APPLICATION OF THE LAW OF WAR TO INTERNAL CONFLICTS

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INTRODUCTION

The idea that the law of war should govern internal conflict may well be an idea whose time has come. The serious student of this subject, the oldest and until recently the most highly codified branch of international law, soon discerns a familiar pattern in its development. Many of the rules embodied in the present law of war first flowed from the pens of scholarly advocates.¹ Next, these rules were included in draft treaties which never came into force and were then incorporated into formal international agreements.² Once implanted in positive law, the germinal ideas grew in scope and detail as nations supplanted the initial agreements with successive conventions.³ The notion, that parties to an internal conflict should respect the law of war has a similar lineage: long advocated by scholars, included in draft instruments and finally incorporated in Article 3 of the 1949 Geneva Convention.⁴

Though no one denies the importance of this “convention in miniature,” which, by its own language, applies to “armed conflicts not of an international nature,”⁵ all recognize its inadequacies. At the urging

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¹The scholar and diplomat Hugo Grotius has been recognized as the “father of international law” because his treatise ON THE RIGHTS OF WAR AND PEACE so profoundly influenced its development. Even today article 38 of the Statute of the International Court of Justice advises members of the Court to look to “the teachings of the most highly qualified publicists . . . as a subsidiary means for the determination of rules of law.” The polemicist and humanitarian Henri Dunant stimulated the whole codification movement in the last half of the 18th century with his A Memory of Solferino. Cf. G. DRAPER, THE RED CROSS CONVENTIONS OF 1949, 2-3 (1958).

²The first attempt to regulate treatment of prisoners of war through an international convention, for example, was made at Brussels in 1874. Articles 23 through 34 established a regime for their capture, internment, and treatment. Cf. A. HIGGINS, THE HAGUE PEACE CONFERENCE 273 (1909). The Brussels Declaration, though never adopted as a convention, did establish principles that found expression in later agreements such as the Hague Regulations of 1907 and the Geneva Conventions of 1929 and 1949.

³A good illustration is the treatment of sick and wounded. The first Geneva Convention of 1864 dealt solely with the care of the sick and wounded in ten brief articles. Today there are two Geneva Conventions for the protection of the sick and wounded, and they contain over 125 separate articles.


⁵Jean Pictet, the most distinguished authority on the Geneva Conventions, considers article 3
of both the International Committee of the Red Cross\(^4\) and the United Nations Secretariat,\(^7\) the world’s governments have decided to draft new and more detailed international rules for the regulation of internal conflict. In 1971, the first Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in Geneva. [In May, 1972 the International Committee of the Red Cross submitted a second protocol to extend the protection of the Geneva Conventions to captured guerillas and other combatants in civil wars.]

Before the next convention individual governments are reevaluating their stands and preparing position papers for the arduous debates ahead. One can easily identify the major substantive issues which will divide the delegates. First, should the body of rules deduced from the application of law of war principles to the problems of international conflict also govern internal conflicts? Or, alternatively, do the problems characteristic of internal conflict differ so markedly from those common to international conflicts that the application of the same principles will nevertheless yield different rules? Second, should those rules already proven inadequate in the context of international conflict be revised if applied to internal conflicts? Beyond these macro-questions are the many micro-questions of substantive law. The purpose of this article is to set out and analyze the competing claims to apply or not to apply the law of war to internal conflict.

I. THE CLAIM TO CONDUCT HOSTILITIES UNRESTRAINED BY THE RULES APPLICABLE TO INTERNATIONAL CONFLICT

As Professor Tom Farer has pointed out, "The international legal rules governing combat operations . . . have traditionally been held to apply only to international armed conflict."\(^8\) Even article 3,\(^9\) the only

\(\text{\textsuperscript{4}}\) See generally Int’l Comm. Red Cross, Applicability of Humanitarian Principles in Case of Internal Disturbances (1955); Int’l Comm. Red Cross, Aid to Victims of Internal Disturbances (1962).

\(\text{\textsuperscript{7}}\) See generally Int’l Comm. Red Cross, Applicability of Humanitarian Principles in Case of Internal Disturbances (1955); Int’l Comm. Red Cross, Aid to Victims of Internal Disturbances (1962).

\(\text{\textsuperscript{8}}\) Farer, Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict," 71 Colum. L. Rev. 37, 40 (1971).

portion of the law of war universally recognized as applicable to internal conflicts, does not, it is often asserted, incorporate the Law of The Hague. The assertion is not, it should be noted, that the language of article 3 is so general as to be meaningless. However, that proposition might be argued with equal or even greater justification. The belief that article 3 does not incorporate any of the Hague rules is premised on the view that its purpose differs from that underlying the Law of The Hague. The only explicit provision in article 3 is its statement of purpose. The protection of noncombatants, which is widely under-


"It appears to us that the fundamental defect of art. 3 . . . lies in the lack of balance between the principle figuring or heading 1 and the enumeration as examples of particular violations under subheadings a) to d." Schlogel, Civil War, [1970] INT'L REV. OF THE RED CROSS 123, 132-3.

The law of war is often broadly divided into two branches: The rules protecting noncombatants, often called the law of Geneva; and the rules regulating conduct of hostilities, often called the law of The Hague. The distinction is misleading for two reasons. The first is that documents signed at either The Hague or Geneva often contain provisions with respect to both the protection of noncombatants and the conduct of hostilities. Much of the early law on treatment of noncombatants, for example, was embodied in the 1907 Hague Regulations of War. Hague Convention Respecting the Laws and Customs of War on Land, effective Jan. 26, 1910, arts. 4-20, 36 Stat. 2277, 2296-301 (1911), T.S. No. 539. And the 1925 Geneva Gas Protocol, to take another example, would fall within the law of The Hague. Geneva Protocol, Oct. 2, 1924, II INTERNATIONAL LEGISLATION 1398 (M. Hudson ed. 1931). Secondly, and more fundamentally, the distinction is misleading to the extent that it implies that different purposes underly two categories. The purpose of the law of The Hague is not only to regulate or govern the conduct of tactical operations but rather to reduce human suffering and protect fundamental human rights by limiting operational excesses. Thus, its purpose is the same as that of the law of Geneva.


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

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

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

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

(b) taking of hostages;
stood to be the basic purpose of the Law of Geneva, is not so readily recognized as the animating spirit of the Hague rules. Scholars persist in characterizing the latter as "game rules," as the following passage illustrates:

The international law of war was primarily designed to govern a contest between two armed forces which carry on the hostilities in a more or less open fashion. Analogously, the rules of football were designed to govern a contest between two uniformed teams, clearly distinguishable from the spectators. How well would those rules work, however, if one team were uniformed and on the field, the other hid itself among the spectators, and the spectators wandered freely over the playing field?\(^4\)

Analogizing the laws of war to football rules enables the author to make his point effectively; unfortunately, he reinforces the misleading and confusing idea that the purpose of the Hague rules is other than protection of noncombatants. It is not.\(^5\) To the extent that the Hague rules are intended to protect noncombatants, they are, as limited by reasonable interpretation, incorporated into article 3.

Consider, for example, the following hypothetical. Government forces receive sniper fire from a small village. The village is suspected of rebel sympathies, and reliable intelligence sources report that a rebel unit has set up headquarters for its local operations in the village. The commander of the government forces calls in artillery fire on the village. A Red Cross medical unit is hit and several patients killed. Has the commander violated article 3? Article 25 of the Hague Regulation provides that the "bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited." Article 27

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

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

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

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

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

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


says that in any attack, nonmilitary targets such as schools, hospitals, churches, and museums should be spared. However, it should be noted that damage to such institutions and loss of innocent lives does not violate the laws of war so long as it is incident to a lawful attack upon a legitimate military target. While the rebel soldiers are not protected persons within the definition of article 3, the medical staff and patients, as noncombatants, are entitled to "humane treatment."

If protection of noncombatants is the underlying purpose for restricting bombardment, then the answer becomes first one of interpretation, and second one of fact. The interpretative question is one we shall analyze again and again: what constitutes "humane treatment"? The general requirement of humane treatment may be too slender a basis upon which to incorporate all the rules whose purpose is the protection of noncombatants, but we also find in article 3 the injunction that the "wounded and sick shall be collected and cared for." Like all the provisions in article 3, this, too, is very general. At a minimum, however, one could surely imply that medical establishments cannot be attacked and that hospital staff must be respected. Otherwise, it is difficult to see how "the wounded and sick" can be "collected and cared for." One may then conclude that the general requirements of humane treatment and care for the sick and wounded preclude indiscriminate bombardment in the circumstances outlined above. In short, this portion of the Hague rules is incorporated into article 3.

The second question is the factual one: did the attack violate the rules of bombardment? Was the artillery strike an excessive use of firepower? Was the Red Cross unit clearly marked? Was it located dangerously near a legitimate military target? It should not surprise lawyers that here, as elsewhere in the law, "the facts" are more important than the rule. One cannot determine whether the commander violated article 3 by shelling the village unless he knows "the facts." Rules are not unimportant, however, in analyzing specific claims to apply particular rules in the conduct of tactical military operations.

A. The Claim to Use Terror Tactics

Both established governments and rebels have, in past internal conflicts, claimed the right to use terror tactics. Parties to conflict, of course, piously condemn their opponent's resort to such "outrageous, shocking" acts while cloaking their own conduct in euphemisms which deceive only those who wish to be deceived. Whatever the label, terrorism is aptly defined as a "symbolic act designed to influence political
behavior by extranormal means, entailing the use or threat of violence.'

The guerrillas claim the right to use terror because in the early stages of a conflict it is their only effective weapon. Sabotage and political assassination, we are told, are "characteristically guerrilla tasks." The record justifies the assertion. The revolutionary movement may begin with the murder, beating, or kidnapping of selected government officials, employees, businessmen or landowners. Between 1956 and 1960, for example, the Viet Cong killed over 10,000 village officials in South Vietnam. If the government attempts "to steal the rebel's thunder" by extending medical and educational services to the previously neglected peasants, the rebels undermine the programs by kidnapping the doctors and teachers. In the earliest phases of the revolution the rebels use terror to expose the government's weakness, intimidate its would-be supporters, and dramatize injustice and inequities.

In the next phase of the initial operations, the rebels raid villages, attack small military posts, and ambush patrols. These actions have many objectives including the need for food supply. In Greece the rebels not only fed themselves with stolen foodstuffs but also embarrassed the government by aggravating already existing food shortages. Guerrillas also need weapons. One observer has calculated that the Castro forces bought or received only 15 percent of their weapons from abroad. They stole most of their weapons from army garrisons or captured them from defeated troops. Most importantly, guerrillas need victories. Numerically inferior, they rely upon ruses and stratagems to inflict militarily insignificant but politically embarrassing defeats upon government forces.

In the last phase of their initial operations, the rebels strike at communications facilities, power plants, and other similar installations. The Algerian rebels announced their revolution with a series of nighttime

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21Murray, supra note 19, at 69.
23Murray, supra note 19, at 69.
bombings. Thus launched, the rebels continued to practice their terrorist art throughout the Algerian conflict.

The guerrillas nevertheless understand that they cannot terrorize the entire population into supporting them and their cause. Mao insisted upon “rigid discipline and scrupulously correct behavior by fully mobile guerrilla troops in order to prevent their alienating the rural population. . . .”25 Halfway around the world and a decade later the other revolutionary hero of our age, Che Guevara, decried the use of terrorism because it is generally ineffective and indiscriminate in its results, since it often makes victims of innocent people. He nevertheless conceded that terrorism should be considered a valuable tactic when it is used to put to death some noted leader of the oppressing forces well-known for his cruelty, his efficiency in repression, or other quality that makes his elimination useful.26 Guevara saw the guerrilla as an ascetic social reformer who must always help the peasant.27

Consequently, the guerrillas claim only the right to use terror against “the active participants in the struggle for power,” and not against “the more or less passive bulk of the citizenry.”28 Consider, for example, the program of the Tupamaros, the urban guerrillas of Uruguay. They robbed a bank to expose a financial scandal. They kidnapped an executive of the national power and telephone monopoly to reveal corrupt rate-fixing.29 Each act had symbolic significance.

Government, in the few instances in which it is honest enough to admit its use of terror, does not so delimit its claims. French theorists, reflecting on their unhappy experience in Algeria, have concluded that terror is the essential ingredient in guerrilla wars and thus advocate its wide use. Colonel Trinquier bluntly declared:

We know that the sine qua non of victory in modern warfare is the

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21J. KRAFT, THE STRUGGLE FOR ALGERIA 69 (1961). The Algerian attacks have been described:
That night (November 1, 1954) armed bands struck in fifty different actions all across Algeria. Biskra was rocked by bomb explosions. In Batna the French army barracks was attacked and two sentries killed. Two bombs exploded in downtown Algeria. Arris was desieged. At Boutari the European-owned agricultural cooperative was destroyed. In the Tighanimine Gorge armed bands stopped a bus, hauled out a caid and two Europeans, and shot them on the spot. In the Kabylia two policemen were killed and a storage depot was burned to the ground. Near Oran two settler farms were burned, a motorist killed, a power plant attacked.

22Johnson, Civilian Loyalties and Guerrilla Conflict, 14 WORLD POL. 646, 655 (1962).

23E. GUEVARA, ON GUERRILLA WARFARE 17 (1961).

24Id. at 31.

25T. FARER, supra note 18, at 42.

unconditional support of a population. According to Mao Tse-tung, it is an essential to the combatant as water to the fish. Such support may be spontaneous, although that is quite rare and probably a temporary condition. If it doesn’t exist, it must be secured by every possible means, the most effective of which is terrorism.30

Professor Farer, who feels sympathetically toward guerrilla terrorism but quivers with moral indignation at the government variety, captures in a single sentence the unfortunate consequences of a government policy of indiscriminate terrorism: “It beaches the guerrilla fish by draining the sea.”31 Such broadscale use of terror seems almost genocidal, particularly when employed against ethnic groups such as the Kurds in Iraq or the Ibos in Nigeria.

Occasionally, governments claim rather more limited rights to resort to terror. In the later stages of a guerrilla war when rebels have succeeded in occupying and administering territory, the government itself may adopt a program of political assassination. A journalist described how such a program operated in Vietnam:

South Vietnamese government squads, generally operating in stealth at night, have begun a campaign of terror against Viet Cong officials in the Mekong River Delta.

Small teams of commandos, armed with exact intelligence and daggers, are moving into Viet Cong hamlets in critical provinces near Saigon, assassinating key Viet Cong leaders, and slipping away.

They are leaving calling cards on the bodies of their victims—an enormous white eye printed on a black slip of paper.32

The Applicable Law

Does present international law permit or in any way circumscribe the use of such terror tactics in internal conflicts? Article 3 only protects those persons taking no active part in the hostilities. It does not protect combatants. But who in the context of an internal guerrilla conflict is a combatant? The traditional idea that he must be in military uniform may be inadequate. Professor Farer has, for example, asked:

Why should the guerrilla be castigated for failing to distinguish between the commander of a district para-military force and the civilian official from whom he receives orders? Why should the Minister of the Interior ensconced in his office be legally immune, while some

31T. FARER, supra note 18, at 29.
32N.Y. Times, July 15, 1964, at 3, col. 3.
wretched platoon suffocating in the scorched bush is fair game? And why distinguish between the general, directing hostilities from a command helicopter, and the same man clipping roses in the garden of his villa?

Practice in World War II and after has already eroded the earlier customary rules which forbade political assassination in international conflict, and some see little reason to prohibit it in internal conflicts.

Professor Farer's examples suggest that all those officials with policy making powers can be considered legitimate assassination targets. At the same time, one need not limit assassination targets to those receiving government pay checks. The editor of a pro-government or pro-guerrilla newspaper, an influential private businessman, a prominent clergyman responsible for organizing rebel forces—all would seem to be legitimate targets under a broader test of combatancy.

Whether it is desirable to legitimize assassination, however, is debatable. While uniformed soldiers do not fight along fixed battle lines in a guerrilla war, they do still engage each other in fire fights—the paradigm circumstance in which the law permits one combatant to take the life of another. Assassination permits a combatant to kill another when that other poses no immediate threat to the slayer's life. Why an internal struggle for power should transform what is otherwise murder into a legitimate act of war, absent the conditions which normally justify killing in war, is not clear. Selective use of assassination does not make it any less reprehensible, and one may speculate that the guerrilla's infrequent use of the tactic reflects, if not their deference to the norms forbidding it, at least their recognition that reciprocal assassination by the government would escalate the conflict to undesirable levels of brutality. While assassination may be an effective guerrilla weapon, effectiveness has never been the sole test of legality. The tactic seems particularly indefensible when used to disrupt the political process which might otherwise produce some compromise settlement of the problems which bred the internal conflict.

Terror tactics are not limited to political assassination or kidnapping, however. Many terroristic acts inevitably injure those who even under some broader test of combatancy are noncombatants protected by article 3. The question is whether it protects them from terroristic acts. The answer must depend on whether the military benefit gained outweighs

\[\text{T. Farer, supra note 18, at 43.}\]
\[\text{Kelly, supra note 20 at 101.}\]
\[\text{Id.}\]
the harm inflicted upon innocent people. Che Guevara used an instructive illustration in his primer on guerrilla warfare:

If well conducted, sabotage is an effective weapon. But do not knock out industries and put people needlessly out of work without helping to achieve the revolution's goals. For example, stopping a soft-drink factory will not paralyze a whole sector of the oppressor's economy; blowing up an electric plant will.\(^{38}\)

The example not only reflects the balancing of interest suggested earlier, it also suggests that an appropriate balance can be struck by distinguishing, as the law of war has always done, between military and nonmilitary targets. Whether one can rely on a generalized rule rather than on a specific enumeration of permissible military targets or, alternatively, a listing of those targets which should be immune from attacks, is debatable; but however formulated, such a stricture should eliminate the bomb-in-the-marketplace kind of terrorism. In attacking legitimate targets, the guerrillas should minimize the destructive impact upon the innocent population. For example, they can strike a plant after hours when the work force is absent, or they can use small explosives which destroy the target without damaging surrounding buildings or homes.

There remain, of course, a wide range of legitimate activities often denominated terroristic. Ambushing a military convoy, blowing up a barracks, and robbing an arms depot are to war as dribbling, passing and shooting are to basketball. These are legitimate military targets. The legitimacy of certain other kinds of terror tactics, particularly bombing, is analyzed below.

B. To Use Chemical or Biological Weapons

During the Yemeni civil war, royalist forces charged that the Egyptians gassed their troops and napalmed loyal villages.\(^{37}\) The Egyptians denied the charge,\(^{38}\) and the facts remain disputed.\(^{39}\) Certainly neither side publicly claimed the right to use gas or any other chemical or biological weapons. The United States has, however, insisted that it has the right to use tear gases and herbicides and has acted upon that conviction in the Indo-China war.\(^{40}\) Though participants have seldom

\(^{36}\)E. Guevara, supra note 26, at 18.


\(^{38}\)Id.


\(^{40}\)Statement by President Nixon, Chemical and Biological Defense Policies and Programs, 61 DEP'T. STATE BULL. 541 (1969).
invoked the right in past internal conflicts, they may, acting on the Vietnamese precedent, claim it in the future. Chemical and biological agents range from the lethal to the nontoxic, and their legality is much debated.41

The Applicable Law

Article 3 does not explicitly limit the use of any weapon—conventional, chemical, or biological. It does, however, in addition to imposing the general requirement of humane treatment, forbid cruel treatment. One could plausibly equate “cruel treatment” with the infliction of “unnecessary suffering,” the standard found in article 22 of the Hague rules42 and the basis for outlawing almost all illegal weapons of war. But since article 3 only protects noncombatants i.e., “persons taking no active part in the hostilities,” it would not prohibit the commander from using chemical or biological weapons against combatants. This result obtains not because the use of such weapons does not constitute cruel treatment, but because combatants fall outside the protective ambit of the article. Article 3 simply does not require that government forces treat resisting rebels humanely.

However, chemical and biological weapons do affect the noncombatant population; therefore, their use may violate the article 3 charge to treat noncombatants humanely. The World Health Organization concluded that “[c]hemical and biological weapons pose a special threat to civilians” because their effects were “indiscriminate” and could lead to “significant unintended involvement of the civilian population within the target area and for considerable distances downwind.”43 The report emphasized the “uncertainty and unpredictability” of such weapons because of “complex and extremely variable meteorological, physiological, epidemiological, ecological and other factors.”44 If the effect of these weapons is uncontrollable, thereby endangering the noncombatant population, article 3 may prohibit their use—at least where the military

41See generally Baxter & Burgenthal, Legal Aspects of the Geneva Protocol of 1925, 64 A.J.I.L. 853 (1970). The twelve member Geneva Disarmament Conference has recently agreed on a draft text prohibiting the use of bacteriological weapons. The draft text may be found 65 DEPT STATE BULL. 508-10 (Nov. 1, 1971).
42It is almost impossible to determine what constitutes “unnecessary suffering,” and some have therefore argued that it imposes no effective restraints on the use of new weapons. Cf. J. Stone, Legal Controls of International Conflict 550-51 (1959).
43World Health Organization, Health Aspects of Chemical and Biological Weapons 10 (1970).
44Id. at 11.
unit has available for its use some less blind weapon with which it can eliminate or neutralize the enemy target.

The international law standard is clearer. The Geneva Protocol of 1925 forbids "the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices," as well as "the use of bacteriological methods of warfare." Every major state except the United States and Japan has ratified the Protocol. The President of the United States has submitted the Protocol to the Senate for its advice and consent and has publicly declared that the United States will respect the principles embodied therein. As Professor Baxter has pointed out.

The weight of opinion appears today to favor the view that customary international law prescribes the use of lethal chemical and biological weapons.

Does customary or conventional law likewise proscribe the use of nonlethal chemical and biological weapons? Though disputed, the consensus is that it does. Many scientists reject the military distinction between lethal and nonlethal agents, arguing that the effects of a chemical warfare agent depend as much on the way it is used as on its toxicological properties. A lethal agent if disseminated in small doses may cause only temporary incapacity. A nonlethal agent may kill or severely injure one exposed to an unexpectedly large concentration. Furthermore, some scholars argue that tear gas, for example, is usually used in conjunction with other, lethal weapons whose effectiveness it enhances. They add that the use of any kind of gas is repugnant to the conscience of mankind.

There is also a growing body of authoritative pronouncements which bar the use of all chemical and biological weapons. The International Committee of the Red Cross has long contended that the ban was absolute. The General Assembly also declared the use of chemical and biological agents "contrary to the general recognized rules of interna-

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43III INTERNATIONAL LEGISLATION 1670-72 (M. Hudson ed. 1931).
44Statement by President Nixon, supra note 40.
45Baxter & Burgenthal, supra note 41, at 853.
46WORLD HEALTH ORGANIZATION, supra note 43, at 12.
47Compare Meselson, Behind the Nixon Policy for Chemical and Biological Warfare, 26 BULL. OF ATOMIC SCIENTISTS 23, 31 (Jan. 1970) with New York Times, Sept. 29, 1969, at 11, col. 1. Much of the distaste for the use of tear gas in Vietnam stems from the critics' conviction that it is used to "flush out" suspected Viet Cong who are then machine gunned.
48International Conferences of the Red Cross have repeatedly adopted resolutions condemning the use of indiscriminate weapons, as the chart below indicates:
tional law” and the same sentiment is expressed in the new treaty on biological warfare.

C. To Employ Strategic Bombing

The incumbent government often enjoys an advantage in firepower. At various times the Iraqi, Cuban, Nigerian, and Pakistani governments have all struck against rebel factions from the air. Monopolizing the skies, they strafed and bombed villages and rural areas suspected of rebel sympathies. During the Vietnam war, the United States dropped more bombs on Southeast Asia than it dropped on Germany and Japan during World War II. Critics have questioned the wisdom of air strikes in internal conflicts, and the record proves that predominant air power

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Other claims are made to use firepower in particular ways, as in “free fire” zones. The concept of free fire zones is identified almost exclusively with American practices in Vietnam, however, and is not therefore universal enough to justify textual analysis. The term connotes a policy of authorizing troops to fire at anything and everything; and while that has never been the policy of the United States, it has been her soldiers’ occasional practice—as it has occasionally been the practice of soldiers in all conflicts—to shoot first and ask questions later. During the Vietnam War, allied forces designated specified strike zones within which troops enjoyed greater than usual freedom to fire. These specified strike zones were established in hostile areas which the government wanted to pacify. First, the South Vietnamese government and army would evacuate all innocent civilians. Second, they would certify that no one other than Viet Cong inhabited the area. Then allied forces operated under relaxed rules of engagement, which, while classified, can at least be said to have given the individual soldier and unit considerable discretion in firing.


does not insure victory; but few states with an air capability have foregone using it.

*The Applicable Law*

Just as article 3 does not explicitly forbid the use of chemical and biological weapons, it does not forbid the use of air power unless its impact is so indiscriminate as to endanger protected persons. Given the precision with which bombing raids can be conducted, it is difficult to see how the article 3 injunction to treat noncombatants humanely can be construed as an absolute ban against bombing. It may nevertheless make illegal particular raids which inflict great injury upon the civilian population without achieving commensurate military gains.

In internal conflicts examples of such indiscriminate bombing are numerous. Since Iraqi pilots were unfamiliar with the Soviet planes they flew, they area bombed; and while the government pounded Kurdish areas mercilessly, the available evidence indicates that the bombing failed to inflict heavy losses on the guerrillas. The Batista air force bombed rural areas indiscriminately. Critics allege the same is true of the American bombing policy in South Vietnam. One report asserts that 80 percent of bombing victims in Vietnam have been civilians. Another likens the Vietnamese countryside to a moonscape desolate and pocked with craters.

It is difficult to conclude, however, that bombing raids which inflict heavy losses on the civilian population are illegal under article 3, since they are arguably permissible under the relevant norms of international law applicable to international conflicts. In the first place, there are no codified rules of aerial warfare. The rules governing land bombardment provide some guidance when applied analogously, but they are inadequate, as they were drafted in 1907 before the air age began. In the second place, state practice has imposed few limits on bombing. The Germans launched indiscriminate V-2 rocket attacks against England.

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58T. TAYLOR, supra note 54.


The Americans firebombed Dresden and Tokyo and dropped atomic bombs on Nagasaki and Hiroshima. The lack of authoritative rules coupled with the record of state practice has led some scholars to conclude that international law imposes no restraints on bombing.82

In the Shimoda case the Japanese District Court rejected this argument and held that blind aerial bombardment was still illegal though it did not go so far as to label strategic area bombing illegal.83 Scholars remain divided on this point84 and are likely to remain so until the international community adopts a formal code regulating the use of air power in armed conflict.

D. To Commit Reprisals

In the Arab-Israeli conflict both sides have justified individual raids or air strikes as reprisals.65 Public officials in the United States have occasionally characterized particular Allied operations in Vietnam as reprisals.66 As internal conflicts degenerate into bloody wars, each side will likely seize upon some real or imagined excess by its opponent to justify its own excesses. Reprisal, an illegitimate act of warfare used in retaliation against a prior illegal act by the enemy for the purpose of forcing him to comply with the laws of war,67 is always the legal rationale. Although participants in internal conflicts remain free to use reprisals, their discretion is not unlimited.

The Applicable Law

Article 19 of the 1954 Hague Convention prohibits reprisals against cultural or artistic property in any armed conflict. Furthermore, article 3 explicitly forbids “the taking of hostages,” a frequent reprisal tactic in an earlier era. The question is whether the general protection afforded by article 3 to the noncombatant population insulates them from any other kind of reprisal. Pictet argues that the humane treatment requirement excludes reprisals against protected persons as individuals or as

members of a community. Mr. Kalshoven thinks the answer is less certain and therefore urges amending article 3 to prohibit all forms of reprisals. If article 3 prohibits all reprisals, as Pictet contends, it goes further than do the present rules of international law applicable to international conflicts. While they enumerate many specific prohibitions, they do permit reprisals against innocent persons outside the control of the reprising power. There is no control criterion included in article 3; but it would be anomalous if a single provision, thought to embody the minimum protections of the larger agreement, in fact extended greater protections than the parent instrument.

The unmistakable trend in international law is toward limiting the right of reprisal. Although the Belgian delegate to the 1874 Brussels Conference felt there was something "odious" about the principle of reprisal, the reporter of the 1899 Hague Peace Conference commented that the provision in article 50 prohibiting collective punishment had been drafted "without prejudice to the question of reprisal." Not until the 1929 Geneva Prisoner of War Convention did international law include an express prohibition of reprisals against prisoners. The 1949 Geneva Conventions expanded that prohibition. Now all persons and property protected by the four Conventions are also protected from reprisals.

International law also prohibits the use of particular weapons as reprisals. Many states which ratified the 1925 Geneva Protocol reserved the right to use the prohibited weapons if another party first used them.

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51Quoted in Kalshoven, supra note 69, at 185.

52Id. at 184.


It is difficult to imagine states agreeing to anything more than a no-first-use prohibition on such weapons. One must keep in mind, however, that such reservations do not entitle a state to use such weapons in retaliation for any infringement of the laws of war other than use of the proscribed weapon.\(^\text{75}\)

II. THE CLAIM TO INTERFERE WITH THE CIVILIAN POPULATION

More than a century ago Abraham Lincoln asked whether a government of necessity must be too strong for the liberties of its people or too weak to maintain its own existence. It was Mr. Lincoln who established the first modern precedent for suspending democratic guarantees during a civil war, and today free societies usually confer nearly dictatorial powers on their war leaders, confident that their Cincinnatus will vanquish the enemy, restore the sacrificed freedoms, and return to his plow. Emergency government is a normal response to either external or internal crises; and whatever its precise form, emergency government claims the right to intensify its regulation and supervision of the community. Whether such claims are legally permissible within the domestic constitutional framework of any given country is beyond the purview of this article.\(^\text{76}\) What is relevant is the compatibility of such claims with the applicable rules of international law.

A. To Relocate Citizens

Quite frequently, governments combating an internal guerrilla movement assert the right to relocate citizens in "fortified," "strategic," or "pacified" villages or hamlets. In Malaya the British uprooted hundreds of thousands of Chinese squatters living in remote jungle villages which the army and police could not protect and resettled them on new land within effective British control.\(^\text{77}\) They deeded land to these peasants, who henceforth lived in one of 600 new villages enclosed in barbed wire and lighted at night.\(^\text{78}\) The British thus severed the lifeline between the guerrillas and the civilian community while improving the living conditions of the poorest and most vulnerable portion of the population.\(^\text{79}\) One observer analogized the British effort to pest control: "to destroy

\(^{75}\) Kalshoven, supra note 69, at 188.

\(^{76}\) See generally C. Rossiter, Constitutional Dictatorship 77-129 (1948).

\(^{77}\) Linebarger, They Call 'em Bandits in Malaya, Modern Guerrilla Warfare 293, 296-7 (F. Osanka ed. 1962).


\(^{79}\) Id. at 304.
the enemy, [they are] breaking up the nesting places of the pests." 

In Cambodia the government resettled approximately 600,000 Khmers in rectangular, stockaded villages which the native population could defend. As in Malaya, the motive was the same: to snatch "a malleable and easily terrorized population from the enemy grasp." The result, again, was an improvement in the economic life of the relocated peasant. 

In Algeria, the French emulated the British practice, by moving nearly two million Moslems into fortified villages. One of the principal theoretical architects of French strategy commented upon its historical roots: "In effect, we are reestablishing the old system of medieval fortified villages, designed to protect the inhabitants from marauding bands." Undoubtedly, some villages came voluntarily to escape the rebels. Others were forced to protect themselves. The army, which operated this system of quadvillages, imagined itself building a new Algeria.

To salvage the old Algeria, however, the French intensified their supervision of the "pacified" population. In Algiers, for example, they issued identification cards and consistently checked Moslems. They also established the ilot system: one person in each family was responsible to a floor chief who was responsible to a building chief who was responsible to a block chief. Through this system the French administrator could and did reach into every Moslem home. A French military magazine described the mission: "The population must be cleaned up, assisted, helped, organized, administered."

The Portuguese in their African provinces, the Ethiopians, the Israelis in the occupied territories, the South Vietnamese and Americans in Vietnam have all used the same or similar techniques. While these relocation programs differ in scope and detail, they remain identical in the broad outlines. All of the civilians within a particular territory are removed from their homes and resettled in areas which the government can defend. The government extends medical, educational, and other social services to the villages while closely watching the native population. The educational program usually includes political indoctrination.

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[80]Linebarger, supra note 77 at 296.
[84]Id. at 107.
[85]Id. at 103.
The Applicable Law

Article 3 does not prohibit resettlement programs. Since all those involved would fall within the protective ambit of article 3, they are, of course, entitled to "be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth." Though some might argue that resettlement programs for specific groups such as the Moslems in Algeria, the Chinese in Malaya, or the blacks in Angola and Mozambique represent impermissible discriminations based on religion, color, and race, the government can reply that article 3 prohibits only adverse distinctions on those grounds. From the government's point of view, the resettlement program is in the best interests of the people relocated. Furthermore, the government could contend that so long as its motives were other than bias or prejudice against particular ethnic groups, it cannot be barred from taking legitimate steps to secure itself and its citizens simply because the burdens of defense fall more heavily on one group than another.

More specific guidelines for the operation of resettlement programs may be found in the international law applicable to international conflicts, particularly the law of belligerent occupation. Article 49 of the Geneva Civilian Convention is the key article. While prohibiting "[i]ndividual or mass forcible transfers," it does authorize the "total or

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*Article 49 of the Geneva Civilian Convention states:

Individual or mass forcible transfers; as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motives.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

partial evacuation of a given area if the security of the population or imperative military reasons so demand." The article admonishes the occupying power to transfer "[p]ersons thus evacuated . . . back to their homes as soon as hostilities in the area . . . cease, as the Vietnamese have done once Allied forces have pacified the area. During the evacuation and relocation, members of a family may not be separated. The government must also insure "satisfactory conditions of hygiene, health, safety, and nutrition." Most governments try to comply but few succeed. While some provisions of article 49 would make little sense in the context of an internal conflict in which both sides consider themselves citizens of the same country (secessionist wars excepted), article 49 sets out some standards which could be used to implement the article 3 requirement of humane treatment.

Other Civilian Convention articles raise disquieting questions about other aspects of relocation programs. Article 51 prohibits the occupying power from "compelling protected persons to serve in its armed or auxiliary forces." Furthermore, it forbids "pressure or propaganda which aims at securing voluntary enlistment." The Vietnamese "Chieu Hoi" program is a typical example of government efforts to reeducate disaffected citizens. If article 51 applied to internal conflicts, the "Chieu Hoi" program would be illegal. The French also infused a great deal of political indoctrination into the curriculum in the schools which they established in camps and villages.

Article 78 permits the occupying power to "subject [protected persons] to assigned residence or internment . . . for imperative reasons of security." The article specifies, however, that protected persons should have the right to appeal the decision and to periodical review if the decision is upheld. Few countries have established judicial procedures for the review of relocation decisions.

The Civilian Convention also contains over twenty separate articles on places of internment and the rights of internees. Many requirements parallel those found in the POW Convention. Generally, Chapter II insures that the internee is safely housed, well-fed and otherwise protected. If Chapter II applied to internal conflicts, few internment camps would measure up to its standards.

See generally article 55, which provides that "the Occupying Power has the duty of ensuring the food and medical supplies of the population. . . ." Id. art. 55, at 3552, 75 U.N.T.S. 322.


B. To Defoliate Farm and Forest Lands and Destroy Food Stores

In most third world countries the majority of the population live outside the cities. Rural and poor, they subsist on the land. The rebels rely upon the meager peasant food stores of the populace to sustain themselves. The thick jungle and tropical rain forests which flourish in many of these lands protect the guerrilla forces by providing shelter, concealing their movements, and preventing effective pursuit. In Malaya the jungle is so thick, for instance, that a man disappears from view six feet off the road.90 In Cyprus and in the Philippines the mountain forests have offered refuge to insurgent forces.91 In such circumstances, government forces have a clear incentive to cut off rebel food supplies and destroy their natural cover, as the English did during the Boer war.92

The Allied program in South Vietnam illustrates such an effort. Both the initial date of the Allied crop destruction mission and the extent of the acreage destroyed are disputed. Perhaps as early as 1962, and certainly no later than the spring of 1965, the Allies had launched a crop destruction program.93 A New York Times dispatch reported:

> Although the Vietcong control or at least contest 70 per cent of the land area of the nation, crop destruction missions are aimed only at relatively small areas of major military importance where the guerrillas grow their own food or where the population is willingly committed to their cause.94

A 1967 Japanese study concluded that Allied spraying had ruined more than 3.8 million acres of arable land.95 The United States dismissed such claims as propaganda. Nevertheless, it conceded destroying 20,000 acres, or one-third of one percent of the land cultivated. However large the acreage destroyed, the United States claimed that "great care has been taken to select areas in which most harm would be done to the Viet Cong and the least harm to the local population."96

Allied ground forces have also destroyed crops and killed livestock. The journalistic accounts of the war are replete with examples of such
destruction.\textsuperscript{97} One legal justification offered for the destruction was that the food was intended for or was being used by the Viet Cong.\textsuperscript{98} Frequently, however, Allied forces commandeered the rice supplies rather than destroy them.\textsuperscript{99}

Though effective defoliation posed greater problems than did crop destruction,\textsuperscript{100} the Allies persisted. They wished to strip off the forest cover above rebel supply routes and expose concentrations of guerrilla units.

\textit{The Applicable Law}

Article 3 does not explicitly forbid crop destruction or defoliation programs. Unless they produce inhumane side effects upon the protected population so great as to offset the legitimate military advantage gained, thereby such programs are legally permissible. In a Japanese study, critics of United States policies in Vietnam decried the cruel impact of crop destruction and defoliation programs on what they describe as the innocent civilian population. The chemicals used in crop spraying are toxic,\textsuperscript{101} and they can and sometimes do adversely affect men. The same Japanese study charged that the herbicides used in crop destruction programs have caused over 1000 peasant deaths.\textsuperscript{102} Others have attributed blindness and premature or stillborn births to exposure to the chemicals used.\textsuperscript{103} Realistically, defoliation seldom causes any such immediate effect because few people other than transient guerrillas inhabit the forested areas. It may nevertheless cause untoward ecological imbalances whose total effect is as yet unrealized. In addition, the chemicals do affect livestock and other animals.\textsuperscript{104}

Under the more detailed norms of the law of war applicable to international conflicts, defoliation and crop destruction would remain legiti-

\textsuperscript{97}Cf. J. Schell, \textit{The Military Half} (1968).
\textsuperscript{98}An American pilot is quoted as saying, "We bomb the paddies by day to deny food to the VC . . . as a matter of fact we destroy pretty much anything that might be useful" quoted in Mirsky, \textit{The Tombs of Ben Suc, Crimes of War}, 363, 367 (R. Falk, G. Kolko & R. Lifton eds. 1971).
\textsuperscript{100}S. Hersh, \textit{supra} note 93, at 153, quotes Secretary McNamara as telling Congress that "defoliation is still a rather primitive technique . . . . It depends for its effectiveness on the time of year, the type of foliage and on wind and other conditions in the area."
\textsuperscript{101}The level of toxicity to man is, however, low and the chemical dissolves in the soil quickly. It can nevertheless cause eye irritation and gastrointestinal upset.
\textsuperscript{102}S. Hersh, \textit{supra} note 93, at 152.
\textsuperscript{103}Id. at 157.
\textsuperscript{104}Id.
mate military tactics. Article 23(g) of the Hague Regulations simply formalizes the "balancing test" outlined above:

... [I]t is especially forbidden: ... (2) I to destroy or seize the enemy's property, unless such destruction be imperatively demanded by the necessities of war."\(^{105}\)

As one post-World War II war crimes judge lamented: "The rule is clear enough but the factual determination as to what constitutes military necessity is difficult."\(^{106}\) Some courts have lent a sympathetic ear to the plea of military necessity; others, a deaf one.\(^{107}\) In the Hostages Trial the court suggested that a retreating army could destroy public and private property "which would give aid and comfort to the enemy."\(^{108}\) The Allies in Vietnam have denied villages to the Viet Cong by destroying them. Former Secretary of the Navy, Paul Nitze's justification echoes the Court's judgment: "Where neither the United States nor Vietnamese forces can maintain continuous occupancy, it is necessary to destroy those facilities."\(^{109}\) The tribunal in the High Command case felt that "a great deal of latitude" should be given the commander who must decide whether to destroy enemy property. It too emphasized the importance of the factual determination:

What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature.\(^{110}\)

III. THE CLAIM TO TREAT CAPTURED PERSONNEL AS COMMON CRIMINALS OR TRAITORS RATHER THAN AS PRISONERS OF WAR

The rebel presently fights in a twilight zone between lawful combattancy and common criminality.\(^{111}\) Governments are loath to recognize the captured or surrendered rebel as a prisoner of war, particularly in the insurgent stage of the revolution. The Russian delegate to the 1912

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\(^{105}\) Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23 (g), 36 Stat. 2277, 2302 (1911), T.S. No. 539. Article 46 provides that private property must be respected, and subsequent articles whose provisions were repeated and expanded in the Civilian Convention delineate the rights of the Occupying Power vis à vis property owners. These and other articles dealing with property seem inappropriate in the context of internal conflict.

\(^{106}\) The German High Command Trial, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 93-94. (U.N. War Crimes Commission 1947).

\(^{107}\) Courts have been less sympathetic to the plea in nonproperty cases. E.g., The Peleus Trial, I LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 15-16. (U.N. War Crime Commission 1947).

\(^{108}\) The Hostages Trial, VIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 67-9 (1949).


\(^{110}\) The German High Command Trial, supra note 106, at 123-26.

International Conference of the Red Cross denounced the proposal to extend convention protections to participants in civil wars:

I consider, in addition, that the Red Cross Societies should have no duty towards insurgents or bands of revolutionaries whom the laws of my country regard as criminals.112

The guerrilla himself was initially regarded, even in international conflicts, as a violator of the law of war;113 and though the 1949 Geneva Conventions granted him legal status in certain limited circumstances, he remains an outcast.114

Indeed, a country's initial reaction to an insurgency is usually to decree martial rule, expand the reach of the criminal law, and increase the punishment for offenses endangering national security.115 In the Philippines, for example, the government suspended the right of habeas corpus for all those detained for the crimes of "sedition, insurrection, or rebellion" and for "all other crimes . . . committed . . . in furtherance . . . thereof."116 In Thailand the government conferred upon military courts the jurisdiction to try "offenses against the Sovereign . . . the security of the state . . . public peace and order."117 These examples demonstrate that states, far from recognizing rebels as legitimate combatants, will first pursue extraordinary criminal remedies against them.118

The record of state practice also demonstrates, however, that governments may eventually treat captured persons as prisoners of war. France finally abandoned its effort to prosecute the Algerian rebels as criminals. In March 1958, General Salan ordered that military prisoners be held in special camps rather than in prisons; and the International Committee of the Red Cross, which had been permitted to inspect the French prison and detention camps, "construed these actions to mean that the French government intended to accord to FLN militants treatment 'closely related' to that governing prisoners of war in international con-

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112Quoted in Schologel, supra note 11, at 125.
114Professor Farer refers to the guerrilla as the "stepchild of the laws of war" and characterizes him as "grudgingly recognized and poorly treated." T. FARER, supra note 8 at 36.
116Id. at 104.
117Id. at 105.
The Algerian rebels had said from the beginning that they treated captured French soldiers as prisoners of war. Though both factions in the Congo mistreated captured personnel; one student nevertheless concluded:

Most captives in the Congo civil war were detained under acceptable conditions and exchanged or released in the course of hostilities. The International Committee of the Red Cross visited prisons representing all factions during the crisis in an effort to insure that prisoners received treatment in accordance with the Geneva Convention.

The Applicable Law

This confusing pattern of state practice reflects the confused state of present law. Article 3 does not confer prisoner of war status upon anyone although it does charge the captor with the duty to treat a prisoner humanely. Even if the prisoner of war convention itself were applicable, many combatants in internal conflicts would not qualify as prisoners of war. Basically, article 4 of the POW Convention says that one is a prisoner of war if, one, he is a member of a national armed force or, two, if he is a member of a group that fulfills the following four conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

No guerrilla is likely to qualify for POW status under such conditions. While the guerrilla force will probably have a hierarchical command, its members are not likely to wear a “fixed distinctive sign recognizable at a distance”; nor will they always bear arms openly. Whether or not they obey the laws of war seems an irrelevant criterion. Desirable as it might be for all parties to a conflict to obey the laws and customs of war one’s failure to do so should not affect his status or even his

114 See Kelly, supra note 14, at 99.
subsequent treatment, other than the severity of punishment upon prosecution. In our criminal law the man charged with the most reprehensible crime is still submitted to the reasoned judgment of the law. The absurdity of the last of the four conditions is not the point, however; it is that many participants in an internal war would not be entitled to prisoner of war status even if international law standards were applicable.

On the other hand, there is, as Professor Baxter has pointed out, a trend toward extending "the protection of prisoner-of-war status to an ever-increasing group. . . ." Free World Forces in Vietnam, for example, treat as prisoners of war large numbers who do not satisfy the article 4 criteria. Moreover, the General Assembly has repeatedly called upon governments to treat captured insurgents as prisoners of war; and the International Committee of the Red Cross has intervened with varying degrees of success in numerous internal conflicts to insure humane treatment of prisoners.

The answer may well be that a combatant in an internal conflict cannot be classified by using existing legal forms. Rather than trying to determine whether he is or is not a prisoner of war with all the legal consequences such a status entails, one might more fruitfully reflect upon whether different kinds of participants in internal conflicts should be entitled to different rights. Such a classification scheme would reflect the functional necessity and wisdom of treating one kind of participant differently from another. Within certain categories one might then look to certain provisions in the Geneva Conventions for authoritative standards of humane treatment. Treating a rebel as a prisoner of war for one purpose would not require the same treatment for all purposes. Some provisions of the POW Convention might prove unworkable in the peculiar context of internal war. It is far more difficult, for example, to determine "the combat zone" in a guerrilla conflict than in a World War II-type war. Other provisions may be incompatible with specific article 3 provisions. There is, for instance, the clause in article 3 which

Harv. L. Rev. 851 (1967), which explores the theoretical difficulty of making international law binding on guerrillas and other insurgent groups. See also External Affairs, [1965] Int'l Rev. Red Cross 636. Among recent rebel groups only the Algerians claimed to follow the law of war. The Viet Cong, for example, rejected the idea that it was bound "by the international treaties to which others besides itself subscribed."

Baxter, supra note 113, at 343.


seemingly permits prosecution and execution of rebels but not prisoners of war.

A. To try and to execute summarily

The news photo flashed around the world during the 1968 Tet offensive in Vietnam showing the Saigon chief of police executing a suspected Viet Cong with his hand gun dramatically demonstrated the reality of the frequently asserted claim to execute captured foes summarily. Journalists reported that some commanders in the Nigerian army similarly disposed of captured Ibo tribesmen fighting for Biafra. Both sides in the Congolese war occasionally indulged their taste for summary justice. Following an attack upon a United Nations mess at Kindu, Congolese soldiers arrested thirteen Italian airmen, shot them, dismembered their bodies, and passed the pieces out to onlookers.127 A year before, a Liberian contingent had herded ninety-two arrested Baluba tribesmen into unventilated railroad cars. They suffocated.128

Guerrilla forces often dispense summary justice because they control no territory and lack the facilities in which to house prisoners. One should hardly expect a small mobile unit to drag handcuffed prisoners through the jungle with them on their way to the next ambush, therefore, the policy of taking no prisoners is a reasonable one. Unfortunately, it is often translated into a policy of executing all captured personnel. However, the practice of the Castro forces demonstrated that “taking no prisoners” need not be a euphemism for murder. A journalist who trudged through the mountains with Castro quotes Castro’s brother Raoul talking to captured Batista soldiers:

We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation—and I am not going to repeat it—you will be delivered to the custody of the Cuban Red Cross tomorrow. Once you are under Batista’s orders again, we hope that you will not take up arms against us. But, if you do, remember this:

We took you this time. We can take you again. And when we do we will not frighten or torture or kill you, any more than we are doing to you at this moment. If you are captured a second time or even a third by us, we will again return you exactly as we are doing now.129

127 McNemar, supra note 121, at 264.
128 Id. at 265.
129 Chapelle, supra n.22, at 223.
In fact, there are really two separate claims being made here: the first, to forego any trial at all; the second, to execute. As to the first, there can be little doubt that international law requires trial before the imposition of punishment, whether capital or otherwise. Article 3 forbids:

. . . the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.120

This simple prohibition reflects a principle of criminal justice common to all domestic legal systems: every man is entitled to his day in court. The specific application of that principle as dictated by the language of article 3 is not so simple. What is a "regularly constituted court"? What "judicial guarantees" are recognized as "indispensable by all civilized peoples"?

The "regularly constituted court" requirement should not be construed too literally. Guerrillas, after all, are not apt to carry black robes and white wigs in their back packs. Any proceeding they convoke will necessarily be ad hoc. While the government will have a system of established courts, they may not be open for business—at least not for the business of trying rebels. Operating under martial rule, the government may have created special courts or conferred jurisdiction on military tribunals. Precedent justifies characterizing such tribunals as "regularly constituted courts."121 The test is authoritativeness; that is, whether the appropriate authorities, acting under appropriate powers, created the court according to appropriate standards.

There is today a consensus that certain specific rights are fundamental to trial in any such court. Among these are prompt notice of charges, adequate time and facilities to prepare defense, right to counsel and the assistance of an interpreter. This list of rights appears in such diverse agreements as the NATO Status of Forces Agreement,122 the POW Convention,123 the Civilian Convention,124 the European Convention

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121J. KELLY and G. PELLETIER, supra note 115, at 303-305.
For the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{135} and the draft American Convention on Human Rights.\textsuperscript{136} The right to a speedy trial and the right to appeal are also important though less universally conceded rights. The "judicial guarantees . . . recognized as indispensable by all civilized peoples" do not include a jury or a ban on hearsay evidence. There are almost no rules of evidence in civil law countries,\textsuperscript{137} and likewise no requirement of jury trials in some criminal cases.\textsuperscript{138} However, there are minimum standards, but it is difficult to imagine guerrilla forces being able to comply with even the most minimal standards. There is also substantial precedent for the proposition that the government may suspend at least some among them during public emergencies.\textsuperscript{139}

Other than the implied sanction of executions, article 3 is silent as to the scope of permissible punishments, only conditioning their imposition upon a prior judicial determination of guilt. States have repeatedly used such punishments as the firing squad, the rope, or the gas chamber to silence once and for all those who opposed them. Those who oppose capital punishment concede that "there is nothing [in article 3] to prevent the execution of such combatants merely for having borne arms against the enemy."\textsuperscript{140} Since "the slaughter of prisoners with or without legal proceedings can hardly satisfy humanitarian conscience," they argue for either (1) deferment or (2) annulment of capital punishment during hostilities. Mr. Veuthey argues:\textsuperscript{141}

\textsuperscript{135}European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 219, 228.
\textsuperscript{138}Id. at 139. Professor Merryman does argue that the equivalent of a jury exists, but he admits that it "may not consist of twelve persons, it may frequently take the form of lay advisors who sit on the bench with the judge, and even where it looks like ours, it may not have to render a unanimous verdict of guilty in order for the accused to be convicted." At some point differences of degree become differences of kind, and the Professor's conclusion from the preceding recital is an understatement: "These are, particularly when they accumulate, important differences between our conception of a jury and theirs."
\textsuperscript{139}Article 15 of the European Convention, for example, explicitly states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention . . . ." The European Court of Human Rights has upheld detention without trial under the article 15 exception by the Republic of Ireland in its suppression of the outlawed Irish Republic Army. "Lawless" Case, [1961] Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 474.
\textsuperscript{140}Veuthey, \textit{supra} note 126 at 416.
\textsuperscript{141}Id. at 417.
Any capital punishment in time of conflict, in relation with the conflict, cannot fail to bring about an increase in tension, vigorous reaction from the enemy and even reprisals.

The problem of capital punishment is but one aspect of the problem. The black militant demand in this country to be treated as a prisoner of war illustrates the complexity of the issue. If we accept the proposition that he may not be punished for “offing a pig” the converse is also true that he may be held for the duration of the conflict. The indeterminate sentence is widely used; if it were not, a rebel tried in a civil court would be released and returned to the streets or jungles to continue the revolution, a prospect which can hardly delight authorities. Attempts to “reeducate” confined rebels or loyalists may also violate their rights if they are analogized to prisoners of war. Participation in a “Chieu Hoi” program arguably constitutes a renunciation of rights not permitted by the Geneva Convention. With the exception of article 5 of the Universal Declaration of Human Rights, which prohibits “cruel, inhuman or degrading treatment or punishment,” suffice it to say that present international law provides almost no guidelines as to the permissible kind and form of punishment.

B. To Detain Arbitrarily

The problem of detention is multifaceted, because the claim to detain arbitrarily is but a general one embracing many specific, related claims. There are, for example, claims to detain prisoners incognito without charges; claims to hold in solitary confinement; claims to bar visits by relatives, friends, ministers, or representatives of relief organizations; and claims to deny, regulate, or censor correspondence. Beyond these claims there is the problem of housing and feeding those detained. While no government explicitly claims the right to hold persons in unsanitary camps and feed them a subsistence diet, governments do hold people in just such conditions daily.

A few examples will put flesh on this skeletal outline of claims. In 1955 the Singapore Legislative Assembly passed legislation permitting authorities to detain persons for as long as two years on the mere suspicion that the detainee might commit an act “prejudicial to the security of Malaya.” The act also authorized the imposition of house

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143 See Hickling, The First Five Years of the Federation of Malaya Constitution, 4 Malaya L. Rev. 183, 184-85 (1962). Several hundred persons were detained under this act. See also Davies,
arrest, police supervision, and curfews on suspected individuals. Both government and rebel groups have refused inspections by agencies such as the International Committee of the Red Cross even though its reports are never made public. North Vietnam did not permit any Red Cross visit to their prisoner of war camps. The Red Cross never inspected rebel prison facilities in Algeria.\textsuperscript{44} South Vietnamese citizens have demonstrated against their government's refusal to permit visits to friends and relatives incarcerated in Vietnamese jails.\textsuperscript{45} The press descriptions of the so-called "tiger cages" revealed shocking conditions in what had been trumpeted as model facilities.\textsuperscript{46} The problem is partially one of resources and priorities. One can hardly expect a small, underdeveloped country whose government is fighting for its existence to devote substantial quantities of its precious resources to the building and maintaining of model penal colonies. One can expect even less of the guerrillas. But the problem is exacerbated by the lack of authoritative international law standards for detention applicable to internal conflicts. In their absence, it is not surprising that conditions are as despicable as they are.

\textit{The Applicable Law}

Article 3, whose protective ambit embraces all those detained for any reason, imposes only the general requirement of humane treatment, which is amplified by prohibitions on "cruel treatment and torture" and "outrages upon personal dignity, and in particular, humiliating and degrading treatment." These general standards do not constitute a set of specific rules and regulations for detention. They do provide guidance for the establishment of such rules, particularly if interpreted in the light of the detailed provisions of the prisoner of war and civilian conventions, which are, after all, designed to implement the same standards.

The POW Convention sets out very specific rules for detention. \textit{Medical care:} Prisoners of war "may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness."\textsuperscript{47} They are entitled to free medical care as needed\textsuperscript{48} and should be medically examined monthly.\textsuperscript{49}

Housing: Generally, prisoners cannot be held in "close confinement." They must be housed in barracks "protected from dampness and adequately heated and lighted" and allotted at least the minimum "surface and . . . cubic space . . . , bedding and blankets" given "forces of the detaining power who are billeted in the same area." The detaining authorities are obligated "to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics."

Food: Prisoners are entitled to "daily food rations . . . sufficient in quantity, quality, and variety to . . . prevent loss of weight or the development of nutritional deficiencies."

Communication privilege: Within a week of capture, the prisoner is entitled to write his family, and he may continue writing no less than two letters and four cards monthly. Moreover, "prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character. . . ."

It is unrealistic to expect that participants in internal conflicts will build and maintain such model detention facilities, desirable as that might be. There is nevertheless one recurrent standard in these provisions not found in article 3, and adherence to it might insure more humane detention conditions than now generally prevail. The standard is that prisoners are entitled to the same general treatment accorded members of the captor's armed forces or his nationals, as, for example, in article 49 which specifies that those prisoners who are required or who elect to work are entitled "to suitable working conditions not inferior to those enjoyed by nationals of the Detaining Power employed in similar work, especially as regards accommodations, food, clothing, and equipment." Given the often disparate conditions in which guerrillas operate and the poverty which afflicts most third world countries, the similar treatment standard will not insure anything like ideal treatment.

150 Id. art. 21, at 3334, 75 U.N.T.S. 152.
151 Id. art. 25, at 3338, 75 U.N.T.S. 156.
152 Id. art. 29, at 3342, 75 U.N.T.S. 160.
153 Id. art. 26, at 3340, 75 U.N.T.S. 158.
154 Id. art. 70, at 3370, 75 U.N.T.S. 188.
155 Id. art. 71.
156 Id. art. 72, at 3372, 75 U.N.T.S. 190. But see id. art. 76, at 3376, 75 U.N.T.S. 194.
157 Id. art. 49, at 3354, 75 U.N.T.S. 172. Officers cannot be required to work though they may volunteer. Non-commissioned officers can only be given supervisory jobs.
158 Id. art. 51, at 3356, 75 U.N.T.S. 174.
The ideal is seldom a viable alternative, however, and so long as the participants feed, house, and care for their prisoners no less well than they do for their own forces, they may have conceded as much to the demands of humanity as the necessity of their circumstances permits.

C. To Use Coercive Means of Interrogation

Intelligence information is vital to both sides in an internal conflict. Its importance to the guerrilla is obvious, since he must know when to strike and when to flee. It is even more important to the government, however, because it must pierce the veil of secrecy behind which the rebel conceals his operations. A military correspondent for *Le Monde* said of the need for intelligence in Algeria: “The search for information, once the concern of general staffs, has become for everybody a question of life or death.” Consequently, both sides may claim the right to use coercive methods of interrogation to obtain intelligence data. Laotian Major Generals Vang Pao and Kouprasith Abkay recently conceded to newsmen “that prisoners who had refused to cooperate in interrogations . . . were subjected to deprivation of food and drink, to beatings and electrical shock torture.” Of one man, starved for four days despite a shoulder wound, beaten and tortured by shocks administered through electrodes fixed to two fingers of his left hand, General Vang Pao shrugged: “He does not want to tell the truth, so he was forced a little.” Such callous observation proves Professor Farer’s assertion that “[s]ince in guerrilla war the most serious problem facing incumbents is a lack of intelligence, the military, if not the political, leaders may regard any inhibitions on intelligence gathering techniques with surly apprehension.”

The Applicable Law

Article 3 does not forbid interrogation, but it does prohibit “torture.” There may well be a distinction between “coercion” and “torture”, but while the former is not specifically forbidden, its use may be circumscribed by the prohibitions on inhumane, humiliating, or degrading treatment. It should also be clear that most of the standard techniques such as applying electrical shocks, driving splinters under fingernails, and dunking in water constitute torture rather than coercion under any reasonable definition of those terms.

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190Quoted in J. Kraft, *supra* note 24, at 102.
192Farer, *supra* note 8, at 64.
Were the entire POW Convention applicable, authorities could still interrogate prisoners. Article 17 does not bar all questioning. It does, however, forbid "any physical or mental torture," as well as "any form of coercion." While requiring prisoners to give their "surnames, first names and rank, date of birth, and army, regimental, personal or serial number," it specifies that "prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Again, terms such as "disadvantageous treatment" are not self-defining, but article 17 would appear to preclude the common practice of denying food and medical attention to captured persons until they "talk." This view is reinforced by the frequent charge to treat the sick and wounded "without any adverse distinction founded on sex, race, nationality, religion, political, or other similar criteria." Refusal to answer questions should not preclude care, since "only urgent medical reasons" determine priority of treatment. Other Convention articles point to the same conclusion. Captors must evacuate the prisoner from "the combat zone" as quickly as possible. One could imply that beyond ascertaining identity, any questioning must be delayed until the prisoner is interned in "camps situated in an area far enough from the combat zone to be out of danger." The implication is practically sound because most violations occur within a very short time after capture when line personnel interrogate for "combat" intelligence. The line officer, untrained in the art of questioning and lacking the time to "soften" the prisoner, too often resorts to intimidation or torture.

The prohibition on coercion does not tie the hands of the skilled interrogator. He can exploit the understandable fears of the prisoner

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165Id.

166Moreover, the officer is probably unfamiliar with the native language. The U.S. Army trains its soldiers to segregate prisoners and send them to the rear immediately so that trained interrogators can question them.
through a variety of standard psychological techniques of interrogation. As one scholar has put it:167 "Article 17 . . . does not protect the prisoner against the wiles and cunning of enemy interrogators." There are no international Miranda rules, and the captor has no duty under the convention to reassure, calm, or put the enemy prisoner at ease.

IV. THE CLAIM TO BAR HUMANITARIAN RELIEF

Humanitarian relief efforts are not new. During the 18th century wars between France and England, Samuel Johnson organized a committee in London to supply clothing to French prisoners of war held in England. What is new is the capacity of the international community to mobilize large scale, sustained relief efforts. The United Nations and the International Committee of the Red Cross maintain trained staffs and can tap substantial resources. The Red Cross, particularly, can draw upon its considerable experience in organizing and carrying out relief efforts.168 A host of other private organizations such as church groups also run humanitarian relief programs and often participate in joint efforts.169

Unfortunately, governments sometimes decline offers of humanitarian relief or diminish its impact by interfereing with shipments. The attitude of the Nigerian government during the recent civil war in that country is a case in point. They declared the first executive of the relief effort "persona non grata" after ten months because they felt he favored the Biafrans.170 They authorized only perilous nighttime flights to rebel-held territory.171 They insisted that flights to Biafra land at the Uli airfield, which Biafra used for military purposes. Biafran authorities refused to permit the neutralization of the base.172 When Biafrans and federal authorities finally agreed upon a neutral base, Nigerian pilots strafed it.173 An ICRC DC-7B flying to Biafra was shot down on 5 June 1969, and the ICRC felt obliged to suspend further relief flights for several weeks.174 The Nigerian government insisted on inspecting ship-

171Id. at 355. The Nigerian air force had no night fighters but did use anti-aircraft guns. As guns were flown into Biafra under cover of darkness, government forces were apt to shoot at anything in the air.
173Id. at 455, 461.
174Help to War Victims in Nigeria, supra note 170 at 353.
ments,\textsuperscript{175} and it would not permit the ICRC to send food through a land corridor, the method which the head of the relief operation in Biafra insisted was necessary if adequate foodstuffs were to be supplied.\textsuperscript{176}

Countries other than the Nigerian Federal Government blocked relief efforts. On several occasions the government of Equatorial Guinea, from whose Santa Isabel base the ICRC flew its relief planes to Biafra, jeopardized the airlift. It forbade transportation of fuel which the ICRC used to generate electricity in its hospitals and to run the trucks delivering food and medicine.\textsuperscript{177} It once forbade any flights at all for two weeks.\textsuperscript{178}

The attitude of the federal government was understandable if not commendable. In the first place, it was legitimately concerned that rebel supporters might conceal military supplies in the relief shipments. Secondly, it feared that the relief supplies would strengthen the rebels and thereby prolong their resistance. In an internal conflict it is difficult to ascertain whether one is feeding an innocent civilian or a soldier. A wounded soldier whom an ICRC medical team heals may return to the battlefront. For all these difficulties, starvation cannot be recognized as a legitimate means of waging war even though the Tribunal in the High Command Case held: \textsuperscript{179}

A belligerent commander may lawfully lay siege a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.

\textit{The Applicable Law}

Article 3 does not oblige the warring factions in an internal conflict to accept or permit humanitarian relief. It does, however, permit "[a]n impartial body, such as the International Committee of the Red Cross [to] offer its services to the Parties to the conflict." The draftsmen of article 3 undoubtedly assumed that a party which accepted such an offer

\textsuperscript{175}Freymond, \textit{supra} note 169, at 67.
\textsuperscript{176}Help to War Victims in Nigeria, \textit{supra} note 172, at 518.
\textsuperscript{177}Help to War Victims in Nigeria, [1969] INT'L REV. OF THE RED CROSS 81, 84.
\textsuperscript{178}Id. at 86.
\textsuperscript{179}The German High Command Trial, \textit{supra} note 106, at 84. See also Mayer, \textit{Starvation as a Weapon}, CHEMICAL AND BIOLOGICAL WARFARE 76 (S. Rose ed. 1968).
would respect the Red Cross symbol and its personnel even though article 3 does not specifically require such respect. Yet some states have agreed to Red Cross efforts at the organization's own peril. Red Cross hospitals have been attacked and doctors slain. Consequently, national societies have often hesitated to act.¹⁸⁰

Even under the broader rules of the Geneva Conventions, states have not obligated themselves to accept offers of humanitarian assistance. Several Convention provisions nevertheless subsume the compatibility of private relief efforts with Convention obligations. Common article 9 of the Geneva Conventions, for example, states:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.¹⁸¹

This provision expands article 88 of the 1929 Geneva Conventions, which limited the right of humanitarian initiative to the International Red Cross. The Hague Regulations of 1907 also permitted approved relief agencies to carry out their charitable activities, and the ICRC during World War I opened a Prisoners of War Agency and sent delegates to inspect internment camps.¹⁸² The right of humanitarian initiative is thus a well established principle, codified in prior international agreements.

The rules governing the kind of relief a charitable group may offer, the persons whom it may aid, and the procedures by which it dispenses assistance are less clear. Since the present Conventions mention the Red Cross in connection with a number of specific humanitarian responsibilities,¹⁸³ any initiative in one of those areas would be legitimate. Beyond that, Pictet categories authorized activities into three kinds: (1) representations, interventions, suggestions, and practical measures affecting the protection accorded under the Convention; (2) the sending of medical and other personnel and equipment; and (3) the sending and distribution of relief (foodstuffs, clothing, and medicaments).¹⁸⁴ The only test is whether the activity is "purely humanitarian in character."¹⁸⁵ The con-

¹⁸⁰Veuthey, supra note 126, at 416.
¹⁸²Id. at 106.
¹⁸³Id. at 107.
¹⁸⁴Id. at 108.
¹⁸⁵Id. at 107.
cept of appropriate relief has gone far beyond article 24 of the 1909 London Declaration, which declared that food, clothing, clothing material and footwear suitable for military use were conditional rather than absolute contraband. Unfortunately, one man’s humanitarianism may be another’s political maneuvering, and even the ICRC has been accused of favoritism.

Pictet implies that eligible recipients include all those to whom the Conventions are applicable. That criterion, broad as it is, may still be too narrow. There are unfortunate gaps in Convention coverage, and the range of conflicts to which it is applicable is uncertain. The Civilian Convention, for example, often refers only to children, expectant mothers, and the wounded and sick. They are not likely to constitute the bulk of any civilian population. Scholars who support the right of humanitarian intervention have built into the norm a shock-the-conscience test: intervention is justified only when the target state violates some minimum international law standard. It would seem that any group whose human rights are endangered is a legitimate object of humanitarian concern.

Disputes over the appropriate nature of relief and the eligibility of recipients have not usually proved insurmountable as have, too often, questions about procedures for supplying the aid. Time and again the ICRC effort to help war victims in Nigeria collapsed because the parties quibbled over where, when, and how goods were to be shipped. The frustrating fact is that states may take away with the left hand what they give with the right by permitting humanitarian relief in principle but insisting upon procedures which negate its impact.

Just as in an international conflict a state may blockade its enemy, in an internal conflict a state retains its right to inspect shipments, regulate commerce, or close its ports. It, too, may blockade rebel-held territory, as the Union did during the American Civil War. International law does not permit a state to cut off all shipments to the blockaded country, however. Article 23 of the Civilian Convention guarantees free passage for humanitarian shipments. However, the right of free

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187One of the most recent examples of humanitarian intervention was the joint Belgian-American airlift in the Congo, where the rebels held two thousand European hostages.

188Article 23 states:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall
passage is couched in very restrictive language. First, the article limits the kind of relief which may be shipped. Only "medical and hospital stores," "objects necessary for religious worship," and "essential foodstuffs, clothing, and tonics" are entitled to free passage. Second, the article limits the persons entitled to relief to civilians, children under fifteen and expectant mothers. This limitation cannot be read to exclude the sick and wounded, since article 38 of the Geneva Convention for the Protection of War Victims (Armed Forces at Sea) authorizes free passage for such consignments. Third, the article conditions free passage of relief to such limited categories of persons on several factors, the chief being that no "definite advantage" will "accrue to the military efforts or economy of the enemy" upon receipt of the goods. Pictet urges a reasonable interpretation of the "definite advantage" condition:

It will be agreed, generally speaking, that the contribution represented by authorized consignments should be limited: in the majority of cases, such consignments will be hardly sufficient to meet the most urgent needs and relieve the most pitiable distress; it is hardly likely, therefore, that they would represent assistance on such a scale that the military and economic position of a country was improved to any appreciable extent.

The article also gives the blockading power the right to supervise likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a high Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) that the consignments may be diverted from their destination,
(b) that the control may not be effective, or
(d) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.


shipments: "the power which permits their free passage shall have the right to prescribe the technical arrangements under which passage is allowed." How else could the blockading power quiet its fears "that the consignments [might] not be effective." The blockading power may, of course, rely upon a distinterested organization such as the International Committee of the Red Cross to supervise distribution. Still, it will wish to set the times, places, and means of delivery. These arrangements, which are necessary to insure the safety of the personnel distributing the goods, as well as to protect the interests of the blockading power, should not negate the impelling requirement that "[s]uch consignments shall be forwarded as rapidly as possible."

V. CONCLUSION

The law of war is but another proof that Holmes' famous aphorism about the common law is true of all law: its life force has been experience, not logic. While some have never been able to rationalize the coexistence of law with violence, men in every generation have labored with increasing success to circumscribe the ravages of war by subjecting its conduct to legal rules. Today we face the familiar challenge: to tailor the existing law to the peculiar kinds of war characteristic of our time—namely, internal conflicts waged with guerrilla tactics.

The preceding discussion of competing claims to apply or not apply the law of war to internal conflict illustrates the complexity of that task. Reasonable men may debate the wisdom of specific solutions, but they cannot question the importance of the search.