

PROBLEMS WITH THE APPLICATION OF NORMS GOVERNING INTERSTATE ARMED CONFLICT TO NON-INTERNATIONAL ARMED CONFLICT

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I will undertake the task of trying to fill some gaps in our understanding of international norms limiting the behavior of parties to non-international armed conflict.

I. DISTINCTION BETWEEN RULES GOVERNING INTERNATIONAL AND INTERNAL ARMED CONFLICT

Let me begin by searching for some concrete distinctions between the international norms governing interstate armed conflict and those governing non-international armed conflict.

Colonel Draper is quite right when he states that sovereignty is the factor that limits both the development and the application of normative restraints on violence and cruelty in civil wars and insurgencies. Sovereignty is, however, a very abstract concept that flows easily off the tongues of delegates objecting to restrictions on how their governments elect to suppress rebellion. Let me reveal the concrete objections that governments of newer third world states have to applying international armed conflict norms to internal conflict situations as expressed in the coffee bars of Geneva after a learned dissertation on sovereignty (and its infringement) made in open committee session. This is an explanation of one of the problems that really concerns them:

In *international* armed conflicts, P.W. (prisoner of war) status flows from the so-called combatants' privilege, which simply means that the members of the armed forces of a party to the conflict enjoy immunity from the criminal jurisdiction of the adversary for their warlike acts, but do not enjoy immunity from war crimes. In other words, the combatants' privilege is a license

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to kill, maim, or kidnap enemy combatants, destroy military objectives, and even cause unavoidable collateral civilian casualties.

My government, as you know, presides over a new and unstable state. It is plagued with ideological and ethnic rivalries, aided and abetted by external states bent on destabilizing our infant democracy. Do you really think that we would concur in any treaty that would grant immunity from our treason laws to our domestic enemies, and by doing so grant them a license to attack the government's security personnel and property, subject only to honorable internment as prisoners of war for the duration of the conflict? Application of a combatants' privilege and P.W. status in internal armed conflict encourages rebellion by reducing the personal risk of "the rebels."

Whenever the representative of a stable western state, not bothered by any incipient separatist movement (for example Norway), would respond that there is no incentive for rebels to conform to the norms protecting civilians if they will be punished for treason even if they respect these norms, the third world delegate might say:

My government knows that needlessly attacking *innocent* civilians tends to strengthen dissident movements and we will take strong measures against such misbehaviour by our armed forces. But to prescribe an international norm prohibiting attacks against civilians and civilian objects implicitly suggests that it is permitted to attack security personnel and objects. In our country, at least, killing a policeman is, and must remain, a serious offense. This is why we are reluctant to accept the Protocol II you have proposed. We will restrain excessive use of force by our security personnel under domestic law in the exercise of our sovereignty.

This imaginary dialogue represents a composite of remarks made informally over the years of the 1974-1977 Diplomatic Conference. It serves to explain why the efforts of humanitarians to prescribe the fundamental principles of the law of war as treaty rules governing non-international armed conflict were unacceptable to third world (and some other) governments. Remarkably, some rules governing the protection of civilians and other victims of war were formulated. However, without the combatants' privilege and prisoner of war status, there is very little incentive for insurgents to comply with them other than the realization that atrocities are politically and militarily counterproductive.

When an insurgency blossoms into a civil war, the government

may feel compelled to apply the laws applicable to international armed conflict because of the impracticability of prosecuting and executing all of the insurgents. Furthermore, since war, whether civil or international, is never viewed as a permanent condition, compliance with the laws and customs of war facilitates the eventual restoration of peace and helps to heal the wounds of the nation. The application of the laws of war might also be motivated by an expectation of reciprocity or a fear of retaliation in kind, especially if the rebels hold a substantial number of government prisoners.

I need not dwell on the Lieber Code of 1863,¹ which Colonel Draper explained. However, he did not mention that the last nine articles of the Lieber Code deal with insurgencies, rebellions and civil wars. The essence of these nine articles is stated very succinctly in article 3 common to the 1949 Geneva Conventions: application of the normative rules does not change the legal status of the parties to the conflict.²

Lieber was not quite as terse as the modern draftsmen of multi-lateral treaties. His statement of the rule included its underlying rationale:

Treating captured rebels as prisoners of war, . . . or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgement of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war towards rebels imply an engagement with them extending beyond the limits of these rules.³

He made it clear in article 152 that when humanity induces the application of the rules of regular warfare to rebels, neutrals have no right to make such action the ground for recognizing the rebels

¹ F. LIEBER, *General Order No. 100—Adjutant-General's Office, Instructions for the Government of Armies of the United States in the Field*, in 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 245-74 (1880).

² 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 1949 Geneva Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

³ F. LIEBER, *supra* note 1, art. 153, at 273.

as an independent power.⁴ He also observed that in the final analysis "it is victory in the field that . . . settles the future relations between the contending parties."⁵ This proposition was stated succinctly in the sixteenth century by Sir John Harrington who observed: "Treason doth never prosper, what's the reason? For if it prosper, none dare call it treason."⁶

II. LEGAL REGIMES APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICT

I would now like to outline the legal regimes applicable at various stages of internal armed conflict. There are four separate but overlapping regimes which can be classified according to the stage of conflict to which they are applicable.

1. In situations in which tensions and disturbances within the state fall short of actual armed conflict, domestic law and international human rights principles are applicable.

2. In situations severe enough to constitute an armed conflict, but falling short of being a civil war, article 3 common to the 1949 Geneva Conventions, domestic law, and international human rights principles are all applicable. However, since common article 3 does not define "armed conflict," the determination of the threshold for the application of common article 3 is left to the government of the affected state.

3. A third stage of conflict is high intensity civil war in which the rebels have organized armed groups under a responsible command, and they have exercised control over a part of the national territory sufficient to enable them to carry out sustained and concerted military operations, and therefore sufficient to implement Protocol II.⁷ In such situations, 1977 Protocol II is applicable in addition to the norms applicable in situation number 2 above. Despite the high threshold, which approaches the threshold for the application of the nineteenth century doctrine of recognized belligerency, there is no requirement for granting prisoner of war status.

4. In select struggles for self-determination, articles 1(4) and 96(3) of Protocol I⁸ operate to make most of the rules governing

⁴ *Id.* art. 152, at 273.

⁵ *Id.* art. 153, at 273.

⁶ 4 J. HARRINGTON, *EPIGRAMS: OF TREASON*, epigram 259 (1612).

⁷ Protocol II to the 1949 Geneva Conventions, Dec. 12, 1977, art. 1, para. 1, — U.N.T.S. —, reprinted in 16 I.L.M. 1442, 1443 (1977).

⁸ Protocol I to the 1949 Geneva Conventions, Dec. 12, 1977, arts. 1(4), 96(3), — U.N.T.S. —, reprinted in 16 I.L.M. 1391, 1397, 1431 (1977).

international armed conflict applicable. The parties to a conflict may also agree, expressly or impliedly, to make the rules of international armed conflict applicable.

III. INTERPLAY OF HUMAN RIGHTS LAW AND HUMANITARIAN INTERNATIONAL LAW APPLICABLE IN INTERNAL ARMED CONFLICTS

As I have indicated, human rights law is basic, and no matter which of the regimes of humanitarian law may be applied to a non-international armed conflict, human rights law continues to be applicable. Thus, human rights law and humanitarian law operate concurrently, complementing and reinforcing each other.

A. Derogations

The International Covenant on Civil and Political Rights⁹ and each of the regional human rights conventions,¹⁰ however, permit substantial derogations from human rights and humanitarian laws in times of public emergency threatening the life of the nation. Nevertheless, derogation is permitted only if the following conditions are met:

- a. the emergency must be officially proclaimed;
- b. the derogation must be strictly required by the exigencies of the situation;
- c. the emergency measures must not involve discrimination based on race, color, sex, language, religion or social origin; and
- d. the measures must not be inconsistent with other obligations under international law.

Among the normative rules subject to such derogation are the fair trial guarantees of article 14 of the Covenant on Civil and Political Rights,¹¹ article 6 of the European Convention, and article 8 of the American Convention.

On the other hand, the norms of article 3 common to the 1949 Geneva Conventions and those of 1977 Protocol II are not subject to derogation. Indeed, they were formulated to be applied in armed

⁹ G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967).

¹⁰ See, e.g., American Convention on Human Rights, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23 doc. 21, rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970); European Convention for the Protection of Fundamental Rights and Freedoms, *done* Nov. 4, 1950, European T.S. No. 5.

¹¹ 1949 Geneva Conventions, *supra* note 2, art. 3.

conflict—obviously a situation of grave public emergency which threatens the life of the nation. With respect to procedural due process, article 3 prohibits “the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Therefore, for the 151 nations bound by common article 3, their right to derogate from some of the judicial guarantees of the human rights treaties is inconsistent with their non-derogable obligation under article 3. But, as Colonel Draper pointed out, common article 3 is only a statement of general principles. It does not spell out categorically what judicial guarantees are deemed indispensable by all the peoples of the West, the communist countries, and the third world.

A solution to the conflict between the right to derogate and the non-derogable obligations of common article 3 is suggested by article 6 of Protocol II, which was adopted by the consensus of the western, communist, and third world states represented at the 1974-1977 Diplomatic Conference. Article 6 provides a respectable catalogue of what these indispensable guarantees are, including an independent and impartial tribunal, a continuing opportunity to exercise all necessary rights and means of defense, notice of charges, conviction only on the basis of individual penal responsibility, protection against *ex post facto* legislation, presumption of innocence, and the privilege against compulsory self-incrimination. I doubt that there were many military lawyers present when the human rights treaties were drafted, but military lawyers were represented on most delegations at the 1949 and 1977 diplomatic conferences on the Law of Armed Conflict and they did not seem to think that there was any reason to dispense with fair trial standards, even in the heat of a civil war.

Presently, only twenty states are bound by Protocol II, and it may be a long time before it attains the same universal acceptance as common article 3. Article 6 of Protocol II serves as an authoritative declaration of the judicial guarantees deemed indispensable by civilized peoples. Therefore, derogations from fair trial guarantees under the human rights instruments are effectively precluded by common article 3 as interpreted by article 6 of Protocol II, and as a result, the parallel norms of the human rights treaties are strengthened and reinforced.

B. *Enforcement Measures Under Human Rights Instruments*

There remains for consideration the question of how human

rights law, in turn, reinforces humanitarian law.

In contrast to the provisions of the 1949 Geneva Conventions and Protocol I, which are applicable in international armed conflict, common article 3 and Protocol II have extremely weak implementation provisions. In international armed conflicts, the measures for implementation include apparently mandatory provisions for supervision of the application of provisions by a protecting power or an impartial humanitarian organization such as the International Committee of the Red Cross (I.C.R.C.), state responsibility for breaches, and individual responsibility under a system of universal jurisdiction for persons accused of grave breaches. Parties to the Geneva Conventions are obliged to prosecute before their own courts persons allegedly responsible for grave breaches regardless of their nationality or to extradite them to another party which has made out a *prima facie* case.

None of these provisions are applicable to the enforcement of norms for non-international armed conflict. The only provision on implementation in common article 3 is a provision permitting the I.C.R.C. to offer its service to the parties to the conflict, but the parties are under no obligation to accept such an offer.¹² The only implementing provision of Protocol II is article 19 which provides simply: "This Protocol shall be disseminated as widely as possible."

To the extent that the norms of common article 3 and Protocol II parallel the norms of the human rights conventions, the implementing provisions of the conventions can be used to enforce the norms of common article 3 and Protocol II. The implementing provisions of the conventions are rather cumbersome and consist primarily of establishing systems for complaining to human rights commissions and litigating in regional human rights courts. Under the European Convention, complaints are considered by the Commission only pursuant to reference by a member state. On the other hand, the American Convention permits complaints to be filed by individuals who have exhausted their domestic remedies and by non-governmental organizations with preferred standing. The Commission has binding jurisdiction to investigate and report on such complaints. I have said that these procedures are cumber-

¹² The mere fact that common article 3 puts rebels on the same footing as the government with respect to such offers has made governments extremely reluctant to allow the I.C.R.C. access to captives under the article. The I.C.R.C. has been more successful in gaining access to visit political detainees without any claim of legal authority or obligation.

some. To the individual captive in a dungeon they are almost insurmountable. It is difficult to envision a helpless detainee in a civil war situation invoking these procedures without outside help. They do, however, afford a forum for adjudicating violations of human rights whenever an organization like Amnesty International or a concerned government can marshal sufficient evidence for a complaint. As a practical matter, a visit by an I.C.R.C. delegate who interviews the prisoner in private and whose report is made discreetly to the authorities of the government is more likely to help correct abusive practices.

IV. TRANSNATIONAL ENFORCEMENT OF NORMS PROHIBITING THE TAKING OF HOSTAGES

The 1979 International Convention Against the Taking of Hostages¹³ (Hostage Convention) provides a means for international enforcement of the prohibition against the taking of hostages. Under the Geneva Conventions and the 1977 Protocols, the norms against the taking of hostages are applicable in virtually all international and non-international armed conflicts. However, a grave breach of the norms occurs only when the victim is a "protected" civilian in the power of a party to an international conflict other than the one of which he is a national. The Geneva Convention system imposes an obligation to prosecute or extradite persons allegedly responsible for grave breaches since such breaches are considered universal and extraditable crimes. By virtue of article 12 of the Hostage Convention, the strong obligation to prosecute or extradite is somewhat elliptically made applicable to any hostage taking prohibited under the Geneva Conventions or its protocols whenever the obligations to prosecute and to extradite under these treaties are not applicable. Where the obligation to prosecute or extradite exists under the Geneva Convention system, the Hostage Convention is not applicable. Thus, the two regimes complement each other and cover almost every hostage taking situation. This model could be used in other multilateral treaties designed to deter and punish acts of individual and state terrorism where present enforcement procedures are inadequate.

¹³ G.A. Res. 34/14b, 34 U.N. GAOR C.6 —, U.N. Doc. A/L.6/34/L.23/Add.1 (1979), *reprinted in* 18 I.L.M. 1456 (1979) (U.S. Senate consent completed, but not yet in effect).

V. TRANSNATIONAL PRACTICE RELATIVE TO EXTRADITION AND ASYLUM

I would like to conclude this presentation by returning to the discussion of the combatants' privilege with which I began.

Because common article 3 of the 1949 Geneva Conventions is the only article of the Conventions relating to non-international armed conflicts, none of the provisions of the Conventions relating to enforcement, including the prosecute or extradite provisions, are applicable to the norms of article 3. It follows that the only bases for extradition under United States law for offenses violative of article 3 are the various bilateral extradition treaties relevant to common crimes. However, these treaties are subject to the political offenses exception, which was invented in 1840 for the purpose of shielding from extradition the participants in the liberal and nationalistic revolutions which occurred in mid-nineteenth century Europe and the Americas.

Although there is no mandatory combatants' privilege or prisoner of war status in internal armed conflicts within the scope of any nation's municipal law, a qualified combatants' privilege has been recognized by third states in matters relating to asylum and extradition. The dichotomy between the state of municipal law and transnational practice in this regard was vividly expressed by Sir James Stephen in his explanation of the British Extradition Act of 1870:

[I]f a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, . . . by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.¹⁴

This reasoning was applied in the case of *In re Castioni*,¹⁵ which became the leading influence on the application of the political of-

¹⁴ J. STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 70-712 (1883).

¹⁵ 1 Q.B. 146, 167 (1891).

fenses exception in American courts.

The difficulty with the simple formula of the *Castioni* case is that it does not recognize that there are limitations on the conduct of internal armed conflict. Revolutionary or counter-revolutionary violence which transgresses these limitations should not be shielded by the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.

A 1927 French law comes much closer to the recognition of these limitations. It provided:

[Extradition is not granted] when the crime or offense has a political character or when it is clear (*resulted*) from the circumstances that the extradition is requested for a political end.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance . . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.¹⁶

Similarly, article 33 of the 1967 Protocol Relating to the Status of Refugees,¹⁷ which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, does not apply to persons against whom there is significant evidence of commission of a war crime or a serious non-political crime.¹⁸

In view of the practice of states in applying the political offenses exception to normal combat activities in a non-international armed conflict occurring in another country, we must be careful when drafting legislation intended to bar the use of the political offense exception by international terrorists so that it does not exclude the participant of a non-international armed conflict whose conduct has not transgressed the norms established by international conventions to which the United States is a party. I am afraid that

¹⁶ Law of March 10, 1927, tit. 1, art. 5, para. 2, quoted in Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1249 (1962) (footnote omitted).

¹⁷ 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

¹⁸ *Id.* arts. 2(F), 33.

current legislative proposals now pending in Congress have failed to make this distinction.

