

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

1-1-1971

## Internal Conflict and Article Three of the Geneva Conventions

James E. Bond

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [International Law Commons](#), and the [Transnational Law Commons](#)

---

### Recommended Citation

James E. Bond, Internal Conflict and Article Three of the Geneva Conventions, 48 *DENV. L.J.* 263 (1971).  
<https://digitalcommons.law.seattleu.edu/faculty/587>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

# INTERNAL CONFLICT AND ARTICLE THREE OF THE GENEVA CONVENTIONS

BY JAMES E. BOND\*

## CONTENTS

INTRODUCTION .....	263
I. TO WHAT KINDS OF CONFLICTS DOES ARTICLE 3 APPLY?.....	266
A. <i>Legislative History</i> .....	266
B. <i>State Practice</i> .....	270
C. <i>Function or Purpose</i> .....	273
II. HOW DOES ONE DETERMINE THE SUBSTANTIVE	
CONTENT OF ARTICLE 3? .....	277
A. <i>Analyzing the Language of Article 3</i> .....	278
B. <i>Analyzing Analogous Geneva Conventions</i> .....	281
C. <i>Analyzing Article 3 in Light of a</i> <i>Humanitarian Standard</i> .....	284
CONCLUSION .....	284

## INTRODUCTION

THOUGH internal conflict is not a new phenomenon in the international legal order — brothers have been fighting each other since Cain slew Abel — it has swollen into epidemic proportions in the last two and a half decades. One observer culled from the pages of the New York Times, well over 1,200 unequivocal examples of internal war between 1946 and 1959.<sup>1</sup> Even the casual newspaper reader can recall how many among the numerous recurrent “crises” of the last 10 years grew out of internal conflicts: Nigeria, the Congo, Cyprus; and in the past few months alone one thinks of Ceylon, Pakistan, and Northern Ireland. Former Secretary of Defense Robert McNamara confirms this impression by pointing out that while there were throughout the world 23 prolonged insurgent movements in 1958, there were 40 by 1966.<sup>2</sup> As the present decade opened, one

\* Assistant Professor of Law, Washington and Lee University Law School; A.B., Wabash College, 1964; LL.B., Harvard, 1967; LL.M., Virginia, 1971.

<sup>1</sup> Eckstein, *Introduction: Toward the Theoretical Study of War*, INTERNAL WAR 3 (Eckstein ed. 1964).

<sup>2</sup> R. McNAMARA, THE ESSENCE OF SECURITY 145 (1968).

observer estimated that one quarter of all the sovereign states in the world were engaged in some kind of armed conflict, largely internal.<sup>3</sup> Even the two current conflicts most accurately characterized as "international," Vietnam and the Middle East, are rooted in internal struggles for power.

Given, first, the pervasiveness of internal conflict and, second, the likelihood that its incidence will increase rather than diminish in the last quarter of this century, it is surprising that until recently few commentators have analyzed what, if any, laws of war restrain participants therein.<sup>4</sup> The traditional laws of war, which evolved over several hundred years before being codified in the last century,<sup>5</sup> never governed any internal conflict other than a civil war.<sup>6</sup> In 1949, however, the Geneva Diplomatic Convention inserted Article 3 into the four Geneva Conventions. The common Article 3 applies to "conflicts not of an international character." It states:

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

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

<sup>3</sup> Kemp, *Arms Traffic and Third World Conflicts*, 577 INT'L CONCILIATION 5 (1970).

<sup>4</sup> Although the problem of internal conflict has attracted the interest of an increasingly large number of international law scholars, they have focused almost exclusively on the legality of third party intervention. See Bond, *A Survey of the Norms of Intervention*, 52 MIL. L. REV. 51 (1971); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205 (1969). The only thorough analysis of Article 3 is J. STOTIS, *LE DROIT DE LA GUERRE ET LES CONFLICTS ARMIES D'UN CARACTERE NON-INTERNATIONAL* (1958), which unfortunately has not been translated into English.

<sup>5</sup> The codification movement began in 1864 with the adoption of the first Geneva Convention for the Protection of the Sick and Wounded. Today the law of war is found largely though not exclusively in the four Geneva Conventions of 1949: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, TIAS No. 3362 [hereinafter cited as GWS (Sea)]; the Geneva Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.S.T. 3316, TIAS No. 3364 [hereinafter cited as POW]; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, TIAS No. 3365 [hereinafter cited as GC]; and the Hague Regulations of 1907, 36 Stat. 2277, TIAS No. 539, II MALLORY TREATIES 2269.

<sup>6</sup> UNITED STATES DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE*, Field Manual 27-10 (1956). "The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents." *Id.* para. 11(a). Accord, H. LAUTERPACHT, II OPPENHEIM'S INTERNATIONAL LAW 209-10 (7th ed. 1952) [hereinafter cited as LAUTERPACHT].

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

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of 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, sick and shipwrecked 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.

While renewed interest in the applicability of the laws of war to internal conflict has stimulated wide-ranging proposals for new conventions and the extension of existing ones,<sup>7</sup> Article 3 remains the only part of the presently codified laws of war applicable to such conflict. Little studied, it is little understood. Although often characterized as a "convention in miniature," it has elicited almost no commentary similar to that poured out on the general Geneva Conventions. Since this dearth of scholarship reflects no dearth of challenging questions about its applicability and substantive content, I ask you to consider with me the relationship of Article 3 to internal conflict.

---

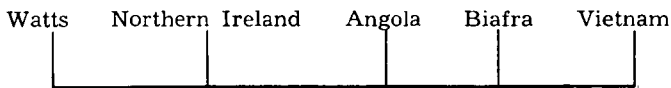
<sup>7</sup> The International Committee of the Red Cross, which as early as 1912 urged the application of humanitarian law to civil wars and insurrections, is presently consulting experts on the general topic, "Reaffirmation and Development of International Law Applicable in Armed Conflict," and has already published *A PRELIMINARY REPORT ON THE CONSULTATION OF EXPERTS CONCERNING NON-INTERNATIONAL CONFLICT AND GUERRILLA WARFARE* (1970). It had previously convened three separate study groups to examine specific internal conflict problems: Commission of Experts for the Examination of the Question of Assistance to Political Detainees (1953); Commission of Experts for the Study of the Question of the Application of Humanitarian Principles in the Event of Internal Disturbances (1955); and Commission of Experts for the Study of the Question of Aid to Victims of Internal Conflicts (1962). The United Nations, whose International Law Commission initially ignored suggestions that it re-examine the law of war, has recently thrown its weight behind proposals for reform. Cf. Report of the Secretary-General, *Respect for Human Rights in Armed Conflict*, U.N. Doc. No. A/8052 (1970).

## I. TO WHAT KINDS OF CONFLICTS DOES ARTICLE 3 APPLY?

One frustrated scholar despairs:

One of the most assured things that might be said about the words "armed conflict *not of an international character*" is that no one can say with assurance precisely what meaning they were intended to convey.<sup>8</sup>

Consider, for example, the scale of conflicts below, which I have arranged very roughly from left to right in order of the increasing scope and duration of the conflict, and the intensity of the threat which the dissident faction poses to the established government.



The scale illustrates how internal conflicts may range from riots or insurrections through guerrilla movements to civil wars or even mushroom into international conflicts. The problem of categorizing internal wars is further complicated because, as the fortunes of the competing factions wax or wane, the conflict may move one way or the other along the scale. The point is that at any given moment there are different types of noninternational armed conflicts. In one sense, of course, each conflict is unique—particular people fighting in a particular place at a particular time. Beyond that, however, one would hope to articulate criteria which distinguish one kind of internal war from another in terms of what laws of war should regulate the conflict. That is the first challenge. There are three sources available to aid in the definition of the Article 3's application: legislative history, state practice, and the function or purpose of the article.

### A. Legislative History

Seeking an answer, one plunges into the legislative history (called the *travaux préparatoires* in the fancy lingo of the international lawyer) only to sink into a quagmire of conflicting views as to the meaning of noninternational conflict. Some delegates thought they had merely incorporated the traditional doctrine that the customary laws of war governed a belligerency but not an insurgency. The U.S. delegation argued, for example, that the Article ought to apply only in the following circumstances:

<sup>8</sup> Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 43 (1971).

- (1) The insurgents must have an organization purporting to have the characteristics of a state;
- (2) The insurgent civil authority must exercise *de facto* authority over persons within a determinate territory;
- (3) The armed forces must act under the direction of an organized civil authority and be prepared to observe the ordinary laws of war; and
- (4) The insurgent civil authority must agree to be bound by the convention provisions.<sup>9</sup>

The identity between these criteria and those for belligerency is obvious.<sup>10</sup> Delegates wishing to extend convention provisions to groups who would be colored as insurgents under the traditional litmus paper tests could take little comfort in the American view which in effect said, "Yes, insurgents should be protected, too — so long as they are belligerents." Though the conference did rebuff the American and other attempts to write these explicit limitations into Article 3, many left the convention with the sense that it only governed civil strife in which the rebels had achieved the status of belligerents.

The Committee report on this article states:

It was clear that this [armed conflict not of an international character] referred to civil war, and not to a mere riot or disturbances caused by bandits.<sup>11</sup>

Even Jean Pictet, who thinks "the Article should be applied as widely as possible,"<sup>12</sup> admits that the criteria embodied in the various defeated amendments "are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection."<sup>13</sup>

Pictet does contend, however, that Article 3 also governs conflicts which do not fit any of those criteria. Though he nowhere explicitly says so, Pictet apparently believes that even one man brandishing a gun in another's face is noninternational conflict within the meaning of Article 3. He, too, mines the legislative history for nuggets of proof. At the XVIIth In-

<sup>9</sup> II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 12.

<sup>10</sup> The five requirements for belligerency are:

1. existence of a responsible government
2. possession of territory
3. existence of an army which follows the laws of war
4. recognition by third states of belligerency
5. existence of general hostilities

LAUTERPACHT at 249. See also M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 18-19 (1959).

<sup>11</sup> II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 129.

<sup>12</sup> J. PICTET, *COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD* 50 (1952). Pictet's four volume commentary is the standard reference work on the Geneva Conventions.

<sup>13</sup> *Id.*

ternational Red Cross Conference, which immediately preceded the 1949 Diplomatic Conference, the International Committee proposed adding a fourth paragraph to draft Article 2:

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 Conventions shall be obligatory on each of the adversaries.<sup>14</sup>

After prolonged discussion, the Conference deleted the phrase "especially cases of civil war, colonial conflicts, or wars of religion." Pictet concludes that "[t]he omission of these words, far from weakening the text, enlarged its scope."<sup>15</sup> Article 3 as finally approved retains "the armed conflict not of an international character" language, and the Conference's rejection of the various amendments which would have explicitly and narrowly circumscribed its meaning by enumerating certain specific types, arguably reinforces Pictet's argument that Article 3 applies to a wide range of conflicts.

Pictet finds further support for his view in the Conference decision to list certain basic principles by which parties fighting each other ought to abide. Initially, the Conference had weighed applying all the Conventions to internal conflicts. Concerned that brigands and bandits, for example, might thus escape punishment by claiming prisoner of war status, representatives of various governments had tried to limit their applicability to conflicts which, though internal in character, exhibited the features of real war.<sup>16</sup> The French delegation broke the logjam over the six different proposals with the suggestion that only certain principles rather than all the provisions of the Conventions be applicable:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall apply the provisions of the Pre-

---

<sup>14</sup> The reference to Article 2 may be confusing. What ultimately became Article 3 was initially included in draft Article 2 as paragraph 4.

<sup>15</sup> J. PICTET, *supra* note 12, at 43. Mr. Pesmazoglon of Greece feared what Pictet hoped: "I consider that the Stockholm Conference by suppressing the explicit references to 'civil war' and 'colonial war' gives too wide a scope to the text." II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 10. Precisely because the Committee shared the Greek delegate's fears, the chairman had asked a working party "to draw up a new provision of a more limited character." *Id.* at 76.

<sup>16</sup> Sir Robert Craigie, the British delegate to the Geneva Diplomatic Conference stated at the outset that he "did not believe it possible to oblige a State to apply the Conventions to situations which were not war, declared or not, as this idea was defined by international law." II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 10.

amble to the Convention for the protection of Civilian Persons in Time of War.<sup>17</sup>

The Soviet Union favored an enumeration of specific Convention provisions rather than a statement of general principles and, therefore, proposed the following text:

In the case of armed conflict not of an international character occurring in the territory of one of the State Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:

- humane treatment for the wounded sick;
- prohibition of all discriminatory treatment of wounded and sick practised on the basis of differences of race, colour, religion, sex, birth, or fortune.<sup>18</sup>

Although the Conference adopted the French rather than the Russian approach, the final Article did specify more fundamental principles than those contained in the never-adopted draft Preamble. Pictet, reflecting on the debate over Article 3, depicts the delegates as choosing between (1) applying all the Convention provisions to a limited range of conflicts, or (2) applying a limited number of principles to an unlimited range of conflicts. If Pictet has fairly juxtaposed the alternatives, the Conference did choose the latter course.

Pictet also argues the number of applicable principles is so limited that they must be observed in all conflicts. He asks rhetorically:

What government would dare to claim before the world in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?<sup>19</sup>

The regrettable fact is that some nations have implicitly claimed as much. Moreover, under traditional and still widely-held views about the nature of international law, states are bound to observe only those rules to which they agree;<sup>20</sup> and they have usually resisted even minimal efforts to tie their hands in dealing with domestic enemies. All this may suggest that the delegates considered "an armed conflict not of an inter-

<sup>17</sup> *Id.* at 78. In addition to the original Stockholm draft and the French and Russian proposals, the British and Italian delegations had submitted drafts. There was finally the text of the Working Party, a committee which had ironed out a compromise provision. Following a discussion of these proposals at the 24th meeting of the Special Committee of June 15, 1949, the chairman appointed a second working party composed of representatives from Britain, France, Italy, Monaco, and the U.S.S.R. On June 24, the Working Party reported to the 28th meeting a text, which, with minor revisions, became the present Article 3.

<sup>18</sup> J. PICTET, *supra* note 12, at 47.

<sup>19</sup> *Id.* at 50.

<sup>20</sup> Case of the S.S. "Lotus" [1927] P.C.I.J., ser. A, No. 9.



national character" a civil war by any other name and voted in favor of applying a limited number of principles to a limited range of conflicts. Mounting evidence suggests that their instincts may have been sound: one of the few effective ways to deal with domestic unrest is to strike swiftly and severely.<sup>21</sup>

There is, however, another and to my mind more persuasive reason for taking Pictet's argument with a few grains of skepticism. While the number of principles set out in Article 3 is small, they are very general and therefore susceptible, as we will shortly see, of broad interpretation. Desirable as it may be to pour increasingly detailed content into the vague language of Article 3, one must face the dilemma that the more specific the rules he sees embodied in the Article, the less likely it is that the draftsmen ever envisioned their application to riots, insurrections, or even insurgencies. If the humanitarian must impale himself on one or the other horns of this dilemma, he may lose less blood by opting for a more definite code which extends some otherwise inapplicable rules to the most destructive kinds of internal conflicts. The alternative is to affirm the continued applicability of minimal restraints already enshrined—though admittedly not always worshipped—in the constitutions of all states. If Article 3 imposes only "a few essential rules which [the government] in fact respects daily under its own laws, even when dealing with common criminals,"<sup>22</sup> then it hardly justifies the effusive praise or the desperate fears which attended its adoption.<sup>23</sup>

No set of criteria for determining the type of internal conflicts to which Article 3 applies is buried in the Conference committee reports. Reading through them, one nevertheless is convinced that the delegates intended Article 3 to apply to belligerencies or civil wars (Biafra), perhaps to insurgencies (Angola), but never to bandits or riots (Watts) or even insurrections (Northern Ireland).

## B. State Practice

The practice of states may often dispel the fogs of legisla-

---

<sup>21</sup> See generally Pye, *The Roots of Insurgency and the Commencement of Rebellions*, in *INTERNAL WAR* 157 (Eckstein ed. 1964).

<sup>22</sup> The exhortation is Pictet's. J. PICTET, *supra* note 12.

<sup>23</sup> But see, Ford, *Resistance Movements in International Law*, 7 *REV. OF THE INT'L RED CROSS* 579 (1967):

The rules of Article 3 are of considerable importance in the case of an armed conflict not of an international character because, the national legislations, which are adapted to normal conditions, may prove to be inadequate in the event of internal disturbances, so the possibility of excesses must not be ruled out. *Id.* at 587.

tive history (indeed, examination of state practice is to be preferred to examination of legislative history as a method of interpreting an international agreement<sup>24</sup>), and state practice underscores the limited range of conflicts to which authorities believe Article 3 applicable. Though there has been, as my introductory comments illustrate, no absence of opportunities for the application of Article 3 in the 25 years since its adoption, states have generally ignored it. So discouraging has Jacques Siotis found the record of state practice that he has concluded that governments do not regard the new rules of conventional law contained in Article 3 as obligatory.<sup>25</sup>

A few examples will illustrate that Siotis has ample justification for his pessimism. From 1946 until 1949 when fighting ended, the Greek government, though it permitted the International Committee of the Red Cross to perform limited humanitarian functions, denied that it was embroiled in a civil war and refused to abide by any laws of war.<sup>26</sup> While Article 3 had not yet come into force, the ICRC did call the Greek government's attention to the work of the 1946 Pre-Conference Meeting of the Red Cross Societies which had resolved that in case of an armed conflict not of an international character, each of the parties should observe the conventions unless one of them explicitly refused to do so.<sup>27</sup> Article 3 had certainly come into force when Biafra split from Nigeria, precipitating a bloody civil war. The Nigerian government never admitted any legal obligation to adhere to its provisions though it permitted the ICRC to perform certain humanitarian functions and itself vowed to conduct military operations humanely.<sup>28</sup> The widely reported "night of the long knives" suggests that the military in Indonesia did not take seriously any restraints contained in Article 3. Within the last year both Pakistan and Ceylon have had to employ regular military units against rebel forces. Neither has publicly recognized any obligations under Article 3; and press reports indicate what would appear to be

<sup>24</sup> According to the "treaty on treaties," state practice is a primary means of interpretation whereas preparatory work is a subsidiary means of interpretation, resorted to only if primary sources leave "the meaning ambiguous" or "lead to a result which is manifestly absurd or unreasonable." Article 31 and 32, *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF. 39/27, May 23, 1969, printed in 63 AM. J. INT'L L. 875 (1969).

<sup>25</sup> J. SIOTIS, *supra* note 4.

<sup>26</sup> Ford, *supra* note 23, at 585.

<sup>27</sup> M. Veuthey, *The Red Cross and Non-International Conflicts*, 10 INT'L REV. OF THE RED CROSS 411, 412-13 (1970).

<sup>28</sup> Farer, *supra* note 8, at 60. The ICRC faced many obstacles in Nigeria. See *Help to War Victims in Nigeria*, 9 INT'L REV. OF THE RED CROSS 353 (1969).

widespread violations of its basic provisions.<sup>29</sup> Likewise, Portuguese authorities have never admitted any obligation to apply the provisions of Article 3 to rebel forces in the African provinces of Mozambique and Angola, even though the General Assembly has demanded that the native guerrillas be treated as prisoners of war,<sup>30</sup> a specific requirement quite beyond anything imposed by Article 3 itself.

Algeria was the only contemporary internal conflict in which both sides agreed to abide by Article 3.<sup>31</sup> Though both sides occasionally violated it (as is perhaps inevitable in any armed conflict) they publicly and repeatedly urged each other to respect its humanitarian provisions. Moreover, a number of countries such as Greece and Nigeria, though denying the applicability of Article 3, did permit the Red Cross to exercise humanitarian functions. In the Yemenese Civil War, the ICRC operated field medical hospitals.<sup>32</sup> Following the brief 1954 revolt in Guatemala, the ICRC inspected prison facilities and insured proper treatment of political detainees.<sup>33</sup> While these examples do not show widespread compliance with Article 3, they do create a less bleak picture than emerges from analyzing foreign office statements.

Two conclusions emerge from a survey of state practice. First, states which quell riots, insurrections, or even revolts quickly do not feel bound to respect Article 3. In the absence of any widely-held expectation of the international community that they conform to Article 3, they act under emergency or martial law. The internal conflict is over before the international community can apprise itself of the facts and generate any pressure on the competing parties to comply with the provisions of Article 3. States do, second and nevertheless, accept

---

<sup>29</sup> Consider the following press report, which an Associated Press newsman in Ceylon filed:

Bodies of young men presumably killed by policemen and soldiers have been floating down rivers in groups toward the sea near Colombo. . . . Some of them were decapitated and others riddled with bullets, their wrists bound behind their backs.

Steiba, *Ceylon's Police and Army Fight Rebels with Terror*, N.Y. Times, April 25, 1971 at 1, col. 6. The Times has also reported that the Pakistani Army had orders to kill students, intellectuals, professors, doctors, and others of leadership caliber in East Pakistan. Schanberg, *Bengalis Form a Cabinet as the Bloodshed Goes On*, N.Y. Times, April 14, 1971, at 7, col. 2.

<sup>30</sup> G.A. Res. 2395, 23 U.N. GAOR Supp. 18. U.N. Doc. A/OR/23/S/18 (1968).

<sup>31</sup> See, *The ICRC and the Algerian Conflict*, (International Committee of the Red Cross Pamphlet, 1962).

<sup>32</sup> See, *The ICRC and the Yemen Conflict* (International Committee of the Red Cross Pamphlet, 1964).

<sup>33</sup> Ford, *supra* note 23, at 586.

some obligation to treat opposing forces humanely if the conflict drags on beyond several weeks or months. While this recognition seldom takes the form of an explicit acceptance of Article 3, it often manifests itself in acceptance of some Red Cross initiative. Curiously enough, this practice antedates the adoption of Article 3 and formed the basis for the original ICRC proposal to the 1946 Preparatory Conference.<sup>34</sup>

### C. *Function or Purpose*

Reflecting upon the purpose or function of Article 3 may focus some light on the kinds of internal conflicts to which it should apply. The general purpose of Article 3 is the same as that which animates the whole of the laws of war: to ameliorate suffering insofar as military necessity permits. At the most abstract level, then, the laws of war reflect a tension between the principles of necessity (defense justifies resort to violence) and humanity (fundamental human rights must be protected).<sup>35</sup> Professor Baxter has succinctly delineated this tension:

The law of war is itself a compromise between unbridled license on the one hand and, on the other, the absolute demands of humanity, which, if carried to a logical extreme, would proscribe war altogether. Stated in other terms, the law seeks to limit the measures of war to those which are necessary and to curb those activities which produce suffering out of all proportion to the military advantage to be gained.<sup>36</sup>

While it is difficult to stake out the parameters of military necessity, that necessity is not, as Professor Baxter suggests, unlimited. The demands of military necessity in internal conflicts might conceivably legitimate some terror tactics not authorized in international conflicts,<sup>37</sup> but they could not justify

<sup>34</sup> J. PICTET, *supra* note 12, at 41. Article 3 still authorizes an "impartial body, such as the International Committee of the Red Cross . . . [to] offer its services to the Parties to the Conflict" and further encourages them to "endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." Article 3 thus retains the right of humanitarian initiative while imposing some minimum obligations. Before the laws of war became substantially codified, states frequently negotiated ad hoc arrangements, as, for instance, the cartel of March 12, 1780, between France and England establishing the ransom in pounds sterling for captured field-m Marshalls.

<sup>35</sup> For a thorough but brief sketch of the conceptual basis for the laws of war, see J. PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1966).

<sup>36</sup> Baxter, *The Geneva Conventions of 1949*, 9 NAVAL WAR COLLEGE REV. 59 (1956).

<sup>37</sup> R. TRINQUIER, *MODERN WARFARE* 8 (1964).

We know that the sine qua non of victory in modern warfare is the unconditional support of a population. . . . Such support may be spontaneous, although that is quite rare and probably a temporary condition. If it doesn't exist, it must be secured by every possible means, the most effective of which is terrorism. See also Thornton, *Terror as a Weapon of Political Agitation*, in *INTERNAL WAR* 71 (Eckstein ed. 1964).

wholesale denial of human rights.<sup>38</sup>

Many of the same human rights protected by the laws of war are threatened during internal conflicts. Accurate figures are difficult to come by, but estimates on loss of life and destruction of property run high.<sup>39</sup> Torture, degrading imprisonment, and summary execution are all too commonplace. Children starve and the sick and wounded languish unattended. The dead rot. Families may be forcibly evicted from their homes and "relocated."<sup>40</sup> When, as is often the case, ethnic or religious differences permeate the conflict, the savagery would warm the heart of Ghengis Khan, who cried:

The greatest happiness is to vanquish your enemies, to chase them before you, to rob them of their wealth, to see those dear to them bathed in tears, to clasp to your bosom their wives and daughters.<sup>41</sup>

Article 3 denies such happiness to would-be Ghengis Khans.

Since the protection of certain human rights is the chief purpose of Article 3, one might reasonably conclude that it should come into force in any internal conflict which endangered those rights. Inquiry should focus on the nature of the human rights being threatened rather than on the nature of the conflict (i.e., whether it was a riot, insurrection, insurgency, or belligerency). The *use of regular combat units in tactical operations* would be the most important criterion justifying application of laws of war. Both because of the weapons which soldiers are likely to use (artillery, fire and chemical weapons, for example) and the probable scope of any military operation (the use of air cover or support, for example), the threat to human rights normally protected by the laws of war is great.

<sup>38</sup> It was during an internal war — the American Civil War — that a government issued the first official document recognizing humanitarian limitations on military necessity. Para. 14-16 General Order 100, "Instructions for the Government of Armies of the United States in the Field" (April 24, 1863). During the same war, however, General Sherman, who proved a man of his word, explained why an internal war dictated a strategy of terror and devastation:

[T]his war differs from European wars in this particular; we are not only fighting hostile enemies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies.

Quoted in C. Fenwick, *INTERNATIONAL LAW* 568 (3d ed. 1948). For an analysis of the continuing relevance of the principles embodied in General Order 100 to the conduct of unconventional warfare, see Garner, *General Order 100 Revisited*, 27 *MIL. L. REV.* 1 (1965).

<sup>39</sup> Cf. D. de Huan and J. Tinker, *Refugee and Civil War Casualty Problems in Indochina* (Staff Report of the U.S. Senate Subcommittee on Refugees).

<sup>40</sup> Johnson, *Preface to CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE LAW OF ARMED CONFLICT* (1971).

<sup>41</sup> Quoted in L. MONTROSS, *WAR THROUGH THE AGES* 144 (1944).  
HeinOnline -- 48 Denv. L.J. 274 1971-1972

Another criterion for the application of the laws of war is the *duration of the conflict*. As the fight drags on, the disruption of normal life intensifies. The sick and wounded demand treatment; the hungry, food; the homeless, shelter. The number of prisoners grows; and difficult questions about their classification, punishment, detention, and care must be answered. All of these problems are common to international conflicts, and large portions of the laws of war were designed to provide humanitarian solutions.

*Foreign troop participation in tactical combat operations* is a third criterion for the application of the laws of war. There is no litmus paper test by which one can distinguish an internal war from an international war; and while one can imagine an internal conflict in which foreign troops participate on either side without thereby internationalizing it, their presence creates conditions which demand application of the laws of war. Foreign assistance may, for example, augment native firepower and thereby increase the potential destructiveness of their operations. Failure to treat captured soldiers from foreign countries as prisoners of war will exacerbate tensions and may trigger a spiraling wave of inhumane reprisals.

What may be called the "*intensity*" of the conflict for want of a more descriptive term is a fourth criterion for the application of the laws of war. Sporadic raids and firefights do not greatly endanger large numbers of people, nor are they apt to provoke government use of combat troops. They may entail an occasional violation of a human right normally protected by the laws of war, but the acts will probably also violate domestic criminal law, as, for example, in the case of a political assassination. When the fighting intensifies, these violations proliferate. It is at that point—when the fighting becomes the bloodiest—that the laws of war should be applied to prevent wholesale slaughter and destruction. Neither side wins if it inherits only the wind. A stable government rests upon a loyal people, and one does not induce loyalty by raping and pillaging. A viable economy requires productive farms and industries. The farmer cannot reap from the salted earth; neither can the factory worker conjure wares from the rubble of bombed industries. An efficient state needs doctors, engineers, lawyers, and scientists. Whichever side wins will require their professional skills and can ill afford their loss through mass executions or indiscriminate bombardment.

A group of distinguished scholars has identified several

other criteria which would indicate a need to apply the laws of war to an internal conflict:

It is submitted that even though governments fighting insurgents generally refuse formally to recognize the "belligerency," they acknowledge the seriousness of the insurgency rather clearly through alterations in their normal domestic laws and institutions. Some of the signs that internal strife ought not to be considered as purely domestic are the following:

a. imposition of martial law or state of siege generally or in certain areas over a long period of time;

b. organization of emergency military or paramilitary security agencies, inter-departmental committees or councils operating with extraordinary powers similar to those exercised in wartime;

c. enforcement of laws and institutions commonly associated with wartime such as high draft calls, extraordinary measures with respect to food and other necessities, transportation and the like;

d. drastic increase in detentions and other deprivations of civil rights for political or security reasons, detentions over long periods without trial, increase in trials not characterized by minimal due process, or at least, due process as it was supposed to exist in the state in normal times.<sup>42</sup>

These criteria are nothing more than contextual factors which provide a sounder index to those circumstances in which human rights normally protected by the laws of war are endangered than do the traditional categories of riot, insurrection, insurgency, and belligerency. It is true that these traditional categories reflected, roughly, differences in the duration, troop involvement, and intensity of internal conflicts. Riots or insurrections seldom last long. Military troops usually pour onto the battlefields only during insurgencies or belligerencies. One might therefore conclude that the rights protected by the laws of war are far more likely to be denied during an insurgency or belligerency than during a riot or insurrection because the government will, when combating the former, usually conduct the kind of operations and adopt political measures that often generate law of war violations. Policies adopted to control riots and put down insurrections may, of course, also violate certain human rights; but to the extent that the rights violated are other than those guaranteed by the laws of war, they should have no application. The point remains, however, that the traditional categories do not invariably reflect accurately the degree of troop involvement, the duration and intensity of an internal

---

<sup>42</sup> INSTITUTE OF WORLD POLITY, *THE LAW OF LIMITED INTERNATIONAL CONFLICT* 48 (1965).

conflict, or the significant changes in domestic policies outlined above.

A moment's reflection upon the factor of jurisdictional competency within the international legal order reinforces the conclusion that Article 3 ought to apply, even under a purpose test, only to those internal conflicts far along the scale in terms of scope, duration, and intensity. The sovereign equality of states remains a fundamental building block of the international legal order,<sup>43</sup> and states retain a considerable degree of absolute discretion in regulating events within their territory. The idea is enshrined in the United Nations Charter, which provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ."<sup>44</sup> The continuing General Assembly consideration of the South African policy of apartheid has narrowed the scope of the domestic jurisdiction reservation,<sup>45</sup> and the growing body of international humanitarian law demonstrates a growing international concern in the very problems we have been discussing. As I implied in my survey of state practice, a state will nevertheless still claim absolute discretion to deal with riots and insurrections.

## II. HOW DOES ONE DETERMINE THE SUBSTANTIVE CONTENT OF ARTICLE 3?

We now turn our attention to the second major challenge inherent in Article 3. To what situations does it apply? For example, many metropolitan police forces use dum-dum bullets,<sup>46</sup> which have long been considered illegal per se in international law.<sup>47</sup> Are we then to conclude that their use against bank robbers is illegal? Most governments regularly use non-toxic tear gases to disperse riots. If, as certain authoritative

<sup>43</sup> Friedmann, *Intervention, Civil War and the Role of International Law*, 1965 PROC. AM. SOC. INT'L L. 67, 67-68.

<sup>44</sup> U.N. CHARTER art. 2, para. 7.

<sup>45</sup> See generally McDougal & Reisman, *Rhodesia and the United Nations: the Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

<sup>46</sup> Cf. *Police in Memphis are Criticized Over a Rash of Killings on Duty and Use of Dum-dum-Like Bullets*, N.Y. Times, July 5, 1970, at 34, col. 1.

<sup>47</sup> The Judge Advocate General of the Army has recognized that "there is an international law restriction . . . on the types of bullets that may be used in both smooth-bore and rifled small arms." Opinion No. JAG. W 1960/1305, filed January 4, 1961 in the office of the Judge Advocate General of the Army. The restrictions date back to the St. Petersburg Declaration of 1868, (PHILLMORE, III INTERNATIONAL LAW 160-62 [3d ed. 1885]) and are summarized in ARMY FIELD MANUAL 27-10, *supra* note 5:

Usage has, however, established the illegality of the use of . . . irregular-shaped bullets . . . and the scoring of the surface or the filing off of the ends of the hard cases of bullets. *Id.* at 34.



sources believe, the Geneva gas ban extends to non-toxic gases,<sup>48</sup> must we also conclude that governments must use other, presumably more humane, methods of riot control? I raise the questions not to answer them but to re-emphasize the subtle interplay between the decision to ascribe a particular substantive content to the Article, and the decision to apply it to particular types of internal conflicts.

I think that the best way to get a handle on Article 3's substantive content is to analyze a series of hypotheticals. I assure you that my examples are realistic if not real. Their realism is a healthy antidote to academic theorizing, for these hypotheticals require us to fit our textual analysis to battlefield realities.

There are three techniques of interpretation which may be used in applying the substantive content of Article 3 to these hypothetical situations. One is to analyze the language of the Article alone. Another approach is to analyze analogous but more detailed provisions of the Geneva Conventions. Finally, one might analyze Article 3 in light of a subjective, humanitarian standard.

#### A. *Analyzing the Language of Article 3*

The first question one asks himself is who is entitled to the humane treatment guaranteed in Article 3. Consider the following hypothetical case. Government troops engage a rebel band entrenched in a mountain redoubt. The commander of the government forces decides to gas the rebels with an asphyxiating gas. The Geneva Gas Protocol of 1925<sup>49</sup> forbids the use of such gas. Most scholars now argue that the prohibition on the use of gas is customary international law and therefore binds equally those who did not sign the Geneva Protocol.<sup>50</sup> For our present purposes let us assume that customary international law does prohibit the use of asphyxiating gas or that the government is a signatory. Does Article 3 prohibit the commander from employing it against the rebels in their mountain stronghold?

Article 3 does not explicitly forbid the use of gas or, for that matter, any other weapon. It does, however, in addition to imposing the general requirement of humane treatment, for-

---

<sup>48</sup> Cf. G.A. Res. 2603 (A), 24 U.N. GAOR Supp. No. 30, p. 16 (Dec. 16, 1969) reprinted in 64 AM. J. INT'L L. 393 (1970).

<sup>49</sup> L.N.T.S. 65. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare.

<sup>50</sup> See generally Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375 (1969).

bid cruel treatment. One could plausibly equate "cruel treatment" with the infliction of "unnecessary suffering," the standard found in Article 23 of the Hague Rules<sup>51</sup> and the basis for outlawing almost all illegal weapons of war.

Whom does Article 3 protect? It protects only non-combatants, *i.e.*, persons taking no active part in the hostilities. Article 3 would therefore not prohibit the commander from gassing rebels in their mountain stronghold, not because gas does not constitute cruel treatment (that is, as I have indicated an open question), but because combatants fall outside the protective ambit of the Article. Article 3 simply does not require that government forces treat resisting rebels humanely.

The implication of this conclusion is disheartening. The laws of war may be broadly divided into two branches: the rules protecting non-combatants, often called the law of Geneva; and the rules regulating conduct of hostilities, often called the law of The Hague.<sup>52</sup> While, as we shall see, Article 3 does incorporate much of the law of Geneva, it incorporates almost none of the law of The Hague. Consequently, government forces need not play by the "game rules"—particularly the provisions and principles of the Annex to the 4th Hague Regulation of 1907 on weapons, targets, ruses, and stratagems—unless their actions would unjustifiably subject non-combatants to inhumane treatment.

A second hypothetical case will illustrate this possibility. Government forces receive sniper fire from a small village. The village is suspected of rebel sympathies, and reliable intelligence sources report that a rebel unit has set up headquarters for its local operations in the village. The commander of the government forces calls in artillery fire on the village. A Red Cross medical unit is hit and several patients killed. Has the

---

<sup>51</sup> It is almost impossible to determine what constitutes "unnecessary suffering," and some have therefore argued that it imposes no effective restraints on the use of new weapons. Cf. J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 550-51 (1959).

<sup>52</sup> The distinction is misleading for two reasons. The first is that documents signed at either The Hague or Geneva often contain provisions with respect to both the protection of non-combatants and the conduct of hostilities. Much of the early law on treatment of non-combatants for example, was embodied in the 1907 Hague Regulations (*e.g.*, Articles 4-20 dealt with prisoners of war). And the 1925 Geneva Gas Protocol, to take another example, would fall within the law of The Hague. Secondly, the distinction is misleading to the extent that it implies that different purposes underlie the two categories. The purpose of the law of The Hague is not simply to regulate or govern the conduct of tactical operations but rather to reduce human suffering and protect fundamental human rights by limiting operational excesses. Its purpose is thus the same as that of the law of Geneva.

commander violated Article 3? Article 25 of the Hague Regulation states: "The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited."<sup>53</sup> Article 27 says that in any attack non-military targets such as schools, hospitals, churches, and museums should be spared.<sup>54</sup> Damage to such institutions and loss of innocent lives does not violate the laws of war, however, so long as it is incident to a lawful attack upon a legitimate military target.<sup>55</sup> While, as our first hypothetical showed, the rebel soldiers are not protected persons, the medical staff and patients are. They are entitled to humane treatment; and if one assumes, as I do, that protection of non-combatants is the underlying purpose for restricting bombardment, then the answer becomes first one of interpretation, and second of fact. The interpretative question is one we have already analyzed and shall analyze again: what constitutes "humane treatment"? The general requirement of humane treatment may be too slender a basis upon which to incorporate all the rules whose purpose is protection of non-combatants, but we also find in Article 3 the injunction that the "wounded and sick shall be collected and cared for." Like all the provisions in Article 3, this, too, is very general. At a minimum, however, one could surely imply that medical establishments cannot be attacked and that hospital staff must be respected. Otherwise, it is difficult to see how "the wounded and sick" can be "collected and cared for." One may then conclude that the general requirements of humane treatment and care for the sick and wounded preclude indiscriminate bombardment in the circumstances outlined above.

The second question is the factual one: did the attack violate the rules of bombardment? Was the artillery strike an excessive use of firepower? Was the Red Cross unit clearly marked? Was it located dangerously near a legitimate military

---

<sup>53</sup> Customary practice has modified this rule. Attacks upon military targets in undefended cities are legal. K. RABY, *BOMBARDMENT OF LAND TARGETS — MILITARY NECESSITY AND PROPORTIONALITY INTERPELLED* (an unpublished thesis presented to the Judge Advocate General's School 1968). See also, ICRC draft *Rules for the Limitation of the Dangers Incurred by the Civilian Population in Times of War*. Article 6 specifies:

[S]hould members of the civilian population . . . be within or in close proximity to a military objective they must accept the risks resulting from an attack directed against that objective.

<sup>54</sup> The immunity is not absolute, however. If enemy forces are using the institution for a military purpose (e.g., using a church steeple as a lookout) opposing forces may attack it.

<sup>55</sup> Cf. Article 6, ICRC I DOCUMENTS ON INTERNATIONAL LAW FOR MILITARY LAWYERS 61, 63 (1969).

target? One cannot determine whether the commander violated Article 3 by shelling the village unless he knows "the facts."<sup>56</sup>

### B. *Analyzing Analogous Geneva Conventions*

The importance of the facts does not make the rule unimportant, however, and we must know what it means. A third hypothetical case will illustrate an interpretive means by which we can flesh out the skeletal provisions of Article 3 by analogy to provisions of the Geneva Conventions. Regular government forces capture a guerrilla leader. He is wounded, though not seriously, and is in some pain. He has not eaten in three days and is hungry. The commander of the regular army forces tells the captured man that he will get him medical attention and food as soon as he answers some questions. The commander then asks the prisoner several questions about the location and strength of guerrilla units. Although the prisoner initially refuses to answer, he finally gives his interrogator the information, after which he gets the promised food and treatment.

The prisoner is clearly a protected person. True, he is a rebel. But he is no longer fighting; he is in the "power" or "hands of" government forces. He is *hors de combat* and therefore must be treated as a non-combatant. Does questioning a man when he is hungry and wounded, and conditioning feeding and treatment on his answering, violate the obligation to treat humanely? Is it torture? Cruel treatment? Humiliating and degrading? Does such treatment violate the command to attend the wounded? Where does one look for some standards by which he can judge what constitutes torture or cruel treatment?

One alternative is to look to the more detailed provisions of the Geneva Conventions. For example, one could look at Article 17 of the Geneva Prisoner of War Convention which establishes guidelines for interrogating prisoners. Article 17 states:

No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.<sup>57</sup>

<sup>56</sup> An example of the growing literature which demonstrates little interest in "the facts" of U.S. Army operations in Vietnam is Sheehan, *Should We Have War Crimes Trials?*, N.Y. Times, March 28, 1971, § 7, at 1, col. 1.

<sup>57</sup> The Article is a direct lineal descendant of Article 9 of the 1907 Hague Regulations:

Every prisoner of war is bound to give, if he is questioned on the subject, his name and true rank, and if he infringes this rule, he is liable to have a curtailment of the advantages accorded to prisoners of his class.

The Article does not bar all questioning.<sup>58</sup> It does prohibit all coercive tactics. The Article is not without ambiguity, however, for what constitutes "disadvantageous treatment" remains a question of interpretation. One could nevertheless argue that the denial of food and medicine falls within the scope of any reasonable definition of "disadvantageous treatment." This view is reinforced by the frequent charge to treat the sick and wounded "without any adverse distinction founded on sex, race, nationality, religion, political, or other similar criteria."<sup>59</sup> Refusal to answer questions should not preclude care, since "only urgent medical reasons" determine priority of treatment.<sup>60</sup>

Other Convention articles point to the same conclusion. Captors must evacuate the prisoner from "the combat zone" as quickly as possible.<sup>61</sup> One could imply then that beyond ascertaining identity, any questioning must be delayed until the prisoner is interned in "camps situated in an area far enough from the combat zone to be out of danger."<sup>62</sup> Moreover, the captor must "supply prisoners with sufficient food and potable water, and with the necessary clothing and medical attention."<sup>63</sup> The various articles just surveyed suggest one answer: the commander violated the law by denying the prisoner food and medical attention.

As a method of interpretation, this approach has much to commend it. It refers us to a pre-existing detailed body of law. Many Convention articles, for example, establish procedures for implementing the humanitarian dictates of the law; and since procedural safeguards are almost entirely unspecified in Article 3, reference to the Geneva Conventions as a whole would provide an authoritative solution to many problems of insuring humane treatment. Where better to look for the meaning of the general principles contained in Article 3 than in the detailed provisions of the Geneva Conventions from which they were deduced?

One objection to this approach is that it in effect incorporates the whole of the Geneva Conventions into Article 3 and thereby makes applicable to internal conflicts a whole body of

---

<sup>58</sup> For a "handbook" on permissible interrogation techniques under the Geneva Conventions, see Glcd & Smith, *Interrogation under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145 (1963).

<sup>59</sup> E.g., common Article 3; GWS Article 12; GWS (Sea) Article 12; POW Article 16; GC Article 13.

<sup>60</sup> GWS and GWS (Sea) Article 12.

<sup>61</sup> POW Article 19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* Article 20.

law whose applicability the Geneva Diplomatic Conference explicitly rejected. The present hypothetical illustrates the point nicely. Article 3 does not grant prisoner of war status to anyone. As noted earlier, delegates to the Geneva Diplomatic Conference rejected the notion that their governments should treat traitors — and that is what a rebel is from the government's point of view — as prisoners of war because among other things they could then claim immunity from prosecution under domestic criminal law.<sup>64</sup> Established governments have a vested interest in making the cost of unsuccessful revolution high; and even the international community, whose concern must be as much with stability as self-determination in a nuclear age, has a considerable interest in shoring up the price levels. Immunizing captured rebels from ordinary or even extraordinary criminal processes may dangerously lower the cost of revolution.

An answer to this objection may be that one need not incorporate all of the Geneva Conventions' provisions; rather, he need only look to certain provisions for authoritative standards for humane treatment. In the context of the present hypothetical, for example, the question is not whether the prisoner may be prosecuted under domestic criminal law but whether his captor may deny him food and medicine until he answers intelligence questions. One can conclude after interweaving various relevant articles in the POW and Sick and Wounded Conventions that denial constitutes inhumane or cruel treatment without also concluding that the rebel cannot be tried as a traitor. Assimilating a rebel to a prisoner of war for one purpose does not dictate assimilating him to a prisoner of war for all purposes. Some provisions of the POW Convention might prove unworkable in the peculiar context of internal war. It is far more difficult, for example, to determine "the combat zone" in a guerrilla conflict than in a World War II-type war, which was the paradigm in the draftsmen's minds. Others may be incompatible with Article 3 provisions relevant to the present hypothetical; for instance, there is the clause in Article 3 permitting trial and execution. This clause would seem to permit prosecution of rebels even though prisoners of war could not be.

---

<sup>64</sup> Treating rebels as POW's is not without advantage to the established government; for while they may not be prosecuted under the ordinary criminal law, they may be held for the duration of the conflict. Were the rebel prosecuted, convicted, and jailed for committing a crime, he could upon completion of his sentence return to the jungle to continue the revolution — a prospect unlikely to delight the incumbent authorities.

### C. *Analyzing Article 3 in Light of a Humanitarian Standard*

Somewhat similar to the look-to-the-Geneva-Convention approach is the I-know-it-when-I-see-it approach to interpretation. This latter approach would eschew reliance on the Geneva Conventions in favor of an admittedly subjective case-by-case judgment. While subjective, the determination need not be irrational. One would strike some balance between the right of an established government to protect itself against domestic enemies and the human rights of the individual. In the context of the present problem, the observer would weigh the importance of intelligence information to government forces combating guerrillas. Professor Farer, whose enthusiasm for the revolutionaries of the world is undisguised, admits that "in guerrilla war the most serious problem facing the incumbents is a lack of intelligence. . . ."<sup>65</sup> Recognizing the importance of combat intelligence, the observer would keep in mind the mounting evidence that coercion yields unreliable information.<sup>66</sup> If pragmatic reasons also underscore prohibitions on coercion, the observer would be especially sympathetic to humanitarian claims. In assessing the scope of such claims, he could examine not only the Geneva Conventions but other documents such as state constitutions and comparative criminal practice, human rights covenants, reports of the International Committee of the Red Cross, and General Assembly resolutions.

Conceivably, the I-know-it-when-I-see-it approach might yield more humane results. The previously mentioned growth in humanitarian law has occurred since the Geneva Conventions were opened for ratification. The cutting edge of the law has now advanced well beyond their provisions, even those such as Article 3 which struck some as dangerously avant-garde at the time. Looking to recent developments in humanitarian law, as well as to the Conventions themselves, for standards by which to measure "humane treatment" would incorporate into Article 3 more stringent safeguards than are found in the Geneva Conventions alone.

### CONCLUSION

The notion that the laws of war should apply to internal conflicts may well be an idea whose time has come. Many of the present rules of war were initially advocated by scholars and later included in draft agreements which never came into

<sup>65</sup> Farer, *supra* note 8, at 64.

<sup>66</sup> The Army Military Intelligence School teaches that one cannot get information from a dead man.

force before finally finding general expression in formal international conventions. The general principles were then elaborated in increasing detail in subsequent conventions. The idea that parties to an internal conflict should respect the laws of war has a similar lineage. Long advocated by scholars and included in draft agreements, it finally emerged in limited form in Article 3 of the 1949 Geneva Conventions. We must thus all hope that the ongoing discussions at the United Nations and in Geneva will produce at an early date tangible results: a new and detailed international covenant for the protection of victims of internal conflict.

In the meantime we must persuade with wit and imagination, a straight face and a reasonable voice, governments to accept broad obligations under Article 3 to treat all humanely.<sup>67</sup> Though states have too often ignored Article 3, their actions nevertheless demonstrate a surprising sensitivity to humanitarian claims, particularly when those claims are based on explicit Convention provisions. The language of Article 3 is unfortunately general, but selective incorporation of the more detailed rules of the Geneva Conventions can flesh out its general language. While it is true that the legislative history of Article 3 shows no intent to incorporate all the Convention provisions, their purpose was identical: to ameliorate the sufferings of war. And it is the nature of the suffering to be alleviated, not the nature of the conflict, that should define the application of the laws of war to situations of internal strife. Otherwise, we shall have kept the humanitarian promise to the ear of the innocent but broken it to their hope.

---

<sup>67</sup> This obligation might be best implemented in directives to military personnel. The soldier inevitably makes law on the battlefield. If he has received sound instruction in his responsibilities, and if he has been issued directives which embody sound principles, he will usually make good law. The quality of the directives is all important because every army runs on directives. I would therefore suggest that we draw up model directives on subjects such as detention and interrogation. These directives would "concretize" the general principles in the penumbra of Article 3.