HUMANITARIAN LAW IN ARMED CONFLICTS: PROTOCOLS I AND II TO THE 1949 GENEVA CONVENTIONS *

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INTRODUCTION

TERMINOLOGY. From the beginning, war as a phenomenon has invited the attention of mankind because, as Pindar said, "war is a tyrant and a mistress, lording it over all law; there being nothing so opposed to God's gift of law as force, which is the main characteristic of beasts."[1] Some would even trace the study of war to the story of Cain and Abel.[2] In any event, the law of war is the oldest part of international law, having descended directly from the old *jus gentium,* which included the medieval law of arms. This intellectual odyssey gave rise to the traditional term "laws of war" (*jus in bello*), but of late it has grown into disfavor, and modern scholars now prefer to use the term "law of armed conflicts." The new expression first surfaced in the Geneva Conventions of 1949.[3] It is technically preferred because it applies not only to cases of international war in the formal sense, but also to armed conflicts which do not fall under the formal definition of war. It thus avoids traditional distinctions between international war, internal conflicts, or conflicts which although internal in nature are characterized by a degree of direct or indirect involvement of foreign power or foreign nationals.[4] It must be added, however, that the term "laws of war" is not entirely obsolete. Even at present, it designates the set

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[1] Quoted in B. Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III,* in II CLASSICS OF INTERNATIONAL LAW vii (J. Westlake ed., 1912).

[2] Some claim this fraternal conflict to be a classic case of the defense of agricultural versus pastoral tribal mores, *See* Russell, *Western Civilization,* in IN PRAISE OF IDLENESS AND OTHER ESSAYS.

[3] Common Art. 2, para. 1 provides: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other *armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." (Emphasis added.)

[4] *Respect for Human Rights in Armed Conflicts; (First) Report of the Secretary-General,* U.N. Doc. A/7720 at 11 (1969) (hereinafter cited as *First Report of the Secretary-General*).

of rules applicable to war in the formal sense, *viz.*, rules concerning war on land, sea, and air; rules concerning the protection of victims of war; rules regulating the occupation of enemy territory; rules of economic warfare; certain rules relating to the law of treaties; and the rules on neutrality.

Humanitarian law is "the large body of public international law derived from humanitarian sentiments and centered upon the protection of the individual." It has both a broad and narrow sense. In the broad sense, it "consists of those rules of international conventional and customary law which ensure respect for the individual and promote his development to the fullest possible extent compatible with law and order and, in time of war, with military necessities." Humanitarian law has two branches: the law of war and the law of human rights, which are distinguished from each other mostly in that human rights are independent of the state of conflicts.[5]

The law of war in turn has a broad and a narrow sense. In the broad sense, it is a body of rules seeking "to regulate warfare and attenuate its rigours in so far as military necessities permit." Furthermore, the law of war is divided into two branches: the Law of the Hague, and the Law of Geneva. The Law of the Hague, which includes conventions not bearing the name of that city, "lays down the rights and duties of belligerents in conducting operations and limits the methods of warfare." The Law of Geneva "is designed to ensure respect, protection and humane treatment of war casualties and noncombatants."[6] In other words, the Law of the Hague concerns the legitimate means and methods of war, while the Law of Geneva concerns humanitarian protection for the victims of war.[7]

Although the Law of the Hague is supposed to give primary concern to state interests and the Law of Geneva to the victims of war, both have humanitarian values.[8] Morever, each is being integrated with the other. Hence, the term "humanitarian law in armed conflict" is nearly synonymous to the term "law of armed conflict."[9] Nonetheless, one could apply certain criteria for delimitation. Whereas both the Law of the Hague and the Law of Geneva impose direct personal obligations on individuals, it is only the Law of Geneva

[5] Pictet, *The Need to Restore the Laws and Customs Relating to Armed Conflicts*, 1 REV. INT'L. COM. JURISTS 22-23 (1699).

[6] *Id.* at 23.

[7] Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 27 n. 6 (1975) (hereinafter cited as Graham).

[8] H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YRBK. INT'L. L. 363 (1952).

[9] Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INTL. L. 87 (1975) (hereinafter cited as Forsythe).

which confer subjective rights on individuals in respect of states. Morever, the Law of the Hague regulates permissible limits for infliction of casualties and destruction of property, while the Law of Geneva regulates conduct towards the victims of armed conflicts, including both those who are wounded and those who have fallen into the power of the enemy. Thus, the Law of Geneva comes within the purview of human rights, as applied to armed conflicts.[10]

RATIONALE OF THE LAW. War is an abiding phenomenon; of the 3,500 recorded years of the history of mankind, only 270 years were not attended by armed conflict.[11] As Plato correctly predicted, only the dead have seen the end of war; this menace value is the rationale for the law of armed conflicts. Admittedly, the U.N. Charter prohibits the use of force, leading some to conclude that it in effect denies the aggressor any rights, while according to the one invoking self-defense unlimited rights. But when the U.N. fails to determine who is the aggressor, then force becomes lawful for both sides, and the law of armed conflicts assumes legitimacy.

Even then, it is argued that to admit the existence and putative legitimacy of war would be immoral because it detracts from the genuine task of mankind, which is to abolish war. The answer to this argument is the proposal to undertake both functions concurrently. Another argument posits that a law of armed conflicts only encourages the use of force. In reply, it should be pointed out that no degree of publicity about the horrors of war seems to have inhibited those determined to embark upon it. Moreover, it would seem that, contrary to the thrust of this argument, the balance of nuclear terror has contributed to the postponement of a generalized war.

But the ingenious argue that, since it is the balance of power which deters war, the law of armed conflicts is at bottom inutile. It should be pointed out that this argument is based on the concept of total war, and the expectation that it is inevitable. Such notions are belied by conflicts today, which are limited geographically and restricted as to the aims of the belligerents and the means they utilize. These localized conflicts are more susceptible to pressures meant to insure compliance with international humanitarian law.

All these considerations support the "growing conviction that the law of armed conflicts is not only legitimate, but also that it is possible and indeed necessary to reexamine and 'restore' it."[12] In

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[10] Binschedler—Robert, *A Reconsideration of the Law of Armed Conflicts,* in REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 7 (P. Rambach ed., 1971) (hereinafter cited as Binschedler).

[11] L. MONTROSS, WAR THROUGH THE AGES 313 (3d ed., 1964).

[12] Binschedler, *supra,* note 10, at 12.

the light of this conviction, two questions arise: *de lege lata,* are the present rules on armed conflicts still valid; and *de lege ferenda,* how can the new set of rules reconcile the postulates of military necessity and the values of an ethical system?

THE 1949 GENEVA CONVENTIONS

The Geneva Conventions of 12 August 1949 for the Protection of War Victims constitute the core of international humanitarian law applicable in armed conflicts.[13] After the experience of the Second World War, the Swiss Federal Council convened in Geneva from 4 April to 12 August 1949 the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. The Conference drew up four Conventions, which were signed on 12 August 1949 and entered into force on 4 October 1950:

(1) Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (hereinafter referred to as Geneva Convention 1);[14]

(2) Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter referred to as Geneva Convention II);[15]

(3) Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as Geneva Convention III);[16] and

(4) Geneva Convention Relative to the Treatment of Civilian Prisoners in Time of War (hereinafter referred to as Geneva Convention IV).[17]

Each of the four Conventions — to which the Philippines is a signatory[18] — replaces or supplements previous Conventions.[19] As of

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[13] For a historical survey of international instruments of a humanitarian character relating to armed conflicts, see *First Report of the Secretary-General, supra,* note 4, at 16-28.

[14] (1955) 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

[15] (1955) 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.

[16] (1955) 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

[17] (1955) 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

[18] The Philippines ratified the Conventions on the folowing dates: Convention I—7.3 1951; Convention II—6.10, 1952; Convention III—6.10. 1952; and Convention IV—6.10. 1952.

[19] "Geneva Convention I replaces the conventions of 1864, 1906 and 1929 in relations between the Contracting Parties (article 59). Geneva Convention II replaces the Tenth Hague Convention of 1907 for the Adoption to Maritime Warfare of the Geneva Convention of 1906 in relations between the High Contracting Parties (Article 58). Geneva Convention III replaces the Geneva Prisoners of War Convention of 1929 in relations between the High Contracting Parties. In the relations between the Powers which are bound by the Hague Conventions relating to the Laws and Customs of War on Land whether of 1897 or 1907, and which are Parties to Geneva Convention III, Geneva Convention III is complementary to Chapter 2 of section 1 of the Hague Regulations of 1899 and 1907 dealing with prisoners of war (Articles 134 and 135).

1 January 1974 there were 140 parties to the four Conventions; with the exception of the Republic of China, the non-parties held no significance, leading a publicist to declare that: "It is thus only of academic interest to consider whether the Conventions have passed into customary international law."[20]

The four Conventions have so-called "common articles." States Parties assume the unilateral undertaking to respect and to ensure respect for the Conventions in all circumstances,[21] regardless, as a general rule of "military necessity." The Conventions have to be applied in all cases of declared war or of any other armed conflict between two or more of the Parties, even if the state of war is not recognized by one of them, and in cases of partial or total occupation.[22] The Parties are bound to apply the Conventions in relation to a non-party if the latter accepts and applies the provision of the Conventions. All four Conventions prohibit the renunciation of the rights they set out, either by the protected persons or by the States on whom they depend.[23]

The so-called Protecting Power plays a role in securing the application of the Conventions and in relation to disputes as to their interpretation.[24] The Parties undertake to legislate for the repression of grave breaches of the Convention, to search for and try persons who have committed them or, alternatively, to hand them over to other Contracting States.[25] A denunciation shall take effect one year after ratification; but a denunciation of which notification has been made at the time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded and only after operations connected with the release, repatriation and re-establishment of the persons protected by the Conventions have been terminated. A denunciation in no way "impairs the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages

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Geneva Convention IV protects civilians who find themselves in cases of a conflict or occupation in the hands of a State Party of which they are not nationals. In the relations between the Powers which are bound by the Hague Conventions respecting the Laws and Customs of War on Land of 1899 and 1907 and which are Parties to Geneva Convention IV, Geneva Convention IV is supplementary to sections II and III of the Hague Regulations (Article 154)." *First Report of the Sec.-Gen., supra,* note 4, at 25.

[20] Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law,* 16 HARV. INT'L. L. J. 1 (1975) (hereinafter cited as Baxter).

[21] Common Article 1.

[22] Common Article 2.

[23] Conventions I, II, and III Article 7; Convention IV, Article 8.

[24] Conventions I, II and III, Articles 8, 9 and 11; Convention IV, Articles 9, 10, 11, and 12.

[25] Convention I, Articles 49 and 50; Convention II, Articles 50 and 51; Convention III, Articles 127 and 130; Convention IV, Articles 146 and 147.

established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

The four Conventions contain 427 articles, representing "one of the most developed and widely accepted bodies of rules governing the conduct of states and of individuals alike."[26] But since 1949, when the Conventions were written, they have been either widely violated or simply not applied in armed conflicts. During all this time, amidst the sufferings of military and civilian victims of wars, technology developed even more devastating weapons. There was a change even in the political face of war, which took on the ideological complexions of colonialism and racism, leading to the potentially troublesome concept of "wars of national liberation." Hence, there was a need to update the law pertaining to the victims of armed conflict, and to make the law relevant to contemporary forms of armed conflict.

THE DIPLOMATIC CONFERENCE

After the United Nations completed its basic work on human rights in time of peace,[27] it was only logical that it would concentrate on human rights in time of armed conflict. Hence, as part of the International Year for Human Rights, it sponsored the UN International Conference on Human Rights at Teheran on 2 April to 13 May 1968.

One of the resolutions adopted[28] was Resolution No. XXIII,[29] which reiterated that, even during the periods of armed conflict, humanitarian principles must prevail. It noted that the Hague Conventions of 1899 and 1907 were adopted at a time when the present means and methods of warfare did not exist. It considered that the provisions of the Geneva Protocol of 1925 prohibiting the use of "asphyxiating, poisonous or other gases and of all analogous liquids, materials, and devices" have not been universally accepted or applied. It considered further that the 1949 Geneva Conventions are not sufficiently broad in scope to cover all armed conflicts. And it noted that minority racist or colonial regimes frequently resort to inhuman treatment of the detained, who are entitled to be treated as prisoners of war or political prisoners under international law.

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[26] Baxter, *supra*, note 20, at 4.

[27] The UN Human Rights Commission and the Third Committee had by this time drawn up the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic and Social Rights.

[28] At the Plenary Session of the Conference, it was adopted by 67 votes in favor, none against, and 2 abstentions.

[29] Resolution XXIII, *Final Act of the Conference on Human Rights*, U.N. DOC. A/CONF. 32/41, at 18 (1968).

In the light of this preface, Resolution XXIII requested the General Assembly to invite the Secretary-General to study (a) steps to secure the better application of existing humanitarian international conventions and rules in armed conflicts, and (b) the need for additional conventions or for possible revision of existing Conventions to secure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

Acting on the Conference request, the General Assembly adopted Resolution 2444 (XXIII)[30] which affirmed the following principles:[31] (a) that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) that it is prohibited to launch attacks against the civilian population as such; and (c) that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to spare the latter as much as possible.

The General Assembly also invited the Secretary-General, in consultation with the International Committee of the Red Cross (ICRC) and others, to conduct the studies requested by the Conference. In compliance, he submitted three reports in 1969-71.[32] In 1970, the General Assembly requested[33] him to give particular attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination, and to the better application of existing humanitarian international conventions and rules to such conflicts.

In response to the concern shown by the General Assembly, the Red Cross in 1969, at its XXIst International Conference, requested[34] its International Committee to draft new rules, consult governmental experts and their proposals, submit them to governments for comments, and, if desirable, to recommend the convening of a diplomatic conference to adopt new legal instruments incorporating these rules. In 1971, the I.C.R.C. convened the Conference of Government Ex-

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[30] G.A. Res. 2444 (XXIII), 16 Dec. 1968, 23 U.N. GAOR Supp. No. 18, at 50, U.N. Doc. A/7218 (1969).

[31] As contained in Resolution XXVIII of the 10th. International Conference of the Red Cross at Vienna in 1965.

[32] *Respect for Human Rights in Armed Conflicts*: *Report of the Secretary-General.* First Report in U.N. Doc. A/7720 (1969). Second Report in U.N. Doc. A/8052 (1970). Third Report in U.N. Doc. A/8370 (1971). See *supra*, note 4.

[33] G.A. Res. 2597 (XXIV), 16 Dec. 1969, 24 GAOR Supp. No. 30, at 62, U.N. Doc. A/7130 (1970).

[34] Resolution XIII, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, XXIst International Conference of the Red Cross, Istanbul, Sept. 1969, Resolution 10 (1969).

perts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. After the first conference, the ICRC, through its own legal staff, prepared two draft protocols to supplement the 1949 Geneva Conventions. In 1972, it convened the second Conference of Government Experts. After the second Conference, it prepared for the submission of the texts to a diplomatic conference.

Accordingly, the Swiss government—the depository of the 1949 Geneva Conventions — convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. The Conference met in first session on 20 February to 29 March 1974; second session on 3 February to 18 April 1975; third session on 21 April to 11 June 1976; and fourth session on 17 March to 10 June 1977, which culminated the Conference by the ceremonial signing of the Final Act on the last day. The Conference drew up and adopted on 8 June 1977 Protocols I and II which remained open for signature for a period of 12 months from 10 December 1977.[35] They come into force six months after the second instrument of ratification has been deposited with the Swiss Government, as depository for the Geneva Conventions.[36] The final session of the Conference was attended by 110 states and three liberation movements,[37] as compared with 126 states and 10 national liberation organizations which were represented in the first session.[38] Among the states which did not participate were China, Albania, and South Africa.

The Diplomatic Conference was beleaguered by political questions on participation and representation.[39] But these problems did not detract from its character as the first attempt by a diplomatic conference in 25 years to create new law for the protection of war victims; the first in 40 years to restrict the use of conventional weapons; and the first since World War I to analyze methods of attack and their impact on the civilian population.[40]

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[35] Protocol I, Article 92; Protocol II, Article 20.

[36] Protocol I, Article 95; Protocol II, Article 23.

[37] Suckow, *The Development of International Humanitarian Law — Concluded*, 19 REV. INT'L. COM. JURISTS 47 (1977).

[38] Suckow, *The Development of International Humanitarian Law — A Case Study*, 12 REV. INT'L. COM. JURISTS 50 (1974). *But see Extracts from the Final Act*, 197-198 INT'L. REV. RED CROSS 123 (1977) which gives slightly different figures, viz: "One hundred and twenty-four States were represented at the first session of the Conference, 120 States at the second session, 107 States at the third session and 109 States at the fourth session."

[39] *See* Suckow, *Conference on Humanitarian Laws — Phase II*, 14 REV. INT'L. COM. JURISTS 43-46 (1975): Baxter, *supra*, note 20, at 9-11; Graham, *supra*, note 7, at 30-34.

[40] Forsythe, *supra*, note 9, at 77.

The two Protocols which were drafted at the Diplomatic Conference are additional to the 1949 Geneva Conventions and relate to the protection of victims of armed conflicts. Protocol I, relating to international armed conflicts, has 102 Articles and is divided into six parts, with two Annexes. Protocol II, relating to the non-international armed conflicts, has 28 Articles and is divided into five parts. This paper discusses salient aspects of the two Protocols.

PROTOCOL I: PROTOCOL ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS

SCOPE OF APPLICATION. Article 1 (2) provides: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." This is a restatement of the famous "Martens clause," authored by Prof. Fedor Fedorovich de Martens and taken from the Preamble of the Hague Convention No. IV of 18 October 1907. The Martens clause is commonly taken to show that the Hague rules were the expression of customary law. Most of the states supporting this paragraph argued that only states possess the resources and institutions for complying with the obligations imposed by the general principles of international law.[41]

Article 1 (3) provides: "This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 Common to these Conventions."

Common Article 2 provides:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
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> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereto.

[41] Suckow, *supra*, note 38, at 53.

Under Common Article 2, there are two terms used to determine those to whom the Convention might apply: "High Contracting Party" and "Power." Both these terms traditionally referred to states. But the final session, although short of a consensus,[42] adopted Article 1(4) which provides: "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Governing Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations."

The controversial Article 1(4) catalyzed a confrontation between the traditional and the novel viewpoints in international law. The traditional view considered that only states were the subjects of international law, and that only conflicts between states could be considered international. The novel view considered that conflicts between a colonial power and those in the colonial territory fighting for independence, although not constituting a state or a government, were of an international character, and the parties were subjects of international law. Apparently, the novel view sought to characterize liberation wars as international conflicts under Protocol I. This view was supported by many African states and some Asian and socialist states, and by the end of the first session it became clear that they constituted a large majority.[43] But the efforts of the Third World to guarantee a broad legal definition of an international war was opposed by the West. The debate between the two camps shall now be outlined.

The West argued, *first,* that traditional international law distinguished between international and non-international armed conflicts on the basis of what has been called a geomilitary scale. A conflict became international only when: either it reached a certain threshold of violence; or when a geographical boundary was crossed. Either one of these conditions can be effected only by a state.

Second, if the law of international armed conflict were to regulate non-state parties, this would eliminate that reciprocity between juridically equal states which is one of the primary inducements for obedience to law. "Peoples" are weaker than states in responsibility, in international law, and in capability; this weakness would abet non-compliance with the law.

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[42] The vote was 87 in favor, 1 (Israel) against, and 11 abstentions.
[43] Suckow, *supra,* note 38, at 51.

Third, the novel view would indirectly confer an international right to revolt against certain governments, and those who challenged certain types of governments would be accorded prisoner of war status. Until the traditional geomilitary threshold is crossed, even colonial and racist regimes should be able to deal with armed conflicts as internal ones within their domestic jurisdiction, as limited by already existing international law.

Article 1(4) defines the scope of international armed conflict as including wars of self-determination, and then refers to the U.N. Charter and the Declaration on Friendly Relations. It has been said that the draftsmanship of this section conveys the misleading impression that the two documents intend to sanction the use of force by certain "peoples" seeking to achieve an inherent right.

Fourth, the original reason for having two Protocols was to have one set of rules for armed conflict between states, and another for armed conflict involving non-states. To adopt the novel view would entail rewriting of all the other articles in Protocol I.[44] The novel view would make not only Protocol 1 but also all the Geneva Conventions applicable to wars of national liberation, and it would then become necessary to consider article by article whether the law can apply to this type of conflict.[45] This analysis would cover the 427 articles of the 1949 Geneva Conventions and the 130 articles of the two Protocols.

Fifth, the terms are vague. For one thing, the phrase "fighting against colonial domination and alien occupation and against racist regimes" can be extended beyond wars of national liberation. Authorities in power can always be characterized as a "racist regime" or as holding the country in "colonial domination."[46] No group has been designated which can decide between two sides, each with its own subjective appraisal of the situation. There are no tangible criteria for such a decision.

Moreover, there is a need to define the terms "peoples" and "right of self-determination." What number of individuals in each political and social context would qualify them as "peoples"? Who may claim the right of self-determination, and how may it be valid-

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[44] Forsythe, *supra,* note 9, at 80-81.

[45] For example, what is an "occupied territory" under Geneva Convention IV, Part III, Section III? Could a captured member of a national liberation movement be characterized as "not being a national of the Detaining Power, is not bound to it by any allegiance," under Geneva Convention III, Article 87? And is a liberation movement capable of trying a prisoner of war "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," as required under Geneva Convention III, Article 102? *See* Baxter, *supra,* note 20, at 15-16.

[46] *Id.*

ly exercised? There is also a need to categorize the circumstances which would constitute an "armed conflict." What criteria would be relevant; the number of individuals involved, the amount of territory effectively controlled, the length of the struggle, or the actual degree of combat activity? The language does not sufficiently ensure that the law would apply in all conflicts, such as those described as "police actions."

Who will have authority to determine whether certain "peoples" are engaged in an "armed conflict" in order to achieve their "right of self-determination"? If the U.N., should it be the Security Council or the General Assembly? An existing regional organization or an independent body? A Protecting Power? Or individual states? Or any group of individuals who issue a call to arms against their government and file an accession to Protocol I?[47] In the absence of a resolution of this question, Article I may never be applied, for the established government will always claim that its own troops are entitled to legal protection, while simultaneously claiming that the rebels do not qualify for the status of a group fighting a war of national liberation.

Sixth, the application of the law of international armed conflict to wars of national liberation imparts once more into the law of war the notion of *bellum justum,* or the just war, which historically has occasioned some of the worst offenses against war victims. Article 1(4) introduces norms about the initiation of war into the law of war: it introduces *jus ad bellum* into *jus in bello.* This normative judgment about the cause of the fighting is alien to *jus in bello* and traditional humanitarian law. Such a judgment creates a double standard: if the war is just, the law of international armed conflict applies *ipso facto;* if unjust, the law applies only when the conflict reaches a certain geomilitary scale.[48]

One publicist lambasted Article 1(4) by contending that this article, considered in conjunction with certain UN documents,[49]

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[47] Graham, *supra,* note 7, at 48-54.

[48] Forsythe, *supra,* note 9, at 80.

[49] These documents are: *First,* the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations,* G.A. Res. 2625, 25 U.N. GAOR, Supp. 28, at 121, U.N. Doc. 28 (A/8028) (1970). It provides, *inter alia*s "In their actions against resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purpose and principles of the Charter of the United Nations."

Second, the resolution on *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes,* G.A. Res. 3103 (XXVIII) (1973). It provides *inter alia*: "Any attempt to suppress the struggle against colonial and alien domination and racist regimes... constitutes a threat to international peace and security... The

tends to legitimize through positive international law a unilateral resort to armed force in order to achieve self-determination. He says that the results of this theory would be:[50]

> Existing legal prohibitions against the use of force in order to achieve desired political goals would be completely negated. Furthermore, the decision to sanction the use of force in the achievement of self-determination might establish a precedent that would lead to the legitimation of unilateral or multilateral resort to force in order to accomplish any of the purposes set forth in the United Nations Charter. Such a result can readily and validly be analogized to the eleventh century "just war" concept used during the Crusades to justify killing in the name of God.
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> The effect that the adoption of amended article 1 will have on established concepts of conflict management is substantial. Reference to struggles for self-determination in the context of an article conferring a preferred status on particular armed conflicts elevates the principle of self-determination to the position of a legal right, justifying the use of armed force by now-favored liberation movements and perhaps even by third states, despite the fact that neither self-defense nor Security Council action is involved. Thus, where claims of self-determination are espoused, war once again becomes a legally recognized instrument for challenging and changing rights based on existing international law.

Apparently proceeding from the concept of the "just war," some states have already contended that all law applicable to armed conflict must consider the just nature of a cause of self-determination and also prohibit assistance to or protection of "aggressors." The result would be that regular armed forces of a state where a group of "people" are engaged in "armed conflict" would be viewed as participants in a criminal war and hence, treated on capture as war criminals rather than as prisoners of war.[51]

As against these arguments of the West, the arguments of the Third World revolved around a core proposition: that the Third

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armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions... is to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes."

Third, the draft *Definition of Aggression* adopted by the UN Special Committee on the Question of Defining Aggression, U.N. Doc. A/Ac. 134/L. 46 (1974). It provides, *inter alia*: "Nothing in this definition... could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter of..., particularly peoples under colonial and racist regimes or other form of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principle of the Charter and in conformity with the above-mentioned Declaration."

[50] Graham, *supra*, note 7, at 44.

[51] *Id.*, at 54-57.

World seeks a new criterion, in addition to the established legal norm, for international regulation of conflict. It seeks to gain an international right to struggle against certain governments by obtaining legal status and protection for those engaged in that struggle. It wants to create international legal standards that would supersede municipal law regarding treason, subversion, sabotage, and like offenses. In sum, the Third World seeks to amend nothing less than the traditional definition and the traditional structures of the law which the West is at such pains to preserve.

The Third World states seek a modified norm of justice supplemental to the traditional geomilitary scale, in order to extend the scope of law to a broader field. They feel that this ambition is only reflective of developments in other fields of international law,[52] where considerations of "justice," or intrinsic importance, have transferred jurisdiction from domestic forums.[53] If these developments reflect the political preferences of the Third World, so be it; they are the "new majority" who possess voting control of the international institutions that make international law. They require the "old majority," who shaped customary international law in the nineteenth century, to recognize that times have changed.

It is conceded that the draftsmanship of Article 1(4) is faulty.[54] There is no objective definition for the flamboyant terms "colonialist," "racist," or "self-determination." Yet it should be realized that at times, deliberate ambiguity might be the only means of achieving a consensus. Besides, a criterion is provided for characterizing an "armed conflict:" the purpose of the participants, i.e., "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self-determination." Concededly, the purpose criterion alone is not an adequate indicator; hence, it should be considered as only one of multiple criteria, e.g., the duration of the conflict, the use of regular combat troops, and the invocation of emergency governmental powers.[55]

Article 1(4) does not legitimate wars of national liberation; it only recognizes rights already determined by extrinsic documents

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[52] *E.g.*, slave trade and drug traffic.

[53] Forsythe, *supra*, note 9, at 82-84.

[54] Common Article 2 of the Geneva Conventions covers only "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," and "all cases of partial or total occupation of the territory of a High Contracting Party." Since national liberation movements have not signed the 1949 Conventions, they should not be entitled to rights under Article I of Protocol I, which is subordinated to Common Article 2. This is a clear case of faulty draftsmanship because the logical result of treaty language is at cross-purposes with the intent of the framers.

[55] INSTITUTE OF WORLD POLITY, THE LAW OF LIMITED INTERNATIONAL CONFLICT 48-49 (1965).

of the UN.[56] That the article may lead to discriminatory treatment of combatants is possible, for guerilla groups would be unable to carry out all their obligations under the Geneva Conventions. Yet the article does speak in neutral terms, and will subject both the guerilla and the governor to pressures to moderate their conduct under prevailing legal norms. Combatants have habitually claimed, not that they had the right to violate the Geneva rules, but that the Geneva rules did not apply to them. Since Article 1(4) expands the scope of coverage, this excuse is no longer available, and in this manner Article 1 serves the cause of humanitarianism.[57]

PROTECTING POWERS. The Diplomatic Conference sought to guarantee application in practice of the law that it was formulating by providing for the Protecting Power system, i.e., the rights and duties of neutral states or their substitutes (non-state third parties such as the ICRC or the UN) to supervise the implementation of the law. Article 5 provides for the appointment of Protecting Powers and of their substitutes, thus resorting to the traditional method of international participation in ensuring compliance with international instruments relating to armed conflicts. In the context of the law of war, the institution of the Protecting Power is usually traced to the Franco-Russian War of 1870. It was widely accepted during World War I, but remained an essentially customary institution until the adoption of the 1929 Geneva Convention relative to the Treatment of Prisoners of War. It provided in Article 86 "that a guarantee of the regular application of the Convention will be found in the possibility of collaboration between the Protecting Powers charged with the protection of the interests of the belligerents."

Many features of the Protecting Power system remain part of the customary law, such as the conditions of the designation of Protecting Powers in specific conflicts, a process involving a "triangular" arrangement between the Protecting Power and each of the belligerents. The Protecting Power's specific war-related role was very limited until World War I, when some visiting of war prisoner camps was permitted.[58] At this time, it appeared that the role of the Protecting Powers had gained acceptance in customary international law.[59] The functions of the Protecting Powers were

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[56] See *supra*, note 49.

[57] Bond, *Amended Article I of Draft Protocol I to the 1949 Geneva Conventions: the Coming of Age of the Guerilla*, 32 WASH. & LEE L. REV. 65-78 (1975).

[58] Suckow, *supra*, note 39, at 46.

[59] F. SIORDET, THE GENEVA CONVENTIONS OF 1949: THE QUESTION OF SCRUTINY 5 (1953).

supplemented by the work of the ICRC and the National Red Cross Societies which provided material and medical assistance to individuals in places of detention. The same system obtained in World War II.[60]

The Protecting Power system is the keystone of the 1949 Geneva Conventions which made it mandatory in a Common Article[61] by providing: "The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Power whose duty it is to safeguard the interests of the Parties to the conflict . . . The said delegates of the Protecting Power shall be subject to the approval of the Power with which they are to carry out their duties." Thus the role of the Protecting Powers does not appear to be limited to the specific attributions entrusted to them in the Conventions, but extends to all matters relating to their implementation.

In addition, provision was made for official substitutes because in World War II, Protecting Powers ceased to function when a belligerent state went out of legal or actual existence. Moreover, it was feared that in World War III there might not be any neutral states. Thus, Geneva Convention III provides:[62]

> The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the Present Convention.
>
> When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the function performed under the present Convention by a Protecting Power designated by the Parties to a conflict.
>
> If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian function performed by the Protecting Power under the present Convention.

The 1949 Conventions also provide for the role of the ICRC, which is authorized to become, under certain conditions, an official substitute,[63] as well as an unofficial substitute.[64] It may engage in such specific tasks as operating the Central Information Agency.[65]

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[60] Only Switzerland and Sweden were the Protecting Powers for almost all belligerents of World War II.

[61] Common Art. 8/8/8/9.

[62] Art. 10.

[63] Art. 10/10/10/11.

[64] Art. 9/9/9/10.

[65] Geneva Convention IV, Art. 140.

It has the right to visit places of detention, whether or not a Protecting Power or official substitute was designated by belligerents.[66] These visits are to occur automatically, subject only to the detaining state's consent to the particular ICRC delegate, but not to the visits in principle.

Under the 1949 Conventions, international armed conflicts[67] are subjected to supervision, official[68] and unofficial.[69] On the one hand, official supervision may take one of three forms: (1) belligerent-appointed Protecting Power; (2) belligerent-designated official substitutes; and (3) automatic introduction of an official substitute like the ICRC. On the other hand, unofficial supervision may take one of two forms: (1) the automatic introduction of the ICRC to perform specific humanitarian visits to detainees, and tracing; and (2) the possible introduction of Red Cross agencies to perform traditional humanitarian tasks of an unspecified nature.[70] In sum, under the Geneva Conventions, while the primary responsibility for the application of the Conventions rests with the parties themselves, a Protecting Power or a substitute humanitarian organization should be available in all cases to cooperate with the parties and to supervise the application of the Conventions.

A survey of state practice for the period 1949-74 indicated that although the effort to introduce in international armed conflicts the element of Protecting Powers or their official substitutes is long-standing, there has been only infrequent recourse to Protecting Powers and no recourse at all to official substitutes. Moreover, unofficial supervision through the Red Cross has prospered, as evidenced by frequent reliance on the ICRC for humanitarian protection and assistance. These developments led the surveyor to conclude that "Protecting Powers in the form of neutral states do not seem to have constituted the answer to the need for supervision of the law of armed conflict, ..."[71]

At any rate, Protocol I, Article 5 reinforces the system of Protecting Powers, who "have the duty of safeguarding the interests of

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[66] Geneva Convention IV, Art. 126; Geneva Convention IV, Art. 143.

[67] The provisions of the 1949 Conventions on the Protecting Power system cover only international armed conflicts, not non-international armed conflicts. The latter cases fall under Common Article 3, which does not refer to a Protecting Power or a substitute, but provides, *inter alia*, that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

[68] Common Articles 8/8/8/9 and 10/10/10/11.

[69] Common Article 9/9/9/10.

[70] Forsythe, *Who Guards the Guardians: Third Parties and the Law of Armed Conflict*, 70 AM. J. INT'L. L. 41-45 (1976) (hereinafter cited as Forsythe).

[71] *Id.*, at 45-48.

the Parties to the conflict," Article 5 underlines the mandatory nature of the appointment of Protecting Powers in international armed conflicts by providing that it is "the duty of the Parties"[72] to provide for their designation and acceptance "without delay."[73] Otherwise, the ICRC or any other impartial humanitarian organization may offer its good offices towards this end.[74] If the tender of good offices fails to obtain agreement on a Protecting Power, the parties are obliged to accept without delay an offer to act as a substitute which may be made by the ICRC—or by any other organization which offers all guarantees of impartiality and efficacy—after consultations with the Parties. The work of the substitute is subject to the consent of the Parties.[75] This provision on substitutes constituted the most controversial paragraph of Article 5.[76] Since the ICRC did not wish to be thrust upon a belligerent, the introduction of the ICRC as a substitute for Protecting Powers in certain situations is non-automatic.

Some sectors criticized the introduction of state consent into the functioning of the substitute because it was not a requirement in the 1949 Conventions,[77] under which ICRC involvement could be forced by means of the provision that a Detaining Power had to request third party supervision. This criticism came mainly from the Third World and Western delegations. It was countered by a reminder that the 1949 Conventions are still operative, although the provision in question is unworkable up to today. Moreover, while the ICRC could be forced into becoming an official substitute, a belligerent does have the opportunity to express its *ad hoc* consent for the functioning of the ICRC,[78] since each ICRC delegate must have the consent of the belligerent.[79]

The designation and acceptance of Protecting Powers does not affect the legal status of the Parties or of any territory.[80] The maintenance of diplomatic relations between Parties is no obstacle to the designation of Protecting Powers.[81] Any subsequent mention in Protocol I of Protecting Powers includes also a substitute.[82]

Although Article 5 uses imperative language and imposes "duties" on the Parties, the operation of the system depends upon

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[72] Art. 5(1).
[73] Art. 5(2).
[74] Art. 5(3).
[75] Art. 5(4).
[76] *See* Forsythe, *supra*, note 70, at 48-55.
[77] *See* Common Art. 10/10/10/11.
[78] *See* Geneva Convention III, Art. 126.
[79] Forsythe, *supra*, note 70, at 57.
[80] Art. 5(5).
[81] Art. 5(6).
[82] Art. 5(7).

the necessary approval of the party in whose jurisdiction the Protecting Power is to act. After all, if a major power is involved, there is no way to compel it to accept involuntarily a Protecting Power. The practical utility of Article 5 lies in its potential "to expose an obstinate power which refuses all the possible alternatives to moral opprobrium.'[83] But in the near future, as in the past, what is likely to be more important is unofficial supervision by the ICRC.[84]

COMBATANT AND PRISONER-OF-WAR STATUS. Since Article 1(4) in effect declares liberation wars to be international conflicts, the Diplomatic Conference had to find terms to define the guerilla fighter so that he could benefit from the protection of the Conventions and the Protocol. The guerilla, after all, is of ancient lineage; he first appeared under this name during the Spanish war of resistance against the armies of Napoleon. But it was after the 1949 Geneva Conventions were adopted that guerilla warfare became more frequent in armed conflicts designated as wars of liberation, or national, anti-colonial, social and ideological struggles.

If considered within traditional strategic political and legal criteria and classifications, the problem of guerillas is anomalous. They appear in both international conflicts and conflicts of an internal character. They have many names: guerillas, partisans, irregulars, members of resistance movements, members of movements of national liberation, members of subversive movements, etc. Although they do not always hold territory, in fact they usually have a safe retreat or sanctuary. Their method consist of fighting by disguised and mobile groups, resorting to surprise attacks, ambushes and sabotage, and avoiding, as a rule, pitched battle. Generally this method is employed by those who are weak in manpower and material resources. The guerilla is thus able to strike unpredictably while remaining elusive; for this type of operation, light arms suffice.[85]

The 1949 Geneva Conventions recognize the guerilla as a lawful combatant and thus entitled to prisoner-of-war status under the following conditions:[86]

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

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[83] Suckov, *supra*, note 39, at 48.
[84] Forsythe, *supra*, note 70, at 61.
[85] *First Report of the Secretary General, supra*, note 4, at 53.
[86] Geneva Conventions I and II, Art. 13; Geneva Convention III, Art. 4.

(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.

These conditions can be classified into: (1) conditions concerning the group, and (2) conditions to be fulfilled by individual combatants. The conditions for the group are, *first,* that they must belong to a party to the conflict. The rationale of this condition is to insure a certain level of responsibility. However, it has been criticized as tending to deny protection to guerillas when the government of their state does not consider itself at war or when it does not recognize the guerilla movement. Moreover, it is unclear how a group should "belong" to a party. The gamut of the relationship may range from a simple *de facto* alliance or even a tacit agreement, to incorporation in the armed forces of the belligerent.

Second, the group must be organized under a responsible commander. *Third,* the group must comply with the laws and customs of armed conflicts. This condition has been criticized as impractical, particularly as it deprives guerillas of protection when they utilize the usual fighting method — terrorism. But this criticism would ultimately result in the application of the principle that the end justifies the means. There are certain bedrock principles that must certainly apply, e.g., the prohibition to "kill or wound an enemy who, having laid down his arms, or having no longer any means of defense, has surrendered at discretion."[87]

The conditions for the individual are, *first,* that he must have a "fixed distinctive sign recognizable at a distance," and must "carry arms openly." This fundamental condition means that the guerilla must segregate himself from the civilian population. Accordingly, while the guerilla may not camouflage himself as a civilian, he may camouflage himself as any regular soldier may. He is to carry arms "openly" as a regular soldier does, and should not be hidden such that the guerilla will be mistaken for a disarmed civilian.

Second, the guerilla should not camouflage himself as a civilian for a military action; otherwise, he loses his privileged status. Also, if his actions constitute treachery, he would be violating the laws and customs of war. *Third,* a fixed sign must be worn at all military

[87] The Hague Conventions of 1899 and 1907 Respecting the Laws and Customs of War on Land, Art. 23(c).

actions in which the guerilla is engaged, or at least during the whole of each hostile action taken individually.[88]

In international conflicts, guerillas in occupied territories are protected by Geneva Convention III, which entitles them to a regular trial. But this does not prevent the occupying power from prosecuting and punishing them subject to certain guarantees, safeguards, and instructions.[89] In conflicts not of an international character, guerillas are protected by Common Article 3, provided they no longer take "active part in the hostilities." Sentence cannot be passed on them nor executions carried out "without previous judgment, pronounced by a regularly constituted court affording all the judicial guarantees. . . ." But the Conventions do not protect them against severe punishment which regularly constituted courts might impose upon them, including, if so provided by the national law concerned, capital punishment.[90]

Hence, there has been a trend to grant to guerrillas certain additional rights.[91] Protocol I expresses this trend in the following provisions:

> *Article 43 — Armed forces*
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> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

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88 Bindschedler, *supra*, note 10, at 38-45.

89 Geneva Convention V, Art. 71; Art. 68 et seq.

90 *First Report of the Sec.-Gen., supra*, note 4, at 54-55.

91 This trend is evidenced, for example, by four resolutions adopted by the General Assembly at its 23rd session: Resolution 2383 (XXIII) on the question of Southern Rhodesia; 2395 (XXIII) on the question of Territories under Portuguese administration; 2396 (XXIII) on the policies of *aopartheid* of the Government of South Africa; 2446 (XXIII) on measures to achieve the rapid and total elimination of all forms of racial discrimination in general and the policy of *apartheid* in particular.

In the latter resolution, the General Assembly confirmed the views of the Teheran International Conference on Human Rights which recognized and vigorously supported the legitimacy of the struggle of the peoples and patriotic liberation movements in southern Africa and in colonial Territories. The General Assembly also confirmed the decision of the Conference to recognize the right of freedom-fighters in southern Africa and in colonial territories to be treated, when captured, as prisoners of war under the 1949 Geneva Conventions.

3. Whenever a Party to a conflict incorporates a para-military or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 — Combatants and prisoners of war

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

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

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

   (a) during each military engagement, and

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

   Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

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

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

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

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed

> forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

The text, it has been noted, tries to give something to each side.

Under Article 43(2), combatant status—enjoyed by members of the armed forces of a Party—confers the right to participate directly in hostilities. If combatant status is lost, the act of participating in hostilities may be treated as unlawful rebellion. In this case, the guerilla would be entitled to a protection equivalent in all respects to those accorded to prisoners of war, including the basic guarantees of a fair trial.[92]

Article 44(3) recognizes situations where an armed combatant cannot distinguish himself from civilians. The word "cannot" refers to the military (not the physical) impossibility for the guerilla to distinguish himself and still retain a chance of success.

PROTOCOL II: PROTOCOL ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS

Article I defines the material field of application of this protocol as follows:

> *Article I — Material field of application*
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> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall aply to all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Common Article 3, commonly referred to as a "miniature convention," provides:

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[92] Suckow, *Humanitarian Law Conference, A Progress Report*, 16 REV. INNT'L. COM. JURISTS 57 (1976).

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;
   (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
   (d) the passing of sentences and the carrying out of execution 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 parties to the conflict.

The parties to the conflict should further endeavor 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 the conflict.

Common Article 3, by setting certain minimum standards in non-international armed conflicts, was received as a novel element in the law. It is not a complete code of behavior, for it contemplates that the parties to the conflict should, by means of special agreements, bring into force all or part of the other provisions of the Geneva Conventions.

Although the value of Article 3 is recognized,[93] it needs to be specified or supplemented. For example, as the ICRC noted, "it has happened several times in international conflicts that governments denied the existence of a conflict to which the Common Article 3 of the four 1949 Geneva Conventions applied; they claimed that only national law applied to the situation. It has also happened that insurgents refused to consider themselves bound by Article 3 and

[93] The XXIst International Red Cross Conference held at Istanbul in 1969 adopted a resolution stating that Art. 3 had already rendered great service in protecting the victims of non-international armed conflicts.

stated that they could not apply some or any provisions of that article, particularly when they resorted to terrorism as a weapon."[94]

In the same report, the ICRC pointed out that although Article 3 leaves considerable discretion to the legal government, it excludes purely arbitrary governmental decisions. Under international law, adherence to the Conventions binds not only the government but also the population. Hence, when conditions require, its application is compulsory both for "insurgents" and for authorities even when they did not yet exist at the time the state, by ratification or accession, became a party to the Conventions.

The ICRC also pointed out that in several internal conflicts, foreign intervention has taken place,[95] and this factor further justifies the broadest possible application of the law of armed conflicts. But at the same time, the ICRC called attention to certain lacunae in Article 3. For one, it does not refer to the respect due to the sign of the red cross, to hospitals, to military and civilian medical personnel, and to the national Red Cross societies. This omission makes the activities of Red Cross units and medical personnel more difficult. For another, it does not distinguish between those who fight openly and fairly and those who don't; this omission exposes the former to measures of repression similar to those meted out to the latter.

Furthermore, Article 3 does not provide for persons detained in an internal conflict the right to receive and send family messages and to receive relief. Neither does it provide that Contracting Parties shall allow the free passage of consignments of medical and hospital stores, etc., intended for civilians of another Contracting Party, even if the latter is its adversary; and shall likewise permit the free passage of consignments of essential foodstuffs, clothing and tonics, intended for children under fifteen, expectant mothers, and maternity cases.[96] Finally, Article 3 merely authorizes the ICRC to offer its services, which may or may not be accepted; it does not specifically provide for the cooperation either of a Protecting Power or a neutral impartial organization in the application of humanitarian provisions. For all these reasons, it was necessary for a new international instrument to provide in particular for a comprehensive system of protection of civilian populations, as well as combatants in internal armed conflicts of international concern.[97]

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[94] Special report of the ICRC to the XXIst International Conference, *supra,*

[95] *E.g.,* the provision of material or financial assistance, military advisers, troop contingents, all-out expeditionary forces; or the issuance of authorization to volunteer corps to assemble abroad and go to the country where the conflict takes place to serve as party to the conflict.

[96] This provision is already found in Geneva Convention IV, Art. 23, applicable to international conflicts.

[97] *First Report of the Sec.-Gen., supra,* note 4, at 55-57.

This new elaboration is embodied in Protocol II. However, it does not protect guerilla type conflicts, which are frequent contemporary phenomena, until a stage in the conflict has been reached where control of a part of the territory has been achieved. Article I therefore raises the issue of how to determine when this stage has been reached, prompting several delegates to the Diplomatic Conference to specifically reserve to their governments the final decision on when the Protocol would come into force in a particular conflict. Excluded conflicts would have only the protections of Common Article 3 of the Geneva Conventions.

A number of states with civil war situations apparently covered by the definition, including the Philippines,[98] sought to limit the application of Article I. Nonetheless, it goes beyond the classical civil war situation since it does not require an opposing government but merely an "organized armed group." Several delegations made reservations to the principle of the Protocol itself, prompting a publicist to air the suspicion "that it will not find wide acceptance by ratification among states where it would be most likely to find application."[99]

Moreover, it has been observed that it might be difficult to find any governments willing to apply Protocol II, since they could always argue that the "threshold of violence" had not been reached.[100] Conferences of Government Experts have grappled with various criteria for this threshold, including the nature of the entities in conflict, the level of violence employed, the length of the conflict, the objectives of the parties, the degree of organization attained or governmental functions performed.[101] The controversial nature of this question aroused distrust among a large number of states who did not give their support to Article I, reasoning that this article was the basis for the rest of the Protocol.[102]

CONCLUSION

It has been noted that the fundamental principles of the traditional laws of war are still valid and applicable, not only to wars in the formal sense, but also to all international armed conflicts. But

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98 The Philippines proposed to merge the two Protocols into one, with a common part covering the provisions that would be identical in the two types of conflicts, and separate parts for those provisions differing in international and non-international conflicts.

99 Suckow, *supra*, note 39, at 50-51.

100 Mr. George Aldrich, Deputy Legal Adviser, US Department of State, cited in Cummings, *Revising the Law of War: Future Developments*, 1975 PROC. AM. SOC. INT'L. L. 247 (1976).

101 Baxter, *supra*, note 20, at 20.

102 The vote on Art. 1 was 58 to 5, with 29 abstentions. Protocol II was adopted by consensus. Suckow, *supra*, note 37, at 56-60.

the contemporary application of these principles is uncertain because their practical scope has frequently turned into a question of interpretation. This is the rationale for Protocols I and II, which represent a revision of the law of armed conflicts: not only a confirmation of the fundamental principles, but a clarification, and a delimitation of their scope under the conditions of modern war, particularly in non-international armed conflicts. In this manner, the law of armed conflicts, while not a substitute for peace, "preserves a certain sense of proportion and human solidarity as well as a sense of values amid the outburst of unchained violence and passions which threaten these values."[103]

Do the two Protocols actually improve the current status of the laws of war? At the very least, they represent an addition to the Fourth Hague Convention of 1907, since they carry provisions on the protection of the environment, starvation, and target area bombing of cities. From the point of view of governments, the two Protocols have advanced certainty and discretion, but only at the expense of basic humanitarian considerations. For instance, conflicts covered by Common Article 2 of the Geneva Conventions now need a lesser threshold of violence, while those covered by Common Article 3 now need a larger one.[104]

The two Protocols embody both hard law and soft law, depending on how the law is directed toward different subjects of the law. The language employed by the law differs, depending on whether the norms are addressed to individuals or states. In any event, the norms of the two Protocols, as of the law of war in general, serve the following purpose: (1) guides to the conduct of states; (2) guides to the conduct of individuals; (3) measures of the responsibility of states; (4) rules of penal responsibility of individuals; and (5) standard for employment by the ICRC in its function of protecting war victims.[105] The law concurrently performs three functions: (1) it is a technical language; (2) it is a policy instrument

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[103] Bindschedler, *supra*, note 10, at 60-61.

[104] Cummings, *supra*, note 100, at 254. The article also cites Major General George S. Prugh, Judge Advocate General of the U.S. Army. He pointed out that the threshold of violence needed for Protocol II to become applicable has increased, since the rebel force must obtain control of territory. Wars of national liberation, of course, would not be covered by this Protocol, but rather by Protocol I. The final result is that rules of applicability for tht two Protocols, in his view, are now inconsistent. *See* 248-49.

[105] *Id.*, at 249, citing Richard R. Baxter of the Harvard Law School, who gave the following example: Protocol I, Art. 57, para. 2(a) which refers to precautions in attacks is addressed to the military commander who plans or decides upon an attack. In contrast, Art. 59 of the same Protocol (on the immunity of non-defended localities) is a norm directed to the state. Since the provisions are addressed to different entities (individuals or states) and serve different purposes, some will be in the active voice while others will be in the passive, depending on the nature of the obligation.

in the political process; and (3) it is a formal reflection of agreement and consensus on public policy.[106]

It should not be overlooked that the two Protocols represent a milestone in the evolution of the law of armed conflict. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law held in 1974-77 constituted an international forum for the expression of the legal views of states; as such, the Conference accelerated the process by which international legal principles are enunciated and become generally accepted. In adopting the two Protocols, the Conference provided a case study of the new[107] process of evolution of international law in modern times.[108]

The future impact of the Protocols depends of course upon state participation. It has been pointed out that it is important for the major military powers to become parties, otherwise the possibility might arise that many international armed conflicts will not be governed by the Protocols because only one of the two contending states is a party to the new agreements. Moreover, if some but not all parties to the Geneva Conventions become parties to the new Protocols, the community of Geneva Convention states will itself be weakened by the controversy and by the fact that different groups of states are bound by different treaty obligations.[109]

Protocol I, Article 1 may have marked the high point of Third World success and constituted a victory for the Third World-Socialist bloc coalition. But its practical effect has been placed very much in doubt. Assuming that a state extends general acceptance without reservations, would it be ready to admit it was the colonial or racist state to which Article 1 (4) refers? As for Protocol II, its basic concept was constantly exposed at the Diplomatic Conference to the open hostility of many developing countries who face real danger of internal conflict. An observer warned: "It would be prudent to expect a number of States present and accepting the final consensus not to be among the signatories to Protocol II."[110]

In the final analysis, the legal value of the two Protocols will take years to appreciate, as they await ratification or accession, and the reservations with which state action may be accompanied. Even more importantly, the provisions governing battle zone conditions

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[106] Forsythe, *supra*, note 9, at 87.

[107] As contra-distinguished from international legislation, consisting of international treaties or conventions; and customary international law.

[108] Suckow, *supra*, note 37, Art. 62. *See also* Suckow, *supra*, note 38, at 50.

[109] Baxter, *supra*, note 20, at 25.

[110] Suckov, *supra*, note 37, at 61. The rolls of the Protocols were open for 12 months from December 1977.

must await an empirical test. It is possible that before this eventuality, new and more devastating techniques of warfare might overtake the two Protocols. The documents, therefore, do not aspire to reverse the tendency towards the progressive cruelty of war. Rather, they represent a brake on that progression, and in this sense their achievement" is in having implicitly accepted by all parties that the cruelty imposed by war which is unrelated to a military objective, is both unproductive or even counter-productive and contrary to what may be described as the universal conscience of mankind."[111]

The strength of the Protocols, to repeat, depends upon their capacity to achieve a universal basis. The attainment of universal applicability would not be so difficult if the codified rules were initially accepted as "pacts with the devil" for mutual advantage during a conflict. In particular, in deciding whether or not to ratify Protocol II, each government must realize that methods which outrage the conscience of humankind are counter-productive. For they do not in fact produce significant advantages, and neither do they intimidate the other Party; they only serve to isolate the government which is utilizing them and thus further embitter the conflict. Protocol II is also useful because in the event of a change of government, it assures reciprocal treatment between parties in "conflicts which do not dare to tell their name."[112] It would be lamentable if Protocol II were to become an archive piece, for lack of ratification by states where it is most likely to be called for.[113]

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[111] *Id.*, at 61-62.

[112] L. Boissier, *Les Troubles Interieurs et L'action du Comite International de la Croix—Rouge* REVUES DES TRAUX ET COMPTES RENDUS DES SEANCES PUBLIQUES, 51 et seq. (1959).

[113] Suckow, *supra*, note 39, at 52-53.