THE HUMANITARIAN LAWS OF WAR IN CIVIL STRIFE : TOWARDS A DEFINITION OF « INTERNATIONAL ARMED CONFLICT » *

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INTRODUCTION

The distinction between a domestic and international armed conflict is not wholly academic. For the tragic victims of armed conflict — the prisoners, the sick, the wounded, and other non-combatants — it could represent the difference between a decent and a miserable life, or even between life of any kind and death.

Article 3 which is common to all four of the Geneva Conventions of 1949 does provide a « minimum » protection for those who are trapped in the maelstrom « of armed confict not of an international character » [1].

> « In the case of armed conflict not of an international character occuring 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;

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[1] International Committee of the Red Cross (hereafter referred to as the I.C.R.C.), *The Geneva Conventions of August 12, 1949,* 1950, 2nd ed., 24.

(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. »

Article 3's deficiencies emerge not only from the fact that the substantive rights formally guaranteed are aptly characterized by use of the word « minimum », but also because its failure to guarantee supervision by a neutral body makes the implementation of its substantive provisions necessarily speculative. Only an « impartial humanitarian body », not a state, may even offer its services to expedite implementation; Parties to the Convention are under no obligation to accept the offer. If recent civil conflicts are accurate auguries, however, the I.C.R.C.'s proffer of services will be accepted in most cases [2], but perhaps only within limits carefully defined by the Parties to promote the appearance of compliance while enjoying the putative benefits of violation [3]. For instance, an incumbent government struggling with insurgents employing guerilla tactics might permit discretionary inspection by the I.C.R.C. of all prison camps, but might set up transit camps where captured guerrillas could be held for short periods and interrogated by torture. If such camps were located in areas of substantial guerrilla activity, a policy of barring discretionary access by the I.C.R.C. or representatives of other humanitarian organizations on « security grounds » might be accepted by international public opinion as not patently unreasonable.

Where there is a genuine effort to comply with Article 3 the position of non-combatants still is gravely inferior to that of their counterparts in an international war. This is obviously true of participants in the conflict who have been rendered *hors de combat* by sickness, wounds or capture. While torture is prohibited, nothing in Article 3 prevents their being hung for « treason » [4].

[2] See I.C.R.C., « Protection of Victims of Non-International Conflicts », Report submitted to the XXth International Conference of the Red Cross, February 1965, p. 4.

[3] Of course, this may occur even in a conflict generally conceded to be international in character. During World War II, for exemple, the I.C.R.C. apparently did not discover the true nature of the German death camps.

[4] See, *e.g.*, DRAPER, « Rules Governing the Conduct of Hostilities - The Laws of War and their Enforcement », The United States Naval War College, *Readings in International Law*, 1969-1970, 380.

Moreover, even if their punishment is limited to detention, because they are denied the full, detailed protection of Convention III the form of detention may hover on the frontier of barbarity without manifest violation of humanitarian law.

Civilians who inhabit areas where insurgents are active also are subjected to forms of detention. Normally they are garbed in euphemistic vestments such as « relocation centers » or « fortified hamlets », etc., with respect to which Article 3 contains no specific safeguards. Civilians may also be compelled by either belligerent to serve in effect as slave labor and subjected in the process to the dangers of conflict. Mere passivity may be harshly penalized. Food and other essential goods may be requisitioned or destroyed to prevent them from falling into the hands of the other party [5].

Civilians in conflict deemed non-international are disadvantaged not only because of the inapplicability of the detailed provisions of the Geneva Conventions, but also because the international legal rules governing combat operations — largely codified in The Hague Conventions — have traditionally been regarded as applicable only to international armed conflicts [6]. Hence such practices as the destruction of towns and villages to achieve insignificant military objectives or indiscriminate zonal bombardment allegedly designed to harass unseen enemy forces may not be covered by the international law of internal war, although one could possibly argue that these tactics violate Article 3's injunction to treat « humanely... Persons taking no active part in the hostilities » and its prohibition of « violence to life and persons ».

There is, of course, nothing theoreticial about these deficiences in the law of internal war. Even the most casual observer of internal strife in our time can attest to their reality. As the I.C.R.C. has long contended, the only fully satisfactory response to this incarnadine spectacle is elaboration of humanitarian law and its extension to every level of conflict. The Universal Declaration of Human Rights, the various Human Rights Covenants, and the Genocide Convention all are steps in that direction. Hopefully they are genuine omens of a universal law guaranteeing basic human decency. From a shorter time perspective, we might hopefully anticipate at least partial extension to civil wars of the detailed provisions of the Geneva Conventions and the rules governing combat operations. One way of achieving extension is to win support for a broader definition of international conflict.

[5] Salient among the provisions of Geneva Convention IV which would protect civilians from such abuse are Articles 33, 38, 40, 51, 55 and 95.

[6] See I.C.R.C., « Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts », Report Submitted to the XXIst Conference of the Red Cross, May, 1969, p. 8.

AN APPROACH TO THE INTERPRETATION OF TREATIES

The object of treaty interpretation is to determine « whether the application of an agreement to a particular situation is or is not in accordance with the shared intentions, expectations and objectives of the parties » [7]. To that end, jurists, diplomats, and private scholars have employed one or a mixture of three modes of interpretation : the « intention of the parties » of « founding fathers » approach; the « textual » or « ordinary meaning of the word » approach; and the « teliological » or « aims and objects » approach [8]. While they are by no means mutually exclusive — actual interpretative operations have normally deployed all three — yet, as Sir Gerald Fitzmaurice has correctly noted, « each tends to confer the (*sic*) primacy on one particular aspect of treaty interpretation... to the subordination of the others » [9]. He has summarized the main thrust of the different approaches or « schools » as follows [10] :

> « For the " intentions " school, the prime, indeed the only legitimate, object is to ascertain and give effect to the intentions, of the parties : the approach is therefore to discover what these were, or must be taken to have been. For the " meaning of the text " school, the prime object is to establish what the text means according to the ordinary or apparent signification of its terms : the approach is therefore through the study and analysis of the text. For the " aims and objects " school, it is the general purpose of the treaty itself that counts, considered to some extent as having, or as having come to have, an existence of its own, independent of the original intentions of the framers. The main object is to establish this general purpose, and construe the particular clauses in the light of it : hence it is such matters as the general tenor and atmosphere of the treaty, the circumstances in which it was made, the place it has come to have in international life, which for this school indicate the approach to interpretation. It should be added that this last, the teleological, approach has its sphere of operation almost entirely in the field of general multilateral conventions. »

The textual approach seems finally to have achieved ascendancy. Recommended by the International Law Commission to the Vienna Conference on the Law of Treaties, it was adopted despite spirited opposition led by the United States Delegation [11] and incorporated into the Vienna Convention of the Law of Treatess. The relevant articles, 31 and 32, provide that [12] :

[7] LISSITZYN, O., « Treaties and Changed Circumstances (*rebus sic stantibus*) », 61 *A.J.I.L.*, 895, 896, (1967). On the interpretation of international agreements generally, see MCDOUGAL, LASSWELL and MILLER, *The Interpretation of Agreements and World Public Order*, 1967, and Gidon Gottlieb's perceptive critical review in 21 *World Politics* 108, 1968.

[8] FITZMAURICE, G., « The Law and Procedure of the International Court of Justice : Treaty Interpretation and Certain Other Treaty Points », 28 *B.Y.B.I.L.*, 1, 1951.

[9] *Ibid.*

[10] *Id.* at 1-2.

[11] See SINCLAIR, I.M., « Vienna Conference on the Law of Treaties », 19 *I.C.L.Q.*, 1970, 47, pp. 62-63.

[12] 8 *International Legal Materials*, 1969, 679, 691-2.

« SECTION 3 : INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes :

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context :

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable. »

Whether one approaches these articles from the perspective of a textualist, an intentionist or a teleologist, recognition of the triumph of the « plain meaning » school is unavoidable. The relative merits of the several schools were debated openly both in the International Law Commission and at the Convention, as well as in books and journals [13]. At Vienna, the United States Delegation finally proposed an amendment, the principal objective of which was to eliminate the hierarchy between the sources of evidence for interpretation by combining the articles containing the general rule and the supplementary means of interpretation [14]. It attracted scant support during debate in the Committe of the Whole and was overwhelmingly rejected [15].

[13] See, *e.g.*, McDOUGAL, M., « The International Law Commission's Draft Articles upon Interpretation : Textuality *Redivivus* », 61 *A.J.I.L.*, 1967, 992.

[14] KEARNEY, R., and DALTON, R., « The Treaty on Treaties », 64 *A.J.I.L.*, v970, 495, pp. 519-520.

[15] *Id.* at 520. The exact vote was 8 in favor, 66 against, with 10 abstentions. See SINCLAIR, I.M., *supra* note 11, at 65.

The reference to « context » and to « object and purpose » in the principal article do not appear to represent any substantial compromise. Indeed, it seems that they were calculated not to moderate but to confirm the triumph of textualism implicit in the article's opening words. In its report on this article the International Law Commission stated unequivocally that the relevant « context » was the entire *text* in which a controverted provision was embedded, and that « " object and purpose " do not refer to the actual subjectivities of the parties... but rather to the mere words about " object and purpose " intrinsic to the text »[16].

Of course the Convention itself is not yet a legally-binding instrument, though one assumes that given the care devoted to its preparation, the presence at the Conference of most of the world community, the serious tone of the debates, and the overwhelming, broadly-based majority which voted for its adoption — 79 votes in favor, 1 against with 19 abstentions[17] — it will eventually be ratified by the great majority of states. But whatever the Convention's ultimate fate, since the provisions on treaty interpretation purportedly reflected the proponderant opinion among jurists and practitioners on the relative value to be attached to the various elements of treaty interpretation[18] and since after the defeat of the United States amendment the articles on interpretation were adopted unanimously, it constitutes persuasive authority as to the existing customary law. Hence, whatever one's personal reservations about the Convention's formulation, it does provide the most easily defensible framework for an essay in interpretation. And its use certainly is facilitated where, as in the case of Article 3 of the Geneva Conventions, the text « leaves the meaning ambiguous or obscure », so that recourse « to supplementary means of interpretation » is unavoidable.

There is one respect in which, for the private scholar, the Convention's framework is inadequate. Articles 31 and 32 are, in effect, a set of instructions — to jurists on how to go about deciding cases where decision turns on the interpretation of an international agreement and to national advocates making or refuting claims under such agreements. Their roles require judges and advocates formally to ignore the relationships between the policy interests of individual states and particular interpretations, even where the impartial application of interpretive techniques fails to yield an unambiguous result. The scholar can and should be more candid. As Myres McDougal and Harold Lasswell have so often reminded us, where the application of legal techniques leaves a residuum of logically defensible alternatives (as they would I think argue was almost always the case), decision must then either be wholly arbitrary

[16] Cited by McDOUGAL, M., *supra* note 13, at 993-994.

[17] SINCLAIR, I.M., *supra* note 11, at 47.

[18] *Id.* at 65-6.

(the flip of a coin) or policy-guided. There can be little serious doubt about which alternative will be chosen.

Among the scholar's functions is clarification of those policies, often covert, which will inevitably govern the processes of claim and of decision in the various international arenas. By so doing, he both promotes rationality in the decision process and augurs the directions in which it will move.

TEXTUAL EVIDENCE

One of the most assured things that might be said about the words « not of an international character » is that no one can say with assurance precisely what meaning they were intented to convey. If the intention of the original signatories was to hold every case of civil or colonial war within the pinched confines of Article 3, a less artful linguistic means can hardly be imagined. A simple reference to civil and, perhaps, colonial armed conflicts surely would have served such an end with vastly greater efficacy and essentially equal linguistic economy. One can also imagine a retinue of less felicitous alternatives which, nevertheless, would have surpassed « not of an international character » as a means of assuring a freedom of action for governments supressing civil or colonial uprisings inhibited only by the capacious generalities of Article 3.

On this textual evidence alone, it might be argued persuasively that Article 3 precisely fails to achieve that end. The argument's plausibility is enhanced when one considers the general political context surrounding the Geneva Diplomatic Conference. By 1949, it was already well established that political phenomena the material manifestations of which occur entirely within the recognized perimeter of a given state's authority might legimately engage international concern.

The Union of South Africa's racial policies had already been subjected to hostile scrutiny by the General Assembly despite its Government's insistence that those policies were purely a domestic matter and therefore insulated by paragraph 7 of Article 2 from United Nations concern [19]. In the Security Council an overwhelming majority had endorsed a sub-committee report which concluded that the Spanish Government, by virtue of its origins, philosophy and internal policies, constituted a « potential menace to international peace » and suggested that the General Assembly pass a resolution which would recommend the termination by members of their diplomatic relations with Spain if the Franco regime were not withdrawn [20]. While agreeing enthusiasti-

[19] See United Nations, « Repertory of Practice of United Nations Organs », vol. I, art. 2 (7), para. 53 and following.

[20] SCOR, 1st yr., 39th mtg., Special Supplement, p. 10, para. 18 b, p. 11, para. 31. See discussion in HIGGINS, R., *The Development of International Law Through the Political Organs of the United Nations*, 1963, pp. 77-80.

cally that the character of the regime was an entirely appropriate object of international concern, the Soviet representative vetoed the operative resolution because in his opinion the situation in Spain constituted an actual threat to the peace, and the Council itself should have called for the severance of diplomatic relations [21]. The General Assembly nevertheless went ahead and adopted a comparable resolution [22]. A third breach in the old wall of national sovereignty was the Security Council's assumption of jurisdiction over the conflict between The Netherlands and the Indonesian rebels [23]; efforts by the former to wrap the conflict in the cloak of domestic jurisdiction had been disregarded. I am not suggesting that the decision of a political organ of the United Nations to place a civil conflict on its agenda compels characterization of the conflict as « international ». I am merely hoping to demonstrate first that the words « not of an international character » had no neatly dichotomous reference point in international practice, and secondly that in light of contemporaneous assertions of international concern with domestic phenomena, it is improbable that the « founding fathers » of the Geneva Conventions intended to hold all civil conflicts within the limits of Article 3.

Is there evidence elsewhere in the text which supports a contrary conclusion ? The answer is « yes », but the evidence in question is not terribly persuasive. There are, for example, the provisions relating to repatriation of imprisoned soldiers and civilians [24]. It is true that at the conclusion of an armed struggle carried on within the territorial confines of a single recognized state only one government may remain, in which case the concept of repatriation is otiose. But this is equally true where state *A* defeats and then absorbs state *B*, a not particularly uncommon historical phenomen. Then there are references in various articles to the « *enemy state* » [25] (emphasis added) or « the populations of the *countries* in conflict » [26]. One might argue that in their ordinary meaning, « state » and « countries » do not embrace rebel-held territory. But at least where the rebels have established, and sustained for some considerable period, an effective administration over a territory comparable in size and population to shall we say a Member of the United Nations, one does not have to stretch the skin of these words very much in order to encompass such a case, particularly in the context of Conventions the main object of which is inter-state conflict; it would have been awkward and uneconomic to develop and apply in article after article a special vocabulary applicable to domestic conflicts of an

[21] *Id.* at 45th mtg., pp. 331, 338; 47 mtg., pp. 367-369, 379.

[22] Res. 39 (I), GAOR, 1st sess. pt. 2, plen., 59 mtg., p. 1222.

[23] See OPPENHEIMER, vol. II, 7th ed., *supra* note 28 at 108, 164, 166-167.

[24] See Part IV of Convention III and Chapter XII of Convention IV.

[25] See, *e.g.*, Article 44 of Convention IV.

[26] See, *e.g.*, Article 13 of Convention IV.

international character when there were terms available (state, power, country) which could cover the whole field.

Finally there are the various provisions of Convention IV which prevent an occupying power from, *inter alia*, confiscating personal property, conscripting for military service, or prosecuting civilians for offenses « commited before the occupation ». One might, I suppose, argue that the surrender by states of such vast powers to deal with persons they will regard as their own nationals should not be presumed. In response, however, one might note that where civil strife has assumed the proportions of factual belligerency [27], the powers surrendered are largely illusory. Civilians who had transferred their allegiance to the rebel government hardly offer a promising pool of talent for the incumbents' army. As to their incapacity to prosecute for crimes committed prior to occupation, arguably this does nothing more than prevent a treason trial until the rebel régime has been liquidated. When peace and unity have been restored and the Conventions are no longer applicable, then a citizen might be hanged for treason [28]. The same sanguinary result might be justified under the theory that « offenses commited » are only those which occur *after* the rebels have succeeded in establishing themselves as an effective administrative entity. Hence the original rejection of the incumbents' authority would not be covered.

Even if these arguments are unconvincing and one concludes, as I prefer, that Article 70 effectively precludes a subsequent prosecution for treason, I would submit that little of significance has been surrendered. At the conclusion of great civil wars, wise governments have frequently sought to reestablish the emotional unity of the nation through a policy of reconciliation implemented, in part, by the grant of amnesty to all, or almost all, of the rebels. One notable example, of course, is the American Civil War. And there are abundant contemporary precedents for granting partial or total amnesty to unsuccessful rebels who were never recognized as belligerents. Although the British regarded Jomo

[27] « Certain conditions of fact, not stigmatised as unlawful by International Law — the Law of Nations does not treat civil war as illegal — create for other States the right and the duty to grant recognition of belligerency. These conditions of fact are : the existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; the practical necessity for third States to define their attitude to the civil war. » OPPENHEIM, *International Law*, vol. II, 7th ed., Lauterpacht, ed., 1952, p. 249.

[28] Perhaps that interpretation of the Convention underlay the Soviet delegate's dismissal of this apprehension. See Final Record of the Diplomatic Conference of Geneva of 1949, vol. III-B (Federal Political Department Berne) [hereinafter referred to as *Record*], 43. It appears in any event, to be the view of Quincy Wright, one of the most eminent American commentators : *A study of War*, 1942, 695. And the relevant excerpt is cited with apparent approval by KOTZSCH, L., in *The Concept of War in Contemporary History and International Law*, 1956, p. 233. *Cf.* MCDOUGAL and FELICIANO, *Law and Minimum World Public Order*, 1961, pp. 537-538.

Kenyatta as the principal leader of the Mau Mau uprising in Kenya, shortly after the rebellion's supression they negotiated an independence agreement with him. The Phillippines Government granted amnesty to the Huk rebels. The recently concluded conflict in Nigeria was followed by an amnesty for most Biafran soldiers and officials. This policy undoubtably reflects the perceptive judgment that the risk of capital punishment for rebels who have achieved a substantial level of organization adds little to the other disincentives to rebellion including the prospect of serious injury or death in battle and the imposition of criminal sanctions when the rebellion does not achieve dimensions which merit recognition of insurgency [29].

For all these reasons I therefore find little if any persuasive signs in the text at large of an intention to use Article 3 as a massive dumping ground for all conflicts contained within the territory of a single state and prosecuted primarily by domestic forces. There is, moreover, some textual evidence to the contrary. Article 4 of Convention III includes in its definition of prisoners of war « Members of regular armed forces who profess allegiance to a government or an *authority* not recognized by the Detaining Power » (emphasis added). The reference to an unrecognized « government » would seem sufficient to cover all cases of conflict between two political actors who refuse to recognize each other but are generally perceived by the rest of the international community as separate political units. What then is the plausible function of reference to an unrecognized « authority » ? Conceivably it was designed solely to govern conflicts involving forces deployed by the United Nations or some other international organization. However that limited end could easily have been clarified by the economic addition of several words such as « international or regional » to qualify « authority ». Moreover, despite the fact that the United Nations Charter contemplates the creation of a military force under United Nations command, there is not a shred of evidence in the voluminous record of the Geneva Conference suggesting any sensitivity to the possibility of an international force. This total indifference to the problem may have resulted from the providential timing of the Conference : after the break-up of the United Nations Military Staff Committee and prior to the outbreak of the

[29] There is no precise definition of the criteria for recognition of insurgency. Lauterpacht warns that « any attempt to lay down the conditions of recognition... lends itself to misunderstanding. *Recognition in International Law,* 1947, pp. 276-277. Accepting that *caveat,* the following alternatives, drawn from a slightly different context, probably reflect the rough outline of scholarly agreement :

« (1) That the Party in revolt aginst the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. » PICTET, J., *Commentary on the Geneva Conventions of 12 August 1949,* vol. I, 1958, 49 [hereinafter referred to as *Commentary*].

Korean War. One might note, in addition, that when United Nations Forces became engaged in the Congo, no one appears to have suggested that Article 4 was in any way responsive to the laws-of-war problem created by United Nations operations in that country [30]. Hence it is by no means implausible to find in the palm of the language actually employed an intention to cover certain cases of conflict between political forces within a geographic area hitherto classified by the international community as a single state.

On the other hand, the next does imply certain limitations on the kinds of civil conflict which should engage the full Conventions. Unless the rebels operate an effective civilian administration in some substantial territory for a sufficiently prolonged period so that one can reasonably imagine a transfer of allegiance by the citizens of that area, most of Convention IV would either be inapplicable or might well appear to impose intolerable restraints on the incumbent government. This is not equivalent to stating that the rebels must have achieved the status of « belligerence » [31]. Insurgency [32], that somewhat more modest level of rebel achievement, would seem to be the minimum which the text would allow.

Having seemingly exhausted the text's potential for enlightenment, we turn now to the preparatory work for the Conventions and the circumstances of their conclusion, leaving practice and policy for subsequent delineation.

THE GENEVA DIPLOMATIC CONFERENCE

The term « international character » is so obviously laden with ambiguity that one naturally starts by imputing to it the function of reconciling strongly opposed views, an assumption confirmed by the Record of the Geneva Diplomatic Conference [33]. On the dichotomous issue of whether the Conventions in their entirety should apply to armed conflicts between factions within a recognized state, the battle lines were drawn clearly. For decades the I.C.R.C. had been attempting, in the face of what Jean Pictet describes delicately as a « frequent

[30] *Cf.* McNemar, *The Post-Independence War in the Congo,* a study prepared for the « Panel on the Role of International Law in Civil Wars » of the American Society of International Law [hereinafter referred to as the *Panel*], to be published by the Johns Hopkins Press, pp. 30-31.

[31] See note 27 *supra.*

[32] See note 29 *supra.*

[33] See also Siotis, J., *Le droit de la guerre et les conflits armés d'un caractère non international,* 1958, 185-206; McDougal and Feliciano, *supra* note 28, at 536-537, and Yingling and Ginnane, « The Geneva Conventions of 1949 », 46 *A.J.I.L.* 393, 395-396, 1952.

lack of understanding on the part of the authorities »[34], to secure some restraint in the conduct of such conflicts. In 1921, the Xth International Red Cross Conference adopted a resolution affirming the right of all victims of civil wars, or social or revolutionary disturbances, to relief in conformity with the general principles of the Red Cross[35]. The XVIth Conference, held in 1938 on the brink of war, considerably elaborated this general position in the following resolution[36] :

> « The Conference... requests the International Committee and the National Red Cross Societies to endeavour to obtain :
>
> (a) the application of the humanitarian principles which were formulated in the Geneva Convention of 1929 and the Tenth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores;
>
> (b) humane treatment for all political prisoners, their exchange and, so far as possible, their release;
>
> (c) respect of the life and liberty of non-combattants;
>
> (d) effective measures for the protection of children, ... »

A decade (in which humanity approached its nadir) elapsed before the Conference was again convened, this time to formulate the proposals which would be submitted to the Diplomatic Conference on the Humanitarian Rules of War scheduled for the following year. National governments, as well as Red Cross Societies, were represented. After extended debate, the delegates approved the following provision governing the applicability of the proposed Conventions to non-international armed conflicts[37] :

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

Carried to Geneva the following year as a small but essential piece in the package of proposals, it was greeted with pronounced hostility by a substantial number of national delegations[38]. The principal stated objection was that full application of the Conventions to domestic conflict might seriously erode the state's capacity to maintain internal order[39]. If, for instance, rebels had to be

[34] *Commentary*, vol. IV, at p. 27.

[35] *Ibid.*

[36] *Id.* at 28.

[37] *Id.* at 30.

[38] See, *e.g.*, the statements of the Delegates from the United Kingdom, France and Greece, *Record*, pp. 10-11.

[39] See, *e.g.*, statement of the Delegate from Greece, *ibid.*

treated as prisoners-of-war under the terms of Convention III, some delegates concluded the rebels could not then be tried for treason [40]. Hostile national delegations also insisted that application to civil strife of certain provisions of the Civilians Convention — such as the one prohibiting conscription of citizens in occupied territory — posed even more serious obstacles to repression of rebellion [41].

In addition to this type of particularized concern, some states objected in principle to a proposal which would legitimate a certain measure of foreign involvement in matters they conceived of as intrinsically domestic [42]. The prospect of insurgents selecting a Protecting Power who would then intercede on their behalf to assure effective implementation of the Conventions evoked shrill antagonism [43].

In light of these widespread, but by no means unanimous, objections, it was apparent from the outset of the Conference that the Stockholm language would not be adopted [44]. On the other hand, there were concomitant indications that a very large majority of the governments favored partial application of the Conventions to cases of civil strife [45].

As an early Working Party Report noted, there were two ways of approaching a compromise [46] :

> « ... either restrict the cases of conflicts not of an international character to which the Conventions should apply — or restrict the contractual provisions to be applied in the case of a conflict which was not of an international character. »

The first approach would assuage the asserted fears that the defining language « armed conflicts not of an international character » would make it possible « for forms of disorder, anarchy or brigandage to claim the protection of the Convention (*sic*) under a mask of politics or on any other pretext » [47]. One can only speculate as to whether such statements reflected genuine concern or were merely ploys to enhance a bargaining position. Many delegates decorously

[40] *Ibid.*

[41] See, *e.g.*, remarks of the United Kingdom Delegate, *Record*, at 41.

[42] See, *e.g.*, remarks of the French Delegate, *id.* at 98-99.

[43] *Ibid.*

[44] Statement of a representative of the I.C.R.C., *id.* at 336-337.

[45] At an early stage in the Conference, the Special Committee of the Joint Committee voted 10 to 1, with 1 abstention, in favor of the « principle of (extending) the Conventions to cases of armed conflict which were not of an international character ». *Id.* at 45. The Special Committee, which included Delegates from the U.S.S.R., U.S., Greece and Norway, appears to have been generally representative of the various groups of States attending the Conference.

[46] *Id.* at 76.

[47] Remarks of the French Delegate, *id.* at 10.

disparaged these lugubrious predictions of the Conventions' extension down to the lowest conceivable level of domestic armed conflict [48].

Nevertheless, in order to conciliate those who objected to the alleged range of potential applications, the Working Party, composed of delegates from the United States, France, Australia and Norway, attempted to combine the two general roads to compromise by recognizing three categories of civil conflict [49] :

> « (a) (Conflicts where) the *de jure* government has recognized the status of belligerency of the adverse party, without restrictions, or for the sole purposes of the application of the present Convention, or
>
> (b) (conflicts where) the adverse party presents the characteristics of a State, in particular, that it possesses an organized military force, that it is under the direction of an organized civil authority which exercices *de facto* governmental functions over the population of a determinate portion of the national territory, and that it has the means of enforcing the Convention, and of complying with the laws and customs of war :
>
> (c) (all armed conflicts) which do not fulfill the conditions as determined above... »

The Conventions would be fully applicable in conflicts meeting the standards laid down in either « (a) » or « (b) », except for the provisions relating to the « Protecting Power ». In category « (c) » cases, the parties would be enjoined « to act in accordance with the underlying humanitarian principles » of the Conventions.

The I.C.R.C. was vocally unenthusiastic. Its representative asserted that the proposal « could never have been applied in any recent case of civil war. It therefore did not represent a (*sic*) progress with regard to the present situation. Moreover, it would often be difficult to determine which was the legal government, since each Party to the conflict would pretend to be the legal government [50]. » The principal basis for the opposition of many governments to this compromise was concern not that it accomplished too little but rather that it achieved too much in the direction of limiting their appreciation of appropriate means for crushing rebellions [51]. After a resolute and formidable opposition to the compromise became evident, the French delegation offered as an alternative the language which the Conference ultimately adopted by a vote of 34 to 12, with 1 abstention [52].

One may doubt that this record of events preceding the Diplomatic Conference and of the Conference itself carries us a significant distance further along the road towards a confident interpretation of Article 3's reach. There clearly was

[48] See, *e.g.*, remarks of the Rumanian Delegate, *id.* at 11.

[49] *Id.* at 46-47.

[50] *Id.* at 48.

[51] See, *e.g.*, the remarks of the Burmese Delegate, General Oung, *id.* at 50.

[52] *Id.* at 339.

a compromise [53]. But only the arts of divination seem capable of establishing beyond dispute its true nature.

There were several alternatives before the delegates. One was to agglomerate under Article 3 all three categories of civil conflict defined by the Working Party. Thus the victims of category « (c) » wars would receive more specific protection than under the Working Party Proposal while the safeguards of persons in category « (a) » and « (b) » conflicts would be cut back drastically. While at first this might seem closer to a surrender than a compromise, after one takes into account the relative frequency of the different categories of conflict, the compromise seems far more even-handed and thus plausible. It therefore would not be incredible to suppose that this was in fact the compromise intended by the delegates who voted on it.

There are, however, other possibilities, most eminently that of ultimate recourse to the legislator's classic response to stalemate — the covert postponement of definitive resolution by the employment of ambiguity. Let future practice determine whether the non-international conflict shall include all three categories of civil conflict or « (b) » and « (c) » but not « (a) » or « (c) » alone or all three except where there is substantial foreign involvment and then only « (b) » and « (c) », etc.

The particular language chosen might have been calculated to perform a dual function : first to permit agreement by leaving apparent linguistic room for states confronted with rebellion reasonably to claim limited liability under the Conventions; and secondly, to incorporate within the Conventions a dynamic element which would facilitate their expansion coincident with the development among national elites of an enhanced sense of international community. Some effort, overt of covert, to build a growth factor into the Conventions would be entirely natural. The moving spirits behind the Conference particularly the I.C.R.C., were all too familiar with the reluctance of states to surrender even an inch of discretion concerning the means for the conduct of war. It had taken decades of importunity and, primarily, the cataclysmic trauma of the Second World War to generate the momentum which finally brought the diplomats to Geneva in 1949. The protections for civilians had not been significantly improved since The Hague Conventions of 1907. If history were an accurate guide, further decades might pass before a comparable opportunity would again arise. In light of these considerations and the substantial support at the Conference for application of the bulk of the Conventions to serious civil strife and evidence of change in the common perception of what domestic phenomena were properly insulated from international concern, an intention to impart growth potential to the Conventions might reasonably be presumed.

[53] See, *e.g.*, the statement of the Swiss Delegate, *id.* at 334-336.

SUBSEQUENT PRACTICE

Subsequent practice offers at best moderate interpretive assistance, in part because of the reluctance of incumbent regimes to recognize formally the applicability of the Conventions. Neither the United Kingdom in the cases of Kenya, Malaya and Cyprus, nor the French in Algeria were even willing to concede unequivocally that they were Article 3 conflicts much less conflicts of an international character. Their refusal moved that eminent authority on the laws of war, Colonel G.I.A.D. Draper, to remark with characteristic English restraint that [54]

> « The refusal of France and the United Kingdom to recognize that these conflicts fall within Article 3 has, it is thought, been determined by political considerations and not by any objective assessment of the facts. »

With respect to the British decolonization struggles, Colonel Draper's assumption that nothing more than Article 3 was applicable seems to reflect a generally-shared perception. It is at least true that in those cases no one claimed that the full Conventions were applicable, and in a decentralized legal system, the absence of claim by parties with obvious incentives to speak is persuasive if not dispositive evidence of the state of the law.

The Algerian case is somewhat more ambiguous [55]. When armed conflict commenced in 1954, the French took the position that their operations in Algeria were a mere police action [56]. But a year later, in response to a formal query from a member of French National Assembly, Premier Faure acknowledged the applicability of Article 3 of the Conventions [57]. However, this acknowledgement was never published in the *Journal Officiel* [58]. Arnold Fraleigh [59] has cited further evidence of French concession with respect to the applicability of Article 3 : the arrangement which the I.C.R.C. made with the French Government for visits to French detention camps and prisons in Algeria. « In requesting permission to make such visits, the I.C.R.C. referred to Article 3. The French Government permitted the visits to be made and duly accepted reports from the I.C.R.C. missions after completion of the visits.

[54] *The Red Cross Conventions,* 1958, 15, n. 47.

[55] My discussion of Algeria rests heavily on Arnold Fraleigh's comprehensive study, *The Algerian Revolution and the International Community,* vol. I, Part two, prepared for the Panel, and soon to be published.

[56] See discussion of official French statements in BEDJAOUI, M., *Law and the Algerian Revolution,* Bruxelles, 1961, pp. 142-152; see also CLARK, *Algeria in Turmoil : A History of the Rebellion,* 1959, pp. 117-140.

[57] BEDJAOUI, M., *id.* at 213 and fn. 11, referring to written question from M. Boutbien, N° 17.250 of June 20, 1955.

[58] FRALEIGH, A., at 67.

[59] See note 55 *supra.*

The I.C.R.C. considered that the French in confirming the agreement in 1956 for these visits implicitly recognized that Article 3 was applicable [60]. »

In 1958, the F.L.N. for the first time claimed that the conflict was properly governed by the Conventions in their entirety [61]. The precipitating issue was the continuing trial and execution of F.L.N. militants by the French authorities [62], a power generally conceded to be unaffected by Article 3. According to the I.C.R.C., in response to an F.L.N. threat of reprisals, the French Government decided to terminate the systematic prosecutions [63]. Special camps for the imprisonment of captured members of the F.L.N. armed forces were established [64]. The I.C.R.C. interpreted this as a sign of willingness to grant treatement « closely related » to that governing prisoners in international conflicts [65]. Officially, however, the French Government continued to insist that the conflict was internal and that F.L.N. soldiers were not in any legal sense prisoners of war [66].

This change in French behavior was followed by the F.L.N. s issuance of a regulation ordering strict observance of all provisions of the Geneva Conventions [67]. One month later the conflict lurched back towards unrestrained barbarism when the French recommenced executing F.L.N. militants to which the F.L.N. responded by executing three French prisoners [68]. But this proved to be a rather transient setback. In January of 1959, President De Gaulle announced the commutation of the death penalty to life imprisonment in 140 cases [69]. Two months later the rebel chiefs who had been held by the French for over two years were moved to a new and more comfortable place of detention and the French coincidently announced that these men would be treated as prisoners of war [70]. Finally, in a memorandum to the French Minister of Justice in November of 1959, an officer on General Massu's staff in Algiers declared that [71]

> « ... rebels captured with guns in their hands, guiltless of any crimes of terrorism before joining a rebel group are not prosecuted but are interned in military camps. They are treated as members of an enemy army. »

[60] I.C.R.C., *The I.C.R.C. and the Algerian Conflict*, 1962, 4-6, as cited in Fraleigh at 67.

[61] BEDJAOUI, M., *supra* note 56, at 215, n. 17.

[62] FRALEIGH, A., at 69.

[63] I.C.R.C., *supra* note 60, at 7, as cited in Fraleigh at 68.

[64] FRALEIGH, A., at 69.

[65] *Ibid.*

[66] *Ibid.*

[67] BEDJAOUI, M., *supra* note 56, at 215, n. 17.

[68] *New York Times*, May 10, 1958, p. 3; CLARK, *supra* note 56, at 368-369.

[69] *New York Times*, January 14, 1959, p. 1.

[70] *Le Monde*, March 8, 1959, pp. 1-2; March 19, p. 4, as cited in Fraleigh at 71; *New York Times*, March 8, 1959, p. 26.

[71] BEDJAOUI, M., *supra* note 56, at 149.

Yet at the very same time, and even in the face of Tunisian and Moroccan assistance to the rebels, the French steadfastly refused to acknowledge formally that they were engaged in an international conflict. Moreover, even under De Gaulle, some further executions of Algerian combatants did occur, followed predictably by retaliatory killings [72]. « After seven and a half years of fighting », Fraleigh writes, « the Algerian conflict ended without any understanding ever having been reached between the parties on the application of the humanitarian provisions of the Geneva Conventions or on arrangements for the resolution of the many questions posed by the ways in which the parties treated prisoners and civilians and by the methods of warfare they employed [73]. »

During the decade of the 60's the three most salient cases of civil strife were Congo, Nigeria and Vietnam.

Congo

Congo's post-independance turmoil consisted of at least two civil wars — Leopoldville v. South Kasai and Katanga, Leopoldville v. Stanleyville — and various quasi-private tribal brawls, as well as the tussle between the United Nations Force, acting with Central Government approval, and the forces of Moïse Tshombe [74]. In view of the raucous turbulence of political life, the inexperience of the political elite, the mercurial shifts in the locus of power and authority, and the constantly modulating involvement of foreign interests, it is hardly surprising that the applicability of the laws of war did not apparently emerge as a major concern of the various Congolese elites.

Seven months after independence, in the midst of incessant violence, the Ministry of Foreign Affairs of the Congolese Government officially confirmed the state's succession to rights and obligations under the Conventions arising from Belgian ratification in 1952 [75]. At about the same time — February, 1961 — the I.C.R.C. issued an appeal to all authorities in the Congo to uphold the humanitarian principles of the Conventions [76]. Shortly thereafter the I.C.R.C. reported that [77]

> « Tshombe has now informed Geneva that he is adhering to the principles mentioned in that appeal. »

On neither side does there appear to have been any specific claim with

[72] FRALEIGH, A., at 96.

[73] P. 78.

[74] My discussion of the Congo case draws largely on McNemar's study, see note 30, *supra.*

[75] « The Red Cross Action in the Congo », 2 *International Review of the Red Cross* 7-8, 1962.

[76] *Revue internationale de la Croix-Rouge,* Supplement, March, 1961, 44-45, as cited by McNemar at 30.

[77] *Ibid.*

respect to the alternate applicability of Article 3 or the full Conventions. The position of the United Nations on this issue seems equally uncertain. After the issue was first raised in the Korean War, there were commentators who argued that the United Nations simply was not bound by the Conventions in any formal sense [78]; some even argued that the United Nations had no moral obligation to full compliance [79]. Nevertheless, while serving as Acting Secretary-General following Hammarskjold's death, U Thant appeared to recognize the Conventions as laying down standards of behavior to which the United Nations Forces would conform. Yet, even his attitude was not entirely free of ambiguity. In a letter to the president of the I.C.R.C., he wrote [80] :

> « I am in entire agreement with you in considering that the Geneva Conventions of 1949 constitute the most complete standards granting to the human person indispensable guarantees for his protection in time of war or in the case of armed conflict whatever form it may take. I also wish to confirm that the U.N.O. insists on its armed forces in the field applying the principles of these Conventions as scrupulously as possible. »

The slight ambiguity arises from U Thant's use in the second sentence quoted of the rather general word « principles », rather than the more specific « standards » to which he refers in the prior sentence. This might, of course, be attributed to a desire merely to avoid verbal repetition. The phrase « as scrupulously as possible » may also be entirely innocuous, a merely otiose assurance that the United Nations Force would do its best. However the words « as possible » might conceivably be construed to refer to the attainment of substantive objectives. Since such a position would be wholly inconsistent with the spirit and principles of the Convention which are, after all, designed to outlaw certain means under all circumstances, there ought to be a heavy presumption against such a construction.

Even if there is no substance to those two ambiguities, there is a third one, and it is not susceptible to easy resolution : Was U Thant referring only to the minimal provisions of Article 3, or to the entire Conventions ? The question is relevant not only to future United Nations military operations but more broadly to all third-party interventions in civil strife.

The United Nations Force had entered the Congo at the request of the recognized government. Some commentators have argued that intervention on the side of the incumbent does not transform a civil into an international conflict [81]. This proposition reflects no articulate set of policies; rather it is

[78] See, *e.g.*, STONE, J., *Legal Controls of International Conflict,* 1954, 315.

[79] Report of Committee on Study of Legal Problems of the United Nations, (a panel of the American Society of international Law) 220, (cited by McNemar, *supra* note 30, at 33, n. 19).

[80] 2 *International Review of the Red Cross* 29, 1962.

[81] See, *e.g.*, BINDSCHEDLER, D., « A Reconsideration of the Law of Armed Conflict », a paper delivered at the Carnegie Endowment's Conference on the Law of Armed Conflicts : Contemporary Problems, Geneva, 1969, p. 78.

entirely conceptual in origin. It assumes, inaccurately I believe, the continuing vitality of the traditional (but not uniformly accepted) doctrine that until rebels are recognized as belligerents, third states may assist the incumbents and thereafter neutrality is enjoined [82]. States which do assist the incumbents, rather than being susceptible to characterization as interventionary, are allegedly assimilated to the status of their hosts [83]. Moreover, the rebels are presumed to lack a sufficient international personality to require characterization of conflict between rebels and third-state forces as international.

As I have argued at length elsewhere [84], this traditional majority attribution of a uniformly preferred status to incumbents was a distinctive feature of the era of European mastery. Its assumptions, including the cohesiveness of national entities and the effective centralization of political authority, no longer reflect reality with impressive accuracy. Its values, notably a powerful bias in favor of incumbents, no longer enjoy anything resembling universal acceptance. One can hardly be surprised, therefore, that the so-called rule precluding aid to rebels is widely ignored.

The concept of an international political personality also has undergone radical change. In contexts defined as « colonial », for instance, the United Nations has implicitly recognized indigenous political parties as the legitimate spokesmen for a territory's inhabitants. Actually, in its Decolonization Resolution [85] and through the activities of the Committee of Twenty-four [86] the United Nations appears to have gone further and recognized the unorganized people of a territory as a legitimate political body, a « government of the whole » as it were. It thus seems fair to conclude that at least certain insurgents may achieve an international political personality even if they do not yet have effective control over any territory. And as I will discuss below, this appreciation of political personality also governs the attitudes of states in those regions where, for the past two decades, only political factions with the requisite ideological coloration have been regarded as tolerable. In light of these developments, surely no one can deny that there is a yawning breach in the wall of traditional doctrine. The alleged distinction is, therefore, unpersuasive conceptually, as well as insensitive to relevant humanitarian and political policies.

[82] McDougal and Feliciano, *supra* note 28, n. 164 at p. 194.

[83] Bindschedler, D., *supra* note 81, at 78. Professor Bindschedler is thus in disagreement with the opinion of the I.C.R.C. (and the Experts with which it consulted) contained in its Reports to the XXIst International Conference of the Red Cross, « Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts », 100-101, and « Protection of Victims of Non-International Conflicts », 4, 1969.

[84] « Harnessing Rogue Elephants : A Short Discourse on Foreign Intervention in Civil Strife », 82 *Harvard Law Review* 511, 526, 1969.

[85] G.A. Res. 1514 (XV), adopted in 1960 by a vote of 90 to none, with 9 abstentions.

[86] Established in 1961 by General Assembly resolution 1654 (XVI). The resolution was adopted by 97 to none, with 4 abstentions (France, South Africa, Spain and the United Kingdom).

Vietnam

Because of the Secretary-General's failure to clarify the United Nations' position, its Congo operation adds little of precedental value to guide decision on this larger issue of when foreign intervention internationalizes a conflict. In Vietnam, on the other hand, it has been the object of a far more explicit and detailed concern. This is explicable, I suspect, in terms of the peculiar preeminence of lawyers in American society, a strong tradition of concern with « formal » legality in the conduct of foreign affairs, a throbbing sensitivity about the national image in the context of an intensely controversial military engagement and the extent and protracted nature of the conflict.

In June, 1965, shortly after organized combat units of the United States Army had entered the Vietnamese fray, the I.C.R.C. addressed a letter to all parties to the conflict — the governments of the United States, North and South Vietnam and to the N.L.F. — reminding them of their obligations under the Geneva Conventions. In referring specifically to the Prisoner-of-War Convention, the I.C.R.C. said [87] :

> « In particular the life of any combatant taken prisoner, wearing uniform or bearing an emblem clearly indicating his membership in the armed forces, shall be spared, he shall be treated humanely as a prisoner of war, lists of combatants taken prisoner shall be communicated without delay to the International Committee of the Red Cross (Central Information Agency), and the delegates of the I.C.R.C. shall be authorized to visit prison camps. »

As Professor Howard Levie notes in his study of *Maltreatment of Prisoners of War in Vietnam,* « the items so specified clearly indicate that the I.C.R.C. considered the armed conflict in Vietnam to be of an international character. Indeed, the tenor of the letter leaves no doubt on this score » [88].

In its response, the United States appeared to accept the I.C.R.C.'s characterization of the conflict when it affirmed that it was « applying the provisions of the Geneva Conventions... » [89]. Subsequent practice tends to confirm this appearance. For example, the *New York Times* reported in 1966 that [90]

> « United States officials are quietly putting into effect an important change in the handling of prisoners of war. Vietcong and North Vietnamese fighters captured on the battle field will no longer be turned over to the South Vietnamese Army immediately after the fighting has died down. Instead, they will be sent to American Divisional Headquarters and kept in American hand (*sic*) until they can be transferred to new Vietnamese Prisoner-Of-war compounds... The system

[87] Letter dated June 11, 1965, appearing in 60 *A.J.I.L.* 92, 1966, 4 *Int'l. Legal Mat.* 1171, 1965.

[88] LEVIE, « Maltreatment of Prisoners of War in Vietnam », 48 *Boston U. Law Rev.*, p. 323, n. 5, 1968.

[89] 53 *Dep't. State Bull.* 447, 1965; 4 *Int'l Legal Mat.* 1173, 1965; 5 *Int'l Rev. of the Red Cross*, p. 477, 1965.

[90] July 1, 1966, p. 6.

> has been adopted to enable the United States to meet its responsibilities under Article 12 of the Geneva Convention of 1949 governing the treatment of prisoners of War. The Article requires the country turning prisoners over to another country to guarantee their well-being [91]. »

For our purposes, a significant dimension of United States policy was its extension of P.O.W. treatment to Vietcong Main-Force units (as distinguished from small so-called « terrorist » groups operating clandestinely who did not satisfy Convention III's criteria for P.O.W. status) [92], as well as North Vietnamese troops; in other words, it acted as if the conflict were international in character for all participants, indigenous and alien. Under the circumstances, however, this by no means amounts to a concession that the extension of full-scale military assistance to an incumbent regime by itself transforms a civil into an international war.

From the official United States Government perspective, there are two additional factors here : first, foreign military assistance to the rebels (that North Vietnam ought to be regarded legally as a third-party is, in my opinion, a questionable proposition, but for precedential purposes the formal United States position would seem controlling); secondly, foreign *control* of the rebel forces. (This also is a debatable proposition.)

The Saigon régime, in its reply to the I.C.R.C., announced that it was « fully prepared to respect the provisions of the Geneva Conventions and to contribute actively to the efforts of the International Committee of the Red Cross to ensure their application » [93]. Despite these earnest assurances, both before and for a least two years after they were given, South Vietnamese Forces openly, and apparently routinely, tortured Vietcong prisoners [94]. It would appear, however, that as a consequence of insistent prodding by the I.C.R.C. and the United States, in 1966 Saigon finally indicated it would attemp to enforce Convention III's prohibitions [95]. Reports of deviations from Convention norms did not cease, however [96]; a continuing absence of uniformity in South Vietnamese practice was dramatized by the chief of the national police when, during the Tet offensive, he summarily executed a captive before the cameras of the international press.

Neither the N.L.F. nor the Government of North Vietnam conceded in its response to the I.C.R.C. letter any obligation under the Conventions. The latter

[91] The current official directive establishing this procedure is United States Military Assistance Command, directive number 190-3, April 6, 1967, cited by Levie, *supra* note 88, p. 340, n. 81.

[92] Because they did not have « a fixed distinctive sign recognizable at a distance » or were not « carrying arms openly » or were not « conducting their operations in accordance with the laws and customs of war ».

[93] *Int'l Legal Mat.* 1174, 1965; 5 *Int'l Rev. of the Red Cross* 478, 1965.

[94] LEVIE, *op. cit.*, pp. 338-340.

[95] LEVIE, *op. cit.*, pp. 341-342.

[96] *Ibid.*

simply ignored the question of the Conventions' applicability. It did claim a right to prosecute captured pilots as « war criminals », but asserted that the pilots were in face « well treated ». North Vietnam's refusal to acknowledge the applicability of the Conventions is consistent with, indeed a necessary buttress to, what has been its basic stance as a self-described non-participant in the southern war, an innocent party attacked by an agressive United States, rather as the United States embrace of the Conventions echoes its basic theory of the conflict.

The N.L.F., on the other hand, confronted the issue of applicability and flatly denied any obligation, on the grounds that it was not a signatory [97], a position which, as far as I can tell, has no scholarly support. Despite its alleged freedom from the inhibitions of the Conventions, the N.L.F. asserted that the prisoners it held were humanely treated and that enemy wounded were collected and cared for [98].

In fact, both Hanoi and the N.L.F. have violated Convention standards. Neither has provided lists of prisoners. More seriously, the latter has on at least two occasions executed prisoners in reprisal for the execution of N.L.F. activists who apparently did not qualify under Article 4 for P.O.W. treatment [99]. Hanoi also violated Convention standards when it reportedly paraded captured airmen through the streets of Hanoi [100].

Nigeria

As Rosalyn Higgins aptly puts it, « In Nigeria the situation seems confused [101]. At no time during the protracted conflict did the Federal Government expressly acknowledge the applicability even of Article 3. Yet at times it appeared to concede tacitly that its conduct of the war was governed by the full Conventions. For example, during the summer of 1969, following extended discussions with the representative of the I.C.R.C., Mr. Arikpo, the Nigerian Minister of Foreign Affairs, said that in complying with Article 23 of the Fourth Convention, the State which allows free passage has the right to prescribe technical arrangements [102]. In addition, the Federal authorities appear to have treated captured Biafran soldiers as prisoners of war protected

[97] 5 *Int'l Rev. of the Red Cross* 636, 1965.

[98] *Ibid.*

[99] LEVIE, *op. cit.*, p. 353.

[100] *New York Times*, July 8, 1966, p. 3, *id.*, July 13, 1966, pp. 1 and 5.

[101] « Internal War and International Law », p. 17, a chapter in *The Future of the International Legal Order*, vol. III, Black and Falk eds., to be published by the Princeton University Press.

[102] 9 *Int'l Rev. of the Red Cross* 484-485, 1969.

by Convention III [103]. Another significant *formal* act was the promulgation of a Code of Conduct for Nigerian Air Forces Units, which precluded the bombing of non-military targets [104]. In thus appearing to comply with standards laid down by Hague Convention IV [105], which by its terms applies only to inter-state wars [106], a belief that this was a war of an international character might credibly have been attributed to the Federal Government.

But the precedential value of these indicia is diluted by the Government's affirmation that it was voluntarily living by the Convention standards [107]. Moreover, it did not always abide by them. On at least two occasions, I.C.R.C. hospitals were bombed by the Nigerian Air Force [108]. Once an I.C.R.C. plane was shot down [109]. And prior to occupation Biafran towns and cities were often subjected to prolonged and apparently indiscriminate bombardment [110]. It is impossible to determine whether such acts reflected governmental ambivalence about the relative benefits of the laws of war or the absence of consistently effective control over tactical operations.

As for the Biafrans, they do not appear to have made any specific claims under the Conventions. Their government's energies seemed focused on the policital implications of the humanitarian issues.

A POLICY PROFILE

In civil conflicts, whether wars of secession or struggles for control of the society's entire authority structure [111], incumbents normally possess substantial initial advantages. They will generally control the harbors and airports and the national security forces. By virtue simply of being incumbents, they will have exclusive access to state funds held in foreign banks and hence protected from rebel seizure. Frequently they will enjoy mutual-defense treaty relationships

[103] See, « No Indiscriminate Bombing », p. 7, the report of an observer team composed of representatives of the Secretary-General of the U.N. and the O.A.U. covering the first four months of 1969, Nigerian National Press, Malu Road, Apapa, Nigeria.

[104] *Id.* at 6 and 15.

[105] See FARER, T., « The Nuremberg Trials and Objection to Service in Vietnam », *Proceedings of the American Society of International Law*, 1969, 140, 150-151.

[106] *Ibid.*

[107] HIGGINS, R., *supra* note 101.

[108] 9 *Int'l Rev. of the Red Cross* 4, 1969; *id.* at 83.

[109] *Id.* at 353.

[110] *New York Times*, April 30, 1968, p. 10.

[111] For a far more elaborate typology (though one of doubtful utility because of its academically subtle refinements) in connection with the application of the humanitarian laws of war, see ROSENAU, « Internal War as an International Event », in *International Aspects of Civil Strife*, Rosenau, ed., 1964, 45-91.

with other states. The combination of all these factors have almost invariably permitted incumbents to marshall far greater firepower than that of their opponents.

The rebels' compensatory response is concealment and mobility. Initially they may hide in uninhabited mountains and jungles. But eventually they must come to the people to obtain food and additional troops, and to begin the process of withdrawing the population and its resources from the incumbents' administrative net. It is at the point when the rebels conceal themselves among the people rather than the trees that the rules of land warfare may appear as suffocating inhibitions on preferred tactics.

There is a respectable case, for instance, that under Hague Convention IV, such tactics as high-altitude area bombardment, the declaration of « free-fire » zones where anything that moves is shot on sight, and the annihilation by bombardment of villages where a handful of guerrillas are rumored to be resting all are illegal either because they are indiscriminate in their effect or impose suffering on the civilian population disproportionate to their putative military effects [112]. As indicated earlier, The Hague Conventions are presumed to codify the customary law only of *international* war. But if a civil conflict is deemed a conflict of an international character for purposes of the Geneva Conventions, it may be difficult to contend that the conflict is not equally « international » for purposes of applying the rules of land warfare, particularly in light of the fact that the Second, Third, and Fourth Geneva Conventions explicitly replace or supplement related provisions of The Hague Conventions or their Annexes [113]. On textual grounds, at least, The Hague Conventions would seem an *a fortiori* case; there are obvious (but hardly insurmountable) difficulties encountered in shaping certain provisions of the Geneva Conventions to the formal political context of civil strife which have no counterpart in the application of the rules governing combat behavior. An « undefended village » is an undefended village regardless of whether or not the conflict is contained within the geographic boundaries of a recognized political entity. Unlike a term such as « occupied territory » or even « prisoner-of-war », it evokes a fairly precise and relatively uniform mental image. Its connotations and denotations are not intimately intertwined with legal concepts like recognition, sovereignty and legitimacy.

If, as suggested, application of the Geneva Conventions is authority for requiring application of the Rules of Land Warfare, the fragile elites in those economically less-developed countries which have not experienced a modern social revolution and their partners in the United States national security bureaucracy might therefore be disposed to reject an interpretation of the Geneva

[112] See FARER, T., *supra* note 105, at 150-151.

[113] See Article 58 of Convention II, Article 135 of Convention III, and Article 154 of Convention IV.

Conventions which would require their full application to certain civil conflicts. But as discussed above, in Vietnam the United States and, grudgingly and unevenly, its Saigon clients have taken a contrary position, consistent with the official United States theory of the war as an aggression committed by an independent state north of the seventeenth parallel against a wholly sovereign state of the south [114].

The external-agression interpretation of large-scale insurgency is not restricted to cases where the alleged target state shares a border with a Communist state. At least within the Western Hemisphere, United States decision-makers and the friendly foreign elites associated with them under the umbrella of the Organization of American States (O.A.S.) have declared on several occasions, most recently at Punta del Este in 1962[115], that Communism is alien to the region and, in effect, that whatever their formal nationality, men who espouse Marxist-Leninist principles are assimilated to an alien status, thus justifying intervention by the United States and such other non-communist governments as it can muster for the enterprise.

As one might anticipate, the Soviet Union has adopted a mirror-image posture. It was formalized in the so-called Brezhnev Doctrine, announced to justify the invasion of Czechoslovakia, which makes certain domestic phenomena in Warsaw Pact states a matter of « legitimate » concern to all other Pact Members [116]. In both cases the catalytic phenomena obviously include at the forefront civil conflict in which one faction professes the requisite measure of allegiance to the policies of the dominant regional state. If these conflicts are deemed sufficiently international to justify the ultimate interventionary act — military intrusion, that modest penetration of sovereign isolation represented by application of the Geneva Conventions should seem an *a fortiori* case. Moreover, from the policy perspective of the major powers and their satellites, application of the Conventions might seem to buttress the thesis that the ideologically uncongenial insurgents are instruments of foreign states.

Application of the Conventions may appear to have certain offsetting

[114] See the State Department Memorandum on « The Legality of U.S. Participation in the Defense of Vietnam », submitted to the Senate Committee on Foreign Relations on March 8, 1966, reprinted in *The Vietnam War and International Law,* vol. I, Falk, R., ed., 1968, 583.

[115] The relevant resolution has been published in the *State Department Bulletin* (February 19, 1962) 278. See also the Declaration of the Caracas Inter-American Conference of 1954 (which was motivated by U.S. concern with the Arbenz Government in Guatemala) in *Documents in American Foreign Relations 1954,* 1955, 412.

[116] The « Doctrine » is actually a composite of a number of pronouncements : see statement of Ambassador Malik to the Security Council, U.N. doc. *S/PV.1441,* August 21, 1968, pp. 48-50; *Pravda* editorial, translation by the Soviet Press Agency reprinted in the *New York Times,* September 27, 1968, p. 3; statement of Foreign Minister Gromyko to the U.N. General Assembly, U.N. doc. *A/PV.1697,* October 3, 1968, pp. 26, 30-31.

disadvantages, particularly for the United States. Under the Brezhnev Doctrine intervention may be anticipated in contiguous developed states where overwhelming Soviet military force can be deployed with great rapidity to achieve dispositive military results. The conflict is likely to be over and an ideologically « safe » government installed before questions about enforcement of the Conventions or the rules governing military operations can be adequately raised and processed. It is usefull to recall in this connection that the Soviet Delegate at the Geneva Convention saw no inconsistency between the language of Convention III and punishment of rebels under domestic law [117]. Naturally the triumphant faction will decide who were the rebels. Furthermore, in light of the setting and the disparity in effective force, the Soviet Union will presumably be able to achieve its military and political objectives without encountering those difficulties which are incentives to violation of the Conventions and the Rules of Land Warfare.

After their experience with the Dominican Republic, United States policymakers may anticipate comparable scenarios with the United States replacing the Soviet Union as « leading man ». However, their emphasis (particularly since 1960) on counter-insurgency training for Latin American and certain United States military units evidences a thorougly plausible expectation that as long as they continue to press an agressive counter-revolutionary policy [118], the United States will be involved, directly or by proxy, in protracted guerrilla wars. If, as appears likely, United States intervention will be justified on the grounds that the guerrillas are not genuinely indigenous because of foreign training, direction, or stimulation [119], Vietnam is a persuasive precedent for full application of the Geneva Conventions. The willingness of the United States Government to risk the precedential implications of its Vietnam posture is apparently attributable to the conviction that the Rules of Land Warfare do not inhibit the annihilating tactics employed by the United States and its South Vietnamese auxiliaries against the civilian population in territory not under the exclusive administratice control of the authorities in Saigon.

The Conventions may nevertheless be a nuisance in guerrilla wars because they preclude intelligence acquisition not only by torture but also by « any other form of coercion » [120]. Since in guerrilla war the most serious deficiency of the incumbents and their allies or patrons is a lack of intelligence, any inhibitions on intelligence-gathering competence may be regarded with surly apprehension by military, if not political, leaders. As indicated earlier, however,

[117] See note 15, *supra*.

[118] For an impressive survey and analysis of U.S. policy see BARNET, *Intervention and Revolution*, 1968. See also STEEL, *Pax Americana*, 1967, and DRAPER, *Abuse of Power*, 1967.

[119] See, for example, the remarks of those eminent defenders of U.S. foreign policy, MCDOUGAL and FELICIANO, *supra* note 28, at pp. 190-193.

[120] Article 17 of Convention III.

coercion is likely to be applied immediately after the capture of enemy combatants, before their rights can be safeguarded by the surveillance of a Protecting Power or an international humanitarian organization.

There is, of course, no way of knowing with certainty whether there would be a greater incidence of torture if Article 3 alone were held applicable. But since in recent years I.C.R.C. involvement has generally been accepted by incumbents [121] even where they denied the international character of the conflict and tolerated widespread torture [122], it might be assumed that characterization of the conflict as national or international does not in itself affect significantly the use of coercion for intelligence acquisition.

Incumbent elites may be increasingly receptive to a broad definition of international conflict because they may begin to perceive in the entrails of contemporary events a reduced efficacy for indiscriminate force. The signs have actually been there for a long time. Even in an era when national decision-makers generally recognized the freedom of each equal sovereign to be monstrous to his subjects, and when news of massacre was filtered by time and distance to a largely illiterate and provincial public in the major Western States, there were occasions when atrocities generated an effective humanitarian concern. One might cite, for instance, the 1827 intervention of the great powers in the Greek war of secession from the Ottoman Empire. One might also cite in this context the Spanish-American War. Although the motives of the United States Government appear in retrospect grossly acquisitive, it also appears that public consternation over alleged Spanish atrocities committed against the Cuban population facilitated implementation of the Government's less exalted objectives.

In the nineteenth century and well into the twentieth, however, public concern over bestial behavior in foreign lands was, if not extremely whimsical, at least intensely selective. Today a sustained pattern of atrocity, particularly in the context of armed conflict, tends not only to draw the conflict towards the center of international attention, but also to activate a politically significant « conscience constituency » at least in European and North American states. In the Nigerian civil war, this phenomenon appears actually to have been incorporated into insurgent strategy. Its puissance is suggested by Nigeria's reluctance to pursue a policy of « starving out » the secessionists [123] and the felt inability of the United States and certain other Western Governments to remain

[121] See note 2 *supra.*

[122] See, *e.g.*, French behavior during the Algerian conflict.

[123] See 8 *Int'l Rev. of the Red Cross*, p. 356 and p. 517, 1968. The U.N.-O.A.U. observers' report cited in note 103 *supra* suggests that the Federal Government has met a standard of behavior higher than the one commanded by Article 3. As indicated earlier — see text at notes 108-110 *supra*, other information raises certain doubts about at least the comprehensiveness of this Report.

wholly passive in the face of Biafran suffering. United States participation in Biafran relief despite a political preference for Nigerian unity and despite Soviet competition for the Federal Government's affections offers a particularly vivid demonstration of the political punch of the humanitarian issue.

Yet some massacres still pass by virtually unattended. Within the past five years Indonesia has experienced an orgy of mass murder rivaling in virulence the genocidal campaign conducted by Turks against Armenians earlier this century. No effort was made to intervene and the whole affair evanesced from the pages of at least the American press in a matter of days. On the other hand, the threatened retaliatory liquidation of a comparative handful of anonymous foreign hostages in a hitherto obscure Congolese city ignited vivid concern in the West culminating in a military expedition for their relief [124].

While this differential intensity of concern may be attributable in large measure to the color and nationality of the victims, it might also be explained in terms of two other contextual features peculiar to the Congo : the fact that almost since the day of independence it had been riven by civil strife assuming the form of fairly large-scale armed conflict and the fact that several foreign states *and* the United Nations had become intimately involved in its internal conflicts.

At the Geneva Diplomatic Conference the most unyielding opposition to any restriction on a government's choice of means for the suppression of rebellion came not from the great colonial powers; it came from a small, newly independent, neutral Asian state — Burma. Just prior to the final vote on the language which became Article 3 of the Convention, General Oung, the Burmese delegate, delivered an emotional plea for its rejection. He appeared particularly incensed by the prospect of an impartial humanitarian body such as the I.C.R.C. offering its services to Parties to the Conflict [125] :

> « It may offer them at the request of the *de jure* government or of the insurgents or of the shadow behind the insurgents; neither is the agreement of the *de jure* government necessary. Surely you do not accept that. Acceptance of outside intervention, even if it be from humanitarian organization, would certainly confuse the issue, create further misunderstanding, prolong the dispute, or even involve a State in an international dispute of serious dimensions. I again appeal to your sense of justice, to the declarations in the Charter of the United Nations, that you do not intervene in matters essentially within the domestic jurisdiction of any State nor aggravate the situation, especially that of a domestic nature. »

This searing fear of foreign involvment has not subsided with the passage of two decades. If anything, under the shibboleth of neo-colonialism it probably has intensified, fueled by the universalization of cold-war competition, the persistant thinness of political authority, and continued dependence on various

[124] For an assessment of this « humanitarian intervention », see FALK, R., *Legal Order in a Violent World*, 1968, pp. 324-335.

[125] *Record*, p. 337.

forms of foreign assistance. The humanitarian laws of ware are not, however, merely an incidental victim of a comprehensive desire to insulate societies from all forms of foreign influence. The history and subsisting fragility of political régimes makes the threat of rebellion an integral part of the real world in which incumbent elites operate. Moreover, in these societies there is small scope for achievement outside the political arena. Even if defeated leaders could return unharmed to the status of civilians, they would experience severe degradation in prestige and, if they have not been corrupt or have been unable to conceal their spoils, in wealth as well. Furthermore, such authority (as distinguished from naked power) as they have usually rests in large measure on a nationalist mystique; hence they will be as implacably opposed to separatist rebellions as to those which seek their replacement. For all of these reasons, Afro-Asian elites are likely to regard the laws of war with considerable skepticism except where they are applied to protect rebels struggling with régimes deemed « Western » : the Union of South Africa, Portugal, etc. Their instinctive reluctance to concede a measure of discretion will obviously obstruct application of Article 3, much more the full Conventions, except where it can be demonstrated that the Conventions will not strengthen the rebels.

I have yet to see any real effort to elaborate concretely concern about the operations of the Conventions. General Ong's blunderbuss invocation of vague incubi seems characteristic. What presumably underlies this largely unanalyzed emotional concern is the assumption that activation of the Conventions will somehow increase the military capability of rebels.

Nothing that has happened in Vietnam or Nigeria or other contemporary civil conflicts suggests that the Conventions are likely to inhibit incumbents and their allies from maximum utilization of their normally superior fire power. Nor, as already indicated, do they appear to preclude coercive intelligence acquisition. How, then, could the Conventions help the rebels ? Only by facilitating the extension of assistance to them by foreign authorities or impeding the flow of assistance to the incumbents. The bedrock assumption here is that decisions of foreign governments and multi-national organizations concerning the nature, extent, and direction of their involvement in civil conflict may be influenced either by the formal legal status of the rebels or at least by their appearance of constituting a viable political military authority, and that perceptions of their *de facto* or *de jure* status will be influenced by the perceived applicability of the Conventions.

The plausibility of this assumption would seem to be powerfully affected by context. Where civil conflict erupts in states that have remained aloof from cold-war alliances, the international system probably retains its pro-incumbent bias, particularly where the rebels seek independence for some part of the national territory. In practical terms this means that the incumbents will at a minimum have ready access to the commercial armaments market. Probably they

will also be able to secure a line-of-credit for arms purchased from governments. In addition, their right to the contents of foreign bank deposits made in the government's name prior to the rebellion, the gold reserves, the merchant ships, and to other sources of wealth presumably will be recognized universally. The rebels will have the corresponding disadvantages. Certainly this was the Biafran experience.

But if the rebels can surmount these hurdles and establish themselves as belligerents, the incumbents' initial advantages may be largely neutralized. The criteria of belligerence are, of course, rather general, thus leaving a large margin for the exercise of national discretion, yet also complicating the task for a third-party of justifying the recognition of belligerency and the consequent adoption of a posture of strict neutrality. An at least apparently neutral justification could be based on incumbent acceptance of the Conventions as controlling standards for the conduct of war.

For two interdependent reasons a legal significance transcending the Conventions could be attributed to their application : first, by means of the negative implication from Article 3's insistence that « (t)he application of the preceding provisions shall not affect the legal status of the Parties to the conflict ». There is no comparable caveat governing the other articles of the Conventions. Secondly, in the opinion of some commentators, the only factor, other than foreign military intervention in the side of the rebels, which would transform a civil war into a conflict of an international character is rebel achievement of the status of belligerence [126]. If, as I have surmised, the realistic operational concern of incumbents is rebel access to external arms sources, then once a third-party with the capacity to satisfy the military material requirements of the rebels extends assistance to them, the incumbents' efforts to confine their opponents to the status of insurgents loses its principal rationale and should be dominated by humanitarian concerns — or at least a sensitivity to the humanitarian impulses of foreign constituencies — and by policies designed to facilitate reconciliation at the conclusion of hostilities. It should lead, in other words, to application of the full Conventions.

One must bear in mind that neither the open nor tacit recognition of belligerency amounts in any sense to the concession of a separatist movement's success. When Oppenheim wrote that « there is a fundamental difference between this recognition as a belligerent power and the recognition of the insurgents and their part of the country as a new state » [127], he was communicating a firmly established tenet of the international system, one which seems to have escaped the ravages of time. Its continued vitality may offer a partial explanation of the willingness of the Nigerian Federal Government at least to appear to accept application of the Conventions.

[126] See, *e.g.*, OPPENHEIM, *supra* note 27, p. 212; *cf.* VON GLAHN, *Law Among Nations*, 1965, p. 553.

[127] OPPENHEIM, vol. II, 8th ed., 1955, p. 128.

While this policy analysis calls for recognition of the international character of a conflict at a point well short of the arrival of foreign combat units to support the rebels, it coincidentally rationalizes the incumbents' obdurate insistence on Article 3 characterization, regardless of the nature and intensity of assistance which they alone are receiving or of the international community's formally demonstrated concern about the reverberations of the conflict. There is, of course, no reason why the special sensitivities of insecure national elites should impose a uniform interpretation of the Conventions. Relatively secure elites are likely to adopt a more systemically-oriented set of values to guide interpretation of the Conventions. They may be more impressed by the potential pressures for unilateral intervention which can arise when barbarous means are employed to suppress rebellion and which are likely to be stronger where there has already been a unilateral intervention on behalf of the incumbents (particularly if the intervenor is regarded as a generally uncongenial state). Naturally even incumbents for whom rebellion is a consistently credible threat should also be highly sensitive to this risk, but frightened men tend to have shorter time perspectives. Elites in stable societies are also likely to be more concerned about the intangible effects on system stability of unrestrained violence even within a single political entity : there is the immeasurable danger of generating a mood in which recourse to violence seems less exceptional. These considerations, as well as a purely humanitarian concern, should move states to support the activation of the full Conventions whenever a conflict has begun to move towards the international focus of attention; that is to say, whenever it threatens to influence substantially the climate of international affairs.

This vague criterion can be objectified in terms of different degrees of foreign-state or international-organization involvement. National involvement may assume such diverse physical forms as the sale or grant of military matériel, training programs for officers and enlisted men and administrators, limited participation in logistical and tactical operations (for example, supplying air and artillery support for indigenous infantry), and escalating finally to the introduction of organized ground combat units. Involvement may also assume diplomatic forms such as recognition of a faction as the legitimate government and rhetorical and electoral support in international deliberative bodies. A conflict may be deemed to be internationalized at the moment foreign combat units enter the fray on either side.

Equating rebels and incumbents in this respect does not mark a substantial break with tradition. As early as 1924, the distinguished legal scholar, William Hall, noted

> « [If intervention is] directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the State [128]. »

[128] HALL, W., *A Treatise on International Law*, 8th ed., p. 347.

In other words, incumbent reliance on foreign troops persuasively evidences the achievement by the rebels of the factual requisites of belligerency and may even be regarded as tacit recognition of belligerency by the incumbents and their allies. If the latter implication is drawn, then according to a clear scholarly consensus the Conventions unquestionably apply in toto. If recognition of belligerence is not implied, but foreign states take this as the appropriate occasion for granting belligerent status to the rebels, scholars divide as to whether internationalization necessarily results [129].

In terms of the systemic policies outlined above, it certainly should. Indeed, they might justify recognition of a lower threshold, perhaps the point at which « foreign advisors » begin to participate individually in tactical operations. An important assumption here, which I have discussed elsewhere [130], is that once foreign personnel become directly involved in combat operations and hence experience casualties, the foreign commitment is likely to escalate rapidly to full-scale involvement.

Aside from considerations of substantive policy, if the plain meaning of words is to reign, there seems ample reason to treat a conflict as international wherever third parties attempt through tangible measures to influence the outcome of a civil conflict. After all, the incumbent-rebel dichotomy rests, as I noted earlier, on elaborately conceptual and now controversial arguments, rather than on any empirically-verifiable theory about the relative international impact of assistance to one or the other.

United Nations involvement also may assume forms varying widely in magnitude and character. For the Organization, as for a state, the most intense form of involvement is a military presence. The Congo and Cyprus precedents — particularly when contrasted, for example, with the Nigerian non-precedent — suggest that that degree of involvement becomes feasible for the Organization only after the more widely recognized domestic faction is convinced that it cannot impose its will, either because of the strength of the rebels or that of their allies. Hence at this point the incumbents would appear to have no practical objections to activation of the Conventions.

Where the United Nations acts only on the verbal level, for example, by means of recommendations made by the Security Council under Chapter VI of the Charter or by the General Assembly pursuant to Articles 10 and 11, it might seem quixotic to deny that in a *factual* sense the conflict has an international character; but unless Member States respond by according equal treatment to incumbents and rebels, the former may still perceive advantage in refusing to

[129] See VON GLAHN, *supra* note 126.

[130] FARER, T., « Harnessing Rogue Elephants », *supra* note 84, p. 533.

act in a way which might enhance the rebels' legal status. What, however, is the appropriate stance for impartial observers : the judges of international tribunals or national decision-makers who are not committed to either of the contending parties ?

The question is not academic. Both the General Assembly [131] and the Security Council [132] have asserted an international interest in the domestic policies of the South African and Rhodesian régimes. Consistent therewith, and in the face of domestic violence of such small magnitudes as would not under conventional criteria achieve the dignity even of « armed conflict », the General Assembly has demanded prisoner-of-war status for all rebels [133]. It has taken the same position with respect to the insurgents in the Portuguese territories [134] where violence does, however, assume the unmistakeable proportions of armed conflict.

To the extent they purport to be interpreting conventional or customary international law, resolutions of the Security Council or the General Assembly will be more or less persuasive depending on the number and identity of their supporters, as well as the force of their reasoning. But the resolutions in question may well have a larger ambition; the intention of their advocates may have been not to clarify but to reform the law. Indeed reformation was almost certainly the implicit objective of these resolutions, for they did not purport to be applying the Conventions on the basis of generally relevant criteria of interpretation including the objects and purposes of the Conventions; rather the applicability of the Conventions was asserted on the basis of entirely exogenous criteria. The General Assembly was, in sum, asserting a legislative competence [135].

There is today no consensus about the nature or extent of that competence [136]. It seems fair to observe that states do not feel *legally* bound by General Assembly resolutions or, for that matter, resolutions adopted by the Security Council under Chapter VI. Whatever their legal significance, for incumbents engaged in the suppression of rebellions they convey a warning that the means employed

[131] See, *e.g.*, G.A. Res. 2465 (XXIII) 1968; G.A. Res. 2151 (XXI) 1966; G.A. Res. 2107 (XX) 1965.

[132] See, *e.g.*, S.C. Res. 4835 (1961).

[133] See the following resolutions adopted in 1968 at the 23rd Session of the General Assembly : 2446, December 19, 1968; 2396, December 12, 1968; and 2383, July 11, 1968.

[134] G.A. Res. 2395 (XXIII) 1968.

[135] On the legal significance of decisions of the political organs of the United Nations, see generally HIGGINS, R., *The Development of International Law through the Political Organs of the United Nations*, 1963. See also FALK, R., « On the Quasi-Legislative Competence of the General Assembly », 60 *A.J.I.L.* 782-791, 1966, and ONUF, « Professor Falk on the Quasi-Legislative Competence of the General Assembly », 64 *A.J.I.L.*, pp. 349-355, 1970.

[136] ONUF, p. 355.

are being closely observed and that a substantial group within the United Nations is prepared to seize the opportunity to organize a majority for mandatory measures. Under the circumstances, incumbents would seem well advised to adopt a generous interpretation of their obligations under the Geneva Conventions, so as not to buttress contempt for their social ends with revulsion for their military means. National political leaders, particularly of major powers, who do not feel any pressing concern for the substantive issues, also have reason to attribute operational relevance to the body of opinion reflected in these assertions of quasi-legislative competence, since disregard of the intensely felt opinions of a large bloc within the United Nations can only erode that sense of mutual respect, of community, which creates a climate conducive to international cooperation in resolving the larger questions of international life.

CONCLUSION

The central question to which our discussion has been devoted is — what are the contextual factors which justify characterization of a civil war as an armed conflict of an « international character » ? On this critical issue, the Text's communications are finally Delphic. The *Travaux préparatoires* do little more than supplement our uncertainty. And, as one would expect, the practice of states contributes a rich harvest of ambiguity.

Perhaps one can discern a slight, progressive shift in the candor of States. The obdurate reluctance to concede any Conventional obligations which marked the decolonizing struggles of the 1950's seems to have given way to more flexible postures. I have endeavored to suggest certain considerations of policy which in specified circumstances should stimulate open acceptance of the Conventions' inhibitions on state discretion. These include the interest of bloc leaders in justifying intervention and the interest of incumbents generally in maximizing the opportunities for post-war reconciliation, as well as minimizing the danger of humanitarian intervention on behalf of the rebels. I have also attempted to clarify the points at which the incumbents' fears of enhancing the status of rebels lose their rationality. And I have sought to identify community policies favoring a generous interpretation of the international-character requirement.

In sum, I have attempted to show why the consensus should move beyond its position that civil war has an international character when rebels achieve the formal status of belligerency or are assisted by foreign military units. At a minimum I would urge a finding of internationalization whenever foreign troops have joined either party to the fray or where a United Nations force has been inserted. And, within the limits imposed by history and syntax, practice and policy, I believe one could justify going further to embrace cases where foreign states back the rebels with military matériel.

Finally I would like to recall that in civil conflicts which cannot or need not be characterized as international, the parties are still exposed to the moral adjuration of Article 3 which states that « they shall endeavor to bring into force, by means of special agreements, all or part of the other provisions » of the Conventions. Any régime with a decent regard for the opinions of mankind will heed that plea.