Protocol II were made primarily by developing countries, which constitute the great majority of the voting members of the General Assembly, it is very likely that a General Assembly resolution adopting a code of conduct similar to such a proposed draft would meet with similar objections.

Looking at the substantive content of the existing rules for the protection of victims of non-international armed conflicts, *i.e.* the prohibition of acts which under the national laws of most states constitute the most serious crimes, the most appropriate enforcement for such rules appears to be penal enforcement. However, taking into account the specific nature of internal conflicts, it is very likely that only the actions of the insurgents will be punished, while similar actions of the incumbent government will remain un-sanctioned. The norms for the protection of victims of international conflict established in the 1949 Conventions and additional Protocols require contracting parties to either prosecute or extradite persons accused of grave breaches of those norms.⁵³ On the other hand, violations of common article 3⁵⁴ are not given the status of grave breaches, and therefore, the contracting parties are under no obligation to prosecute or extradite persons alleged to have committed violations of the norms protecting victims of non-international conflicts. However, the distinctions between grave breaches having the status of international crimes and article 3 violations having no such status are largely theoretical. Prosecutions and extraditions of persons accused of having committed grave breaches of the four 1949 Geneva Conventions have been very rare,⁵⁵ as have been prosecutions for article 3 violations committed by the incumbent government.⁵⁶ In view of the apparent reluctance

⁵³ These grave breaches are defined in Geneva Convention I, *supra* note 32, art. 50; Geneva Convention II, *supra* note 32, art. 51; Geneva Convention III, *supra* note 32, art. 131; and Geneva Convention IV, *supra* note 32, art. 147.

⁵⁴ These violations are largely identical to those defined as grave breaches in the four 1949 Geneva Conventions. *Id.*

⁵⁵ C. VAN DEN WIJNGAERT, *supra* note 6, at 146.

⁵⁶ See Roling, *Criminal Responsibility for Violations of the Law of War*, 12 *REVUE BELGE DE DROIT INTERNATIONAL* 8-26 (1976). Cf. Van Den Wijngaert & De Schutter, *Terrorisme Individuel et Terrorisme d'Etat: Une Différence d'Analyse?* in *ACTES DES XE JOURNÉES*

to invoke this so-called indirect enforcement scheme whereby national mechanisms are used to enforce international norms,⁵⁷ the question inevitably arises whether it would not be more desirable to have a direct international enforcement machinery for the investigation and prosecution of gross violations of humanitarian law.

Some experts have pleaded for the establishment of an international criminal court to handle this kind of case.⁵⁸ However, despite the numerous projects and scholarly proposals which have been advanced on the subject during the past few years,⁵⁹ it is highly improbable that such a court will be established under the present political circumstances. The international criminal court contemplated by General Assembly Resolution 260 (III) B to deal with the crimes listed in Resolution 260 (III) A, the Genocide Convention, was never created. Likewise, the penal court contemplated in the Apartheid Convention has yet to be established.⁶⁰

Since both the indirect and the direct enforcement systems are unlikely to operate effectively, it is necessary to put more emphasis on non-penal enforcement systems. Some experts have suggested that the problem be approached from the standpoint of human rights law, and that use be made of existing enforcement machineries, which on the supranational level would be the Human Rights Committee created by the International Covenant on Civil and Political Rights.⁶¹ It is, however, difficult to see how this Committee as it stands could have any control upon internal conflict management. First of all, the Committee can only consider applications of states, except in the very few instances where states

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⁵⁷ For an analysis of the different enforcement systems in international criminal law see M. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 1-37 (1980) [hereinafter cited as M. BASSIOUNI].

⁵⁸ McBride, *The Inter-Relationship Between Humanitarian Laws and the Law of Human Rights* in *PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON HUMANITARIAN LAW* 90 (1970); Robertson, *Human Rights as the Basis of International Humanitarian Law* in *PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON HUMANITARIAN LAW* 71 (1970) [hereinafter cited as Robertson].

⁵⁹ One of the noteworthy efforts was that of the International Association of Penal Law (I.A.P.L.), which promulgated a Draft International Criminal Code in which the creation of an international criminal court is contemplated. The draft was prepared by the I.A.P.L. secretary general, M. Bassiouni. See M. BASSIOUNI, *supra* note 57.

⁶⁰ A concrete proposal for an international criminal court under the Apartheid Convention was made by Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 *HOFSTRA L. REV.* 525-92 (1981).

⁶¹ Robertson, *supra* note 58, at 69-70.

have accepted the right of individual application under the Optional Protocol.⁶² The experience with the European human rights system,⁶³ which is similar to the International Covenant on Civil and Political Rights, has been that application by states are made very rarely, and even then, more for political than humanitarian considerations.⁶⁴ Furthermore, the possibility of condemning a state for violations of inalienable human rights does not exist under the International Covenant. One final obstacle to the use of the enforcement mechanism of the International Covenant is that the great majority of states have not accepted the competence of the Human Rights Committee.⁶⁵

A more feasible proposal is suggested in the Declaration of San Remo: "[A]t the very least, observance of the rules governing the exercise of the rights of a protecting power (should) be improved so as to allow injured parties direct access to an international authority, such as that represented by a United Nations High Commissioner for Human Rights"⁶⁶ Admittedly, the task of such a High Commissioner for Humanitarian Law would be far more delicate than that of his colleague for Refugees. However, the emphasis of the High Commissioner would be more on preventing violations than on suppressing them or stigmatizing governments. The High Commissioner, through his presence in the place where the conflict occurs, might ensure stricter compliance with the rules, and thus minimize the harm inflicted on each side. By gathering information and reporting to political bodies, local and international, he might help the behavior of the parties. In fact, the role of this High Commissioner when dealing with armed conflicts would

⁶² See *supra* notes 20 and 23.

⁶³ This system was established by the European Convention on Human Rights, which also provides for the possibility of inter-state applications. See generally A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1977).

⁶⁴ David, *supra* note 18, at 179. David submits, with respect to interstate applications under the European Convention on Human Rights, that except for the applications lodged against Greece by Denmark, Norway, Sweden, and the Netherlands beginning in 1967, all other applications by states had strong political overtones and were incidental to a political conflict between the states concerned. For example, the applications of Greece against the United Kingdom in 1956-57 were linked to the problem of Cyprus; Ireland's application against the United Kingdom in 1972 was linked to the Northern Irish conflict; likewise, the application by Cyprus against Turkey in 1974-1975 was linked to the problem of the Turkish intervention.

⁶⁵ See *supra* note 23.

⁶⁶ PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON HUMANITARIAN LAW 19(3) (1970). Cf. De Schutter, *De Rol van de V.N. in Humanitaire Interventies*, in 1 *MISCELLANEA GANSHOF VAN DER MEERSCH* 450 (1972).

largely correspond to the role presently undertaken by the International Committee of the Red Cross (I.C.R.C.) and other humanitarian organizations. The difference would be that the High Commissioner, because of his omnipresence through the channel of his local representatives, would be able to affect the behavior of the parties in an early stage, before the conflict escalates to the level at which states may otherwise be inclined to accept the assistance of the I.C.R.C. Nevertheless, the question remains whether states would be any less averse to a United Nations High Commissioner than they presently are to the I.C.R.C.,⁶⁷ which has a specific relief role and does not accept any involvement in the political sphere of the conflict, even though it sometimes expresses "discrete indignation."

The survey made above may appear to be a rather pessimistic one. The existing rules that tend to "humanize" non-international armed conflicts are indeed few in number and small in scope. In this respect, governments have shown a "selective humanitarianism";⁶⁸ their willingness to accept rules restricting their power to strike the enemy is limited to international conflicts and to colonial and post-colonial conflicts. Non-international conflicts have remained within the realm of domestic law. International penal enforcement of the rules in question is non-existent, and non-penal enforcement is still in an embryonic stage.

Nevertheless, these observations do not necessarily lead to an overly pessimistic conclusion. As one author has observed, it is very important to maintain a historical perspective on the growth and development of human rights and humanitarian law.⁶⁹ The few rules that we have today were inconceivable several decades ago, and the very fact that they exist has made domestic conflict management, yesterday's taboo, into a subject matter of current international critique, consideration, and concern.

⁶⁷ For a survey of the different positions of incumbent governments and insurgents with respect to the assistance of the I.C.R.C. in internal conflicts during the past two decades, see M. VEUTHY, *GUÉRILLA ET DROIT HUMANITAIRE* 49 (1977).

⁶⁸ Forsythe, *supra* note 2, at 279-80.

⁶⁹ *Id.* at 295.