



## APPLYING HUMANITARIAN LAW TO NON-INTERNATIONAL ARMED CONFLICTS

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### INTRODUCTORY

Humanitarian law, as a distinct body of law aiming at the protection of the individual in times of war, finds written expression in the four Geneva Conventions of 1949<sup>1</sup> and the 1977 Additional Protocols I and II to the Geneva Conventions.<sup>2</sup> But only a small number of the provisions in these instruments directly apply to civil war situations. In recent years, however, particularly since the end of the Cold War, wars have become, almost exclusively, internal affairs, fuelled by ethnic, religious, ideological, and economic tensions. The draft of common Article 3 pertaining to non-international conflicts, as submitted by the ICRC at the Diplomatic Conference of 1949, which finalised the form of the Geneva Conventions, arouse more controversy and debate than any other provision. Many

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

2. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977 1125 U.N.T.S. (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec 12, 1977, 1125 U.N.T.S. 609 (Protocol II).



governments, who were currently embroiled in colonial conflicts and wars of self determination, (or likely to be in the foreseeable future) were simply not prepared to allow the restraint on their sovereignty and actions which the draft demanded. Newly independent governments, such as Burma, were also reticent, perceiving the article as a threat on their recently gained sovereignty. The resultant common Article 3 is considerably different from that which was originally proposed. The outcome was very much a compromise, in which an effort was made to reduce the most fundamental principles of the Geneva Conventions into a single provision. During the 1960s and 1970s the ICRC began to consider ways in which some of the defects of the common Article 3 could be improved. Armed conflicts in Korea and Vietnam, developments in technology and the growth of phenomena such as terrorism and guerilla warfare raised concerns about the relevance and application of common Article 3 to these new situations, and led to the Diplomatic Conference on Humanitarian Law held in Geneva from 1974-1977. The problem was that while many developing countries were keen to extend international law as widely as possible to anti-colonial struggles or wars of self determination, they were less inclined to do so for indigenous revolutionary movements. Consequently, the Conference saw the eventual development of two Protocols: Protocol I, which internationalised wars against colonial or racist oppression and Protocol II concerned with other internal conflicts. Both Protocols were primarily concerned with the protection of civilians. Protocol II which was considered at the end of the Conference almost failed to be adopted as by then many countries had lost interest. It was subjected to similar concerns that faced common Article 3 at the time of its adoption, regarding its perceived threat to sovereignty and being potentially encouraging of rebellion and separatist movements. Time constraints resulted in many of the detailed provisions in the draft, which were closely modelled on Protocol I, being radically reduced in order to ensure adoption by as many countries as possible.

This paper examines the adequacy of existing humanitarian law as it relates to internal armed conflicts and considers a number of recent developments instigated by the international community relating to the enforcement of humanitarian law.



## COMMON ARTICLE 3

a. *General*

Common Article 3 became the first provision in any international convention to specifically address the issue of internal conflicts. In many ways it was a revolutionary development because it demanded that a state treat its nationals according to universally defined standards. It is also the only provision of the four Geneva Conventions which refers exclusively to internal armed conflicts. While the article offers victims some level of protection, this is certainly considerably less than that prescribed by the four Conventions pertaining to international armed conflicts. However, it is important to emphasise that the article represents a minimum code only. Many people have regarded the Article as a Convention in Miniature or a mini Convention because it embraces the fundamental principles of the laws of war. Pictet in his Commentary<sup>3</sup> considers it as one of the most important articles in the Conventions.

Common Article 3 is now generally considered to have attained the status of customary law. In the *Nicaragua* case the International Court of Justice considered that common Article 3 contained the core norms of humanitarian protection which were applicable to both non-international and international conflicts. The Court stated that:

Article 3 ... defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion reflect what the Court in 1949 called "elementary considerations of humanity"<sup>4</sup>

3. PICTET, J: *Commentary Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952) at 38.

4. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v U.S.), Merits, 1986 ICJ REP. 14, 114, paras 218-219.



In this case the Court determined that the conflict between the Contra rebels and the Sandanista Government was internal and as such, governed only by common Article 3, while that between the United States and the Government was international.

*b. Scope and Application*

The first issue with the Article raises is the precise definition and meaning of the phrase "armed conflict not of an international character." During the Diplomatic Conference considerable debate focused on the question of whether the term should be more precisely defined. Pictet refers to a number of criteria which were outlined at the Conference as useful in distinguishing between situations of armed conflicts and those that fall below the required threshold to which Article 3 will apply.<sup>5</sup> These are closely reflective of the criteria that traditionally governed recognition of belligerents. Indeed many delegates at the Diplomatic Conference believed that the Article applied only to those situations which would have previously warranted belligerent recognition.<sup>6</sup> Pictet insists, however, that common Article 3 is not confined only to the above situations and should instead be applied as widely as possible.<sup>7</sup> A conflict does not need to reach the level required for recognition of belligerency for common Article 3 to apply – Article 3 applies also to low intensity conflicts. The concept of armed conflict comprises relatively objective and commonly accepted elements. Authoritative ICRC commentary has stated that:

Conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities - conflicts in short, which in many respects are similar to an international war but take place within the confines of a single country.<sup>8</sup>

5. PICTET, *supra* note 3 at 49.

6. See BOND, J.: *The Rules of Riot* (Princeton University Press, 1974), 53.

7. PICTET, *supra* note 3 at 50.

8. ELDER, D.: "The Historical Background of Common Article 3 of the Geneva Convention of 1949", (1979) 11 *Case W Res J Int'n'l L* 37 at 53.



Common Article 3 was first applied in Guatemala in 1954.<sup>9</sup> Since then it has been explicitly accepted and applied in a number of situations including Lebanon (1958), Cuba (1959), Vietnam (1964), and Chile (1973).<sup>10</sup> In various other situations it has not been acknowledged, but the ICRC has been able to visit detainees such as in Algeria (1955), Kenya (1956), Burundi (1972) and Ethiopia (1974).

*c. Obligations of the Parties*

An important attribute of common Article 3 is that it imposes obligations on all the parties to a conflict and not just on the government. As Lysaght<sup>11</sup> notes, the juridical basis for imposing legal obligations on persons or bodies other than the government, is questionable. Concern on this point was also expressed at the Conference. Certainly, it had previously been thought impossible in international law to bind non-parties to an International Convention, particularly given that such parties may not have even been in existence at the time of the signing. However, it can be argued, that a government ratifies a convention on behalf of its nationals, including those who revolt against it.

In theory, common Article 3 should be applied automatically and without discretion. The obligations imposed by the provisions are absolute and there is no reciprocity clause. An authority in question can only free itself from the obligations of the convention by following common Articles 63/62/142/158 which pertain to denunciation. It should be noted, that only a High Contracting Party or internationally recognised government may denounce the Convention and that denunciation does not take effect immediately. In any case, as common Article 3 is recognised as customary law and in addition *ius cogens*<sup>12</sup> derogation from it would not be permitted.

9. VEUTHEY, M.: "Implementation and Enforcement of Humanitarian Law and Human Rights in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross" (1983) 33 *Am U L R* 83, at 87.

10. FORSYTHE, D.: "Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts" (1978) 72 *Am J Int'l L* 272, 275.

11. LYSAGHT, C.: "The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments" (1983) 33 *Am U L R* 9, 12.

12. SCHINDLER, D.: "The Different Types of Armed Conflict" (1979-II) 163 *Recueil des Cours* 117, 151.



The rigorous demands as to the standard of protection, requires a considerable degree of organisation and discipline by the parties concerned. However, a party may not accept or reject only such parts of the provision of which they are capable. Theoretically and in practice the entire Article must be applied and implemented.

The final paragraph states that the legal status of the parties is not altered by application of the Article. This clause was considered indispensable to suppress fears, particularly by the *de jure* governments concerned, as to the effects that endorsement would have on the legal status of the parties. The clause implies that the Convention is humanitarian in nature and that it is not concerned with the internal political affairs of a state. The application of common Article 3, therefore, does not constitute recognition by the *de jure* government in any way of the rebel party. Further, it will not restrict a government's right to restrain or quell any rebellion through whatever means its own domestic laws allow. It will also not affect the rebel party's legal status in international terms by giving them any special recognition, privilege or protection other than that set out in the Convention.

#### *d. Humanitarian Content*

The humanitarian content reflects the principles in each of the four Conventions. Sub-paragraph 1 contains the essence of the fundamental principle underlying the Conventions in general, namely that of humanity towards others and is thus of major importance. It embodies principles from a number of sources including the 1907 Hague Convention No. IV on Law of War on Land, and the four Geneva Conventions. It also embraces certain principles of human rights regarding non-discrimination.

The provision extends to all civilians not engaged in hostilities, including members of the armed forces who as individuals or members of a group have laid down their arms. The important qualifying provision is that former combatants are not taking part in hostilities. All such persons are entitled to humane treatment, "without any adverse distinction founded on race, colour, religion or faith, sex or any other similar criteria." No doubt this provision reflected the recent memories of acts perpetrated against minority groups on the basis of racial, ethnic and religious differences during World War II. In order that no potential loopholes remained, the final phrase as to "other similar criteria" was adopted.



What constitutes "humane treatment" is defined in the negative in that the Article then proceeds to outline four major prohibitions. Provision 1 (a-c) deals with acts which are generally considered repugnant by public opinion namely:

- a) Violence to life and Person;
- b) Taking of hostages; and
- c) Outrages upon personal dignity particularly humiliating and degrading treatment.

The final provision 1 (d) refers to the prohibition on summary justice. As Pictet observes,<sup>13</sup> this provision was not intended to protect persons from arrest by the legitimate bodies of the state and does not prevent the state from duly arresting, prosecuting and punishing persons according to the process of the law. Although the provision does not detail what minimal judicial guarantees must be provided for other than those "recognised as indispensable by civilised peoples" reference can be made by analogy to Protocol I, Article 75 which sets out certain fundamental judicial guarantees. These include informing the accused of charges, an impartial court, conducting the trial in the presence of the accused and access to a process of defence. Sub-paragraph 1(2) refers to the care of the wounded and sick. There is no further elaboration as to what the word "care" involves and this is certainly less than the more detailed requirements of Article 12, Geneva Convention I which deals comprehensively and in detail with this issue.

#### *e. Implementation*

The only reference to implementation is in paragraph 2 which refers to the right of humanitarian initiative and enables any humanitarian organisation such as the ICRC to "offer its services". Such services are not confined only to humanitarian services and can include help in negotiating and implementing the provisions of the Article. There is no duty on a government to accept such an offer but they must examine it in good faith. In practice, the ICRC will approach an internal conflict by calling on all sides to observe humanitarian

13. PICTET, *supra* note 3 at 54.



law through careful and discreet negotiation. any contracts will then be made public in a summarised form.

Paragraph 3 urges the parties to apply the other provisions of the full Geneva Conventions to the conflict as well. Legally, the parties are only bound by the minimum requirements of common Article 3. While not phrased as an obligation the parties should certainly "endeavour" to negotiate extra agreements whenever possible. Special agreements have in fact been negotiated in a number of situations particularly at the initiation of the ICRC. This happened, for example, in Yemen<sup>14</sup> and in Nigeria<sup>15</sup> where both sides agreed to apply the full Geneva Conventions. More recently in Bosnia-Herzegovina, the parties to the conflict agreed to include special provisions regarding captured combatants, the conduct of hostilities and assistance to civilians.<sup>16</sup>

#### f. *Enforcement*

The procedures for enforcing common Article 3 are not specified within the article itself. Lysaght<sup>17</sup> notes that there are two possible interpretations or schools of thought as to enforcement of the Article which depend on the view that is taken of the Article's relationship to the rest of the Geneva Conventions. The first is to consider the article as an isolated provision. This view is reinforced by reference to common Article 2 which is generally accepted as defining the extent of coverage of the Conventions as excluding non-international conflicts. The other view is to consider common Articles 49/50/129/146 which refer to each High Contracting Party taking measures for "the suppression of all acts contrary to the present Convention". It is tempting, therefore, to consider the "all acts" as also including breaches of

14. BOALS, K.: "The Internal War in Yemen" in Falk (ed), *The International Law of Civil War* (1971) 314.

15. FARER: "Humanitarian Law and Armed Conflicts: Towards the Definition of International Armed Conflict" (1971) 71 *Col L R* 37, 60.

16. Agreement Between the Parties to the Conflict in Bosnia-Herzegovina, May 22, 1992.

17. LYSAGHT, *supra* note 11 at 12.





common Article 3 which would considerably broaden the scope of possible enforcement mechanisms.

There is no reference to the concept of grave breaches in the Article. However, the general definition of grave breaches does include wilful killing, torture and inhumane treatment which are all prohibited by common Article 3. The problem is that there are no provisions specified as to penal sanctions. As Lopez has noted:

Thus the provisions mandating criminal accountability for grave breaches of the Geneva Conventions do not automatically apply during civil wars.<sup>18</sup>

Nevertheless, recent rulings by the Tribunal for War Crimes in the Former Yugoslavia suggest that the absence of enforcement mechanisms in common Article 3 may no longer be a bar to bringing violators of the Article to justice.

### *Protocol I*

Protocol I addresses a variety of issues that were considered defective and inadequate in earlier humanitarian law and the laws of war. In addition to bringing wars of national liberation into the ambit of international conflicts, it also establishes a set of rules defining military objectives, and provides guidelines for the conduct of combat operations. The Protocol is also important in imposing obligations for greater protection of the civilian population and civilian objects (Articles 50-56), extending fundamental guarantees (Article 75) and measures for protecting women and children (Articles 76-79) amongst other innovative provisions. A number of its provisions are declaratory of customary law and are therefore binding in any international armed conflict.

It is useful to briefly mention Protocol I because although legally it internationalises a specific group of conflicts, it is submitted that in reality these are internal conflicts taking place within a single border. Protocol I,

18. LÓPEZ, L.: "Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts" (1994) 69 *NYULR* 916 at 938.



Article 1 (4) extends the application of common Article 2 of the Conventions to include all armed conflicts:

in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.<sup>19</sup>

The concept of wars of liberation as envisaged by the Article is limited to the above classes and does not include wars of secession or revolts against oppressive regimes. Further, self-determination under the United Nations Charter refers only to non-self governing territories, trust territories and mandated territories and does not apply within an established and sovereign state. The Protocol will, therefore, apply to only a very limited number of situations so far as it is concerned with internal type conflicts.

Originally the provision was aimed primarily at Israel, South Africa and Portugal. The latter relinquished control of its former territories shortly after the Protocol was adopted. With the emergence of a democratic South Africa and recent developments in Israel, there are few remaining candidates, such as for example Timor, who would qualify under the above definition. Had the framers exercised greater vision, the Protocol could have been worked to include wars of national liberation by minority groups who are being systematically persecuted and oppressed. Certainly, this would have encompassed a number of internal conflicts being conducted today. Potential problems of definition could have been overcome by demanding similar pre-conditions as those set out in Protocol II regarding the requirement of territorial control, organisation and a capacity to adhere to the Protocol. In addition, it would have been possible to state the objective characteristics of governmental regimes which, because of the systematic abuse of human rights of minority groups, for example, would validate a claim for self-determination.

19. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977 1125 U.N.T.S.



## *Protocol II*

### *a. Introduction*

The legislative history of Protocol II<sup>20</sup> revealed similar problems of concerns with sovereignty as had occurred during the drafting of common Article 3.<sup>21</sup> In many respects it is difficult not to conclude, given the above discussion on Protocol I, that during its drafting a selective humanitarianism operated. While many countries were keen to denounce racist and colonial regimes they were less inclined to support limitations on conduct in internal conflicts which were perceived as an interference in a state's sovereign rights. Because of the radically opposing views by participants at the Diplomatic Conference and the difficulty of obtaining agreement, the result was what the Vatican called, "a gentlemen's embarrassment"<sup>22</sup> as opposed to a gentlemen's agreement.

Protocol II has been relatively uncontroversial but that may well be because it has so rarely been resorted to due to its limited field of applicability. The only conflict in which Protocol II has been considered applicable has been in El Salvador<sup>23</sup> which is a party to the Protocol. However, in that situation the government refused to apply its provisions to the civil war in progress at the time.<sup>24</sup> Other conflicts which would have met the threshold required have been Lebanon, Ethiopia, Chad and Nicaragua but in general the state concerned was not a party to the Protocol and hence it was not considered.

Protocol II supplements and expands upon common Article 3 and can not be applied alone independently of common Article 3. Along a continuum it would appear that Protocol II would take over from Article 3 remembering that the latter still continues to apply, once hostilities reach a certain level.

20. See Forsythe, *supra* note 10, for an outline of the history of Protocol II.

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec 12, 1977. 1125 UNTS 609.

22. *Ibid.* at 282.

23. FLECK: *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 1995) para 127.

24. WHEELER, M.: "Humanitarian Law, El Salvador and Protocol II: Do These Equal Substantive International Law?" (1980) 21 *Case W Res J Int'l L* 203, 213.



Although Protocol II will, therefore, operate simultaneously with common Article 3, the latter is autonomous in that it is not constrained by the operation of the Protocol. Both common Article 3 and Protocol II have a number of other features in common including: non-recognition of the rebel party as a legal entity in international law; no special status accorded to combatants; and non-application to internal disturbances.

b. *Application*

Article 1 (1) of Protocol II states that it applies to all armed conflicts not covered by Protocol I and which:

take place in the territory of a High Contracting Party between its armed forces and other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol II will only apply where the insurgent or rebel group are organised and control some part of the territory. While it is not specified what proportion of territory must be controlled the emphasis is on the quality of that organisation and control. It must be sufficient to enable the opposition forces to apply the provisions of the Protocol. These conditions, in many respects, resemble the requirements of a full-scale civil war as already outlined under the customary law of belligerency. Further, unlike common Article 3 it does not apply to situations such as that which prevailed in Lebanon in the 1980s and Somalia in 1992 which involved conflicts between different rebel groups contesting for power as government and where the government itself had dissolved. Protocol II only applies between a government and a rebel group.

c. *Obligations of the Parties*

Theoretically, the Protocol should apply automatically once the required threshold has been reached. However, the concept that rebel forces be able to implement the Protocol suggests the element of reciprocity. This is in contrast to common Article 3 and in fact to the underlying scheme of the Conventions as a whole in which the obligations do not depend on whether



the other side observes the provisions or not. Article 3 of Protocol II reaffirms the qualification in common Article 3 that its provisions do not confer any legal status on the parties to the conflict. The Article goes further and notes that the Protocol may not be used to justify any intervention in the internal or external affairs of the High Contracting Party.

d. *Humanitarian Content*

Protocol II expands and elaborates considerably upon the basic and minimal content of common Article 3. It introduces protective measures that have no equal in common Article 3 and which are also not present in human rights conventions generally, such as those pertaining to the protection of children. It also repeats, almost in their entirety, the fundamental non-derogable rights of the 1966 International Covenant on Civil and Political Rights.<sup>25</sup> In addition to a fundamental guarantee of humane treatment, the Protocol also deals with different categories of persons namely detainees, the wounded, sick and ship wrecked and civilians.

Article 4 of the Protocol emphasises the fundamental guarantees of humane treatment. The Protocol's protective ambit applies to all persons who have discontinued or never taken a direct part in hostilities. Activities such as violence to life, terrorism rape, pillage and slavery are specifically forbidden. Children are given special notice and measures for reunification, removal to safe areas and the continuance of their education are included. A particularly unfortunate characteristic of many of today's internal conflicts is the increasing extent to which children often suffer disproportionately either as casualties, through separation from their families, or by becoming recruited as "child soldiers." These features were all prevalent in the Rwanda crisis of 1994, for example.

In the Rwanda crisis approximately 100,000 children became separated from their parents,<sup>26</sup> and children had often been deliberately targeted as part of the process of ethnic cleansing. In addition to that, children were deliberately recruited to carry out some of the killing. Article 4 expressly

25. G.A.Res.2200A, 21 U.N.GAOR Supp. (No.16) at 52, U.N.Doc. A/6316(1966) 999 UNTS.

26. Save the Children Fund (UK), "Emergency Update Rwanda" 20 November 1995, 2.



addresses this latter concern by prohibiting the recruitment of children under the age of 15 into the armed forces.

Article 5 is concerned with those individuals whose liberty has been deprived or restricted as a result of the hostilities. The various provisions pertain to the minimum requirements of providing food and water, separate cells for male and female, medical services and receiving relief, amongst others. Article 6 deals with the some of the precautions necessary in the prosecution and punishment of those accused of criminal offences related to the conflict and includes a number of fundamental requirements for fair justice. Articles 7-12 refer to conditions of care for the wounded, sick and shipwrecked. Of particular importance is the protection of medical personnel so they are able to carry out their professional duties; they can not be penalised, for example, for doing so and medical units and transport must be respected at all times.

An important advancement over common Article 3 is the more extensive Forms of protection provided for the civilian population. These are outlined in Articles 13-18 and are similar to those of Protocol I, Articles 49-58 relating to international conflicts. The section on civilians contains a number of provisions which limit the types of admissible military action. Both civilians and works and installations capable of unleashing dangerous forces may not be the object of deliberate attacks. The use of deliberate starvation as a means of legitimate warfare is also prohibited. Civilians may also not be forcibly displaced which is particularly relevant in light of the practice of "ethnic cleansing".

Article 18 provides that where the civilian population is suffering undue hardship, humanitarian relief aid may be offered by organisations such as the Red Cross and be undertaken subject to the consent of the High Contracting Party. This is somewhat ambiguous because there is a mix of mandatory and consensual specifications. The only reasonable interpretation is that while the state concerned will be under an obligation to accept the relief offered, it may regulate the details involved with regard to the necessities of security and the military situation.

#### *e. Implementation and Enforcement*

Protocol II contains very limited reference to implementation and enforcement. Many of the original draft articles pertaining to implementation and enforcement were deleted in the final form. Even relatively mild proposed



provisions, such as the ability of an impartial body like ICRC to cooperate in the observance of the Protocol, were finally rejected.<sup>27</sup> In fact, there is no reference in the Protocol to the ICRC at all, not even in an implementing capacity. However, it should be noted that the ICRC is entitled to offer humanitarian assistance to any party in an internal conflict under its own Statute.<sup>28</sup> In any case, as common Article 3 continues to apply, the right of the ICRC to offer its services will continue. The only reference to implementation and enforcement mechanism is Article 19 which stipulates that the Protocol is to be disseminated as widely as possible. Consequently, although the content of Protocol II is considerably more expansive than that of common Article 3 its enforcement provisions are not correspondingly more extensive or helpful. A state which is party to Protocol II may denounce it and this step will become effective six months following receipt by the depository. If the state is actually involved in internal conflict which continues beyond six months, the Protocol will continue to remain in force along with its corresponding protection.

### *Evaluation of Current Legal Instruments*

#### *a. Introduction*

The evaluation of instruments of humanitarian law poses a number of difficulties. Certainly, it is possible to analyse the instruments themselves in terms of their wording and deficiencies of content and structure. But ultimately, the question will be whether they have been successful in meeting their broader objectives. Within the chaos that characterises war, success or failure becomes notoriously difficult to measure. All wars, particularly civil ones, are characterised by violence, torture and abuses of legal and humanitarian norms. In most wars, specific examples of violations will defy comprehension as to the level of gross excess and savagery that human

27. Int'l. Comm. of the Red Cross, Draft Protocol Additional to Geneva Conventions of August 12, 1949 Relating to Non-international Armed Conflicts, art.8(5) (1973), reprinted in 1 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Official Records 35-36.

28. Article 5, Statutes of the Movement.



behaviour can descend to during conflict. Consequently, humanitarian law suffers from the same problems and accusations of international law generally. That is, there is a tendency to examine what has not been achieved rather what has. Yet, as the work of the ICRC testifies, there will be many examples where humanitarian law has been consciously observed and applied. Whether this is because of the existence of written laws or from motives such as self interest, reciprocity or a fundamental and universal moral code beyond which the protagonists in a war do not venture is difficult to assess. Nonetheless, a number of problems can be identified in the current legal instruments which govern internal conflicts. These are set out below.

b. *Definition and Scope of Internal Conflict*

Many commentators have criticised both common Article 3 and Protocol II for failing to adequately define the term "non-international conflict". With more than one instrument relevant to internal conflicts, it is important to establish the minimum threshold criteria within a definition to determine applicable legal norms. The problem is that while common Article 3's definition is too broad, Protocol II is so specific that appears to be unattainable. Continually changing phases of warfare poses a further problem in internal conflicts. Generally, there will be a progression of intensity in hostilities but these may also recede temporarily. The result in practical terms is that a party may refuse to apply the relevant instrument on the basis that a conflict of the required intensity no longer exists.

Protocol II's high threshold covers only large scale internal disturbances. This could effectively allow states to argue that any level of violence being witnessed in their countries has not yet reached the high threshold required by Protocol II. As the Protocol does not objectively specify the actual degree of control required by quantifying the control of area in percentage terms either geographically or by population, it is difficult to identify exactly whether a situation fits the paradigm. In addition, because there is no neutral institution to make any such determination, it is left to individual states to evaluate this themselves based on their own self-interests.<sup>29</sup> The other difficulty of importing such a high threshold is that it is unlikely that an incumbent government will readily admit that rebel forces are sufficiently organised or control the substantial portion of territory that

29. López, *supra* note 18 at 927.





Protocol II requires. Such an admission would be a public acknowledgment that the government has lost support of its nationals and is under serious threat. Indeed, it is precisely during periods of tension that governments are most likely to vigorously deny the existence of widespread opposition and to make concerted efforts to reaffirm their control either through propaganda or other means.

The threshold required for common Article 3 is lower as it does not demand the same level of territorial control and organisation by the adverse party as Protocol II. The problem with common Article 3 then becomes that states simply refuse to acknowledge that an armed conflict exists. There have been many instances of states which have refused to apply common Article 3 despite the clear existence of an armed conflict, such as France in the Algerian war of independence and Pakistan in the secession of Bangladesh. These difficulties of application are in stark contrast to international conflicts, where, as was said earlier, the Geneva Conventions will apply automatically, whether or not both sides recognise the existence of the armed conflict.

Finally, in terms of scope of application, criticism of both provisions is that neither is applicable to situations of internal tension such as riots or sporadic acts of violence. This criticism, while partly valid, would merely lead to further complications if acted on. Although ideally it would be comforting to think that the principles of humanitarian law would cover such situations, problems of definition would be further compounded if application was extended beyond the commonly accepted concept of an internal armed conflict discussed earlier. It should also be noted that, in practice, the ICRC does intervene in internal disturbances that have not yet denigrated into actual conflict on the basis of its own statute and custom accepted by states.

### *c. Implementation*

Despite difficulties of definition, the major problem lies in the realm of implementation and observance. First, the lack of mechanisms within common Article 3 and Protocol II referring to implementation has already been mentioned. There is, for example, no system of Protecting Powers. Although the ICRC may offer its services to encourage implementation this is consensual and governments which are reluctant to allow outside organisations into their territory during conflict may refuse such an offer. The lack of an outside neutral party may make monitoring of observance and compliance difficult. Even where parties have agreed to implementation, there



is often a contradiction between agreement and practice. While parties may agree to the general applicability of an instrument, they may disagree as to the interpretation of its contents and the practicality of abiding by its provisions. Often what is agreed between leaders of the parties concerned is not observed by combatants further down the ranks. The history of internal conflicts (and of war in general) is replete with examples of breaches and atrocities despite written confirmation of proposed adherence to humanitarian law between the parties.<sup>30</sup> As occurred in the former Yugoslavia, agreement to observe special agreements does not necessarily mean that parties will abide by them.

The character of many internal conflicts today also makes implementation problematic. War is no longer the exclusive domain of well organised and disciplined armies. The Geneva Conventions were devised during a period when there was a clear distinction between different types of groups such as civilians and combatants. But today, the fragmentary nature of rebel groups, the lack of distinction between civilians and soldiers, the lack of an organised and central command make it difficult to ensure dissemination and compliance with humanitarian law, even where leaders are agreeable. In addition, many government armies today are often badly trained, lack discipline and are either poorly paid or often not paid at all. Often they themselves tend to form rebel groups, such as in Sierra Leone where some army factions organised themselves into loose independent groups and terrorised civilians to extort money and supplies.

Protocol II also sets fairly high standards which may be difficult for the parties to meet, even if the desire to do so is there. This is particularly the case with regard to the requirements of the penal prosecutions under article 6, which demands a relatively sophisticated court procedure and notions of justice. Other provisions are worded more relative to prevailing conditions. Article 5 (1) (b), for example, concerned with detainees, specifies that they receive only the same level of food and water as is provided to the local population. It is important that the provisions are within the attainment capabilities of both parties to avoid the possibility of one side, usually the government, denying its obligations on the basis that the other side are incapable of compliance.

30. See for example an account of the war in Yemen where the parties agreed to respect the principles of the Geneva Conventions but widespread violations still occurred; and see Falk D (ed), *The International Law of Civil War*, (1971) at 315.



#### d. *Enforcement*

Undoubtedly, the major area of criticism which has been directed at both common Article 3 and Protocol II is in their lack of enforcement mechanisms. Protocol II does not even oblige the parties to observe the provisions it contains. As discussed earlier, neither make explicit reference to the concept of grave breaches which provides for universal jurisdiction over certain offences. Consequently, even if governments wished to prosecute alleged violators of humanitarian law during internal conflicts, who had since fled the country, they would be dependent upon the extradition provisions in treaties other than the Geneva Conventions and Protocol I. In general, most extradition treaties contain a political exception clause and states may refuse to extradite on this basis. In Rwanda, for example, many persons who have been identified as perpetrators of the genocide in 1994 still find refuge in other countries. Until recently, perpetrators of horrendous atrocities and genocide in internal conflicts, such as Pol Pot in Cambodia and Idi Amin in Nigeria, had escaped justice. However, the increasing emphasis on bringing war criminals to account via International Tribunals, Truth Commissions (South Africa) or the domestic court system (Ethiopia) indicates that there is a renewed emphasis on the process of enforcement. Governments who grant amnesties to those who have perpetrated gross atrocities during recent periods of conflict are now being exposed to more open criticism for attempting to sweep aside issues of responsibility.<sup>31</sup>

Following internal conflicts, the process of bringing violators to account is particularly important. Unlike the conclusion of international wars, which generally sees opposing combatants crossing back into distant territories, former adversaries in internal conflicts often have no choice but to continue living together in the same community, often in the same village, once the war is over. The process of reconciliation in the aftermath of any war must involve a search for justice and the exposure and recording of what occurred. This is important both at an individual level, particularly for victims who have been tortured or have lost family members and for the country's future psychological health. To attempt to deny what has occurred will merely perpetuate renewed cycles of violence and reprisals. With regard to the

31. See for example the criticism of the Angolan Government to grant amnesties to ex-Unita generals, responsible for killing tens of thousands of Angolans during the recent twenty year civil war there, reported in *The Guardian* 28 June 1996, Section 2, 16.



Rwanda crisis of 1994, for example, it was clear that both the repatriation of thousands of Hutu refugees in countries around the borders of Rwanda and the future rebuilding and stability of the country could not really occur until the principal perpetrators of the genocide were brought before the courts. The other main value of enforcement lies in its deterrent function. Bringing violators of humanitarian law to justice signals that both the country concerned and, increasingly, the international community, will not tolerate those who behave with complete impunity towards the basic minimum rights of others. It should act as a warning to others not to engage in similar future behaviour.

Although the problem of enforcement in common Article 3 and Protocol II is important, it should nonetheless be kept in perspective. First, the establishment of the Tribunal for the former Yugoslavia and Rwanda have established that violations of common Article 3 and Protocol II can still be prosecuted. Even had the Tribunal not been established, there is increasing evidence that breaches of common Article 3 and Protocol II are now considered as attracting criminal responsibility. The US and German Military Manuals, for example, both consider violations in internal conflicts as war crimes for which captured military personnel can be prosecuted.<sup>32</sup>

Second, the problem of prosecuting violations of humanitarian law is not confined only to internal conflicts. Despite more extensive enforcement mechanisms which pertain to international conflicts, the reality is that to date (apart from subsequent trials of former Nazi war criminals) there has been no application of war crimes law as it was established during the International Military Tribunals following World War II. This is despite no shortage of documented violations occurring in both international and non-international conflicts. In the prosecution of the two soldiers involved in the Mai Lai Massacre in Vietnam<sup>33</sup> there was no reference to the international law elements of war crimes. In 1973, Bangladesh decided that it would prosecute 195 Pakistanis for genocide, war crimes, and serious violations of the Geneva Conventions. However, due to political pressure it eventually transferred those

32. MERON, T.: "International Criminalization of Internal Atrocities" (1995) 89 *Am JIL* 554, 565.

33. *Calley v United States* (1973) 48 Court Martial Reports 19.



who had been accused back to Pakistan where no further action was taken apart from an apology by the government of Pakistan.<sup>34</sup>

Third, problems of enforcement in international law often encompass factors which are beyond the scope and power of legal instruments. Enforcement will often only occur where there is the political will by governments to do so. In the Bangladesh case mentioned above, factors such as Bangladesh's desire for recognition through United Nations membership, economic considerations and the basic need to maintain neighbourly relationships were factors which conspired to place political considerations over legal obligations. In both the Iran-Iraq War (1980-1988) and the Gulf Conflict of 1990 there was considerable evidence of breaches of humanitarian law, such as the treatment of prisoners and the use of chemical weapons.<sup>35</sup> Yet in both cases, despite clear evidence of violations and subsequent condemnation by the Security Council and at Diplomatic Conferences, no further action was taken. Both the former Yugoslavia and Rwanda Tribunals have expressed frustration over the lack of cooperation and delay afforded to them by governments in arresting indicted violators.

Fourth, care must be taken that an unduly narrow approach is not taken to the problem of enforcement. On the basis of parallels with domestic law, the traditional legal concept of enforcement is generally considered as a process which occurs following violation. It contains a system which measures the violation against a set standard and sets the punishment accordingly. To some extent, one problem with the Nuremberg trials is that they created an expectation that war crimes must be automatically dealt with within a trial context.<sup>36</sup> However, there are dangers in drawing too much of an analogy between the operation of international law and criminal law systems. Nations observe laws for a complex set of reasons not least because of political pressures and foreign policy considerations. The need for friendly relations, trade and financial considerations, international influence, reciprocity and the costs involved in non-observance are all major factors to ensure compliance rather than the threat of potential litigation. More can perhaps be gained by examining the processes and reasons why states observe international law and

34. For a fuller account of the legal issues involved in the proposed Bangladesh trials see Paust & Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience" (1978) 11 *Van J Tran'l L* 1.

35. See ROBERTS, A.: "The Laws of War: Problems of Implementation" in European Commission, *Law in Humanitarian Crises* (1995) Vol II.

36. *Ibid.* at 30.



using these as a basis for encouraging compliance with humanitarian law, rather than resort to trials as the primary enforcement mechanism.<sup>37</sup>

Finally, while enforcement has an important role there is a danger that focusing exclusively or substantially on the concept of punishment of violators, detracts from the wider issue of implementation and observance. Enforcement is the ambulance at the bottom of the cliff; once it becomes a problem then by implication humanitarian law or at least specific provisions of it, have failed. Ultimately, enforcement, particularly during war, must be a voluntary process which is encouraged by appropriate systems of education and dissemination about humanitarian law, preferably before armed conflict has commenced.

*e. Prisoners of War*

Under both the Geneva Convention III Relative to the Treatment of Prisoners of War and Protocol I, there is extensive reference to the protection of combatants who fall into the power of an adverse party. According to Protocol I, Article 43 (1) this includes all persons who belong to "organised armed forces, groups and units". In effect, captured combatants are granted a privileged status which recognises that a person who has been armed by the state and carries out his duties accordingly does so justifiably even if that involves killing. Provided that a prisoner of war has not violated the laws of war, the Geneva Conventions and Protocol I prohibit punishment of those persons solely on the basis that they have engaged in hostilities. Furthermore, states which are party to the Conventions must enact domestic legislation to punish persons who violate these provisions, in other words, who contrary to the express provisions of the Conventions, mistreat prisoners of war. Under both Protocol II and common Article 3 these privileges do not cover captured combatants in a civil war. While some parties may apply prisoner of war laws in internal conflicts, as occurred in Algeria by the Algerian National Liberation Front (FLN), there is no obligation to do so. This issue is particularly problematic in internal conflicts because the result is that a failure to observe prisoner of war provisions often generates bitter and violent atrocities between the parties. Governments tend to be particularly reluctant to repeal what is the equivalent of treason laws and allow rebels or dissidents to

37. See further HENKIN: *How Nations Behave* (London: Pall Mall, 1968) 31-64.



kill or destroy government property subject only to detention as prisoners of war. Ordinarily, offences committed by rebels such as attacking military installations or other security breaches may well constitute treason under domestic law, the penalty of which in some countries may even be death. Consequently, a spiral of violence tends to be maintained. Government forces may apply increasingly violent methods to suppress rebel groups and to capture them. Often capture results in harsh interrogation, torture and immediate execution due to inadequate facilities of internment and the fear of escape. This in turn gives rebel groups little incentive to observe and respect humanitarian law, particularly towards government personnel, because while they are likely to be subjected to gross violations of their rights they are aware that there is no superior law regulating the actions of the government. Due to an increased emphasis on evading capture because of the consequences, both sides might adopt methods of warfare which breach humanitarian law and involve civilians who become the innocent victims.<sup>38</sup> A similar problem had formerly arisen in relation to the status of UN peacekeeping personnel. The problem was highlighted in Somalia where a number of incidents occurred against UN peacekeepers who were carrying out humanitarian duties and were deliberately killed by unknown attackers.<sup>39</sup> On 9 December 1994, the General Assembly adopted the Convention on the Safety of United Nations Personnel.<sup>40</sup> The Convention creates a regime to prosecute or extradite persons accused of attacking United Nations personnel who are not in a combative role, including those in internal conflicts.

#### f. *State Sovereignty*

Humanitarian law generally is a compromise between military necessity and concerns to curtail the detrimental effects of war on humankind as much as possible. But in internal conflicts humanitarian law operates under a double burden because it must also accommodate the extent to which its principles

38. This is evident, for example, in Sri Lanka, where the Tamil Tigers often employ the use of suicide bombing missions to attack military installations and government property, resulting in many deaths amongst both military personnel and civilians.

39. See for example DRYSDALE, J.: *Whatever Happened To Somalia* (London: Haan, 1994) at 180-188 for an account of the June 5 incident in which 24 Pakistani soldiers were killed.

40. G.A. Res. 49/59 (Dec. 9, 1994).



impinge on state sovereignty. As the legislative histories of both common Article 3 and Protocol II reveal, it is the concern with state sovereignty which acts as a major impediment to expanding the scope of the provisions. Both common Article 3 and Protocol II recognise and address this problem but in doing so also affirm the notion of state sovereignty. Common Article 3 does so with its proviso that application does not change the status of the parties, while Protocol II, Article 3, prohibits intervention or anything that would affect a state's sovereignty. The result is that a state's decision not to apply the Protocol can not be challenged by another state as this constitutes intervention. On the other hand, any application of humanitarian law in an internal conflict does in reality impose limitations on the sovereignty of the state involved. Despite the proviso of common Article 3, rebels in a conflict will be given certain responsibilities and obligations under international law instruments which are generally only within the domain of states. Also, where a government accepts the services of the ICRC, its actions become subject to scrutiny by an external body. Consequently, states are reluctant to accept both Protocol II and common Article 3 because of their fear of the legal effects that the Protocol could potentially confer on dissident forces. The other source of reluctance is that states will inevitably wish to maintain control over any dissident faction by municipal law rather than relinquishing control to international law.

Protocol II is even more problematic because it assumes that the rebel party already has some degree of organised control. A certain paradox then exists where the state, who is a party to the Protocol, will be expected to enforce it over territory over which in fact it no longer has control. Where control by the rebel force is extensive, the state will generally also have lost legal jurisdiction by its courts in those areas. This poses the perceived threat that applying the Protocol implies recognition of the sovereignty of the other party over the area it controls. It is for these reasons that the government side has often not considered it to be advantageous to its own position to apply the provisions of humanitarian law. In El Salvador, for example, the government refused to apply Protocol II despite the fact that the situation met the threshold requirements in terms of the rebels' control over territory.<sup>41</sup> The government believed that applying the provisions would give the rebels international status and further it considered it was in a more superior position to suppress the rebellion without the constraints upon it of international law.

41. WHEELER, *supra* note 24 at 212.





Revolutionary forces, however, will generally be more inclined to want to have either provision applied because of their improved status and because it removes their behaviour from the realm of the criminal under domestic jurisdiction to protection under international law.

The issue of sovereignty in internal conflicts creates an inherent friction between the rights of individuals and the interests of the state. But recent developments suggest that sovereignty may no longer be such a sacrosanct concept, as it once was. The development of human rights law, increased United Nations concern with the internal affairs of states and the concept of humanitarian intervention, point to a gradual erosion in the importance of state sovereignty as a reason for refusing to apply humanitarian law.

*g. Confusion of Instruments and Provisions*

Finally, it is worth mentioning that the number of instruments which effectively regulate the various categories of internal conflicts is confusing. Selection of the appropriate instrument requires a prior analysis which may not only be impractical and open to interpretation but also entails a level of research which is beyond the competence of both the parties involved and interested groups such as the ICRC. In addition, it involves sensitive political issues which may put the neutrality of those groups in question. The creation of too many categories with prescribed boundaries, may mean that some conflicts do not fit neatly into any appropriate classification. This is the problem with "internationalised conflicts". Here a complicated situation is created where some combatants in the same conflict will be expected to observe the entire Geneva Conventions and other only the law pertaining to non-international conflicts. Distinctions on the basis of category are also artificial. Protocol I for example raises the question as to why wars of liberation against oppressive regimes which discriminate on the basis of ethnic groups or religion (e.g. Sudan) are not internationalised in the same way as wars against racist or colonial regimes. Ultimately, a victim is a victim and should not be discriminated against on the basis of imposed legal distinctions.



### *Conclusion*

It is apparent that changes are occurring in international humanitarian law as it applies to non-international conflicts. Although seemingly slow and insignificant compared to the scale of human suffering which occurs, these changes are breathing new life into the field of humanitarian law. The creation of the ad hoc Tribunals for Rwanda and former Yugoslavia have been amongst the most important and influential factors to reflect and determine those changes. The findings of the Tribunal to date, which include the extension of protection to include the Hague Regulations, the role of customary law and the criminalization of atrocities, have expanded the scope of protection and enforcement possibilities in internal conflicts which until recently were not thought to have existed. These trends also exemplify an erosion of the distinction between international and non-international conflicts. The term "international humanitarian law" is evolving to mean just that: an emphasis on the universality of the law without distinction. The fundamental principle of the Geneva Conventions, which is the protection of the individual in times of armed conflict, is gradually asserting itself without acknowledging artificial legal distinctions as to the nature of those conflicts.

Significantly, this change has not come from the creation of further treaties but from public pressure which has led to the more pragmatic step of the establishment of the Tribunals for Rwanda and former Yugoslavia. The situation parallels the events following World War II where the International Military Tribunals at Nuremberg and Tokyo also stemmed from public outrage and the demand for justice. These subsequently developed new norms as to what constituted war crimes and their prosecution and led to the further development of the Geneva Conventions as they exist today. Such change also raise the question whether there is a need to re-examine the development of a new body of written law which explicitly erases the distinction between international and non-international conflicts. Certainly, the recent Declaration of Minimum Humanitarian Standards goes some way in simplifying humanitarian law and making it applicable to a very wide range of situations.<sup>42</sup> The reality, however, is that the world is still dominated and

42. The Declaration was drawn up by a group of jurists in Turku, Norway, in 1990. Further changes to the Declaration were made during a meeting at the Norwegian Institute of Human Rights in Oslo on September 29-30, 1994. The Declaration has subsequently been transmitted to the Commission on Human Rights by the UN Sub-Commission on Prevention of Discrimination and



divided by sovereign states and it is unlikely that many states will concede to a new instrument that gives insurgents the same status as armed forces of an enemy state. Even the Tribunals continue to acknowledge the distinction between the two, as shown by the fact that the Rwanda Tribunal has jurisdiction only over breaches of common Article 3 and Protocol II. Ultimately, a single body of law covering all types of conflict should be the aim but this is unlikely to occur in the foreseeable future. Emphasis should also be directed at improving the process of dissemination of humanitarian law. The need to disseminate information about humanitarian law to as wide a base of the population as possible is crucial to minimise the effects of armed conflicts. Finally, that the international community is increasingly confronting the problems of internal conflicts and assuming greater collective responsibility for enforcing humanitarian law is to be welcome. But at the same time, more international effort must be directed at examining and eliminating the problems of poverty, racial and ethnic discrimination and availability of weapons which created those wars in the first place.

Protection of Minorities. See Res. 1994/26, noted in EIDE, ROSAS and MERON, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards" (1995) 89 *Am J Intn'l L*.

