THE INFLUENCE OF SOVEREIGNTY AND NON-INTERVENTION ON THE DEVELOPMENT OF HUMANITARIAN LAW APPLICABLE IN INTERNAL CONFLICTS

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SUMMARY

Although internal conflicts are recurrent phenomena in the history of mankind. Their regulation by international law has been very slow. The usual explanation of this state of affairs is that such events touch directly on the survival of established Governments or even the existence of the State itself.

States view with suspicion, fear and even hostility any attempt at the international level to regulate their conduct **vis-à-vis** their local enemies.

They use the principles of sovereignty and non-intervention as a shield against any effective regulation of such tragic events by humanitarian law.

However, no serious attempt has been made by international lawyers to study the issue of the influence of those two principles on the development of humanitarian law applicable in internal conflicts.

This study tries to establish with exactitude how and where sovereignty and non-intervention have been resorted to, in order to hinder such regulation, and how other considerations (especially the concept of human rights) have opened the way to such regulation.

In this respect the study after clarifying in the first two chapters, the meaning, the limitations, and the place in the practice of states of the principles of sovereignty and non-intervention, has concentrated on their influence on three main issues raised by internal conflicts, namely:

1. The definition of internal conflicts. In this sphere, the question of the criteria or thresholds of internal conflicts to which humanitarian law is to be applied and the question of which authority has the power to decide the existence of an internal conflict, are dealt with in the context of customary law, common Article 3 and Protocol II of 1977. It is asserted that the claims of sovereignty and non-intervention have been used extensively to restrict any real progress in this area.

2. The protection of the victims of internal wars. In this important area the study tries to trace the development of specific legal norms for the protection of the victims and to determine whether the concept of human rights has contributed in any way to better protection of those victims.

Thus, a systematic examination and analysis of the **travaux préparatoires** of the 1949 and 1974-1977 Diplomatic Conferences is undertaken, together with the subsequent practice of states, in order to establish where sovereignty and non-intervention have blocked progress, and where real development has taken place.

3. Compliance and implementation of humanitarian law in internal conflicts. In this context it is established beyond any doubt that the claims of sovereignty and non-intervention have been used extensively, both in 1949 and also 1974-1977 to stop all attempts to institute measures for the control of application of humanitarian law, especially those measures which would involve third party supervision. However, it is asserted that human rights machinery may be used to fill this loophole as the UN practice shows.

ABBREVIATIONS

AFDI	Annuaire Français de Droit International
AIDI	Annuaire de l'Institut de Droit International
AILC	American International Law Cases
AJIL	American Journal of International Law
ALN	Armée de Libération Nationale
ASIL.Proc.	American Society of International Law, Proceedings
AULR	American University Law Review
AYIL	Australian Yearbook of International Law
BILC	British International Law Cases
BYIL	British Yearbook of International Law
Case.W.Res.JIL	Case Western Reserve Journal of International Law
CDDH	Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts (1974-1977)
CGEDHL	Conference of Government Experts on the Development and the Reaffirmation of Humanitarian Law Applicable in Armed Conflicts
CLR	Columbia Law Review
CWJIL	California Western Journal of International Law
CNRESM	Centre National de Recherche et d'Etudes sur les Sociétés Méditerranéennes
CNRS	Centre National de la Recherche Scientifique
CUB	Cambridge University Press
Den.LJ	Denver Law Journal
Doc	Document
EEC	European Economic Community
ECOSOC	United Nations Economic and Social Council
ENAL	Entreprise Nationale Algérienne du Livre
FLN	Front de Libération Nationale
GJICL	Georgia Journal of International and Comparative Law
GPRA	Gouvernement Provisoire de la République Algérienne
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
IC	International Conciliation
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, Reports
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	Annual Digest of Reports of Public International Law Cases, later International Law Reports (ed. H. Lauterpacht)
IRRC	International Review of the Red Cross
IYHR	Israel Yearbook of Human Rights
JAIL	Japanese Annual of International Law
Keesing's	Keesing's Contemporary Archives
LGDJ	Librairie Générale de Droit et de Jurisprudence
MLR	Michigan Law Review
MUP	Manchester University Press
NDLR	North Dakota Law Review
NELR	New England Law Review
NILR	Netherlands International Law Review
NLF	National Liberation Front
NYIL	Netherlands Yearbook of International Law
NYJILP	New York Journal of International Law and Politics
OAS	Organization of American States
OAU	Organization of African Unity
OCFLN	Organisation Civile du Front de Libération Nationale
OUP	Oxford University Press
OPU	Office des Publications Universitaires

ORDCHL	Official Records of the Diplomatic Conference on the Development and Reaffirmation of Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977
PCIJ	Permanent Court of International Justice
PM	Prime Minister
PUF	Presse Universitaire de France
PUP	Princeton University Press
RBDI	Revue Belge de Droit International
RCADI	Recueil des Cours de l'Académie de Droit International
RDC	Revue de Droit Contemporain
RDI	Rivista di diritto internazionale
RDMDG	Revue de Droit Militaire et du Droit de la Guerre
RDPSPFE	Revue du Droit Public et de la Science Politique en France et à l'Etranger
RGDIP	Revue Générale de Droit International Public
RICR	Revue Internationale de la Croix Rouge
SCOR	United Nations Security Council Official Records
The Review (ICJ)	Review of the International Commission of Jurists
TILJ	Texas International Law Journal
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UN Doc	United Nations Documents
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNY	United Nations Yearbook
US	United States, United States of America.
USSR	Union of Soviet Socialist Republics
Vand.JIL	Vanderbilt Journal of International Law
VJIL	Virginia Journal of International Law
WLR	Washington Law Review
WULQ	Washington University Law Quarterly
YILC	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law
YLJ	The Yale Law Journal
YUP	Yale University Press

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INTRODUCTION

The aim of my thesis is to undertake a systematic study and research into the influence of two of the most important principles of international law of today, namely: sovereignty and non-intervention on the development in the field of humanitarian law relating to internal conflicts.

Some may argue that the result of such an effort would be an exercise in the obvious, since there is a wide measure of agreement that the two principles have, to a large extent, simply blocked any real progress, in the field of humanitarian law applicable to internal conflicts.[1] In my opinion, this is a very simplistic view; the issue is very complex and needs more thorough study and research to establish with exactitude where the two principles (sovereignty and non-intervention) have blocked progress and whether other considerations have led to some important developments.

Such exercise will reveal the place and limits of these two principles in international law and also the extent to which humanitarian law has been developed in the very sensitive area of internal conflicts and eventually the relevance of international law to one of the most difficult challenges of our contemporary world, namely making civil wars more human. In other words, protecting human rights in very hostile circumstances, when the authority and legitimacy of the established Government is being challenged by force, by a section of its own citizens.

In order to cover the subject, the thesis is divided into five chapters. The first chapter deals with the concept of sovereignty, its meaning, its place in State practice, doctrinal viewson its role, if any, in international order, and lastly, its limitations with human rights as one of the most important limitations. The chapter establishes that sovereignty is with us for the foreseeable future, it is a very important principle of international law though not absolute in character. Developments in international law are of capital importance in any assessment of the meaning and role of sovereignty in international law.

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1 In this context, Best wrote:

> "... [A] strong doctrine of sovereignty stalks through these protocols like a riot squad. In one sense this is no change from 1949 or earlier; the Geneva Convention like the rest of the law of war, were built on the presumption that Governments lawfully were masters within their own territories and that State's sovereignty except in so far as they might voluntarily shed positions of it, was inviolable".

He further added that:

> "States, insistence on the plenitude on their sovereignty rights has been the mightiest obstacle, and international humanitarian law, order and welfare were kept weak and undeveloped as a result. Sovereignty's most striking positive assertion of itself in the protocols comes, not surprising in the opening 'scope' section of protocol II...".

(G. Best: Humanity in Warfare. Weidenfeld & Nicolson, London, 1980, pp.322-323). Also, Aldrich, who was among the delegation which represented the US, stressed:

> "Excessive sensitivity to any provision that might be thought to give an international status to rebels within such countries (newly independent States) or to retain the Governmental forces in suppressing rebellions, resulted in a protocol II that affords very limited protection and has escape clauses designed to make its applicability easily deniable".

G.H. Aldrich: Some Reflections on the Origin of the 1977 Protocols of Geneva, in C. Swinarski (ed.): Etudes et essais sur le droit international humanitaire et sur les principes de la Croix Rouge. Martinus Nijhoff, 1984, p.136.

The second chapter is about intervention or rather the principle of non-intervention, because this principle has also been always used against the extension of humanitarian rules to internal conflicts, its place and limits in international law. State practice, doctrinal views, in this sphere are extensive, my aim is to establish what does non-intervention mean when used in the context of internal conflicts.

The other three chapters (3,4 and 5), which constitute the heart of my thesis will deal with three main aspects of humanitarian law in internal conflicts where the above two principles were used. These chapters, in effect, constitute an empirical research into how and where those two concepts have been used by States, and how they influenced the emergence of new humanitarian rules or conversely, how they toppled such prospects.

The third chapter deals with the question of the definition of civil wars (non-international armed conflicts). In my view, this is a very important question since the whole application of humanitarian law to such conflicts depends on how the events which take place in a given State, can be characterised, by whom and on what grounds.

Thus, in this context, the concept of recognition of belligerency in customary international law, the absence of definition of non-international armed conflict in common Article 3 of the 1949 Geneva Conventions, and finally the definition of such conflicts in Article 1 of Protocol II of 1977, constitute different reactions on the legal level to the question of definition.

My view is that the concepts of sovereignty and non-intervention have either directly or indirectly influenced the course of action in the above three contexts. As a result, the definition or non-definition policy was done with due regard to the principles of sovereignty and non-intervention in order to always give priority to the claims of the established Government which reflects, in effect, the preference of international law to the claims of legitimacy of the established Governments, rather than the plight of insurgents.

Moreover, definition or non-definition constantly poses the question of who can determine the existence of the conflict. No answer can be found either in customary international law, common Article 3 or Protocol II. This, in practice, means that the idea of objectivity (the existence of objective criteria which does not need any specific organ for their determination) gives way to the principles of sovereignty and non-intervention, because those principles would give the Government in power the presumed right of auto-determination.

The fourth chapter is a thorough study and research into the influence of the two concepts: on the development of humanitarian rules relating to the protection of the victims of internal conflict (the civilian population, the sick and wounded and captured combatants). The importance of this chapter stems from the fact that it deals with the fate of human beings during the tragic experience of civil wars. In effect, it is human rights of individuals against their own State which is at the root of the problem.

The legal developments from customary international law to the Protocol II in this field are dealt with. While on one hand, more rights were granted to specific categories of the victims such as the civilians and the wounded and sick, on the other hand, captured combatants are still considered as criminals. The conclusion of this chapter is that the arguments of sovereignty and non-intervention were not used in a systematic way, to

eliminate humanitarian rules for the protection of the victims of internal wars because human rights were in general accepted as a valid limitation upon the conduct of States vis-à-vis their own citizens.

The fifth chapter deals with the question of enforcement and implementation of humanitarian law in internal conflicts: it asks the question of compliance, its importance since the significance of the rules adopted with respect to the protection of the victims of internal conflicts, depends in the final analysis, on their respect and application in practice.

A general investigation into the question in humanitarian law as a whole and not only that part concerning internal conflicts is carried out. It is established that if arguments of sovereignty and non-intervention have directly or indirectly slowed down the development of legal mechanisms for the control of applications of humanitarian law between States. In contrast, in the sphere of internal conflict, they destroyed any prospect for such a control. The **travaux préparatoires** of Article 3 and Protocol II especially are very clear in this respect.

However, my argument is that the ICRC, and the mechanisms of human rights can, to some extent, (in practice) fill this gap (of the absence of mechanisms of control). The practice of the ICRC, the UN, and some regional organisations (such as the OAS) in internal conflicts, by using the mechanisms of control of human rights, in this respect, is very important. This shows again the importance of human rights as a limitation upon State sovereignty, since States are not systematically opposed to such attempts.

The method used in dealing with the subject matter of my thesis, is generally an historical-legal and positivist approach. Legal development are traced according to three main periods: in customary international law, in the context of common Article 3 and finally in Protocol II. This has been done especially with the chapters which deal with humanitarian law (the third, fourth and fifth chapters). In all these periods the aim is to discover the influence of the concepts of sovereignty and non-intervention and by the same token to find how international law responds to the problems posed by internal conflicts.

The positivist element in my method means essentially that State practice will be of importance, that of course does not exclude my use of the doctrine which is a secondary source of international law, and at the same time may afford different interpretation of State practice. However, I must make it clear that **travaux préparatoires** occupy a very special place in my approach, especially in the context of chapters 3, 4 and 5. The reason is that in order to discover the influence of the principles of sovereignty and non-intervention, either positively or negatively, on the development of humanitarian law relating to internal conflicts, a review and analysis of the position of States, during the discussion of different rules is essential to establish the extent and the result of the use of the two principles on the development or lack of development in humanitarian law.

CHAPTER ONE

SOVEREIGNTY

Introduction

The State is still the most important unit in the composition of contemporary international society and also the most important subject of international law, sovereignty is the main legal characteristic of the State. Internal wars, on the other hand, touch the heart of States, they challenge directly or indirectly, the legitimacy and authority of the established Government. States resort to the invocation of the principle of sovereignty in order to have a free hand to deal with their internal enemies, and at the same time use the principle (of sovereignty) to oppose normative innovations at the international level.

Hence, I begin my thesis with a chapter dealing with sovereignty, its meaning, its place in State practice and its limitations. Doctrinal views on the role of sovereignty will also be dealt with. This exercise will show the exact position of sovereignty in modern international law.

My opinion is that sovereignty (which goes throughout the study), is the main pillar of the existing international order and a central element in any discussion of a new world order. However, sovereignty must be constructed and understood within the framework of the fundamental changes which have been introduced in international law especially since the advent of the UN Charter in 1945.

With the above qualifications in mind, sovereignty cannot be used by States to justify massive violations of human rights, or to deny the exercise of the right of self-determination or to ignore the constraints and limitations placed upon their conduct when dealing with internal strife.

Moreover, sovereignty cannot be used as a plea to pursue policies which contradict the obligations that international law has placed upon States when dealing with each other such as respect for independence and territorial integrity of others, and banning of aggression in its different forms. Thus, sovereignty can be a guarantee for peace in international society and not an obstacle to it, viz, when understood and acted upon with respect for international law and not outside it (international law which has been developed since the UN Charter). That law which is changing slowly to suit the new 'rapport de force' in international society and becoming more and more truly 'international' in character. In my view, sovereignty can also be a guarantee for peace and justice at the national level, that is within States, however, when full respect for self-determination and human rights is adhered to.

In order to cover the subject of this chapter, I will deal with the following points: First, the meaning of sovereignty by the differents shools of thaught such as the Western, Communist and Third World ones and the pronouncements of international courts on this subject; secondly, the role of the concept of sovereignty in the contemporary international order, i.e., in State practice and the doctrine. Last but least, the limitations of sovereignty such as the human rights, self-determination, and the prohibition of the use of force.

Section I: The Meaning of Sovereignty

Sovereignty is the natural product of the history of Christian Europe, but the concept is not strange to other civilizations and cultures. Thus, the idea that 'God' is the supreme sovereign of the universe is at the heart of the Islamic religion and thought, the Holy Koran states:

> "Allah, is He beside Whom there is no god, the sovereign, the most Holy, the source of peace, the Bestower od Security, the Protector, the Mighty, the subduer, the Exalted".[2]

This means that sovereignty in Islamic tradition belongs only to God; it is absolute in character and covers the whole universe. In this context, in March 1949, the PM of the then new State of Pakistan introduced a resolution, which he wanted to be the Preamble of the new Constitution, and which was adopted by the Constituent Assembly, it stated:

> "Whereas sovereignty over the entire universe belongs to God almighty alone and authority which he has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by him is a sacred trust".[3]

In Europe, the contradictions which plagued the feudal society resulted in the triumph of the King over his competitors, he concentrated the power in his hands in a defined territory and succeeded in eliminating his rivals in the competing centres of influence and power within his State. In fact, sovereignty was one of the necessary elements in the building of the modern State on the basis of feudalism. It permitted the establishment of a national organisation in the form of one centralised administration, with the King as the supreme sovereign, which meant that all officials within the State were obliged to give their obedience to only one person. This opened the way in turn for the unifying of the legal system of the country, the steady flow of revenues which led to the establishment of strong national armies.

Sovereignty has also eliminated any foreign influence or intervention. Thus, practically speaking sovereignty was a very useful tool in the emergence of the concept of State. Actually, it (sovereignty) can be legitimately seen as a valid description of Statehood. The fundamental changes which occurred in Europe in the structure of the feudal society from the political, economic and social spheres, were translated in the political and legal thought in the form of the concept of sovereignty. Medieval doctrine, especially Brodin who dealt extensively with the notion of sovereignty, the meaning of the notion, was exposed. It served essentially to support the building of unified strong States. Sovereignty was seen as absolute, indivisible and embodied in the King, he has the absolute legislative power within his realm, externally he is not subject to any other higher authority or legislator.

Sovereignty was also adopted as from the Peace of Westphalia in 1648 as the guiding principle of relations among States. It is to be observed that the European origins of

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[2] The Quran. Translated by K. Zafrullah, Curzon Press Ltd., London & Dublin, 1971, Chapter 59, part 28, p.557.

[3] Cited by J.H.W. Verzijl: International Law in Historical Perspective. Vol.1, A.W. Sijthoff, Leyden, 1968, p.265.

sovereignty in the context of international law, meant in practice that it has been recognized firstly only to Christian European States, which have been characterized as 'civilized'. This meant that those States accepted that any attempt by any one of them to establish any kind of hegemony over the others is a clear violation of the rules of international law. Consequently, less developed and uncivilised peoples and territories have been for a long time denied any recognition. As a result, their territories were occupied. Their legal systems were not recognized and their resources exploited.[4]

After these preliminary observations, I will now proceed to the meaning of sovereignty (as the different definitions of the notion will reveal) in modern international law. It must be stressed, that the meaning of the concept of sovereignty has been and is being dealt with by the doctrine, since it is a fundamental key to the understanding of the relevance of the limits of international law, in internal, as well as external, of the State's activities. International courts (the PCIJ and the ICJ particularly) have, also, in many instances found it necessary to pronounce themselves upon the meaning of sovereignty in order to decide many concrete cases.

The simplest definition of sovereignty (a dictionary definition) concentrates on the main formal attributes of the concept. Thus, it is "the freedom of State from outside control in the conduct of its internal and external affairs".[5] In fact, there are two aspects in this definition; the internal and external ones. The former means "freedom to manage its domestic affairs without interference. This implies the power to establish its own constitution to make and administer its own laws, and to exercise exclusive jurisdiction over all persons and things within its territory".[6] Whereas the latter means "to conduct its foreign relations without control on the part of another State",[7] in other words, it means independence.

This often used definition is neutral and formal. Neutral in the sense that all regimes can claim sovereignty because the nature of the regime (democratic or otherwise) is irrelevant. It is as well formal in the sense that it hides the realities of the 'working sovereignty' where abuse of using sovereignty as a justification for illegal actions such as violations of human rights and intervention in the internal affairs of weaker States are a common feature and widespread.

A. The Western School

In this connection Brierly maintains that sovereignty :

> "... [S]tands for the power of modern States to decide and act without consulting

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[4] In this context, see H. Bull and A. Watson (eds.): The Expansion of International Society. Clarendon Press, Oxford, 1984, pp.5-6, and especially, A. Watson: European International Society and its Expansion; ibid, pp. 13-32. See also F.S. Northedge and M.J. Grieve: A Hundred Years of International Relations. 2nd impression, Duckworth, 1974, pp.65-66.

[5] M.G. Gamboa: A Dictionary of International Law and Diplomacy. Central Lawbooks Pub. Co., Inc. Quezon City, Philippines, 1973, p.144.

[6] Ibid.

[7] Ibid.

> others and without concern for anything but their own interests as they themselves conceive those interests".[8]

It seems to me that this definition does not differ much from the one which has been advanced by Vattel. The latter observes that:

> "....C'est une conséquence manifeste de la liberté et de l'indépendance des nations, que toutes sont en droit de gouverner comme elles le jugent à propos et qu'aucune n'a le moindre droit de se mêler du gouvernement d'une autre."[9]

And he then adds:

> "De tous les droits qui peuvent appartenir à une nation, la souveraineté est sans doute le plus précieux, et celui que les autres doivent respecter le plus scrupuleusement si elles ne veulent pas lui faire injure".[10]

In my opinion, Brierly's definition would mean in practice, that firstly, powerful States will enjoy more sovereignty than others, since they have the might to decide and act according to their interests whereas weaker States cannot do the same. Secondly, this definition would not guarantee internally the enjoyment of human rights of any State (whether weak or strong) and the maintenance of public peace, since the Government has a very wide range of discretion to do what it sees and considers as its own interest.

Schwarzenberger maintains that the meaning of sovereignty as a principle of international law can be found in the Island of Palmas Case, when the sole Arbitrator, Max Weber, stated:

> "...[S]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State".[11]

On the basis of this opinion, it seems that sovereignty is generally of a negative character as its main element is the prohibition of intervention in the internal affairs of States.

Levi takes as a point of departure in his analysis of the meaning of sovereignty, Max Huber's statement (cited above). He writes that:

> "...[S]overeignty signifies in the political and legal sphere the people's insistence that

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[8] M. Whiteman: Digest of International Law, Vol. 1, US Dept. of State, Washington D.C., 1963, p.237.

[9] M. de Vattel: Le droit des gens ou principes de la loi naturelle. Vol.1, Carnegie Institution of Washington, 1916, p.297.

[10] Ibid.

[11] Island of Palmas Case (Netherlands/United States of America), 2 UNRIAA, p.838. It must also be indicated that according to Schwarzenberger, sovereignty as a principle of international law must be sharply distinguished from other related uses of the term such as sovereignty in its internal and external aspects and political sovereignty. To him, sovereignty in its internal aspect is concerned with the identity of the bearer of supreme authority within a State. Whereas political sovereignty is 'the necessary concomitant of the lack of an effective international order and the constitutional weakness of the international superstructure which has been so far grafted on the law of unorganized international society'. G. Schwarzenberger: International Law as Applied by International Courts and Tribunals. Vol.1, 3rd ed. Stevens & Sons Ltd., London, 1957, p.144. See also the same author: International Law and Order. Stevens & Sons Ltd., London, 1971, pp.57-83.

their State shall be supreme and its individuality inviolate".[12]

He then remarks that:

> "...[A] State is sovereign when there is no higher authority directing its behaviour, when it is free to make its own political decisions".[13]

He also stresses that because interactions between States are growing all the time '...the mutual sensitivities among States allow only for varying degrees of independence.'[14] In other words, there is in fact, no absolute independence, the question is relative and depends upon the degree of co-operation between States at a given time. He maintains that legal sovereignty is easy to define since the language of law is more precise than that used in politics, however, the problem which faces lawyers '...is that State's submissions to international law may not be reconcilable with legal sovereignty'.[15] Such a problem, in his opinion, does not exist in the political arena, because politicians always look for pragmatic solutions, they understand very well that there is no absolute independence, and that it is always a 'question of more or less' so they try at all times to enlarge independence and diminish obligations.[16]

The main criticism of this view is that it is not only in politics that the concept of sovereignty is seen as relative, but as well in legal theory and State practice where the overwhelming view is that sovereignty is not absolute, and that the submission of the State to international law has never been questioned by States, at least verbally.

Visscher shares Levi's view to some extent. He writes:

> "....[T]he politician does not usually mistake the limits imposed on State actions by the existence of other States. In the ordinary course of things he accepts the duties and burdens which these limits imply".[17]

However, he concedes that 'the fact remains that over and against the law the State holds in reserve the plea of sovereignty'.[18]

I believe if the daily business of politicians (bargaining, accepting concessions, gaining advantages due to factual strength etc.) is taken into account when defining sovereignty, a great number of States will be considered as simply having no sovereignty, or at least only having a small portion of it. Hence, it is important to know that in law each State has an

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[12] W. Levi: Law and Politics in International Society. Sage Pub., Beverly Hills, CA, 1976, p.39.

[13] Ibid.

[14] Ibid.

[15] Ibid, p.40.

[16] Ibid.

[17] Ch. de Visscher: Theory and Reality in Public International Law. Translated by P.E. Corbett, PUP, Princeton, 1968, p.102.

[18] Ibid.

equal degree of sovereignty, the right to invoke it in case of need and that limitations upon sovereignty are not factual differences, however important, but only agreed standards.

Fenwick sees sovereignty of the State as 'the independence of any higher control of its right to take the law into its own hands when what it believes to be its vital interest at stake'.[19] This is an extreme view of the meaning of sovereignty because it is conceived as a concept outside the bounds of international law, especially the developments introduced by the UN Charter (e.g. Article 2/4). This kind of meaning suits the powerful; might would be right seen in the context of civil wars, this attitude would allow the State to oppose any normative development and would open the door for a wealth of cruelties to human beings.

On the other hand, Verzijl introduces some important clarifications as to the meaning of sovereignty. According to him, sovereignty has ceased to be a single concept and that it disintegrated into different notions. As a result, the legal theory distinguishes between three aspects of the notion (of sovereignty) in his words 'one directed inward, one outward, one sideward and one upward'.[20] Then, the inward aspect made sovereignty appear as the absolute power of the King over his country without any competitors inside the land. The outward and sideward aspect affected his relationship with his fellow Kings, on the one hand and his position vis-à-vis the once paramount powers of the Emperor and the High Pontiff on the other hand.[21]

The third upward aspect related to the crucial problems as to whether the 'sovereign' is supreme inside and independent outside was completely exempt from any bounds or remained subject to higher command.

Verzijl argues that historically even the most absolute monarchs were supposed to be subordinated to God and his higher authority, however, it was the work of legal philosophy and Statesmen who carried sovereignty to the extreme. Hence, he writes:

> "The notion of sovereignty disintegrated into three completely distinct concepts: Those supreme power within the state, of independence from any other earthly power; and of an initially denied exemption from any legal or moral bound whatever".[22]

He then makes the point that 'by nevertheless maintaining the same word for three such different notions legal doctrine sowed the seeds of a fatal confusion of ideas'.[23] He suggests that it is better to remove the term 'sovereignty from the juristic vocabulary' because it covers a series of homonyms that threaten to make any rational discussion of 'sovereignty' as such a Babylonian confusion of tongues, and leave it as a subject of speculation to legal philosophers [the notion of Rechtssouver Änität] theologians [the sovereignty of God] or politicians [the Netherlands Anti-Revolutionary Party's slogan 'sovereignty in one's own

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[19] Ch. G. Fenwick: Foreign Policy and International Law. Oceana Pub., Inc., Dobbs Ferry, New York, 1968, p.5.

[20] Op. cit., supra. n.3, p.258.

[21] Ibid.

[22] Ibid.

[23] Ibid, pp.258-259.

circle'".[24] He then went on to argue that:

> "...[I]f the word 'sovereignty' is to be banned from the vocabulary of international law, then, it is possible to replace it by other words which denote equivalent ideas in accordance with the context in which it was to be used such as independence, territorial supremacy, higher authority etc."[25]

It follows that it would be possible to dissolve the notion of sovereignty understood as the 'power of the State to act according to its own free will within the limits of the law of nations'[26] into a number of competencies' as reflected in the relations of a State to other States, regarding respectively its powers of exclusive territorial supremacy, of command over its nationals even abroad and the protection of its vital interests against foreign infringement.[27]

Seemingly, the general theme of Verzijl's argument is that there is no such thing as sovereignty, if we want to be legally precise, there are different elements (competences) of sovereignty in international law. It is better to use the name of any element, according to the needs of the context. In my view, this suggestion would, in practice, create many problems, States may differ as to the number and the subject of those competencies and the relative importance of each of them. Nevertheless, the importance of Verzijl's view lies in the fact that he sees sovereignty as a legal concept which is regulated and influenced by the state of development of international law. In that sense he is one of those who see sovereignty inside and not outside international law. This is very important for our subject since sovereignty may mean that States can be under obligation to respect certain standards of human behaviour in internal conflicts.

Lauterpacht takes approximately the same view as Verzijl. He writes:

> "...[S]overeignty to a State is a condition for its recognition as a subject of international law, thus the State must not be sovereign in the sense of being independent of any other State only but it must also possess legal sovereignty in the accepted meaning of international law".[28]

This implies that sovereignty is made as the most important condition for the coming into existence of the State onto the international scene. According to him, sovereignty on the internal level gives the State the complete freedom of action within its borders. However, it must respect its obligations arising from treaties to which it had given its consent. Also, it must treat aliens in accordance with the minimum standards of civilization. As regards the external level, he observes that:

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[24] Ibid, p.265.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] H. Lauterpacht: International Law: Collected Papers. E. Lauterpacht (ed.): Book III: The Law of Peace Parts II-VI. CUP, Cambridge, London, New York, Melbourne, 1977, p.6.

> "...[A]lthough the subjection of the State to international law is both indispensable, hypothesis and an acknowledged principle of the law of nations".[29]

He then quickly notices that this subjection to international law is purely formal and that the 'present day international law recognises that each State is independent not only of other States but also of the totality of States acting as organs of what is known as the international community'.[30] This means that by law each State is the sole judge of its own cause, and that it is free to proclaim and insist upon its views in relation to other States, however, always within international law rules.

Moreover, Lauterpacht, after a detailed study of sovereignty, arrives at the conclusion that 'a State's sovereignty is a quality, a competence conferred by international law'.[31] He adds:

> "...[S]overeignty is a delegate's bundle of rights, it is a power which is derived from a higher source and therefore divisible, modifiable and elastic".[32]

We can infer from Lauterpacht's opinion that sovereignty is seen as a legal concept capable of being defined in international law, the meaning of which is closely linked with the state of advance of international law. He stresses that sovereignty is still extensive, internally and externally. Furthermore, he expresses the view that in the absence of a world legislature and an obligation to submit disputes to a world court, the role of international law in the international society is nominal.

In my opinion, Lauterpacht's view which received wide credence in the West, is not accurate in many respects. Thus, to bind the effectiveness of international law to the existence of a world legislature and a world court is to make a specific idea of law prevail, that is the Western tradition which stresses the importance of a third party adjudication. However, international law can be effective without a real need to a central parliament and a world court because States can use, especially in the area of settlement of disputes, different methods which international law provide and among them but not exclusively the courts.

McLaurin defines sovereignty as 'making decisions that are primarily adjustments to conditions and demands of others'.[33] This definition may be considered as a description of the factual situation of the relations between States, nonetheless, its weakness lies in the fact that it omits the relevance of international law, which may very well be used to safeguard States (inparticular the weak ones) against demands which may compromise their independence.

Brownlie emphasises that 'the sovereignty and equality constitute the basic doctrine of

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[29] Ibid, p.7.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] J. McLaurin: The United Nations Power Politics. George Allen & Unwin, London, 1951, p.428.

the law of nations."[34] He writes:

> "If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law. The principal corollaries of the sovereignty and equality of states are: (i) A jurisdiction, **prima facie**, exclusive over a territory and the permanent population living there; (ii) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (iii) the dependence of obligations arising from customary law and treaties on the consent of the obligor".[35]

He adds:

> "...[T]he manner in which the law expresses the content of sovereignty varies,and indeed the whole of the law can be expressed in terms of the co-existence of sovereignties".[36]

He concludes by stating that "'in general 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another State".[37]

The importance of Brownlie's view stems from the fact that, first, he stresses the importance of equality in dealing with sovereignty. This factual inequality in sovereignty between States does not infringe the legal equality. Secondly, he regards sovereignty as a legal phenomenon capable of being defined, at any given moment, and the importance of international law is emphasized in such exercise.

However, the weakness of Brownlie's view lies in the fact that he still stresses the formal aspects of sovereignty. He sees sovereignty primarily as a legal category, there is no emphasis on the influence of self-determination, or the impact of the participation of many new States on the meaning and content of sovereignty. The latter has ceased, in my view, to be a primarily formal concept. It is a very comprehensive concept which covers economic, social and cultural aspects as well.

It can be concluded that the Western view on sovereignty is much more concerned about analyzing the legal meaning of the concept, rather than its political and economic implications. Thus, sovereignty is a number of legal competencies which can be defined and which every State can enjoy under the auspices of international law. Yet, the Western view does not dwell on whether those competencies can be exercised in practice by every State without any obstacles taking into account the **de facto** inequality between States.

On the other hand, the positive side of the Western view is that it can be easily reconciled with the contention that human rights must be respected in all events and especially in cases of internal wars. Because the view stresses that sovereignty must be exercised within the bounds of international law, hence once we can prove that human rights have been accepted

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[34] I. Brownlie: Principles of Public International Law. Clarendon Press, Oxford, 3rd ed., 1979, p.287.

[35] Ibid.

[36] Ibid, p.288.

[37] Ibid, p.290.

as a legal limitation on sovereignty by States, then the competence of the Government to maintain law and order especially in cases of civil wars is not unlimited.

B. The Marxist Theory and the Meaning of Sovereignty

In 1949, the representatives of Canada, China, France, the UK and the US reported to the UNGA (concerning the difference between the UN and Soviet plans for an international control systems for atomic energy). They stated:

> "All the sponsoring powers other than the USSR, put world security first and are prepared to accept innovations in traditional concepts of international co-operation, national sovereignty and economic organization, where these are necessary for security. The Government of the USSR put its sovereignty first and was unwilling to accept measures which may impinge upon or interfere with its rigid exercise of unimpeded state of sovereignty".[38]

This, in effect, means that the USSR clinged to a very rigid concept of sovereignty like that of the 18th and 19th centuries. Despite of the above statement, it seems that this is not wholly true, the Soviet Union in fact, stressed the importance of international law as a real means of settling different problems between States, which indirectly means that sovereignty it not seen as absolute.

In this context, the Soviet representative at the 1964 Mexico City meeting of the UN Special Committee on the Principles of Friendly Relations is reported to have stated that 'some countries have even considered that international law too was an invasion of State sovereignty and that his own delegation did not share such a view. He maintained that his country held the view that the rules of international law restricted the freedom of States with a view to safeguarding international peace and security, without infringing the sovereignty of the States concerned'. He added that his country's politics and Soviet legal doctrine were consistent with that view.'[39]

However, the truth of the matter is that Communist writers in general, stress the importance of sovereignty in international law, it guarantees the development of different social and economic systems, it is one of the democratic principles of classical international law. They see sovereignty as a fundamental political rule which all States adhere to since it "excludes by its very nature any 'ideological reconciliation' between socialism and imperialism".[40] The meaning of sovereignty in their view is not a static one. Krylov writes:

> "...[A]t different stages of the development of class society the concept of sovereignty had different class meaning".[41]

He stressed that:

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[38] Cited by Whiteman, op. cit., supra. n.8, p.261.

[39] Cited by R.J. Erickson: The Revolutionary State. Oceana Pub., Dobbs Ferry, New York, 1972, p.51.

[40] Cited by L. Wildhaber: Sovereignty and International Law, in R. St. J. Johnson, (ed.): The Structure and Process of International Law: Essays in Legal Philosophy Theory and Doctrine. Martinus Nijhoff, The Hague/Boston/Lancaster, 1983, p.438.

[41] Cited by Whiteman, op. cit., supra. n.8, p.237.

> "...[F]rom the standpoint of the theory of international law, sovereignty means the independence and autonomy of the State in domestic and foreign relations".[42]

Tunkin, on the other hand, stresses that sovereignty in the present era of the development of international relations is not an obstacle to the realisation of the principles banning recourse to force, the co-operation between States and peaceful co-existence of opposing social systems. He stated:

> "C'est la politique de force suivie par les Etats impérialistes dans les intérêts des grandes compagnies privées qui empêche la réalisation du principe de non-recours à la force".[43]

This means that sovereignty among other things is not an absolute concept. Another Soviet author, Mouchan maintains that the notion of **jus cogens** contained in the 1969 Vienna Convention of the Law of Treaties (Article 53) is not confined to the law of treaties but it is applicable to all actions of States in every sphere of international life. He observes:

> "Under the circumstances the notion of **jus cogens** fills the gap and should be interpreted as applicable to all both unilateral and joint, acts by States in their relations with one another; it is an integral component of the concept of modern international law and order".[44]

It is inferred from the above that the principle of sovereignty cannot be used to justify any action on the part of States which contradict any norm of **jus cogens.**

Some Communist writers tried to give a full picture of the meaning of sovereignty in Communist thinking. In this contex, Gedmanu, a Romanian lawyer, gives a detailed definition of sovereignty. He writes:

> "The unique, full and indivisible supremacy of the State power within the limit of the territorial frontiers and the independence of this power in relation to any other power, which is expressed in the State's exclusive and inalienable right to lay down and carry out its home and foreign policy independently to discharge its functions to implement the practical measures for organizing its social life at home and its foreign relations on the basis of respect for the sovereignty of other States for the principles and norms of international law accepted of its own will".[45]

Other Communist writers consider sovereignty as being the facility or an aptitude of a people to shape their fate and destiny freely.[46] Nastasesco notes that the main elements of sovereignty are: (i) exclusive State power in discharging the functions specific to the State;

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[42] Ibid, p.238.

[43] G.I. Tunkin: Droit international et modèle généralement reconnu du système international. In: Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyses du droit international. Mélanges offerts à Charles Chaumont. Ed. A. Pédone, Paris, 1984, pp. 549-50.

[44] A.P. Mouchan: The Concept and Meaning of Modern International Law and Order, 24 Coexistence, 1987, p.130.

[45] Cited by G. Elian: The Principle of Sovereignty over Natural Resources. Sijhoff & Noordhoff, Alphen Aan den Rijin, The Netherlands; Germantown, MA, 1979, p.4.

[46] Ibid, p.5.

(ii) indivisibility, that is full freedom of choice in using the whole set of prerogatives of State power; and, (iii) inalienability which means the impossibility of ceding State power either to some foreign power or to some international body.[47]

Chaumont maintains also, that sovereignty still has a very important role to play in the age of nuclear confrontation, in the tradition of dialectic analysis. He stresses that sovereignty is not 'un pouvoir illusoire de tout faire ni un pouvoir irréel de tout refuser'.[48] He writes:

> "...[La souveraineté] ne peux jamais désigner que l'aptitude de l'Etat à participer au maximum à la vie internationale dans la situation où la géographie et l'histoire l'ont placé".[49]

He sees a direct link between sovereignty and self-determination. Thus, according to him, 'la souveraineté, c'est le droit des peuples à son stade de réalisation.'[50] However, Chaumont warns that sovereignty is not a static concept, he adds:

> "Mais dans aucun cas, il ne s'agit d'un concept statique car la souveraineté réalisée, tout comme le droit des peuples dans la phase de revendication, est une création continue et une vigilance de tous les instants".[51]

From the above definitions, it seems that Marxist lawyers take sovereignty very seriously, it is important for a Communist State since it excludes foreign interference in its internal affairs and it gives the ruling class every power they need for the consolidation of the Communist regime inside the State. In other words, sovereignty can play a very progressive role as it will be used for the benefits of the great majority of the population.

C. Third World Views on the Meaning of Sovereignty

Third World lawyers in general regard the traditional concept of sovereignty as very negative and restrictive in its meaning. They advocate like Socialist lawyers a broad meaning. In this respect, Bedjaoui for example, argues that the classical concept of sovereignty which has been translated into the UN Charter is only defined by its political elements whereas the economic elements are absent. This leads to the inevitable consequence that sovereignty to a new State is a 'drapeau, hymne national et siège aux Nations Unies'[52] while the reality of power resides elsewhere.

in my opinion, Ghozali seems to have made the best attempt by a Third World lawyer to define sovereignty and to show its meaning in our present era, where Third World States

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[47] Ibid.

[48] Ch. Chaumont: Cours général de droit international public. RCADI, 1970/1, p.385.

[49] Ibid, p.386.

[50] Ibid, p.390.

[51] Ibid, pp.390-391.

[52] M. Bedjaoui: Pour un nouvel ordre économique international. UNESCO, Paris, 1979, p.83. See also R.P. Anand: Sovereign Equality of States in International Law. RCADI, 1986/II, pp.77-195.

participate actively in international affairs. In his view, sovereignty must mean other things than the mere proclamations of legal equality. He writes:

> "Elle [la souveraineté] implique la prohibition de l'intervention, et toute forme d'ingérence. Comme toute menace dirigée contre la personnalité d'un Etat, ou contre ses éléments politiques, économiques et culturels. Elle se traduit par le droit imprescriptible de chaque peuple de déterminer librement son destin, et de choisir son régime politique, économique et social".[53]

He then adds:

> "La souveraineté ne signifie plus uniquement l'indépendance nationale. Elle s'accomplit dans le développement. Elle signifie 'le droit au développement'".[54]

As a result, sovereignty is seen by this writer as a political arm against inequality and intervention in the internal affairs of States.

Third World writers then stress that sovereignty has to be broadened and strengthened. It has to give the State the necessary powers to transform the economic, social and cultural structures of the society and guarantee that no forms of interference in that process by outside powers is allowed. On the external front, they advocate that a real and positive meaning must be given to 'independence', so that it allows a just participation in the economic relations and in other fields also such as communications, etc.

The position of Third World countries in the Diplomatic Conference (1974-1977) in relation to the application of that law to internal conflicts confirms their attachment to a very rigid version of the concept of sovereignty. Nevertheless, it must be stressed that their opposition to the extension of humanitarian rules to internal conflicts, was not because they were inhuman. The real reason was, in fact, that they feared that such extension would, in practice, open the door to foreign intervention and would violate their sovereignty. They wanted to have a free hand to deal with internal rebellion, and consequently the concept of sovereignty offers them the best defence.

In this context, the Indian representative in the Diplomatic Conference (1974-77) best described the state of mind of the majority of States and especially Third World countries when he argued that:

> "...[I]f a world government existed, there would be no reason to fear violations of sovereignty but things being what they were, developing countries were bent on protecting their sovereignty and had set their hearts on working for their own development without external interference."[55]

It must be noted that even among Third World countries the feeling was that sovereignty must not be seen as an impregnable fortress, inroads into it were necessary if mankind is

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[53] N.E. Ghozali: Les fondements du droit international public: approche critique du formalisme classique, in Mélanges offerts à Charles Chaumont: Le droit des peuples à disposer d'eux-mêmes: méthodes d'analyse du droit international. Ed. A. Pédone, Paris, 1984, p.312. See also his book: Les zones d'influence et le droit international public. OPU, Alger, 1985, pp.279-286.

[54] Ibid, p.312.

[55] 8 ORDCHL, CDDH/I/SR 30, para 26, p.305.

to be respected. Illustrating this view, the Algerian delegate noted that:

> "...[H]umanitarian law and national sovereignty should not be considered irreconcilable and...hoped that a suitable balance could be reached".[56]

The fact is that the fear of the Third World countries from the extension of humanitarian law to internal conflicts, stems from their belief that they are the real theatre of such wars which means that allegations of violations of its rules would, in practice, be directed against them. Moreover, they always suspect European humanitarianism of concealing realms of interference and domination.

Against this background, Bedjaoui has, in a recent report, stressed that:

> "...[T]hird world should not distrust humanitarian law because of its apparent Western flavour. Concern for the integrity and dignity of the human person is a sort of 'common heritage of mankind' not the property of one specific society".

He added that humanitarian law must not become a victim of the reactions of the Third World to alien domination.[57] These comments relate to humanitarian law in general which presumably includes the part of that law concerned with internal conflicts since concern for the integrity and dignity of mankind cannot be different according to the formal nature of the conflict. Better, sovereignty must not abstract the application of humanitarian law to internal conflicts.

D. International Courts and the Meaning of Sovereignty

The PCIJ and later the ICJ have in some actual cases, dealt with some aspects of sovereignty. In general, sovereignty is seen as a bulk of competencies exercised by the State within the ambit of international law. Thus, in the Lotus Case, the PCIJ held:

> "International law governs relations between independent States...the rule of law binding upon States therefore emanates from their own free will...restrictions upon the independence of States cannot therefore be presumed".[58]

Accordingly, it is independence which gives international law its **raison d'être**, its existence and development, it is directly connected with the existence of independent States. Independence is given here a very broad scope, so it is in essence unlimited which means that the State retains full freedom of action. Only when it accepts restrictions in the form of binding legal rules can that State be considered prohibited from doing or not doing the sort of action agreed to.

Many other statements of international courts stress either directly or indirectly that sovereignty means the right of the State to exercise freely all its competencies inside its

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[56] Ibid, p.233.

[57] M. Bedjaoui: Humanitarian Law at a Time of Failing National and International Consensus, in: A Report for the Independent Commission on International Humanitarian Issues in Modern Wars: The Humanitarian Challenge. Zed Books Ltd., London & New Jersey, 1986, p.6.

[58] The Case of S.S. "Lotus" (France v. Turkey), PCIJ, Series A, No.10, p.18.

territory without any interference. The only restriction is to respect international law, however, when the subject is dealt with and regulated by that law, in the absence of such regulations sovereignty reigns.[59]

In the Customs Regime between Germany and Austria (advisory Opinion), the PCIJ had an occasion to define independence. It stated that:

> "The independence of Austria must be understood to mean the continued existence of Austria within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial or other with the resultthat that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible, a violation of any of them would mean a violation of Austria's independence".[60]

Seemingly, the Court uses independence as meaning sovereignty, it is more than the external aspect of sovereignty, which is essentially negative in character, it includes positive aspects as well, since the State is by virtue of that independence capable of acting positively by taking decisions in different matters affecting the life of the nation. The Court has also emphasised that independence is indivisible, in other words, it cannot be broke up in parts which belong to more than one State.

Judge Anzilotti has, in his Individual Opinion in the above case, as well dealt with the meaning of independence. He writes:

> "...[I]ndependence...is really no more than the normal condition of States according to international law, it may also be described as sovereignty (**suprema potestas**) or external sovereignty by which is meant that the State has over it no other authority than that of international law".[61]

He then added that:

> "...[I]independence in the legal sense is affected neither by a State's submission to international law or by constantly increasing of **de facto** dependence between countries".[62]

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[59] Thus, in the Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)(Second Phase), the PCIJ held:

> "...[T]he sovereignty of France over the Gex District was complete and unimpaired in so far as it was not limited by the treaties in question. No obligations going beyond these treaties can be imposed on France without her consent".

PCIJ, Series A_No.24, p.12. Similarly, in the Asylum Case (Colombia v. Peru), the ICJ held:

> "...[The] grant of diplomatic asylum involved such a derogation from the territorial sovereignty of a State that it cannot be recognized unless its legal basis is established in each particular case".

ICJ Reports 1950, pp. 274-5. See also the Corfu Channel Case (Merits), ICJ Reports 1949, p.35.

[60] Custom Regime between Germany and Austria, (Advisory Opinion), PCIJ, Series A/B, No.41, p.45.

[61] Ibid, p.57.

[62] Ibid.

Consequently, increased international co-operation between States and adherence to international law by those same States, does not mean the end of independence as a legal notion.

Moreover, in his Separate Opinion in the Case Concerning Right of Passage Over Indian Territory, Judge Willington Koo has made two important observations concerning sovereignty: (i) International law makes no distinction between one sovereignty and another; and (ii) it is inconceivable in international law that one sovereignty exists only by the will or caprice of another sovereignty.[63]

Hence, equality is presumed between the sovereignty of all States whatever their factual and real differences. It must be also noted that the jurisprudence of international courts and tribunals has stressed in many cases that sovereignty is essentially territorial. In this context, in the award of the Tribunal of Arbitration in the North Atlantic Coast Fisheries Case (Great Britain v. United States of America) it is clearly held that:

> "[One of the essential elements of sovereignty is that it is to be exercised within territorial limits and that, failing proof to the contrary, the territory is coterminous with the sovereignty".[64]

Thus, there is a presumption in favour of the full sovereignty of the State over its territory unless a contrary rule can be shown under which international law limits such sovereignty, the State has the exclusivity of competencies over its territory. In the Island of Palmas Case, this point was made very clear when it was held that:

> "Territorial sovereignty,....involves the exclusive right to display the activities of States".[65]

Furthermore, Judge de Castro made an interesting analogy between sovereignty and property in his Dissenting Opinion in the Nuclear Test Case. He stated that:

> "The applicant's complaints against France of violation of its sovereignty by introduction of harmful matter into its territory without its permission, is based on a legal interest, which has been well known since the time of Roman law: The prohibitions of Immissio (of water-smoke fragments of stone) into a neighbouring property was a feature of Roman law".[66]

He then added that:

> "The principle **'sic utertuoutalia errum non ledas'** is a feature of law both ancient and modern-it is well known that owner of a property is liable for the intolerable smoke or smells, because he oversteps the physical limits of his property".[67]

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[63] Case Concerning Right of Passage Over Indian Territory Case (Portugal v. India), ICJ Reports 1960, p.66.

[64] North Atlantic Coast Fisheries Case (Graet Britain v. United States), 11 UNRIAA, p.180.

[65] Island of Palmas Case (Netherlands v. United States), 2 UNRIAA, p.839.

[66] Nuclear Tests Case (Australia v. France), ICJ Reports 1974, p.388.

[67] Ibid.

So, territorial sovereignty of each State imposes corresponding duties of abstention and non-interference in whatever form on the part of other States.

Further, Judge Alvarez in his Individual Opinion, in the Corfu Channel Case gave a very interesting definition to sovereignty. He writes:

> "...[B]y sovereignty, we understand the whole body of rights and attributions which a State possesses in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them. These rights are not the same and are not exercised in the same way in every sphere of international law. I have in mind the four traditional spheres: territorial, fluvial and lacustrine-to which must be added three new ones: aerial, polar and floating (floating islands). The violations of these rights is not of equal gravity in all these different spheres."[68]

He concluded by stating that:

> "The sovereignty of a State has now become an institution, an international social function of a psychological character which has to be exercised in accordance with the new international law".[69]

In this opinion, there is an emphasis upon the relative importance of the rights which sovereignty confers upon States. In my opinion, it seems that it is difficult to prove that States regard the violations of particular rights as grave, whereas the same violations of some other rights as not important, States regard all violations of all their rights as of equal importance. This is the logic of the concept of sovereignty itself.

In the Nicaragua Case (Merits), the ICJ had an occasion to deal with the meaning and limits of the concept of sovereignty in our present era. Its pronouncement on the subject (of sovereignty) is very interesting since it is the product of a court which is composed in a way that all cultures and civilizations of our world are represented. The Court stressed that the principle of sovereignty is closely linked and inevitably overlaps with the principles of the prohibition of the use of force and non-intervention,[70] which means that any unlawful use of force or any illegal intervention is a real infringement of the sovereignty of the State.

The Court then and implicitly divided sovereignty into two aspects: internal and external and thoroughly explained the two aspects. Concerning the internal aspect it held that:

> "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligations of international law. Every State possesses a fundamental right to choose and implement its political economic and social systems".[71]

On the question of the possibility of a State binding itself by agreement to a question of domestic policy (such as that relating to the holding of free elections on its territory), the

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[68] Corfu Channel Case (United Kingdom v. Albania), ICJ Reports, 1949, p.34.

[69] Ibid.

[70] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits June 27th, 1986, 25 ILM, 1986, para 212, p.1072, and para 251, p.1080.

[71] Ibid, para 258, p.1082.

Court, after observing that it cannot discover, within the range of subjects open to international agreements, any obstacle to hinder a State from making a commitment of that kind, stressed:

> "A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field."[72]

This, in effect, means that whatever the importance of any given internal competence, the State can always give it away or limit its exercise. Moreover, on the finding of the US Congress that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship', the Court declared that:

> "However, the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests and the freedom of choice of political, social, economic and cultural systems of a State".[73]

In other words, whatever the nature or character of the domestic policy options of a country, third States must respect that choice and must not use any force or threat of it either directly or indirectly to change those options. Otherwise they will be seen as committing an infringement of that State's sovereignty.

However, on the external aspect of sovereignty, the Court when considering the criticisms expressed by the US on the external policies and alliances of Nicaragua, held that:

> "Whatever the impact of individual alliances on regional or international political-military balances. The Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy and there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with another State".[74]

Then, in the absence of clearly established legal obligation the State is free to shape and to conduct its foreign policy which is in effect the external aspect of its sovereignty. The main conclusion to be drawn from the jurisprudence of international courts concerning sovereignty are:

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[72] Ibid, para 259, p.1082.

[73] Ibid, para 263, p.1083.

[74] Ibid, para 265, p.1083. It must be noted here also that the ICJ when dealing with the question of the militarization of Nicaragua which was raised by the US and which was seen by the latter as proving the aggressive intent of Nicaragua, held:

> "It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules other than such rules as may be accepted by the State concerned by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited and this principle is valid for all States without exception".

Ibid, para 269, p.1084.

1. The confirmation of the importance and necessity of sovereignty in international law is upheld, it is in fact said to be the real basis of such law and relations.

2. In general, a broad interpretation is given to the meaning of sovereignty, it is limited only by rules of international law, which were consented to by the State; which means, in the last analysis, that international law itself owes its existence and development to the working of the principle of sovereignty.

3. However, the jurisprudence of the courts also emphasized that the sovereignty of the State, consists generally of competencies granted by international law. This means that the notion of sovereignty is relative in character, and its content depends on the development of international law at any given moment. This has been confirmed in the Nationality Decrees in Tunis and Morocco (French Zone) Case, where the PCIJ rightly held:

> "The questions whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question, it depends upon the development of international relations."[75]

4. In the Nicaragua Case, the Court answered one of the biggest worries of Third World States by stressing the close link between sovereignty and the use or threat of force and interventions. Since any such use of force or threat of it or resort to intervention in the internal affairs of others is considered by the Court to be a direct infringement of sovereignty.

5. It seems to me that the jurisprudence of international courts in general, confirms the Western doctrine's view that sovereignty is in the last analysis a bulk of legal competencies exercised under the auspices of international law (in fact many cases point to that direction such as the Island of Palmas Case, the Wimbledon Case, the Corfu Case and to some extent the Nicaragua Case). Thus, the concerns of Socialist and Third World doctrine which underlined the importance of the issue of inequality, intervention and other problems of a political nature in studying the notion of sovereignty, are not well represented although, as I noted above, the Nicaraguan Case seems to signal a shift in the direction of satisfying Socialist and especially Third World worries about what the notion of sovereignty should mean and contain.

Section II: The Role of Sovereignty in the Contemporary World Order

This section is concerned with the inquiry into the role and the place of sovereignty in the present international society. The importance of such inquiry spring from the fact that some lawyers, especially in the West, see sovereignty as basically against the idea of humanity,[76] which means that as long as sovereignty survives there is no hope for the protection of human dignity and consequently humanitarian law would, in cases of internal conflicts, find in sovereignty a real adversary, if not a killer.

This section, however, demonstrates that sovereignty is not withering away, it is with us.

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[75] Nationality Decrees in Tunis and Morocco (French Zone) (Advisory Opinion), PCIJ, Series B. No.4, p.24.

[76] See especially R.B. Lillich: Sovereignty and Humanity: Can they Converge?, in A. Grahl-Madsen and J. Toman, (ed.): The Spirit of Uppsala. Walter de Gruyter, Berlin/New York, 1984, pp.407-421.

State practice in its different forms (treaties, UN declarations, State pronouncements) confirms unequivocally that verdict. Similarly, Socialist, Third World and a majority of Western doctrine stress for different reasons that the idea of sovereignty is a fundamental guarantee for peace in our world and that basically (sovereignty) is not against the idea of the protection of human dignity and development of international law.

A. Sovereignty in State Practice

In bilateral and multilateral relations between States, sovereignty occupies a very important place. Thus, it is rare not to find insistence upon it in important treaties and declarations of international organizations. The most important multilateral treaty in our present time, the UN Charter, lists sovereign equality as the first principle upon which the organization is based. Its Article 2/7 protects States from the intervention of the organization in their domestic jurisdiction. Moreover, Article 14 of the Draft Declaration on Rights and Duties of States prepared by the ILC in 1949 provides that:

> "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that sovereignty of each State is subject to the supremacy of international law."[77]

However, it must be noted that Korestsky of the USSR considered that Draft Article as a 'maximum attack against the principle of sovereignty'[78] because of its reference to the supremacy of international law, which means in essence that at that time, the Soviet Union clung to a very rigid and absolutist concept of sovereignty. This in turn, can be explained in my view by the fact that the Soviet Union was suspicious of the content of that international law and was afraid to see itself being forced to accept a law which it has not consented to.

The UNGA Resolution 2625 (XXV) (The Declaration on Friendly Relations Resolution) gave in fact an important place to the principle of sovereign equality, it stipulates that:

> "All States enjoy sovereign equality, they have equal rights and duties and are equal members of the international community, notwithstanding differences of economic, social, political or other nature".[79]

Sovereign equality includes among other things, that:

> "...[E]ach State enjoys the rights inherent in full sovereignty".[80]

This Declaration makes it clear that the principles embodied in it constitute the basic principles of international law and as such would be the guidelines which all States and not

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[77] Whiteman, op. cit., supra. n.8, Vol.5, pp.34-35.

[78] Ibid, p.35.

[79] D.J. Djonovich (ed.): The United Nations Resolutions. Series I, Vol. 13, 1970-1971, Oceana Pub., Inc., Dobbs Ferry, New York, 1976, p.340.

[80] Ibid.

only members of the organization should conduct their mutual relations. It must be noted that the ICJ has, in the Nicaragua Case, stressed the importance of this Declaration in relations between States. It held:

> "The effect of consent to the text of such relations cannot be understood as merely that of a 'reiteration or elucidations' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[81]

This means in effect that the court has given a binding legal force to Resolution 2625 independently of its relation to the UN Charter. Thus, within the UN, there is no diminishing importance for sovereignty, it is the central feature of the organization.

Henry Kissinger, the former US Secretary of State, was right when he stated that:

> "The United Nations Charter is based on the proposition that the United Nations is composed of sovereign States and therefore the United Nations has never been intended as a world government superseding the sovereign government".[82]

Such an opinion indicates that sovereignty is the central pillar of contemporary international system. There is no evidence that sovereignty is regarded within the UN as an obstacle to the maintenance of peace or the protection of human dignity or as an idea whose time has past. In this context, Chaumont was right when he wrote:

> "Ainsi, loin que l'ONU à considérer la souveraineté de l'Etat comme une notion depassée elle lui reconnait au contraire une valeur dynamique et fondamentale".[83]

It is to be also noted that all regional organizations of States mention in their constituent instruments, 'sovereignty and independence' as fundamental principles and that their observance and respect is the real basis of their organizations. The latter it must be remembered consist of the membership of an important number of States in different parts of the world. The Charter of the OAS stipulates in its first Article that:

> "The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice to promote their sovereignty, their territorial integrity and their independence."[84]

Articles 9, 10, 11, 15 and 16 insist as well upon different aspects of sovereignty. The latter is not regarded in the Charter as incompatible with struggling for peace and justice or attachment to human rights and human dignity.

The OAU Charter, due to the specific history of the continent, which is characterised by foreign domination and intervention, respect for sovereignty and independence has a very

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[81] Op. cit., supra. n.70, para.188, p.1066.

[82] E.C. McDowell: Digest of United States Practice in International Law. US Dept. of State (1975), Washington D.C., 1976, p.6.

[83] Op. cit., supra. n.48, p.384.

[84] 119 UNTS, 1952, No.609, p.50.

special place. One can speculate that it (non-intervention) is, in fact, the other name of the organization. In this respect, the Preamble of the OAU Charter makes it clear that the organization is 'determined to safeguard and consolidate the hard won independence as well as the sovereignty and territorial integrity of our States'.[85] Article 3 of the OAU Charter which deals with the principles of the organization, mentions respect for sovereignty and territorial integrity of each State and for its inalienable right to independent existence. Article 4 makes independence the fundamental criteria, which must be satisfied by any entity willing to join the organization as a member.

In the Arab world, aspiration for the unity of all Arab people in one single State has been in the front, at least, from the time of decolonization. However, the Pact of the League of Arab States stressed in Article 2 that the League will work towards a closer relationship between member States and co-ordinate their political activities with the aim of realising the closer co-operation there, to safeguard their independence and sovereignty[86] which means that the rhetoric of unity has given way to the reality of sovereignty.

What emerges from these three important organizations is the fact that sovereignty plays a dominant role in their constituent instruments and also in daily practice of their different organs. The whole movement towards more human rights has not affected the attachment of these organizations to sovereignty, on the contrary, it is (sovereignty) considered to be the real guarantee for the enjoyment of such rights. Nevertheless, it is important to note, that the attachment to the notion of sovereignty and insistence on its fundamental role in international relations is not the monopoly of Third World countries. The Conference on Security and Co-operation in Europe held in Helsinki in 1975, and which was attended by more than 30 countries among them the US and the USSR, gave in fact a large place in its Final Act (August 1st, 1975) to sovereignty. Thus, the Final Act provides that:

> "1(a)1. Sovereign equality, respect for rights inherent in the sovereignty.
> The participating States will respect each other's sovereign equality and individuality, as well as all the rights inherent and encompassed by its sovereignty, including, in particular, the right of every State to judicial equality, to territorial integrity and to freedom and political independence".[87]

The Act also stresses the right of every State to choose and pursue freely the political, social, economic and cultural systems which it wishes and their right to determine their laws and regulations, all these rights are, in fact, fundamental ingredients of the concept of sovereignty.

President Ford, who signed the Final Act for the US, in an address to the Conference on August 1st, 1975, observed that the documents agreed upon 'are more than the lowest common denominator of Governmental positions.'[88] He adds that:

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[85] 479 UNTS, 1963, No.6947, p.70.

[86] 70 UNTS, 1950, No.241, p.252.

[87] 14 ILM, 1975, p.1293.

[88] Supra. n.82, p.7.

> "[The documents]...reaffirm the basic principles of relations between States, non-intervention, sovereign equality, inviolability of frontiers and the possibility of peaceful change".[89]

Even the US, the richest country in the world adheres to the principle of sovereignty and sees in it a basic principle of international relations.

The Charter of the Islamic Conference also makes out of the 'respect of the sovereignty, independence and territorial integrity of each member'[90] a fundamental principle of the Conference. This despite the fact that Islam encourages the unity of the Umma (the Islamic Nation) and deplores fragmentation which leads to the weakening of Islam and Muslims in the face of their enemies. Moslem States were not deterred from proclaiming their strong adherence to the principle of sovereignty.

The Charter of the Council for Mutual Assistance (COMECON) which consists of the membership of most Communist States except China, proclaims in its first Article that the Council is based on the principle of 'sovereign equality of all member countries of the Council'.[91] The same Article indicates that co-operation between the members in economic, scientific and technical fields shall take place and be guided by the principles of 'complete equality of rights, respect for sovereignty and national interest, mutual advantage and friendly mutual aid'.[92] This means that the the unity of ideology between Communist States did not weaken their adherence to the concept of sovereignty even in their mutual relations. The Marxist prediction that sovereignty would wither at some stage of the history of Socialist States seems very far away indeed.

In Western Europe also, we can detect that adherence to the principle of sovereignty is not fading away. In this context, President Auriol of France in an address to the US Congress in 1951, stated that:

> "Convinced of the need for supranational institutions, France has declared herself prepared to grant these bodies (of the steel and coal community) in conformity with her constitution and under the condition of reciprocity, part of her sovereignty. And she hopes to convince the still hesitant nations that they will not curtail their sovereignty but on the contrary strengthen it by associating it with others, by uniting their resources and labour to increase their forces."[93]

In 1989 and with the prospect of a united Europe in 1992, most European Leaders still believe that the EEC has no business meddling in security matters. The UK PM, Mrs. Thatcher was unready to discuss a new common currency, and West Germany still insists

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[89] Ibid.

[90] It came into effect on February 28th, 1973. 914 UNTS, 1974, No.13039, p.113.

[91] 369 UNTS, 1960, No.5245, p.266.

[92] Ibid.

[93] Op. cit., supra. n.8, p.262.

that the time was not ripe to talk about a central bank.[94] Moreover, when Jacques Delors the President of the European Commission and arch-champion of a united Western Europe was asked whether Europe is moving toward a political federation, he answered:

> "The 12 members have repeatedly and solemnly reaffirmed their will to build a political union. The creation of a single economic and social space by 1992 constitutes the foundations, not for Gorbachev's 'Common European House' but for a European Community House".[95]

He then adds that:

> "...[B]ut the rest of the house will remain to be built. The cultural part, the foreign policy part, the security part".[96]

In other words, European States, after nearly 40 years of close co-operation, are not ready yet to give up the last and the most important elements of sovereignty.

The conclusion is that State practice, as the instances studied here reveal, proves beyond any doubt that sovereignty has an important place in the relations between States. It also has a role to play in an international society which is divided among territorial units that differ greatly in size, population and wealth. They have different ways of life, different cultures and ideologies too. Sovereignty then is the guarantor of the co-existence of such differences and above all it helps the weaker units of international society to survive without fear.

Thus, the illusion which is entertained by some people that there is an ineluctable force called integration which will destroy weak States and cause them to seek unity and incorporation with one another in order to survive, has no basis of truth in the State practice. Sovereignty has proven its vitality, since without it, the majority of today's States would have little chance of independence.

B. The Doctrine and the Role of Sovereignty

On the doctrinal level, we can distinguish two main tendencies concerning the role of sovereignty in international law and relations. Some scholars maintain that the concept of sovereignty 'as primarily responsible for insufficiencies of the law of nations'[97] or see it as 'a rigid barrier against the spread of internationalism and peaceful relations between States'.[98] Others, on the contrary, regard it as a guarantee for democracy inside the State and for peaceful and orderly international relations on the outside.

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[94] S. Scott: The Czar of Brussels. Newsweek, Feb. 6, 1989, p.9.

[95] Ibid, p.10.

[96] Ibid.

[97] Such as G. Scelle, cited by R.P. Anand: Sovereign Equality of States in International Law, RCADI, 1986/II, p.38.

[98] S.S. Goodspeed: The Nature and Functions of International Organizations. OUP, New York, 1964, p.11.

1. The Argument of Those who Defend Sovereignty

Sovereignty is seen by some as the point of departure in settling most questions that concerns international relations and any attempt at spiriting away from it must remain meaningless.[99] Goodspeed rightly stated that:

> "The facts of present day international life make it appear that despite the need for good faith in interstate relations and the development of complex interrelations among States, each State in the final analysis seeks to be its own interpreter of international obligations and maintains the right to determine its own standards of international conduct".[100]

Sovereignty then is not lost in the fog of interstate relations, it is still a very important element of such relations. Beitz invokes a moral basis for defending sovereignty. He states that:

> "States, like persons, have a right to be respected as autonomous sources of ends".[101]

He argues that the claim to autonomy by a State must rest on the conformity of its institutions with some 'appropriate principles of justice'[102] because the autonomy of the State is the other face of its legitimacy.

Other writers stress that the notion of sovereignty has its foundations in the psychology of nations and peoples. It is, as a matter of fact, the expression on the political and legal levels of the feeling of belonging to one community, which shares many common virtues. Carty, however, argues that lawyers must take into account the phenomenon of nationalism because 'its appearance in the form of the right to self-determination touches upon so many aspects of what is commonly regarded as providence of international law'.[103] He then adds that 'in some way or another, one still has to suppose that the nation State is an individual subject of law with conscience'.[104]

It seems to me that it is possible then to infer from Carty's opinion that nationalism can be the basis for adherence to sovereignty, since the latter is the supreme form of self-determination and also because nationalism insists on particularism and distinct identity, sovereignty then is the legal and political shield which protects that particularism and distinctness on the level of international society. Sovereignty is, in the final analysis, the major criteria which differentiates between nationalism and internationalism.

A radical approach to defending sovereignty has been taken by Kennan. He insisted that 'the interest of the national society for which a Government to concern itself are basically those of its military security, the integrity of its political life and the well being of its

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[99] G. Schwarzenberger: International Law as Applied by International Courts and Tribunals. Stevens, London, Vol.1, 3rd. ed., 1957, p.114-115.

[100] Supra. n.97, p.11.

[101] Ch.R. Beitz: Political Theory and International Relations. PUP, Princeton, Guildford, 1979, p.83.

[102] Ibid.

[103] A. Carty: The Decay of International Law. MUP, Manchester, 1986, p.36.

[104] Ibid.

people'.[105] He sees these needs as having no moral quality, they arise simply from the status of national sovereignty which the State is supposed to enjoy, and that those needs cannot be classified as either good or bad for when the Government accepts to govern it is implicit in that. He adds that:

> "[I]t is right that the State should be sovereign, that the integrity of its political life should be assured, that its people should enjoy the blessing of military security, material prosperity and a reasonable opportunity for, as the Declaration of Independence put it, the pursuit of happiness".[106]

In my opinion, this is a dangerous way of defending and asserting sovereignty because the notion (of sovereignty) is conceived of as outside the realm of law, this is a going back to the Hobbesian 'state of nature'. It is an argument which hides a strong claim to intervention in the affairs of others whenever one of the 'needs of the society' are threatened.

Brierly indirectly refutes such a kind of argument. He writes:

> "...[T]hat sovereignty has come to imply that there is something inherent in the nature of States that make it impossible for them to be subjected to law, it is false doctrine which the facts of international law do not support".[107]

He then correctly adds that:

> "...[B]but to the extent that it [sovereignty] reminds us that the subjection of States to law is an aim as yet only very imperfectly realised and on which cannot afford to disregard".[108]

In fact, he rejects the idea of sovereignty as an idea outside the realm of law, it is within law, otherwise intervention in the affairs of the weak members of the international society would become a daily event.

Levi, after arguing that interaction and interdependence among States made the concept of sovereignty murky, he states:

> "...[N]evertheless the demand for independence everywhere is responsible for the organisation of international society, in forming its institutions, including law, all designed to give substance to the demand".[109]

Interdependence which is undeniably a real fact of international life, did not in any way hinder the importance of sovereignty. The latter, as we have seen, has been maintained and insisted upon in the most adverse circumstances and situations. Also, interdependence did not lead to a world Government; on the contrary, it led to fresh demands for giving sovereignty a real substance, by a real reform of the existing mechanism of the international

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[105] G.F. Kennan: Morality and Foreign Policy. Foreign Affairs, 1985-86, p.206.

[106] Ibid.

[107] J.L. Brierly: The Law of Nations. H. Waldock (ed.), Clarendon Press, Oxford, 6th ed. 1963, p.47.

[108] Ibid, p.48.

[109] Op. cit., supra. n.12, p.39.

economic relations.

On the other hand, Wildhaber correctly pointed out that:

> "...[S]overeignty expresses the essential position of the State in the international system (or lack of a system). It is a 'constitutional principle of international relations not because it can claim a higher sacredness, morality or cogency, but simply because it is, at bottom, an empirically correct description'".[110]

Similarly, Van Kleffens stressed that:

> "The notion of sovereignty is not at all a ghost we can exorcise at will. It is a spirit which is very much alive and very wide awake. Some may regret it but if they fail to recognize this fact, they abandon the firm foundation of reality".[111]

These views confirm once again that despite the growing interaction between States, people and international institutions and despite the rapid extension of international law to regulate many new fields in the relations between States, sovereignty is still safe and well, and it seems that it is here to stay, in fact, it is the other name of Statehood.

The Soviets lawyers, like their Statesmen, are hard advocates of the doctrine of sovereignty, arguing against it, is a reactionary thinking since it is an implicit advocacy of domination and intervention by the Capitalist States and their corporations. In this respect, Korovin stressed that:

> "The Soviet Union is destined to act as the champion of the doctrine of 'classical' sovereignty in so far as its formal seclusion acts as a legal armour protecting it from interference of those factors under the pressure of which the frontiers of contemporary capitalist States are changed and the forms of their law altered".[112]

This means, in effect, that as long as there are Capitalist States in the international society, any limitations of State sovereignty would not be in the interests of Communist States. In fact, the majority of Soviet writers maintain that sovereignty is pre-existing to international law and that the latter is limited by the former. In this respect, Koretsky observed in the ILC, in 1949, that:

> "The sovereignty of States must so regulate relationships between States that the mastery of superiority of one State over another could not exist...to limit the power of one's own State was to open the gates to the intervention of other States. The international field must not be dominated by those who interfere in the internal affairs of others, by reactionaries who sought to organize other countries by force".[113]

This is a recourse to 18th and 19th century theories of sovereignty. However, the justifications of such positions is always political, it is the protection of the most advanced

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[110] Op. cit., supra. n.40, p.438.

[111] E.N. Van Kleffens: Sovereignty in International Law. RCADI, 1953/I, p.128.

[112] Cited by M. Chaksle: Soviet Concepts of the State, International Law and Sovereignty. 48 AJIL, 1949, p.31.

[113] YILC, 1949, Session 1, p.72.

social system in the world, it is the liberation of oppressed peoples in colonies and dependent territories from the imperialist yoke.

In the last analysis, we can State that the Soviet jurists use sovereignty as a legal and political weapon in their theoretical struggle against some Capitalist views on sovereignty, and generally against those who believe that sovereignty is an obstacle to peace and development of international law. Moreover, it is obvious that Soviet defence of sovereignty is not eternal, it is dictated by the realities of the international relations where Capitalist States are a fact of life, and their transformation into Communist States is not near by any means.

It is to be noted that sovereignty in the relations between Socialist States do not seem to be very rigid, in reality, it no longer means complete internal and external independence in the running of the affairs of the State. It simply means in the words of Anand 'freedom to act in the interests of the Socialist world and the interests of the world revolutionary movement'.[114] According to this logic, the sovereignty of the Socialist State cannot be used to claim the return to Capitalism since this would not be in the interests of the Socialist camp. It undermines the gains of socialism and would be contrary to the progressive movement of history. Nonetheless, as the 'Breshnev doctrine' has, in practice, showed that there is no difference between this alleged 'general interest of the Socialist world' and the national interest of the Soviet Union.

Third World lawyers are, like their politicians, ardent champions of sovereignty. In this context, Prakash Singh rightly points out that:

> "...[S]overeignty is the most treasured possession of the newly independent States. On one hand it makes them the masters of their houses, on the other hand, it provides them with a legal shield against foreign incursion or attempts threat by strong States".[115]

It is also natural that sovereignty is seen as a means of achieving demands for a fair share in the participation in the international decision-making process in different fields of international relations.

On the internal sphere, sovereignty as Okoye correctly remarks that:

> "...[I]s a powerful instrument for shaping national identity, breaking the chains of subordination which are factors of backwardness and furthering social and economic progress".[116]

However the danger in the Third World, is that sovereignty in the internal sphere may well be used (and indeed it has been used) in many instances, as a wall which masks and justifies violations of human rights[117] and (as indeed chapters 3 to 5 will reveal) to resist the efforts

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[114] Op. cit., supra. n.97, p.47.

[115] S. Prakash Singh: Perspectives of the Newly Independent States on the Binding Quality of International Law in Frederick Snyder and Surakiat Sathirathai, (eds.): Third World Attitudes towards International Law: An Introduction. Martinus Nijhoff, Dordrecht, Boston, 1987, p.28.

[116] F. Chuks Okoye: International Law and the New African States. Sweet & Maxwell, London, 1972, p.185.

[117] See in this context E. Kodjo: Et demain l'Afrique. Ed., Stock, Paris, 1985, pp.153-172.

at humanizing the conduct of internal conflicts.

In this context, it seems to me that insistence upon sovereignty can be justified only when the State conduct itself in accordance with the basic standards of the protection of human rights and human dignity in times of peace or war. Those standards and norms can be found in the different instruments of human rights and humanitarian law as developed and codified first, in Common Article 3, Protocol II of 1977 and in the practice of regional and universal organizations in the field of human rights. This stand will be discussed in the coming chapters.

On the external sphere of sovereignty, Third World lawyers insist on the necessity of giving independence its real meaning especially on the economic sphere. In this respect, Terki that:

> "...[F]ace à la puissance financière et technologique des Etats du Nord ou de leur sociétés multinationales. Il [the independence concept] est presque vidé de toute sa substances dès qu'il est mis en oeuvre dans le domaine des relations économiques internationales".[118]

For this reason, Bedjaoui stressed that the classical concept of sovereignty needs to be reformulated. He writes:

> "Il conviendrait de lui chercher une formulation nouvelle capable de restituer à l'Etat les bases élémentaires de son indépendance nationale sur le plan économique".[119]

He then argues for the importance of the economic independence as a legal principle which, in practice, means the real sovereignty over natural resources and real participation in the structure of the decision-making process concerning international economic relations.

This is not an exhaustive survey of the doctrine on the question of the role and the place of sovereignty in the international society. However, it showed that those who are attached to sovereignty and maintain that it still has a role to play, invoke many grounds for their assertions. They are basically as follows:

1. The State is still the main unit in the framework of the international society, sovereignty is on the legal and political levels the expression of Statehood.

2. In an international society, in which States follow different paths of development, share different ideologies, sovereignty means something. It indicates the preservation of national identity and national wealth.

3. Some believe that the other alternative to the idea of sovereignty would mean a **Pax Americana** or a **Pax Russia**.

4. Others, especially from the Third World fear for their hard won independence and see that only sovereignty can preserve it. They insist at the same time that the idea of real sovereignty has not been attained yet, it must include the economic aspects as well.

5. Others, the Communists in particular, believe that the time is not ripe yet for the abolition of sovereignty. Thus it is glorified and struggled for, since the realities of

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[118] N. Terki: Normes 'nouvelles' du droit international et pratique national: l'example Algérien, in: La formation des normes en droit international du développement. CNRESM, Ed. du CNRS-OPU, 1984, p.316.

[119] M. Bedjaoui: Non-alignement et droit international. RCADI, 1976/III, p.396.

contemporary international society are against any opposite solution.
My conclusion is that without sovereignty small States which are the majority of today's world would have very little chance of becoming free from outside domination.[120] Then. this instrument (sovereignty) of liberation, must not become the instrument of killing freedom inside those very States, sovereignty must protect human rights and human dignity and further their development.

2. Opinions against the Usefulness of Sovereignty

There is a growing tendency, generally in the West, which considers that the notion of sovereignty is obsolete and that it does not correspond to the developments which have been taking place in the international society. Nevertheless, it must be noted that attacks upon the notion of sovereignty are not a new phenomenon. In this contexet, as far as 1925 Politis wrote that:

> "On peut même dire qu'elle [la notion de la souveraineté] est dès à présent virtuellement abolie, si elle reste encore usitée dans le language officiel et un peu moins dans celui de la science, c'est par défaut d'adaptation visuelle à la disposition d'une lumière qui pendant longtemps a brillé d'un vif éclat".[121]

He then added confidently that:

> "C'est un écran qui viole la réalité. Il faut donc s'en débarrasser si l'on veut voir clair".[122]

He then suggests the replacement of sovereignty by the notion of liberty because:

> '...[A] la différence de la souveraineté, la liberté n'eveille pas l'idée d'omnipotence et d'absolutisme. Elle fait, au contraire, penser que l'Etat, dans la communauté internationale, a une situation analogue à celle de l'individu dans la société moderne".[123]

In my opinion, the weakness of Politis's argument lies, first, in the fact that it is in very clear contrast with the reality of State practice at that time. The League of Nations was, actually, built upon the collective guarantee of the independence of each member (Article 10 of the Covenant).[124] Secondly, sovereignty, is seen as basically absolute in character, it is seen as an extrajudicial notion which makes the State an institution above the law. This is simply not the case, sovereignty knows certain limits which the State by its consent has

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[120] In this respect see J.D.R. Miller: The Sovereign State and its Future. 39 International Journal, 1983, p.84.

[121] N.S. Politis: Le problème des limitations de la souveraineté. RCADI, 1925/I, p.10.

[122] Ibid.

[123] Ibid, p.21.

[124] For a detailed discussion of sovereignty and the League of Nations, see G. Andrassy: La souveraineté et la Société des Nations. RCADI, 1937/III, pp.641-761.

assented to.[125]

It is to be noted that some contemporary international lawyers continue the attack against sovereignty, using different grounds for their stands. Thus, it is argued that the advent of nuclear weapons have created the objective social basis upon which it is possible to build a new political order for world affairs. This means implicitly that the nation State as the 'prime organizing and value realising unit in world politics'[126] is no longer viable.

Falk made an interesting observation when he stated that:

> "My approach to international law has been influenced by a growing conviction that the present structure of international society cannot solve the problems of technetronic man".[127]

According to him, we have only two or three decades to bring a new system of world order. A system that is arranged to identify and implement human interest on a planetary scale. But, he notes:

> "...[I]f the sovereign State remains the organizing center of political life in international affairs, the outlook for human affairs is indeed bleak".[128]

According to his logic, the problems which face humanity such as violence, population explosion, hunger and pollution can only be solved on a planetary basis, which impliedly means that only a world Government can do the job of solving such delicate problems. Nevertheless, if one looks at the realities of international relations, it is very hard to find a move in the direction with Falk advocates. Of course, States are doing their best to solve those problems not by relinquishing their sovereignty, but on the contrary, they insist that sovereignty must have a central role in that process.

On the other hand, Friedman maintains that only three States may claim rightly that they are sovereign (the USSR, China and the US) because they are capable of making an effective military plan. In contrast, other States which claim the traditional attributes of sovereignty such as the 'diplomatic and jurisdictional immunity' cannot survive or develop by themselves.[129] He argued:

> "The tension between the explosive outbursts of nationalism, seeking expression in the symbols of national sovereignty in the non-Western world and the utter inadequacy of nationalism as an effective expression of military, political and economic realities of our time, constitutes one of the major problems of contemporary international politics".[130]

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[125] For an interesting discussion of this point, see A. Verdross: Le fondement du droit international. RCADI, 1927/I, pp.317-319.

[126] R. Falk: Legal Order in a Violent World. PUP, Princeton, 1968, p.27.

[127] R. Falk: The Status of Law in International Society. PUP, Princeton, 1970, p.XIII.

[128] Ibid.

[129] W. Friedman: The Changing Structure of International Law. Stevens, London, 1964, p.36.

[130] Ibid.

He sees no solution to this problem except by turning away from sovereignty and its symbols, he maintains that:

> "The necessity to form partial and more closely knit organizations of a military, political or economic character, transcending the constricting bounds of national borders, is an inevitable corollary to the last orgy of national sovereignty".[131]

To him, the contradictions between the symbols of national sovereignty and the realities of international life 'is a principal cause for the development of international relations on three levels: of universal supranational organisations, of regional integration and of diplomatic coexistence'.[132] The main problem for Friedman, in my opinion, is that he sees sovereignty as basically an obstacle towards more integration and hence real development. This cannot be so, since sovereignty is adapting itself to the realities of international relations for more co-operation in order to solve the dire problems which our world faces.

Moreover, it must not be forgotten that any rejection of the role of sovereignty in international society would, in practice, be in the interest of the developed countries and their multinational corporations since the latter are struggling for the abolition of borders and jurisdictions in order to have direct access to markets and national resources. Bedjaoui refutes suggestions of integration and interdependence by going back to history. He notes:

> "Les visages de l'interdépendence d'hier sont connus, l'interdépendence économique était imposée grâce à une dépendence juridique organisée. C'était les temps des 'solidarités à sens unique' celle du 'loup et de l'agneau' ou encore du 'cavalier et de sa monture'".[133]

According to him, the logic of these old times are not over. He states:

> "....[E]t à chaque instant il est encore loisible de débusquer les thuriféraires de l'ordre établi n'ambitionnent, selon la formule de 'Guepart' qu'à 'changer pour tour conserver' c'est dans cette logique que s'incrivent les tentatives de récuperation du nouvel ordre".[134]

The crux of the matter is that any call for integration and the abandon of sovereignty will never be in the interest of the weak units of international society who will, by abandoning their sovereignty, lose everything, control over their destinies and their social cultural and political particularism. Whereas the strong, the multinationals and their protectors (their Governments) will inevitably gain everything because of their strengths, might and know-how. The relinquishing of sovereignty would give them a free hand to shape the economic face of the world and consequently gain the maximum of profits.

Colliard, in a reference to the views of Scelle on sovereignty observes:

> "Cet esprit généreux [of Scelle] a pu voir dans la souveraineté un obstacle à la réalisation d'une société véritablement internationale fondée sur la primauté des êtres

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[131] Ibid.

[132] Ibid, p.37.

[133] Op. cit., supra. n.52, p.83.

[134] Ibid.

humains".[135]

In fact, Colliard shares the humanist and internationalist view of Scelle that human beings are the supreme essence of the law. This idealist tradition is far away from the realities of the world, the individual, because of the development in the field of human rights, can aspire to the protection of his minimum rights, by his Government or in some cases, by international machinery either regional or universal.

The contention that it is necessary to abolish sovereignty in order to assert the supremacy of the individual is not on the agenda. Some political scientists, like McLauren simply maintains that we need not write many words on sovereignty because:

> "...[T]he world is interdependent socially, economically and even juridically and the sovereignty of a government consists in making decisions that are primarily adjustments to conditions and demands determined by others".[136]

He further asserted that the sovereignty of a Government is not:

> "....[E]ssentially different from the sovereignty enjoyed by the prisoner on his way to the scaffold, he is free to decide whether he shall take short steps or long, smile or breathe defiance or weep".[137]

This kind of argument tries to show that, in practice, sovereignty does not exist and that interdependence is taking over. This under-estimates the realities of international life where even with the interdependence in economic life, States still have a great measure of freedom in running their affairs and, are very attached to their sovereignty, especially when their vital interests are at stake.

Furthermore, within international organizations which are supposed to be the vehicles of such integration, sovereignty is indeed their main pillar. Thus, McLauren's argument that the role of the UN consists in enabling 'Governments to make this loss of sovereignty beneficial rather than injurious planned rather than haphazard'[138] is not the case, since the contrary argument is that precisely since sovereignty at the UN is not working effectively in keeping peace and order in the world. McDougal observes that:

> "The ascendancy of the nation State has been such that it has built into the perspectives of the world community a bias in favour of perceiving advantages and disadvantages in terms of the individual nation State".[139]

Thus, the State in a territorially organised world, became a dominant participant in the shaping and sharing of all values. Because of this state of affairs 'both the search for and

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[135] C.A. Colliard: Institutions des relations internationales. Dalloz, Paris, 1978, p.91.

[136] Op. cit., supra. n.33, p.427.

[137] Ibid, p.428.

[138] Ibid.

[139] M.S. McDougal, H.D. Lasswell, and Lung-Chu Chen: Human Rights and World Public Order. Yale Univ. Press, 1980, p.44.

the discovery of common interests are impaired'[140] (proclaims McDougal and his associates). They also added that:

> "...[T]he emphasis on State 'sovereignty' in expression of excessive 'nationalism' has further exacerbated by the rival ideologies representing the contending systems of public order".[141]

Then, demand for human dignity and its fulfilment is largely dependent upon the performance of Governmental functions, this is true, however, we must not forget that developments within the field of human rights in some instances (the European Convention of Human Rights) have led to the establishment of some machinery, which allows individuals to take their cases outside the jurisdiction of their own State.

Further, it is Jenks, who waged the hardest attack on sovereignty. He writes:

> "...[Sovereignty] holds no promise of peace. It affords no prospect of defence. It provides no assurance of justice. It gives no guarantee of freedom. It offers no hope of prosperity. It furnishes no prescription for welfare. It hardens the opposition to orderly and peaceful social change. It disrupts the discipline without which scientific and technological innovations become the Frankenstein of our society (but a remorseless Frankenstein perpetually making new monsters). It is a mockery not fulfilment of the deepest aspirations of humanity".[142]

He also thought that the conscious rejection of the dogma of sovereignty is an essential step in 'releasing our creative faculties that we can build together the prosperity and welfare of a free commonwealth in which peace with justice, freedom and welfare rest solidly upon the common law of mankind'.[143] He holds a firm view that the world has outgrown sovereignty. He agrees with Max Huber that:

> "...[T]he concept of sovereignty which existed long before the Renaissance may have been necessary for transforming feudal medieval States into modern ones but for any ethic of a supranational community it is mortal poison".[144]

In his view, sovereignty is a mortal poison precisely it alters the movement toward a world community. He maintains that the UN is moving towards that end.

In my opinion, sovereignty is not a mortal poison, it is a healthy medicine. People need it to keep their national identity, for which they had fought hard. Moreover, it makes them the masters of their destiny, it ensures that they have a full right to choose the forms of their political economic and social organization without any interference. Hence, big powers cannot impose or prohibit small States from choosing their ways of life as indeed the ICJ

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[140] Ibid.

[141] Ibid.

[142] C.W. Jenks: A New World of Law? A Study of Creative Imagination in International Law. Harlow Longmans, 1969, p.134.

[143] Ibid.

[144] Cited by Jenks, ibid, p.133.

has noted in Nicaragua Case.[145]

In fact, the Court implicitly refuted any illusions that we are moving towards a 'world Government'. Sovereignty is still the main pillar of international organization. My conclusion concerning the rejection of sovereignty by some Western scholars would be my agreement. Hector Gros Espiell rightly stated that:

> "The concept of sovereignty is a necessary and fundamental part of international law and international life and politics today. To seek to eradicate the concept and confirm its incompatibility with international law as certain doctrinaire schools has attempted constitutes a useless and anti-historical effort incompatible with the world as it is and the inescapable and undeniable political and mythical force of the idea of sovereignty".[146]

Furthermore, I can confidently state that the arguments against sovereignty come from a section of Western doctrine. However, even within that section, two basis for rejecting sovereignty were advanced. The first school is the idealist and humanist which regards sovereignty as a real obstacle against the full realisation of human rights on a plenatary level, to this school, all individuals in all countries are the same and they need to be treated alike, only the fiction of sovereignty separates them. The main criticism of such opinion is, that in practice, it is doubtful whether all peoples and individuals aspire to live under the umbrella of one world Government, especially in our time which is characterised by different and opposing ideologies, values and ways of life.

The second school seems to base its rejection of sovereignty on the basis of the advances made in technology, communications, and the expansion of business. To this trend, in our modern world sovereignty has become a real brake in the face the demands of trade, business and international communications. In my view, this kind of argument is in the interest of big business since a territorially-organized world would be a very serious obstacle for the expansion of mighty multinational corporations which possess the necessary know-how in the sphere of industrial and technological production.

Bearing in mind that developing countries especially have a very long experience with the exploitation of their natural resources and their wealth, they seem to consider that in order to escape another wave of sophisticated domination in the economic field and other fields, it is best to cling to sovereignty and demand its full achievement. In other words, Third World countries and even Socialist States use sovereignty as a political weapon in their struggle against inequality.

It is my opinion that if the Third World countries are justified in defending sovereignty to protect themselves from economic and cultural hegemony of the West. They nonetheless must accept that sovereignty should serve the protection of human dignity inside their territories. Sovereignty must not be used to justify violations of human rights either in times of peace or emergencies like internal wars.

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[145] Op. cit., supra. n.70, para.263, p.1083.

[146] H. Gross Espiell: Sovereignty, Independence and Interdependence of Nations, in A. Grahl Madson and Jiri Toman (eds.), op. cit., supra. n.76, p.279.

Section III: Limitations of Sovereignty

From the above discussion the main conclusion to be drawn is that developments in contemporary international law makes any claim to unlimited and absolute sovereignty meaningless and irrelevant. But, it is certain also that any neglect for the role of sovereignty in the present and future structure of the international legal order is a sheer fantasy. The first and most important limitation seems to be that States cannot be free to respect or reject international law to which they have given their consent.

In fact, it seems that this fundamental limitation is deeply rooted in the conscience of States, since there is no single example that they dared to declare in an official public act that they would not be bound by rules of international law. The jurisprudence of the international courts has also established in many instances that in cases of conflict between municipal law and international law, the latter prevails. In this respect, the PCIJ in the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (advisory Opinion), held:

> "According to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's constitution but only on international law and international obligations duly accepted...and, conversely, a State cannot adduce, as against another State, its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[147]

Implicitly then, it is established that international law limits the sovereignty of State, since national law is the most important symbols of that sovereignty.

The contemporary State practice shows clearly that many important inroads and limitations of the classical concept of sovereignty have been made. They cover a wide range of issues (e.g. communication, the law of the sea, environment, air and space law, etc.). The creation of international organizations had in fact accelerated the process.

A. Sovereignty and Human Rights

Human rights as legal rights, first appeared in the context of international laws. In Britain important instruments were proclaimed (e.g. the 1628 Petition of Rights, the Habeas Corpus Act of 1676 and the Bill of Rights of 1689). In the US, the Declaration of Independence in 1776 and the Bill of Rights of the State of Virginia in the same year contained many important political and civil rights.

The most important internal instrument was the French "Déclaration des droits de l'homme et du citoyen" of 1789, which contained a modern formulation of human rights. However, on the international plan sovereignty reigned supreme. In this context, Shaw rightly observed that:

> "Virtually all matters that today would be classified as human rights issues were at

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147 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Denzig Territory (Adivisory Opinion), PCIJ Series A/B No.44, p.24. The same point was made very clear also in The Greco-Bulgarian "Communities" (Advisory Opinion), the PCIJ held that:

> "It is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".

PCIJ Series B, No.17, p.32.

that stage (the 19th century) universally regarded as within the internal sphere of national jurisdiction".[148]

The advent of the League of Nations did not change the situation much, its main concern was the preservation of peace between nations (Article 11). The result was as Mandelstam rightly noted:

"Mais en ce qui concerne la paix intérieure, en ce qui concerne la protection des droits primordiaux de l'homme contre des atteintes illégitimes de la part de l'Etat, la communauté internationale s'incline encore devant la souveraineté des Etats à moins que ceux-ci n'y aient dérogé eux-mêmes en vertu des traités particuliers".[149]

He then adds:

"Il faut donc reconnaître que la neutralité devant les crimes de lese-humanité est encore le droit commun".[150]

In contrast, the Minorities Treaties (14 in all) were seen as modest steps in the direction of the protection of human rights but their main weakness was they were confined only to some new small States in central Europe. The latter protested of discrimination and the unilateral limitation of their sovereignty.[151] Moreover, the Mandate System was mainly a political move, and was applied only to ex-colonies of the vanquished in the First World War.

The turning point came after the Second World War, it was realised that there is a link between violations of human rights and resort to war, the Nazi atrocities against their own citizens first, and later resort to war against independent States was a very good case. It was realised that maintenance of peace between States begin at home by respecting human rights and human dignity.

In the era of the UN Charter, the law of human rights has been developing and expanding in an unprecedented way and no one can deny that human rights constitute today an important part of contemporary international law. The UN Charter lays down the foundation of human rights in the Preamble and in Articles 1/3. 13/16, 55(c), 56, 62/2, 68, 76(c) and 78. These provisions were, however, formulated in a general and rather vague way which led some lawyers to speculate that they are not legally binding.

In this respect, Hudson stated:

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[148] M.N. Shaw: International Law. 2nd ed., Grotius, Cambridge, 1986, p.175.

[149] A.N. Mandelstam: La protection internationale des droits de l'homme. RCADI, 1931/IV, p.131.

[150] See also in this connection J. Dumas: La sauvegarde internationale des droits de l'homme. RCADI, 1937/I, pp.321-419.

[151] Thus, on Sept. 14th, 1925, Lithuania proposed in the 6th Session of the Assembly of the League of the Nations the elaboration of a general convention dealing with the rights and duties of States vis-à-vis their minorities between all members of the League. Its delegate observed:

"Il n'y aura pas d'unité morale possible entre les membres de la Société des Nations...tant que la souveraineté des uns sera limitée par un intérêt supérieur, alors que l'action des autres ne connaitra pas cette limite".

Mandelstam, op. cit., supra. n.149, p.143.

> "Whenever the question of respect for human rights appeared in the Charter...it was an aim to be achieved. The Charter did not in any way impose on the members of the UN a legal obligation to respect human rights and fundamental freedoms".[152]

However, this interpretation cannot be accepted. First, because the provisions in question are part of a binding legal instrument. Secondly, the practice of the UN shows very clearly that neither the generality nor the vagueness of those provisions have stopped the organization from considering them as legally binding on its members (e.g. the case of South Africa).[153]

It must be noted that the mission of translating the provisions of the UN Charter in concrete individual rights was left to other instruments. The first and most important general instrument was the Universal Declaration of Human Rights which was adopted without a negative vote on December 12th, 1948. It contains 30 Articles which covered a wide range of human rights. The Declaration in itself is not legally binding because it is a UNGA Resolution. Nevertheless, there is a wide measure of support that after 40 years it must be considered as binding. Thus, the ICJ in the Hostages Case (United States v. Iran) seems to treat the Declaration as a binding legal instrument, it held:

> "...Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".[154]

The Court considers the latter (the Declaration) as declaratory of 'fundamental principles' of international law which means that it has a legal obligatory effect.[155] After the Declaration, an endless host of conventions and resolutions on human rights have been adopted not only by the UN, but in some instances by specialised agencies such as UNESCO, the ILO and by some regional organisations.

The instruments dealing with human rights can be classified as Boven rightly suggested [156]

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[152] Cited by N. Singh: Enforcement of Human Rights. Martinus Nijhoff, 1986, p.21.

[153] Ibid, pp.24-27.

[154] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran) Case, ICJ Reports, 1980, p.42.

[155] Moreover, it is necessary to note that even the Soviet Union, which was one of the seven nations which abstained during the adoption of the Universal Declaration seems to take the Declaration as having a binding effect. Thus, in a debate in the UNCHR in Feb. 1968, its representative stated that:

> "...His governemnt has never considered United Nations activities in connection with the Universal Declaration of Human Rights to be theoritical".

He then added that his delegation:

> "...[N]ow appealed to all States to ensure that the Declaration did not remain a dead letter and that the Commission's obligations were honored in deed as well as words".

Cited by T.J.M. Zuijdwijk: Petioning the United Nations: A Study in Human Rights. Martin's Press, Gower St., New York, 1982, p.22.

[156] T. Van Boven: Survey of the Positive International Law of Human Rights, in Karel Vasak (ed.): The International Dimension of Human Rights. Translated, ed. & rev. by Philip Alston, Greenwood Press, Westport, Vol.1, 1982, pp.43-57,

into two main categories: First: general instruments of substantive human rights law, they are: the Universal Declaration, the two Covenants on Civil and Political Rights and on Social and Economic Rights. The European Convention on Human rights and the African Charter of Human Rights can be added to these documents.

The UN documents represent in fact a worldwide system for the promotion and protection of human rights. They contain a comprehensive enumeration of a very wide range of human rights, also the limits that States may impose on the exercise of those rights were set out clearly. The two Covenants are legally binding instruments. They were adopted on December 16th, 1966, entered into force in 1976 and by the 1st January 1989 the Social and Economic Covenant was ratified by 92 States and the Political Civil Covenant was ratified by 87 States.[157]

The regional instruments can be considered as a counterpart of the universal instrument, they contain specific versions of human rights which reflect the priorities of each region in that field together with a detailed procedure for their implementation.[158]

Secondly, in addition to these comprehensive instruments there are other human rights instruments, which are devoted to one specific subject, the UN has adopted a substantial number of them.[159] The ILO especially, has adopted a great number of treaties dealing with different aspects of human rights in the world of employment.[160] The UNESCO adopted few instruments dealing essentially with discrimination in education.[161] Likewise, regional organisations adopted many conventions and protocols dealing with specific human rights subjects.[162]

It must be noted that human rights instruments either general or specific, universal or regional, contain generally a system of implementation which is designed to make these conventions work in practice. The methods of such implementation, however, differ from convention to convention.[163]

It is also interesting to note that the UN has devised other mechanisms of implementation which are not linked specifically to any given instrument of human rights, but apply to all

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[157] 10 HRLJ, 1989, pp.111-112.

[158] The European Convention on Human Rights entered into force on the 3rd September 1953; on the 1st January 1989 it was ratified by 21 States. 8 Protocols were added to the Convention, some of them are in force (see for complete details, ibid, pp.112-114). The European Social Charter entered into force on February 26th, 1965, on the 1st January 1989 it was ratified by 15 States, ibid, p.114. The American Convention on Human Rights entered into force on July 7th, 1978, on the 1st January, 1989, it was ratified by 20 States, ibid, p.114. The African Charter on Human and Peoples Rights entered into force on October 21st, 1986; on 1st January, 1989, it was ratified by 35 States, ibid, p.114.

[159] See for details, ibid, pp.114-124.

[160] See ibid, pp.116-126.

[161] Ibid, p.124.

[162] See ibid, pp.112-123.

[163] For a detailed discussion of the problem of implementation see: M. Schreiber: La pratique récente des Nations Unies dans le domaine de la protection des droits de l'homme. RCADI, 1975/II, pp.303-389; N. Singh: Enforcement of Human Rights. Martinus Nijhoff, Dorderecht, Eastern Law House Private Ltd., Calcutta, 1986, pp.36-83; and L.B. Sohn: Human Rights: Their Implementation and Supervision by the United Nations, in T. Meron, (ed.): Human Rights in International Law: Legal and Policy Issues. Clarendon Press, Oxford, Vol. 2, 1984, pp.369-394.

human rights, such as the reporting system, where States are requested to make periodic reports to the UN on the progress achieved in the field of human rights in their country.[164]

However, the most important device is that of the well-known Resolution 1503 (XLVIII) adopted by the ECOSOC in 1970. This resolution in fact, authorizes the UNCHR to receive and examine communications from individuals or groups of individuals and non-Governmental organizations which reveal 'a constant pattern of gross and reliably attested violations of human rights'.

In this context, it is important to note that in 1982, over 27,000 communications relating to 76 countries were received by the UN, 318 replies were received from 41 Governments[165] which indicates that the procedure has given the UNCHR a useful means of curbing human rights violations. In addition to the UN Charter (provisions on human rights), and the Conventions which are confined exclusively to human rights, the State practice is also full of references to human rights, either in the form of bilateral or multilateral treaties or in declarations of State representatives in international conferences and in organs of the UN.

Thus, the communiqué of the Asian-African Conference (Bandoung 1955) included among the principles of the movement: "1. Respect for fundamental human rights and principles of the Charter of the United Nations".[166] The attachment of this group of States to the principle of sovereignty did not prevent them claiming their adherence to human rights too.

Moreover, in Stella Madzimbamuto v. Desmond William, Lardner-Burke and Frederick Philip George Case, the Judicial Committee of the Privy Council went even further. It held:

> "In modern international law criteria, a regime which does not conform to certain minimum standards of human rights is not in 'effective control' so as to entitle it to recognition. The regime in southern Rhodesia does not conform to these standards and it is thus not in effective control as evidenced by the absence of recognition by any other State in the international community".[167]

This is very important, human rights have been made in fact a central criteria of the legitimacy of any regime in the eyes of the international community. Furthermore, the recent 'Agreement for Peaceful Settlement in Central America (August, 7th, 1987)' between the States of Central America, stipulated that:

> "3. Democratization: The Governments commit themselves to promote authentic participatory and pluralistic democratic process involving promotion of social justice, respect for human rights, sovereignty, territorial integrity of States ... etc.".[168]

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[164] See Sohn, op. cit., supra. n.163, pp.373-376.

[165] Cited by R. Chatterjie: The United Nations, in R.J.Vincent (ed.): Foreign Policy and Human Rights: Issues and Responses. CUB, Cambridge, 1986, p.235.

[166] Supra. n.77, p.33.

[167] C. Parry and J.A. Hopkins, 9 BILC, (Supplement), 1966-1970, 1973, p.47.

[168] 26 ILM, 1987, p.1169.

Thus, again States confirm that they do not see any contradiction in proclaiming their attachment to the two principles of sovereignty and non-intervention and their adherence to human rights.

These developments in the field of human rights rise directly the limits of the concept of sovereignty in present day international law. It is argued here that the sovereignty of State has shrunk substantially in this particular field and it seems very doubtful whether the argument that human rights are solely within the domestic jurisdictions of the State can hold any longer. In this context, Buergenthal rightly observed that:

> "If one looks at the evolution of the past 75 years there is probably no other dramatic, more revolutionary development than the transformation of human rights from a subject deemed to be almost exclusively of domestic concern to one acknowledged to be of international concern".[169]

Human rights then have become a matter of international concern, and the claim of sovereignty cannot be used in cases of their violation. Indeed Warren Christopher, the US Deputy Secretary of State in President Carter's administration has rightly stated before the Senate Committee on Foreign Relations (he was advocating the ratification of 4 major human rights instruments):

> "Although there have been in the past differences of opinion as to what is and is not a matter of 'international concern' it seems clear today that no matter how widely or narrowly the boundaries of 'international concern' be drawn, a treaty concerning human rights falls squarely within them".[170]

Furthermore, President Carter at a White House meeting on November 11th, 1978, commemorating the 30th Anniversary of the Universal Declaration of Human Rights stated specifically:

> "...[W]e will speak out when individual rights are violated in other lands. The Universal Declaration means that no nation can draw the cloak of sovereignty over torture, officially sanctioned bigotry, or the destruction of freedom within its own borders".[171]

This is important, sovereignty can no longer mask or allow violations of human rights, third parties may and indeed can intervene at least verbally by denouncing such violations and thus creating a hostile world public opinion to any Government committing such violations.

On the other hand, Higgins summarised the position in the UN practice by pointing out that:

> "At first glance at the cases involved seems to indicate that the United Nations has long assumed that it has jurisdiction over matters concerned with human rights and fundamental freedoms, certainly it is difficult to think of a case where the United

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[169] Remarks by T. Buergenthal: Proceedings of the 75th Anniversary Convocation, American Society of International Law. Washington D.C. April 23-25, 1981, p.96.

[170] M.L. Nash: Digest of United States Practice in International Law. US Dept. of State, Washington D.C., (1979), 1983, p.488.

[171] Ibid, (1978), 1980, p.429.

Nations has refused to pass a resolution."[172]

This reading reading of the UN practice clearly leads to the conclusion that human rights are no longer within the domestic jurisdiction of the State.

However, Socialist writers who in fact, reflect the official positions of their States, seem to differ from Western doctrine in their assessment of the relationship between sovereignty and human rights. They stress two important points, namely Article 2/7 of the UN Charter and the idea that individuals can never be considered as subjects of international law. In this context, Szabo maintains that the matter of the relationship between sovereignty and the international protection of human rights since 1945 'has hinged upon Article 2 (7)".[173] He then stresses that:

> "The fact is that the recognition of human rights opens up a new area for international law at the United Nations in which the question of sovereignty remains entirely open. Here the State senses a threat on the part of the international community and out of principle takes a stand against the community".[174]

The reason, it seems, is that those States fear that the UN may use human rights as a cloak for intervention in their internal affairs. Moreover, they (human rights) may serve as a weapon of attack between States which adhere to different political and social systems and in many cases they are used as pretexts for fomenting international incidents.

Soviet doctrine and State official policy, seem to favour international control of human rights in cases of non-self-governing territories, trust territories and in cases of gross violations of human rights which may constitute a threat to international peace in the meaning of chapter VII of the UN Charter. This means that they distrust international control in the cases of individual situations of violations of human rights, in other words, they are against complaints by individuals to international organs.

In this context, a Soviet author, Kartshinkin stresses:

> "...[I]magining themselves to be fighters for human rights and freedoms, bourgeois scholars, diplomats and Statesmen are trying at the same time to sow distrust of Soviet internal and external policy...They are trying to replace the solution of problems of cardinal importance. The liquidation of large scale and gross violations of human rights and freedoms...with the question of so-called individual complaints and the protection of the rights of individual people".[175]

However, in a clear contrast to Karshinkin's view, a Polish lawyer Michatska maintains that:

> "...[U]nder the present realities the thesis that the leaving of human rights to the exclusive competence of the State is the only progressive and democratic solution is

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[172] R. Higgins: The Development of International Law through the Political Organs of the United Nations. OUP, 1963, p.118.

[173] I. Szabo: Historical Foundations of Human Rights, in Karel Vasak, (ed.), op. cit., supra. n.156, p.26.

[174] Ibid.

[175] Cited by R. Szawlowski: International Protection of Human Rights: A Soviet and A Polish View". 28 ICLQ, 1979, p.778.

unacceptable".[176]

And she then added:

> "An analysis of Article 2 (7) in connection with the remaining provisions of the Charter, in the light of the **travaux préparatoires** and finally, of practice, justifies, in my opinion the thesis that human rights do not belong to the internal competence of the State".[177]

This is a revolutionary view in the context of Communist doctrine, which sees its task as primarily of defending official positions of State.

However, it seems to me that it is important to distinguish between two questions, namely the implementation of international law that governs massive violations of human rights on one hand and that which governs the protection of specific individual rights, in this context, Buergenthal seems to me to be correct when he noted that:

> "...[T]he universal consensus about gross violations cuts across cultural and ideological boundaries that consensus is much weaker when it comes to specific individual civil and political rights'.[178]

In the last category of rights, one can speak of differences in ideology of regionalism and of cultural differences, he admits.

The conclusion which can be drawn from the above discussion is that sovereignty has been limited to a certain degree, it cannot be used especially to justify massive violations of human rights. In fact, the international community in the form of the UN, can validly intervene by way of discussion, taking resolutions, or even by using force under chapter VII of the UN Charter, if it can be established that the conduct of any State **vis-à-vis** its own citizens constitutes a threat to international peace and security. The latter example has never happened in practice, not because of the lack of the legal basis but because of the absence of political will and divergence of interests between the big powers.

The principle effect of this important conclusion is that in the context of internal conflicts, where massive violations of the most basic human rights (such as the right to life, prohibition of torture and inhuman treatment and the right to fair trial) are by no means uncommon. The international community may and indeed, can intervene by different means including force and that under Chapter VII of the UN Charter, in order to put an end to cases of massive and gross violations of human rights. The State concerned in my view is barred from using sovereignty to justify its inhumanity or to prevent the intervention of the international community either in peace times or even in cases of emergencies such as internal conflicts.

On the other hand, we must not exaggerate the impact of human rights on the traditional concept of sovereignty. In this perspective, I do not share the view that we are witnessing (in the era of the UN Charter) the emergence of sovereignty of man. This idea has been

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[176] Ibid, p.779.

[177] Ibid.

[178] Op. cit., supra. n.169, p.96.

advanced by an eminent jurist, H. Lauterpacht, who argued:

> "An international legal system which aims at effectively safeguarding human freedoms in all its aspects is no longer an abstraction. International law, which has been excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State".[179]

This statement raises fundamental theoretical questions of international law, such as the relation between the State and the individual (whether the latter is an object or subject of international law) and the relations between domestic and international law. However, I am not going to dwell upon these fields but it is indeed clear to me that Lauterpacht's statement is a pure wish, it has no support in practice.

Thus, Joyce is right when he pointed out that:

> "This passage might well become an opening call for the supreme battle of the twenty-first century. For twentieth century is dominated by the sovereign State. National sovereignty permeates countless resolutions and declarations that flow nowadays from the world forum."[180]

In my opinion, Lauterpacht's predictment ignores and underestimated the attachment especially of the newly independent State to sovereignty and their fierce fear of using human rights issues as grounds of intervention.

However, I think that whatever the merits of that fear, it cannot be used in any event to justify massive violations of human rights and the reign of terror. Sovereignty in order to be respected by the international community must guarantee first that human rights and human dignity, must be respected and not suppressed.

B. Self-Determination as a Limitation of Sovereignty

Self-determination is more than a simple human right, it is an essential condition for the enjoyment of all other human rights, because as the Egyptian delegate stated at the 1977 session of the UNCHR that:

> "The real enjoyment of all human rights and fundamental freedoms could be attained only when the right of self-determination has been achieved".[181]

This explains in part why both the Two Covenants of the UN of 1966 begin with a common Article (1) on self-determination. My concern is not to trace the historical development of the right of self-determination or its meaning but only its relation to the principle of sovereignty. Generally, there are two main views on this question. The first sees that there is a contradiction between the two principles. In this context, Pomerance writes:

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[179] Cited by J. Joyce: The New Politics of Human Rights. MacMillan, London, 1978, p.225.

[180] Ibid.

[181] Ibid, p.157.

> "It is no less true today than it was in Wilson's time that the principle of self-determination clashes inevitably with other principles equally sacred".[182]

She lists among those principles: sovereign equality and non-intervention. She seems to argue that the prohibition of the right of succession would subordinate the right of self-determination to sovereignty, hence empties self-determination of any real meaning.

Western practice seems to support such contention, self-determination is viewed as including the right of the people to choose the political form of their association with their own State, their right to determine freely the form of their Government and especially the right to reverse by democratic means the prevailing political and social order in their State. This interpretation of the right of self-determination will implicitly allow secession. However, Pomerance's view and even the practice of Western world express the minority view.

The second and popular view sees no contradiction between sovereignty and self-determination, the UN practice supports this position. Sovereignty according to this view cannot be used as a justification for denying colonial peoples and territories under alien and racist regimes, their right to self-determination, in this case their self-determination is a very strong limitation on the sovereignty of States which control those peoples and territories.

In the case of independent States which do not subjugate other peoples and territories, the Friendly Relations Resolution 2625 of 1970 seems to put respect for the two principles on equal footing. The Declaration stresses that the effective application of the principle of self-determination is based on respect for the principle of sovereign equality, which includes among other things total respect for territorial integrity and political independence and the right of every State to choose its political and social systems.

Nevertheless, the State in order to enjoy these rights, it must as the Declaration emphasises, act in 'compliance with the principle of equal rights and self-determination of peoples'. This means, in my view, that self-determination is a limitation on the sovereignty of all States including the newly independent States, in the sense that they can invoke sovereignty against intervention in their internal affairs, but they must first conduct themselves in accordance with the right of self-determination, by respecting the totality of human rights. Respect for human rights is the new name of self-determination in my view.

The conclusion is that self-determination limits the sovereignty of the State in the sense that the latter is obliged to respect human rights, if it is to enjoy the benefits of sovereignty.

C. Prohibition of the Use of Force as a Limitation on State Sovereignty

Before the advent of the League of Nations, resort to war and the use of force in its different forms such as reprisals and retorsion, were accepted and recognised as cardinal components of State sovereignty. In fact, resort to war was recognized as a legal means by which the State can conduct its external affairs. As a result, the State can either negotiate

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[182] M. Pomerance: Self-determination in Law and Practice. Martinus Nijhoff, The Hague/London, 1982, p.43.

or resort to war, everything depends on the vitality of the interests at stake. Randelzhofer summarises the position before the 20th century as follows:

> "Prior to this century [the 20th] no prohibition of the use of force existed. States were free to resort to war. The medieval theory of bellum justum was developed by theologians and was never a valid rule of public international law. Furthermore this theory lost its war-preventing properties when it became accepted that war could be just for both sides.[183]

This means that international law at that period did not impose any limits of the sovereignty of State in the field of resorting to war.

The League of Nations system did not in fact prohibit war or resort to it, it merely sets up some procedures which States have to observe before resorting to war. Members should according to the Covenant (see especially Articles 10-16) submit disputes likely to lead to a rupture, to arbitration or judicial settlement or inquiry by the Council of the League. Members were prohibited from resorting to war until three months after the arbitral award or judicial decision or report by the Council. Implicitly then the League did not limit the sovereignty of the State in any significant way, since ultimately the State can resort to war if it wishes so, it has only to wait for the expiration of three months. Wehberg notes in this respect that:

> "Même des esprits progressistes à cette époque (1919) considéraient le jus belli ac pacis comme un attribut décisif de la souveraineté de l'Etat".[184]

However, in order to close the gaps in the covenant a very important step was taken, by the signing in 1928 of the General Treaty for the Renunciation of War (The Kellog-Briand Pact) The first Article stipulates:

> "The High Contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the resolution of international controversies and renounce it as an instrument of national policy in their relations with one another."[185]

The Pact, in fact, contained major deficiencies among them: Firstly the absence of any specific sanctions for its breach, Secondly it did not prohibit the use of force in cases short of war and thirdly it contained no machinery for the control of its execution. But, its major setback was that it was not able to prevent the outbreak of World War Two.

Despite all these shortcomings, the Pact has never been terminated which indicates clearly that there is a widespread acceptance that resort to war, except in self-defence is a very valid limitation on State sovereignty.

However, the most important development in contemporary international law concerning

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[183] A. Randelzhofer: The Use of Force in Bernhardt (ed.) Encyclopedia of Public International Law [instalment 4 (1982) pp. 265-266].

[184] H. Wehberg: Interdiction du recours à la force: le principe et les problèmes qui se posent. RCADI, 1951/I, p.33.

[185] H.W. Briggs: The Law of Nations: Cases, Documents and Notes. 2nd ed., Appleton Century Crofts, New York, 1959, p.968.

the prohibition of the use of force, has come with the advent of the UN Charter. Article 2/4 stipulates that:

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations".[186]

The UN Charter does not prohibit the use of force in cases of self-defence (Article 51) or when a decision by the UNSC for collective actions is taken in accordance with its Chapter VII of the UN Charter.

Moreover, the UN practice has established that the use of force for the purpose of attaining self-determination, by colonial peoples and peoples under alien and racist regimes, is not in breach of Article 2/4, the Friendly Relations Resolution (2625) and the Declaration on the Definition of Aggression of 1974, among other resolutions support such contentions. The ICJ in the Nicaragua Case has in fact stressed that the rule contained in Article 2/4, has become a rule of customary law or even a rule of **jus cogens**. It held:

> "...[A] further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2 (4), of the Charter of the United Nations may be found in the fact that it is referred to in statements by State representatives as being not only a principle of customary law but a fundamental or cardinal principle of customary law".[187]

Implicitly then, the Court confirms strongly the proposition that the ban on the use of force is an important limitation on State sovereignty. It is to be noted that the Court also made a very important statement concerning the use of force for the protection of human rights by individual States. It stressed that:

> "In any event, while the United States might form its own appraisal of the situation as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect".[188]

The effect of this statement is that individual States cannot claim by their individual capacity to have the right of the so-called humanitarian intervention, in the era of the UN Charter. However, there is nothing in the statement of the Court which can exclude the organization of the UN to exercise such rights. It must be remembered in this context that especially in the 19th and the beginning of the 20th century, some writers have pretended that under international law States can intervene in other States to stop violation of human rights. Borchard states that:

> "....[W]here a State under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other States of the family of nations are authorized by international law to intervene on grounds of

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[186] Ibid, p.971.

[187] Op. cit., supra. n.70, para.190, p.1066.

[188] Ibid, para 268, p.1083.

humanity".[189]

This position, however, which was supported by some prominent lawyers such as Stowell,[190] and Hall,[191] was not supported by the whole doctrine. Thus, Rougier noted that:

> "It must be recognized that the grounds of humanity is the most delicate of the causes which may be expected to justify the right of intervention and that it raises judicial difficulties in regard to the basis and the extent of this right".[192]

Those who support humanitarian intervention point to the State practice such as the intervention of Britain, France and Russia in Greece in 1827 and especially the intervention of France in Syria in 1860. However, in my opinion, those classical interventions were arbitrary and politically motivated. They were mostly against the Ottoman Empire which has a different religion and was very weak militarily.

Moreover, there is evidence that even the intervention of France in Lebanon in 1860 (which is seen even by Brownlie as a true case of humanitarian intervention),[193] that the Christians were the party which provoked the crisis, knowing in advance that their Christian brothers would come in help in the event of their plans failing.[194]

However, I think that the most important evidence that humanitarian intervention is a political device only is provided by the case of Nazi regime. That regime committed terrible atrocities against its own citizen but no State claimed resort to humanitarian intervention despite the fact that all its conditions were present, since a policy of extermination was planned to get rid of a section of the population because of difference of religion.

Even in the era of the UN Charter, some writers mostly Americans (Lillich, Moore and Reisman among others) still insist that humanitarian intervention is legal. Their main argument is that since the UN cannot act in cases of flagrant violations of human rights by one State against its own citizens, because of the use of the veto, individual States may in such cases and circumstances resort to humanitarian intervention. Furthermore, humanitarian intervention has been advanced as one of the many grounds for the use of force and intervention in many cases (e.g. Hungary in 1956; the Dominican Republic in 1960; Congolese (Zaire) intervention in 1960, 1964 and 1978; Czechoslovakia in 1968; South Africa in the Angolan civil war in 1975; Bangladesh in 1971; Indonesia intervention in East Timor in 1975, Kampuchea in 1979; the US and six Caribbean States in Grenada (1985) and

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[189] L.B. Sohn and T. Buergenthal: International Protection of Human Rights. The Bobbs-Merrill Cie., Inc., Indianapolis, Kansas City, New York, 1973, p.139

[190] Ibid, pp.139-141.

[191] Ibid, pp.141-143.

[192] Ibid, p.139.

[193] I. Brownlie: International Law and the Use of Force. Clarendon Press, Oxford, 1963, p.340.

[194] See on that precise point: T.N. Frank and N.S. Rodley: After Bangladesh: The Law of Humanitarian Intervention by Military Force. 67 AJIL, 1973, p.282.

the Tanzanian intervention in Uganda 1979-1980).[195] However, the UN has never endorsed any of those actions. Thus, for instances in the case of the Vietnamese intervention in Kampuchea, the US delegate after observing that no State has the right to impose one Government on another stressed that:

> "The international community could not allow to pass in silence the acts that had just taken place to do so would only encourage Governments in other parts of the world to conclude that there were no norms, no standards, no restrictions".[196]

Also, in the case of the Tanzanian invasion of Uganda, Wani after revealing the real motives behind the Tanzanian invasion, concluded that:

> "The Tanzanian invasion had at least the single most positive attribute of removing Amin from power and raising the hopes of Ugandans for a new life where they were once resigned to suffering. The real objective of the invasion had more to do with Nyrere's and Tanzania's prestige and a deep seated commitment by Nyrere to return his friend Obote to power".[197]

This state of affairs confirms Brownlie's conclusion that:

> "There is little or no reason to believe that humanitarian intervention is lawful within the regime of the Charter."[198]

He then adds:

> "There is virtually no modern State practice to support that such a right exists".[199]

The above mentioned ICJ view confirms the correctness of such assertions. It must be stressed that it is only humanitarian intervention by one State or a group of States acting outside the UN which is prohibited since the UN can always act by intervening in any State which violates consistently and grossly the most basic human rights of its own citizens, either in peace time or even in internal conflicts. It can do so under Chapter VII of the UN Charter, when it sees that the situation in the country constitutes a threat to international peace and security. However, the UN has never acted in that way, mainly because of political reasons. The legal basis in the UN Charter does exist and is waiting of its use. Thus, there is nothing to prevent the UN from intervention in internal conflicts, when widespread and massive violations of human rights exist. This is another important limitation on State sovereignty.

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[195] Wild-Verwey: Humanitarian Intervention, in A. Cassese (ed.): The Current Legal Regulations of the Use of Force. Martinus Nijhoff, 1986, pp.60-67

[196] Cited by I.J. Wani: Humanitarian Intervention and the Tanzanian-Ugandan War. 3 Horn of Africa, p.22.

[197] Ibid, p.26.

[198] I.Brownlie: The United Nations Charter and the Use of Force 1945-1985, in Cassese, op. cit., supra. 195, p.500.

[199] Ibid.

CHAPTER TWO

THE PRINCIPLE OF NON-INTERVENTION

Introduction

Together with the principle of sovereignty, the principle of non-intervention has also been advanced as a justification for the non-extension of humanitarian law to internal wars. It has been said that the principle, among other things, excludes any international regulations of the conduct of the established Government vis-à-vis its local opponents, any such exercise will result inevitably in opening the door for outside interventions and this leads to the worsening of the internal conflicts. A careful reading of the proceedings of the two Diplomatic Conferences of 1949 and 1974-1977 would confirm that the principle was used extensively by States, first to resist any attempt at regulating internal wars and thereafter to restrict and limit the content of such regulation.

This state of affairs, in my view, imposes the need for a real investigation and analysis of the concept of non-intervention, its place, meaning and limits in traditional and contemporary international law. Moreover, it is necessary to elucidate the question of intervention in civil wars, as it is the most relevant to my research.

Section I: Reasons for the Increase in Interventionary Activity

According to one view intervention is the natural product of the existing system of international society, the combined effect of the absence of a central authority on the universal level, on one hand, and the existence of great powers, on the other hand, will lead automatically to the situation, where the big will intervene in the affairs of the weak. Intervention then, in the opinion of some writers, is the logical consequence of greatness, Barnet states such idea as follows:

> "Intervention, with all its paraphernalia-the aid missions, the CIA operations, the roaming fleet bristling with nuclear weapons, the Green Berets, the pacification teams, and ultimately the expeditionary forces-is the inevitable consequences of greatness-it is the burden and the glory of the republic".[1]

Intervention in the internal affairs of others, is then among the means by which the great power conducts its own affairs. Halpern in fact stresses that:

> "...[A] great power intervenes in the domestic realm of other States when it says 'yes' and when it says 'no' indeed by its sheer existence".[2]

The logical consequences of such assertions is that the independence of especially weaker members of the international community is pure fiction, also any attempt at proclaiming

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[1] R.J. Barnet: Intervention and Revolution: The US in the Third World. Mac Gibbon & Kee. 1970, pp.112-13.

[2] M. Halpern: Morality and Politics, in J.Rosnau, (ed.): International Aspects of Civil Strife. PUP, Princeton. New Jersey. 1964. p.251.

the principle of non-intervention in the relations between States, would go against the logic of the composition of the international community.

To me, these kinds of arguments are not convincing because they are in contradiction with contemporary international law, which stresses the sovereign equality of its members on the legal level. Besides, even 'greatness' must be subjected to law which is based, among other things, on respect for sovereignty, political independence and territorial integrity, otherwise we will go back to the bad old times, where the strong behaved as in the state of nature (in the Hobsian sense) by intervening, invading, and colonizing weak communities.

However, in the face of the rapid increase in interventionary activities especially, as from the 1960s up to now, intervention has become an increasingly prominent feature of international system. This led a host of political scientists and lawyers to study the subject of intervention and thereby suggest the main reasons for its increase.

In this context, Little suggests three main reasons as an answer: (i) The proliferations of nation States, most of which were not considered to be capable of maintaining their independence. (ii) The existence of a sharp ideological cleavage between the two 'superpowers' which precipitated attempts to gain support from new States. (iii) Finally, the production of nuclear weapons which eliminates the possibility of war between the two major actors and encourages them to employ subversive tactics.[3]

On the other hand, Moore advances four reasons for explaining the phenomenon of intervention in internal conflicts: A. The nuclear confrontation.

B. The shift from a stable to a revolutionary system.

C. An accelerating rate of social change in developing countries with the result of a decrease in stability.

D. Finally, the militancy of some new leaders who advocate full use of force for the expansion of ideology.[4]

Thus, if the prospect of nuclear confrontation and its obvious consequences of mutual defeat for the superpowers, has protected Europe from violence, and has given it the longest peace period in the recent history. The fate of the Third World is the opposite. It has become the battle ground for the confrontation between the superpowers. The dire problems of underdevelopment and the inequalities of the distributions of wealth within those societies have, in many instances, given rise to widespread dissatisfaction within the population, and have induced parts of that population to take arms against their own Governments.

The superpowers, especially have mercilessly exploited such situations, by aiding and assisting the faction which can further their ideology, interests and influence. Civil wars in the words of Falk:

> "...[P]resent expanding nations and blocs with opportunities for strategic expansion that does not involve the high risks of reaching those self-destructive levels of conflict that are likely to attend major armed attacks across international

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[3] R. Little: Intervention. Rowman & Littlefield, Totow, New Jersey, 1975, p.4.

[4] J.N. Moore: Law and the Indo-China War. PUP, Princeton, New Jersey, 1972, p.83.

boundaries".[5]

This means that the rule of non-intervention is under heavy pressure, in fact, it is either the observance of the law in the form of abstaining from interference (which in the opinion of the intervening States will result in political defeat), or non-observance which may very easily lead to political victory.

The behaviour of the superpowers especially, in this period (of the 1980s) confirms to a large extent the above observation. The arrival of president Reagan's administration indicated that the Americans are not in the mood of tolerating any more Soviet moves in the Third World. In this respect, the US President, Mr. Reagan warned that:

> "...[T]he US should intervene in wars in the Third World countries whenever there is a chance to fight Soviet or Marxist influence, it should do so all round the world, without regard to particular local conditions. Constraints on American power too must yield to the ideological imperatives".[6]

The Americans seem to give precedence to their ideological preferences over the duty of adhering to the law.

The mood of the Soviets, however, was stated in the Report of the CPSU Central Committee to the 27th Congress in the following terms:

> "Capitalism regarded the birth of Socialism as an 'error' of history which must be 'rectified', it was to be rectified at any cost by any means irrespective of law and morality: by armed intervention, economic blockade, subversive activity, sanctions and 'punishments' or rejection of all cooperation. But nothing could interfere with the consolidation of the new system and its historical right to live".[7]

The Soviets believe deeply that the spread of socialism to all parts of the world is a historical verdict, no force can stop that process. Moreover, they see that the conditions in many Third World countries are ripe for social revolution, and that their duty is to help and assist the progressive forces to take over political power.

The Americans on the other hand, believe that their duty, on behalf of the free world, is to stop the process of revolutionary change whenever Communists are involved. They are certain that without Soviet intervention, internal conflicts and upheavals will not end in the victory of local Communists. Rostow argues in this regard that:

> "...[W]e Americans are confident that, if the independence of this process (of Modernisation) can be maintained over the coming years and decades, these societies (the developing ones) will choose their own versions of what we would recognise as a democratic, open society".[8]

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[5] R. Falk: The International Law of Internal War, in J. Rosman, (ed.): op. cit., supra. n.2, p.188.

[6] New York Times (Dec. 9th, 1985) cited in the International Affairs (Moscow) 10/1986, p.12. See also P.J. Schraeder: Intervention in the 1980s. US Foreign Policy in the Third World. Lynner Rienner Pub., Boulder, London, 1989.

[7] International Affairs (Moscow) 10/1986, p.12.

[8] W. Rostow: Countering Guerilla Attack, Army Magazine, Sept. 1961, reproduced in R. Falk, (ed.)., The Vietnam War and International Law. PUP, Princeton, 1968, p.129.

This means that the Americans too believe that the fate of humanity in its poor parts is connected with the values of the open society, and they see it as their mission to protect this process.[9]

The struggle sometimes takes the overtones of the religious language of bygone ages, Rostow insists that:

> "...[D]espite all the Communist talk of aiding the movements of national independence they are driven in the end by the nature of their system, to violate the independence of nations"[10]

He then confidently asserts the 'noble' American motives:

> "Despite all the Communist talk of American imperialism we are committed, by the nature of our system to support the cause of national independence and the truth will come out".[11]

However, the 'support for the cause of independence' which Rostow talks about, includes among other things "learning to deter guerilla warfare, if possible and deal with it if necessary".[12] This philosophy which advocates intervention to the maximum has been applied to Vietnam, and everybody knows the high cost for international law, and especially the terrible human sufferings of the population.

Also, as I stressed before, in the 1980s the Americans are again buoyant, feeling that the Soviets must be stopped in the Third World, since in their view the Communists are behind all internal conflicts, in this respect Shultz the American Secretary of State wrote:

> "...[T]en to fifteen years ago when the US was beset by economic difficulties neglecting its defences, and hesitant about its role in the world, the Soviets exploited the conditions".[13]

He then added:

> "...[T]hey [the Soviets] and their clients moved more boldly in the geopolitical arena, intervening in such places as Angola Kampuchea, Ethiopia and Afghanistan, believing that the West was incapable of resisting".[14]

The Secretary of State does not advocate restraints and non-intervention as the best policy for keeping order in the world. On the contrary he feels that the US must react by assisting and aiding any faction which resists the Communists, he seems to be proud that in the 1980s, the picture has changed precisely because the Americans are on the offensive in the struggle for the Third World.

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[9]"This is our mission not the mission of Communists", proclaims Rostow. Ibid.

[10]Ibid, p.130.

[11]Ibid.

[12]Ibid, p.131.

[13]G.P. Shultz: New Realities and New Ways of Thinking, 63 Foreign Affairs, 1985, p.706.

[14]Ibid.

He thinks that communism is on the retreat and the Western values of peace, democracy, liberty and human rights are on the offensive, he confidently asserts that:

> "...[T]oday we see a significant new phenomenon, after years of guerrilla insurgency led by Communists against pro-Western Governments, we now see dramatic and heartening examples of popular insurgencies against the Communist regimes".[15]

His strategic shift in the struggle between the superpowers which, taking place in the Third World, will mean in practice that the US in the opinions of the Reagan Administration, has a duty to assist the anti-Communist insurgencies in Afghanistan, Angola, Nicaragua and many others; otherwise, as he put it:

> "...[I]f we turn our backs on this tradition (the American tradition of supporting the struggle of other peoples for freedom and democracy) we would be conceding the Soviet Union that Communist revolutions are irreversible while everything else is up for grabs, we would be in effect, enacting the Brezhnev doctrine into American law".[16]

This is a clear advocacy of intervention in civil wars, which are taking place especially in the Third World, no legal restraints seem to be taken into consideration. The argument is simple, because they intervene we have to intervene, as he States:

> "...[S]o long as Communist dictatorships feel free to aid, and abet insurgencies in the name of 'Socialist internationalism' why must the democracies-the target of this threat-be inhibited from defending their own interests and the cause of democracy".[17]

This is a summing up of the mood of the decision makers of a great power, which, in my opinion, leads to a very dangerous situation, where international law has no impact whatsoever on the actions and decisions of the most powerful nation on earth. The conclusion is that intervention activities, especially in internal wars, has increased. The underlying reasons for such State of affairs are connected with the rift between the superpowers and their mutual distrust. Third World countries are the first target of such activity, because of their internal contradictions, and the absence of democracy, this makes rebellion attractive to the unsatisfied part of the population.

This situation led Third World countries especially, to see in any action, even that aimed at making internal wars more human, as opening the door to more intervention in their internal affairs by external countries, and by consequence as attempts at undermining their independence.

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[15] Ibid.

[16] Ibid, p.713.

[17] Ibid.

Section II: Definition of Intervention

A. Intervention in Historical Perspective

The history of intervention is the history of the State itself, it is in the words of Fawcett "an old political habit even a necessity"[18], the same author emphasises that:

> "...[S]ince the emergence of nation-States has there not been intervention in progress somewhere"[19].

Verzijl stresses in the same context that:

> "If we look at the subject (of intervention) from a historical point of view we find ourselves faced with an endless series of interventions".[20]

Thus, on August 25th, 1215, England's **Magna Carta** was declared by Pope Innocent III to be null and void. However, this was in the era before the birth of the modern State. Nevertheless in practice, even after the birth of the modern system of States after 1648 (Treaty of Westphalia) which was based upon independence and non-intervention, interferences occurred and alliances were created to intervene in the affairs of other States, in order to prevent change of the political authority, or to force such change.

The history of the actions of Russia, Prussia, Great Britain and Austria are well known after the fall of Napoleon, the Quadruple Treaty of Alliance between those powers of November 20th, 1815 stipulates that:

> "Le repos de l'Europe est essentiellement lié à l'affermissement de l'ordre des choses (de le dernier attentent de Napoleon Bonaparte avait momentanément subvertu) fondé sur le maintain de l'autorité royale et de la charte constitutionnelle".[21]

In practice, this policy meant that any attempt to rebel against the Royal regimes in any part of Europe, even when the revolt is widespread will be crushed by the intervention of the said powers on the side of the established Royal regime.[22]

Pitman B. Potter reveals that:

> "On peut donc résumer l'histoire de la pratique de l'intervention en Europe depuis la revolution Française jusqu'à nos jours, en disant que l'intervention s'est élargie en ce qui concerne sa base, ses méthodes, ses objectifs et sa reconnaissance juridique".[23]

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[18] J. Fawcett: Intervention in International Law: A Study of Recent Cases, RCADI, 1961/II, p.347.

[19] Ibid.

[20] J.H.W. Verzijl: International Law in Historical Perspective. Vol.1: General Subjects. A.W. Sijthoff, Leyden 1968, p.238.

[21] Cited by Verzijl, ibid, p.239.

[22] Thus, in 1821, following successful revolutions against Royal Absolutism in Spain and Naples, French and Austrian troops, respectively dispatched wider aegis of the Holy Alliance, intervened to restore eager Monarchs to their full prerogatives. Cited by T.J. Farer: The Regulation of Foreign Intervention in Civil Armed Conflict. RCADI, 1974/II, p.320.

[23] P.B. Potter: L'intervention en droit international. RCADI, 1930/II, p.633.

He adds that intervention had been resorted to more often than the 18th century especially by the European powers and the US.

In my opinion, colonialism includes among other things intervention in the internal affairs of non-European States and entities, thus for the Third World the experience was even worse, conquest, aggressions and military interventions, were accepted as legal devices, in order to gain new territories, influence and markets.

In this context, it is not strange that Stewart Mill advocated non-intervention between the States which possess the same degree of civilization and intervention in States and entities, which are of a 'low grade of social improvements'[24]. He writes:

> "The sacred duties which civilized nations owe to the independence and nationality of each other are not binding towards those whom nationality and independence are either a certain evil, or at least a questionable good."[25]

He calls them 'barbarians' and to him they have no rights as nations. Thus, according to him:

> "The criticisms therefore, which are so often made upon the conduct of the French in Algeria and on the English in India, proceed it would seem, mostly on a wrong principle"[26]

This means that the right principle justifies morally and legally interventions in barbarian States without limits. On the other hand, between civilised States intervention was not justified at least theoretically.

However, especially after the advent of the UN, and under the influence of the newly independent States, the former and the actual victims of interventions, a real legal stock of treaties bilateral and multilateral, UN resolutions and the ICJ pronouncements, especially the last one in Nicaragua Case 1986, non-intervention has acquired a very important place at least on the normative level.

B. The Definition of Intervention

If it is clear that the control of intervention, in general, and intervention in domestic conflicts, is one of the most difficult problems, confronting the future of peace and security in the world and also the future of international law, then the question of definition of intervention is very important since it will help in identifying what constitutes that activity and reveal the extent to which international law has tried to limit the legality of interventions.

On the other hand, it must be noted that many Western lawyers especially, express the opinion that any attempt at defining 'intervention' will lead to confusion. Part of the confusion as Moore feels, lies in 'the tendency to define intervention in high level

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[24] J.S. Mill: A Few Words on Non-Intervention, in Falk (ed.)., op. cit., supra. n.8, p.32.

[25] Ibid.

[26] Ibid, p.33.

generalisation without careful separation of the issues and contexts"[27] whereas Potter attributes the situation to:

> "A cause de sa large utilisation (intervention) par tant d'auteurs qui l'ont appliqué à nombre de phénomènes, qui diffèrent considérablement entre eux, ce terme est arrivé maintenant à posséder une significance emminemment variable et uncertaine."[28]

He then adds:

> "Il suffit, à l'heure actuelle, de prononcer le mot intervention pour provoquer, chez beaucoup de spécialistes de droit international un sourire, voir un froncement de sourcils."[29]

In my opinion, lawyers who think that there is a great confusion in the definition and the law of intervention are generally those who think that any flat prohibition of intervention in whatever form, is not a realistic exercise and that the rule of non-intervention must yield to the exigencies of the real international life, where interventions are sometimes welcomed, due among other things, to the inactivity of the UN, in the face of some important problems. They maitain, or at least, a portion of them think, that it is imperative to review the rule of non-intervention because it is sometimes in contradiction with State practice.

On the other hand, it must be noted that the talk of the existence of a great confusion in the subject of intervention, did not prevent the doctrine from attempting at formulating definitions of the subject.

Vattel who is to be the first lawyer who tried to lay down the theoretical foundations of non-intervention, as the corner stone of a system of international law, which is based on equal sovereign members, in his view, non-intervention is the logical consequence of freedom, it indicated that all States have the full right to govern themselves in any way they choose. No third party can intervene in such a process.[30]

This means in my opinion that intervention is principally forbidden in whatever form, the reason used by Vattel is that States are like persons. They are obliged to refrain from doing anything to each other even for a supposed good.[31]

However, it is to be observed that in the era before the UN and even after the UN at least for some Western lawyers, the element of coercion and the use of force have played a significant role in defining some actions of States as interventions, which means that all forms which do not involve military force were considered not constituting interventions.

Winfield typifies this trend when he states:

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[27] Op. cit., supra. n.4, p.127.

[28] Supra. n.23, p.611.

[29] Ibid, p.612.

[30] Op. cit., supra. chapter 1, n.9, p.297.

[31] In this context, Carty stresses that Vattel "drew upon a tradition of natural law which especially rejected the possibility that any individual could enjoy a divine or natural authority over another", (Op. cit., supra. chapter 1, n.103, p.89).

> "As to the amount of meddling necessary to constitute intervention, there must be compulsion or the threat thereof, and the threat is to be understood as a direct or indirect request by one State to the parties or one party in the context to do or refrain from doing something upon pain of violence"[32]

He accepts the view of Westlake that tender of advice may be injudious, but it is not intervention, he suggests that such advice may be treated as a 'pacific intervention'. Also to him bloodshed is undesirable but it is an inevitable incident. Lawrence is even more explicit, he writes:

> "There can be no intervention without on one hand, the presence of force naked or veiled, and, on the other hand, the absence of the consent on the part of both the combatants".[33]

This means that other acts which do not involve force, are not to be seen as constituting intervention. Stowell on the other hand, observes that:

> "Depuis longtemps déjà, le mot d'intervention est employé dans les affaires internationales pour désigner le recours à des mésures de force, soit sous forme de menace, en vue d'obtenir que les autres Etats adoptent une certain ligne de conduite, ou de mettre fin à des hostilités ou autres activités indésirables".[34]

For Hall, intervention is 'not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war'.[35] Intervention is then viewed as a 'surgical operation' its goal is to oblige the victim to do or to refrain from doing some particular action.

It is very easy to infer from these definitions that intervention will be used in practice only by powerful nations, since no small power can oblige a strong State to do or refrain from doing a particular action. Moreover, we can infer that the powers which resort to intervention are the final judges in deciding whether to intervene or not. In this respect, Winfield cites the examples of France sending naval forces to Korea in 1866, the reason was the murder of a French vicar, also in 1838 France intervened in Argentina, by instituting

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[32] Supra. n.30, p.140.

[33] T.J. Laurence: The Principles of International Law. 4th ed. Rev. & rewritten, MacMillan & Co. Ltd., London, 1913, p.124. In the same context, P.H. Winfield emphasised the prevailing view in that era by saying that:

> "The essence of intervention is compulsion, actual or threatened, by one State against another, or against one or both of two disputant parties in another State".

He then cited 33 grounds on which intervention was supported by jurists and Statesmen, among them:

> "...[T]he balance of power, to maintain the existing order of things, to secure perpetual peace, a crime of a Government against its subjects, maltreatment of aliens. On grounds of morality, humanity, nationality, necessity, policy and religion".

The Grounds of Intervention in International Law. 5 BYIL, 1924, pp.149-150.

[34] E.C. Stowell: La théorie et la pratique de l'intervention. RCADI, 1932/II, p.91.

[35] Hall, W.E.: A Treatise on International Law. 7th ed., Higgins, A.P. (ed.). Clarendon Press, London, New York, Toronto, Bombay, 1917, p.293.

a blockade on the coast of Buenos Aires, the reason being the 'unjust imprisonment of two French subjects' and because six other French subjects have been obliged to serve in the native army.

Oppenheim gives a definition which is often quoted as reflecting the view of classical international law on the subject. He States:

> "...[I]ntervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual conditions of things".[36]

The word 'dictatorial' has been interpreted as meaning first that the intervening State acts without being invited by the target State. Secondly, that the intervening State uses the threat or use of force. He stresses that intervention in order to be forbidden by international law '...must be always dictatorial, not interference pure and simple'[37] which means that other forms are legal in principle. Oppenheim's definition which is used as a standard definition of classical international law, has been attacked by Moore, who after quoting the definition observed:

> "Such definitions are by themselves so devoid of content that any real meaning they convey is little more than pseudo-knowledge comparable to saying that sleeping pills put one to sleep because they contain a dormative agent".[38]

This remark enters in the whole policy of the school of policy oriented approach, which stresses that any simplistic definition, will not cover the complex nature of the phenomenon of intervention.

The conclusion is that intervention, from Vattel onwards has been seen as violation of the sovereignty and independence of the State against which it is used. This is a very important result for international law, and the survival of the international system as a whole. It means, at least theoretically, that States aspire for a more orderly world, where the strong has some limits which must be respected in his relationships with the weaker members of the international community, non-intervention excludes by its nature any state of nature approach to international relations.

On the negative side, the concrete definitions of intervention, did not adhere completely to the declared general principle of non-intervention advocated by Vattel and others. They defined the prohibited intervention, as that which contains the elements of coercion and force, thus other forms which were widespread (such as economic and diplomatic interventions) and even more dangerous were not considered to be worthy of prohibition.

State practice is, in fact, in many respects, opposite to the general principle (of non-intervention) and even to the definitions of the prohibited intervention suggested by lawyers. Thus, the Holy Alliance, considered intervention by whatever means against any

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[36] L. Oppenheim: International Law: A Treatise. Vol.1, Peace. H. Lauterpacht, (ed.)., 8th ed., Longmans, Green & Co, London, New York, Toronto, 1955, p.305.

[37] Ibid.

[38] Op. cit., supra. n.4, p.128.

rising against Monarchy in Europe as legitimate and acted upon that premise in many instances.

The US intervened extensively in central and Latin America essentially for the protection of economic interests of its subjects in the area.

European powerful nations also intervened extensively in the internal affairs of Asian and African States and communities, the flagrant examples are the repeated interests of different European powers in the ottoman Empire, which led to its eventual disintegration, also the intervention of France and then Britain in Egypt, and the intervention of France in Tunisia and Morocco.

This state of affairs leads me to conclude that non-intervention was basically derived from natural law and the logic of State sovereignty, rather than State practice.

C. The Position of Intervention after the Charter

There are in general two currents, concerning what intervention includes and whether there are exceptions to the rule of non-intervention in contemporary international law. The first view holds that the situation after the Charter, has changed dramatically for the legal position of the principle of non-intervention.

Thus, when reading closely Articles 2/4 and 2/7 of the UN Charter together with the legal stock of treaties, Charters and resolutions condemning intervention in the internal affairs of other States, the result is clear, the principle (of non-intervention) has been strengthened, the rule is absolute, no exceptions can be admitted.

Moreover, according to this view intervention has been defined in a way that it does not cover only coercive intervention, but any other form of intervention such as economic, diplomatic and ideological interventions.

This view is held generally by the victims of intervention in the past and in the present (Third World States) and by socialist States. However, for the Soviets the principle of non-intervention is adhered to and insisted upon in the relations with the non-socialist world,[39] but with socialist States, the principle of 'proletarian internationalism' is the rule. This rule in practice meant that Socialist States can intervene in any socialist State, whenever socialism is threatened. The Brezhnev Doctrine is a concrete example of such an interpretation.

According to that doctrine 'the sovereignty of each socialist State country cannot be opposed to the interests of the world of socialism and of the world revolutionary movement',[40] which means that any antisocialist move, even by the legal Government let alone by antiGovernment forces, will be crushed mercilessly, sovereignty cannot stop such interventions. In this context, it is stated that:

> "Naturally the Communists of the fraternal countries could not allow the socialist States to be inactive in the name of an abstractly understood sovereignty, when they

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[39] See for details on this point, T. Caroline: New States Sovereignty and Intervention. Gower Pub. Co. Ltd., Aldershot/Hants, 1985, pp.9-21.

[40] Cited by A.B. Bozeman: The Future of Law in a Multicultural World. PUP, Princeton, Princeton, 1971, p.188.

saw that the country stood in the peril of antisocialist degeneration"[41].

In other words, when it comes to the sphere of influence, non-intervention is impossible, socialism overrides sovereignty and non-intervention. However, I think that the need of the Third World countries for non-intervention, is more or less genuine, since they are the real target of intervention, due to their weakness economically, and to their social problems, which can be easily exploited by outside forces.

The second view, sees with scepticism any general prohibition of intervention in whatever form. They see such an approach as simplistic and unrealistic. They argue for the reformulation of the rule of non-intervention in order to open the door for exceptions, especially since the premise upon which the prohibition of intervention was based, has not been concretisised. They mention as an example the deadlock in the UNSC, which paralysed the UN, in these circumstances they claim States must act even individually and intervene in the affairs of other States.

However, I think the central question on the conceptual level, is whether it is better for international law and the international community of States to have a flat prohibition of intervention on the theoretical and normative levels, and live with intervention in practice, where the rule of non-intervention is breached daily on one hand, or on the other hand we must open on the normative level some ways for legalising certain interventions. This real dilemma makes the subject of intervention a very serious challenge to international law and its future.

In this context, some Western lawyers, especially Americans from the school of policy oriented approach, are tireless in suggesting that the approach of classical and some modern lawyers, and also the practice of the UN, is very simplistic, since any general and vague prohibitions of intervention, is simply out of date, since it does not face to what is going on the daily life of States. It is better, in their view, for the cause of international law, that the treatment of the subject of intervention must go hand in hand with the sophistication of international life, with all its different phenomenon, and the needs of the international order.

To me, the non-respect of the rule of non-intervention by especially strong States in our contemporary world, does not mean that there is something wrong with that rule, on the contrary there must be something wrong with the policies of those who break the rule. Since the flat prohibitions of intervention in all its different forms, is very essential for keeping a minimum world order, in a society which lacks an effective central institution, which has the means of suppressing any breach of the rule.

Turning now to some actual definitions of intervention which have been advanced in the era of the Charter, two trends can be distinguished, the first advocates an extended notion of activities considered to be intervention and thus contrary to international law. This is the doctrine held by Third World and socialist States.

The second trend held by especially some Western lawyers and by Western States stressed that the term is still even in the era of the Charter 'ambiguous' and maintains that the use

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[41] Ibid, p.191.

or threat of the use of force, is still the main condition of the activity to be labelled as intervention, and some of them (especially from the school of policy oriented approach such as Moore) even advocate that in some circumstances even the use of force or its threat cannot be seen as intervention, hence illegal when undertaken to uphold some community values such as human rights and self-determination.

An example of the first trend, Soviet lawyers advanced some definitions, which shed some light on the Soviet view. Thus Tunkin who maintains that the principle of peaceful coexistence presupposes the existence of other important principles of international among them non-interference in the internal affairs of other States,[42] wrote:

> "...[T]he principle of non-interference means that no State may interfere authoritatively in the affairs within the domestic jurisdiction of another State".[43]

It seems here that the definition is restricted by the word 'authoritative', however, another Soviet scholar was very specific, to him non-intervention means:

> "...[The] inadmissibility of intervention in any form whatsoever. Military diplomatic economic as well as rendering support in any form to forces waging a struggle on the territory of foreign State to overthrow the Government of the latter".[44]

This definition, it seems, covers a wide range of activity and allows no exceptions. A recent Soviet definition of intervention reads as follows:

> "...[I]ntervention forcible interference by one or several States into the internal affairs of another State or States, directed against their territorial integrity or political independence or otherwise incompatible with the aims and principles of the UN Charter. There are armed economic and diplomatic intervention i.e. armed intervention or aggression is most dangerous to the cause of peace and to the independence of a country which has become the object of encroachment".[45]

Although 'forcible' interventions are singled out as the most dangerous ones, other forms of intervention are nevertheless prohibited. Soviet writers are keen to give a detailed examples and analysis of what constitutes every form of intervention.[46]

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[42] G.I. Tunkin: Theory of International Law. Translated with an introduction by W.E. Butler. George Allen & Unwin, London, 1974, p.73.

[43] Cited by W.E. Butler: Soviet Attitudes Toward Intervention, in John N. Moore, (ed)., Law and Civil War in the Modern World. John Hopkins Univ Press, Baltimore/London, 1974, p.384.

[44] Ibid, p.387.

[45] A Dictionary of International Law. Progress Pub., Moscow, 1982, pp.139-40.

[46] Thus, all acts of aggression (e.g. declaration of war, invasion, bombardment, naval blockades and giving support to armed bands) are also interventions. Economic intervention is essentially the adoption of measures of economic pressure which isolate the sovereignty of another State obstruct its economic independence and jeopardise the basis of its economic life. Such measures include economic and action taken in respect of another State to prevent the exploitation of its natural resources or the nationalisation of those resources. Ideological intervention is present when the State encourages talks of recourse to war, when it encourages the use of ABC weapons when it promotes the propaganda of Nazi or Fascist views, racial and national exclusiveness, or hatred and disdain for other nations. Cited by Thomas, op. cit., supra. n.39, pp.55-57.

Third World countries in general argue for a simple, flat and general prohibition of intervention in the internal affairs of any State. Intervention in their view covers a wide range of activities which may compromise the political independence and the territorial integrity of any State.

Latin American States were as from the 19th century the advocates of an absolutist approach to the question of prohibition of intervention The Calvo doctrine (1868) and later the Drago doctrine (1902) were real attempts in that direction, however, in the 20th century the Latin American States succeeded in the introduction of non-intervention clause in some important treaties. The 1933 Montevedeo Convention, and the 1936 Protocol of Buenos Aires are prime examples.

The real development, however, came after the Second World War and after the emancipation of a large number of African and Asian countries. The cries for non-intervention, and the need for a very extended definition of the concept of intervention were advocated forcefully. The practice of the OAU, the Non-Aligned movement in its different conferences is very rich in that respect.

For Western lawyers and Western States intervention even after the Charter is still an ambiguous term. Thus, Higgins notedthat:

> "...[I]t is apparent that intervention can mean many different things to many people".[47]

This clearly means that there is no accepted meaning of the term in contemporary international law. The explanations for such state of affairs lies in the view of some lawyers, in the fact that intervention is a very complicated phenomenon, which makes the task of its definition a very complicated exercise.[48] Another explanation has been advanced by Carty, who writes:

> "...[Non-intervention] is stated in remarkably absolute terms, that no State has any right whatsoever to intervene in any way whatsoever in the affairs of other States. Yet it is a well-known fact interventions are a persistent feature of international relations".[49]

In other words, the rift between the principle and the practice of States in the domain of intervention stands in the way of clarifying the real meaning and limits of non-intervention. Despite the above observations some Western lawyers were ready to advance some definitions of intervention. The acts mentioned in those definitions are in their view the

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[47] R. Higgins: Intervention and International Law, in H. Bull, (ed.): Intervention in World Politics. Clarendon Press, Oxford, 1984, p.29.

[48] In this respect, Falk after noting that 'intervention is one of the most ambiguous terms in the literature of international law', observes that:

> "...[T]he task of formulating limits for a complicated phenomenon is never easy. Nowhere, perhaps, it is more difficult than in an attempt to discuss the legal outer limits of possible influence".

R. Falk: Legal Order in a Violent World. PUP, Princeton, 1968, pp.156-159.

[49] Op. cit., supra. n.31, p.87.

only ones covered by the principle of non-intervention.

In this context, a very important number of lawyers (Western) still follow the traditional view, which characterises as intervention only acts which involve the use or threat of the use of force. Thus, Brierly stated before the ILC in 1949 that:

> "...[H]e felt that an act of intervention was an act of dictation by one State to another with regard to its internal or external policy backed by the use or threat of force, express or implied".[50]

He then emphasised that where there was no force or threat of force any action, however, improper or unfriendly could not be qualified as intervention.[51]

Sanders on the other hand, stressed that:

> "Although international law does not provide a complete answer to the questions of the exact scope of intervention, there appears to be general agreement among publicists that intervention is dictatorial or arbitrary interference of a State, acting on its own individual judgement, in the affairs of another State for the purpose of maintaining or altering the actual condition of things in the latter State."[52]

Similarly, Lauterpacht reached the conclusion that:

> "['Intervene' as used in Article 2/7]...can only be taken in its accepted technical meaning, as denoting dictational mandatory interference intended to exercise direct pressure upon the State concerned but not action by way of discussion, study, inquiry and recommendation falling short of intervention proper".[53]

This definition largely confirms the practice of the UN, it relates to the meaning of intervention between the organisation and its members but it seems that Lauterpacht still adheres to the view that in relations between the States themselves, intervention must be dictatorial and mandatory in order to be prohibited.

To me, all these views reflect the position of the stronger unity of the international society, which want to keep a large number of activities outside the scope of the prohibition of intervention. Moreover, the adherents to the policy-oriented approach, are generally sceptical about strict definitions and flat prohibitions of the phenomenon of intervention. Their reason is that any such exercise would be unrealistic.

Thus, Falk after defining intervention as a term which is used 'to identify any consequential impact that the actions of one State have upon the events in another'.[54] This is, in fact, a broad definition of intervention, however, Falk insists that 'it is highly doubtful whether it is desirable to commit international law to a maximum principle of

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[50] Whitemann, op. cit., supra. chapter 1, n.8, Vol.5, (1965), p.329.

[51] Ibid.

[52] Ibid, p.321.

[53] Op. cit., supra. n.20, p.237.

[54] R. Falk: United States Practice and the Doctrine of Non-Intervention in the Internal Affairs of Sovereign States, supra. n.48, p.156.

non-intervention'.[55] He cites instance where intervention was, in his words:

> "...'[P]rompted by humanitarian considerations that one can condemn only by waving too vigorously the banners of sovereignty'.[56]

It is obvious that here, he is speaking about humanitarian intervention as a possible exception to the rule of non-intervention. Sadly humanitarian intervention has never been used for absolute humanitarian motives, also it is always used by the strong against the weak and never the opposite. On the other hand, Higgins notes that:

> "The purpose of the international law doctrine of intervention is,...to provide an acceptable balance between the sovereign equality and independence of States on the one hand and the reality of an interdependent world and the international law commitment to human dignity on the other".[57]

She maintains that it is not profitable to seek a definition of intervention. She gives two reasons for that. Firstly, as she put it:

> "...[O]ne cannot indicate a particular part along the spectrum and assert that everything from there onwards is an unlawful intervention and everything prior to that point is tolerable interference, and one of the things we put up with in an interdependent world".[58]

Thus, she is using the usual argument that certain cases and instances of intervention are quite normal exercises in the daily intercourse of nations, and sovereignty has to be limited in order to absorb these interventions and accept them as a necessary consequence of living in the world today. Secondly, she stresses that:

> "...[T]he term intervention only has a meaning measured against the question 'intervention against what?' and the answer has to be 'intervention against a State domestic jurisdiction'. That is intrusion upon that which is for a State alone".[59]

However, since the constituent elements of 'domestic jurisdiction' is a relative matter as the PCIJ has indicated in the Tunisia and Morocco Nationality Decrees Advisory Opinion. This will mean that the area of unlawful and lawful intervention, and also what constitutes intervention, are questions which are changing with the development of international law and international relations, which indicates that there is a real impossibility of giving a clear definition of intervention, and by consequence any attempt toward such definition is unrealistic.

The practice of Western Governments in general is against extended definition of intervention and its flat condemnation. Thus those States were generally hostile to the

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[55] Op. cit., supra. n.48, p.160.

[56] Op. cit., supra. n.48, p.161.

[57] Op. cit., supra. n.47, p.30.

[58] Ibid.

[59] Ibid, p.31.

approach of the Friendly Resolution to intervention, that resolution in fact, states that:

> "No State or group of States has the right to intervene directly or indirectly for any reason whatsoever, in the internal or external affairs of any other State".

In their (Western States) view, such approach is very rigid since, it condemns indiscriminently even innocent actions of States, and turns any gesture into 'intervention'. Thus, in the last meeting (114th) of the 1970 Friendly Relations Special Committee, Sir Ian Sinclair, the UK representative stated the prevailing view of the Western delegates. He noted:

> "In considering the scope of 'intervention' it should be recognised that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality and self-determination of their peoples."[60]

Similarly, Sir Kenneth Baily attacked Resolution 2131 on non-intervention in the following terms:

> "The language of that resolution was so wide that, in its ordinary meaning, it would prohibit not only all normal practice of diplomacy but every type of endeavour to influence other Governments by negotiation: and we thought to be dangerous as well as silly".[61]

To me, this is the view of the strong powers, who possess the real means of influencing the actions and policies of other States, but for the weak members of the international community extended definition and flat prohibitions of intervention are better. They will benefit from them at least in the war of rhetoric for the hearts and minds of the public opinion, which can in some cases deter the stronger States from engaging in certain interventions.

The conclusion is that there is a general consensus that non-intervention is a fundamental pillar of international relations, and it is the natural consequence of State sovereignty.

The difference of opinion, it seems, lies in what constitutes intervention and whether there are any limits or exceptions to the principle. Western doctrine and State practice in the name of realism, stresses that it is impossible to include everything in the definition of intervention. Some instances of intervention are either part of the daily practice of States or are desirable in some instances such as humanitarian intervention. In this way they are relativists in their approach to the problem of definition and prohibition of intervention.

On the other hand, Third World and Socialist States seem to advocate an absolutist stand to them interventions must be defined in a very broad way to include all acts that might endanger directly or indirectly the political independence, security and the territorial integrity of States.

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[60] Cited by G. Arangio-Ruiz: The UN Friendly Relations and the System of Sources of International Law. Sijthoff & Noordhoff, 1979, p.126.

[61] Ibid, p.130.

Section III: Intervention in Civil Wars

In the last section, I dealt with the concept of non-intervention in general its meaning and limits. In this section, I will concentrate on the very important question of intervention in civil wars. It must be stressed that internal upheavals, among them civil wars '...ont été la cause ou au moins le pretexte de presque toutes les intervention enregisterées par l'histoire'[62] as Rougier notes. In fact, the situation is still the same even in our contemporary world.

A. The Position in Traditional International Law

In general, traditional international law places respect for the sovereignty of State as its most important task. Consequently, it favoured and guaranteed the **status quo** inside the State. The golden rule was that assistance to the established Government is legal, whereas any aid to the insurgents is illegal.

However when the recognition of belligerency is established, the rules of neutrality apply in the relation between the two belligerent and third States. The latter has to abstain from any direct or indirect assistance to either party in the civil war. The 1928 Havana treaty on rights and duties of States in the event of civil strife is seen as a correct codification of customary international law on the subject, Article 1/3 stipulates:

> "...[T]o forbid the traffic in army and war material except when intended for the Government, while the belligerency of the rebels has not been recognised, in which latter case the rules of neutrality applied."[63]

Likewise, the ILA at its 1900 session at Neuchatel emphasised in Article 2/2 of its 'réglement' that:

> "Elle [tierce puissance] est astreint à ne fournir aux insurgés ni armes, ni munitions, ni effects militaires, ni subsides".[64]

Although, State practice is not always consistent, since politics and interests play a major element in their calculations, reveals many instances of interventions of third States on the side of the established Government and a denial of assistance to insurgents. Thus, in 1912 and 1922 the US Congress enacted resolutions which allowed the President to impose embargoes on the shipment of arms from the US to Latin America and China, whenever he has reason to believe that they are likely to be used to promote domestic violence.

Borchard observes that the US has respected the rule during the Cuban Insurrections (1868-1878 and 1895-1898) and emphasises that at the beginning of the American Civil War, several of the important arsenals were located in the South '...had England or any other foreign country undertaken to embargo arms to both the North and South, the North might

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[62] A. Rougier: Les guerres civiles et le droit des gens. L. Larose, Paris, 1903, p.350.

[63] D. Schindler and J. Toman (eds.): The Laws of Armed Conflicts. 2nd ed. rev. & completed. Sijthoff & Noordhoff, Alphen aan den Rigin, 1981, pp.805-806.

[64] Cited by D. Schindler in his Rapport provisoire: Le principe de non-intervention dans les guerres civiles. 55 AIDI, 1973, p.477.

easily have lost the Civil War'.[65]

Simirlarly, during the 19th century Britain assisted the Portuguese throne when it was challenged. Europe sided with the Ottoman Sultan against the Egyptian Revolt in 1840, also France, Russia, Prussia and Austria responded to the appeal of the King of the Netherlands, whose Belgian subjects had declared themselves independent.[66]

During the Spanish Civil War the assistance given by Germany, Italy and to a lesser extent by Portugal to the rebel forces, has been generally seen by international lawyers as against international law. Garner argued in 1937 that:

"...[T]he Government of Spain, for the overthrow of which this aid was intended was the established legitimate Government of the country whatever might be said in criticism of its character or policies"[67]

He then adds:

> "Juridically, therefore, the aid furnished by the three powers mentioned to the rebels arrayed against the Spanish Government was an act of intervention of the kind which cannot be justified on the ground of self-preservation, protection of nationals or any other reasons commonly recognised as justifying intervention by one State in the internal affairs of another State."[68]

Indeed, the whole policy of non-intervention instituted after the outbreak of the Spanish Civil War (for some obvious political and ideological reasons by France and Britain and many other countries), was never accepted by the Spanish Government as reflecting the true stand of international law on the question, and it always insisted on its right under that law to request and receive aid alone, since it is the only legal Government.[69]

In my view, the traditional rule was in effect a logical consequence of the principle of sovereignty. The latter gives the established Government the right to exercise in full its sovereign powers, and among them without any doubt to request assistance from third States

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[65] E. Borchard: Neutrality and Civil War. 31 AJIL, 1937, p.306.

[66] See Ch. Zorgbibé: La guerre civile. PUF, 1975, p.64.

[67] J.W. Garner: Questions of International Law in the Spanish Civil War. 31 AJIL, 1937, p.67. The writer defines the term 'legitimate government' as 'one which had been set up in conformity with the constitution and the laws of the country and as a result of the free political elections'. (p.67).

[68] Ibid.

[69] Thus, on May 13th, 1938, when the Spanish Question was discussed by the Council of the League of Nations, the Foreign Minister of Spain addressed the British and French delegates in these terms:

> "...[I]f irrespective of the Anglo-Italian agreement, Italy and Germany continue to intervene in Spain, and neither France nor UK undertake to prevent this continued intervention, in the name of what morality and justice can you go on depriving the legal Spanish Government of its rights under international law".

Spain in fact submitted to that meeting a Draft Resolution which would invite the League member States:

> "...[T]o envisage as from the moment the end of the policy of non-intervention".

The Resolution was, however, rejected by the Council of the League of Nations. Keesing's, 1937-40, May 15, 1938, p.3467.

when its survival is at stake.

However, it must be mentioned that even in the era of the UN Charter the classical rule has been invoked and used by States, indeed most of the interventions after the UN Charter in cases of civil wars or internal disorders have been justified on the ground of the request of the legal Government. Brownlie noted in this respect that:

> "...[T]here can be little doubt that this type of intervention (intervention by request or consent) is compatible with the Charter of the United Nations. The provisions of the Charter do not contain any provisions related to the question and the legality of such intervention flows from major principles of general international law: the principle of consent and the legal personality of the State producing the request for, or consent to intervention".[70]

In this context, Britain justified its interventions in Jordan in 1958[71] in Muscat and Oman in 1957[72] on the ground of request by the established Government, France did the same in its frequent interventions in Black Africa and the US in its many interventions in Latin America (Guatemala 1960, Dominican Republic 1961, Nicaragua 1960 and now in El-Salvador).[73] Also in Lebanon in 1959 and especially in Vietnam in the 1960s.[74] The Soviet Union has done the same in Hungary in 1956[75] and lately in Afghanistan.[76]

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[70] I. Brownlie: The UN Charter and the Use of Force, in A. Cassesse, (ed.), op. cit., supra. chapter 1, n.195, p.501.

[71] Thus, on July 17th, 1958 the British PM, H. Macmillan informed the House of Commons that HM Government, has on July 16th, 1958 received a request from the King of Jordan and his PM for immediate dispatch of British Forces to Jordan since their country was faced with an imminent attempt by the United Arab Republic to create internal disorder and overthrow the existing regime. The British PM stressed that his Government has accepted the offer to send troops to Jordan. He added that the purpose of this military assistance was 'to stabilise the situation in Jordan by helping the Jordanian Government to resist aggression and threats to the integrity and independence of their country'. Supra. n.50, p.517.

[72] Thus, in HM Queen Elizabeth II speech on January 1st, 1957, the Parliament that 'in view of the long-standing ties of friendship between Muscat and Oman and the UK, my Government took prompt action in response to a request from the Sultan for armed assistance in quelling rebellion in his Dominions, etc.'. Supra. n.50, p.517.

[73] Op. cit., supra. n.50, pp.534-5.

[74] Thus, the Memorandum of the US Dept. of State on the legal basis for US actions against North Vietnam of March 8th, 1965 states:

> "We had been providing Vietnam since 1950-51 with both economic and military aid. This assistance was continued after the conclusion of the 1954 Geneva Accords, within limitations prescribed by those agreements. It had become apparent, however, by 1961 that this limited assistance was not sufficient to meet the growing Communist threat. Consequently in 1961, the Government of the Republic of Vietnam requested additional aid from the US. The US responded with increased supplies and with a larger numbers of training and advisory personel to assist the Vietnamese Forces in prosecuting the war against the Viet Cong. This response was proportionate with the design of sustaining Vietnam in its defense against aggression without extending the conflict beyond the borders of the country".

US Senators Ernest Grevening and Herbert Wilton Beaser: Vietnam Folly, The National Press Inc., Washington D.C., 1968, pp.570-571.

[75] In this case, the USSR always claims that its assistance was requested by the legal Government in conformity with the Warsaw Treaty of 1955. For further details, see supra. n.50, pp.667-76.

[76] In this context, on December 28th, 1979, the Afghan Government issued a statement which read as follows:

B. Evaluation of the Traditional Rule

Three schools of thought are against the traditional rule, to some it simply does not represent a true statement of State practice and that on the theoretical level it is in flagrant contradictions with the spirit of the principle of non-intervention.

To others the rule is not just, since justice implies that both sides must be treated alike and third States should be free to choose to which side their assistance will go to, and finally a third school stress that the search for a single norm to regulate the complex issue of intervention in civil wars is simply a meaningless exercise.

1. The First School: the Absolutist School

This school advocates a strict adherence to the rule of non-intervention, the rule in their view is against unilateral intervention on any side, the legal Government included. According to this view the legal Government is entitled to request and receive assistance from third parties in times of peace only, however, in times of internal disorders the Government has to be let alone to deal with the situation.

The reasons advanced to justify this stand, differ from lawyer to lawyer, however, examples include:

1. The absence of effective control by the established Government over its territory and population.

2. Lack of legitimacy of the established Government.

3. Its lack of representativity.

4. Assistance is against the right to self-determination and social change and lastly the uncertainty of the outcome.

Hall was the first lawyer who advocated such an absolutist view, he exposed his opinion in a well-known passage:

> "Supposing to be directed against the existing Government, independence is violated by an attempt to prevent the regular organs of the State from managing the State affairs in its own way. Supposing on the other hand, to be directed against the rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of

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"The government of the Democratic Republic of Afghanistan taking into account the continuing and broadening interference and provocations of external enemies of Afghanistan, and with a view to defending the gains of the April Revolution [of 1978], territorial integrity and national independence, and maintaining peace and security, proceeding from the treaty of Friendship, Good-Neighbourliness and Cooperation of December 5th, 1978, has approached the USSR with the insistent request to give urgent political, moral and economic aid, including military aid, which the Government of the Democratic of the Republic of Afghanistan repeatedly requested from the Government of the Soviet Union. The Government of the Soviet Union has met the request of the Afghan side".

Moreover, in a statement published by Pravda, President Brezhnev stressed that:

> "The increasing armed intervention, the well-advanced plot by external forces of reaction, created a real threat that Afghanistan would loose its independence and be turned into an imperialist military bridgehead on our country's southern border. In other words, the time came when we could not but respond to the request of the Government of friendly Afghanistan. To have acted otherwise would have meant leaving Afghanistan a prey to imperialism, etc."

26 Keesing's, 1980, pp.30229-30236.

the State".[77]

He then adds:

> "If intervention is based upon an opinion as to the merits of the question at issue the intervening State takes upon itself to pass judgement on a matter which having nothing to do with the relations of States, must be regarded as being for legal purposes beyond the range of its vision".[78]

It is clear that Hall, advocates an absolutist non-intervention rule, as from the moment the insurrection began and here he differs from the traditional view, which institutes neutrality only from the moment of the recognition of belligerency. It is to be noted that some distinguished international lawyers still even in the era of the Charter advocate Hall's view, among them Wright, Chaumont and Friedmann.

In this context, Wright after observing that Hall's view is the predominant one, which implies that he does not consider the traditional rule as the correct statement of customary law, develops another argument to justify his position in advocating abstention of assistance to either side, he states:

> "It clearly belongs to the sovereignty of a State, as recognised by the Charter, to ask for help, but it must be emphasised that sovereignty belongs to the State and not to the Government and a Government beset by internal revolt of such magnitude that the result is uncertain is not in the position to speak for the State".[79]

Thus, the criteria of the lack of representative coupled with the uncertainty of the result of the context are the prime reasons for pursuing a full policy of non-intervention.

Chaumont on the other hand develops the argument of self-determination as basis for non-intervention on either side in civil wars,[80] whereas Friedmann after reviewing the

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[77] W.E. Hall: A Treatise on International Law. 8th ed., Oxford, 1924, p.347.

[78] Ibid.

[79] Q. Wright: US Intervention in Lebanon. 53 AJIL, 1959, p.122. Similarly, in another article, he stressed that:

> "...[T]he handling of insurection, rebellion, civil strife, or other forms of internal violence is presumed to be within the domestic jurisdictions of the State, and that neither a foreign State nor the UN can intervene to suppress it, even on the invitation of the Government, in case the revolution is so serious that the result is uncertain, etc".

Op. cit., supra. n.50, p.462.

[80] He writes:

> " 'le droit d'un Etat de choisir son système'entraine dans le droit international contemporain, l'obligation pour les tiers de laisser le people de cet Etat régler lui-même les constestations qui s'élèvent en son sein en ce sens que la position du gouvernement établie n'est juridiquement ni meilleure, ni plus mauvaise, vis-à-vis des tiers, que celle des insurgés".

Op. cit., supra. chapter 1, n.48, p.406. Moreover, in his observations on the Rapport provisoire, "Concerning Non-Intervention in Civil Wars" prepared by Schindler, Chaumont stated that:

> "Soutenir de l'extérieur un governement contesté par la violence revient tout comme le soutien des insurgés à prendre parti dans cette contestation et par suite estimer ingérence dans les affaires intérieures d'un Etat".

different attitudes towards intervention in civil wars makes the statement that "what on balance favours the view that in civil war the two sides are to be treated on a par, is the consideration that international law should not be used to prevent social change."[81] Implicitly then, the proposition is if social change has to take place and pursue its natural course, abstentions from assisting any side is the correct measure to follow for third States.

However, the main criticism of the neutrality argument, is that it is very idealistic, since it is very hard to be concreticised in practice. The Spanish Civil War is a case in point, since the policy of non-intervention has been violated systematically by even the signatories of the non-intervention treaty.[82]

Similarly, the doctrine can be said to go against the spirit of the system of international law, which favours established Government, indeed the principle of sovereignty goes in that direction. Also it is in a way against the stand of the UN, which does not prohibit assistance to peoples struggling for self-determination in colonial, racist and alien domination situations.[83]

2. The Second School:Assistance to Both Parties

This school advocates assistance to both parties of the internal conflict, States are free to choose which party their assistance is to go. Vattel, it seems is the father of such stand, he states:

> "Toutes les fois donc que les choses en viennent à une guerre civile, les puissances étrangères peuvent assister celui des deux parties, qui leur parait fondé en justice".[84]

It is the justice of the cause of the internal war which is the essential element, which States have to take into account when giving their assistance. However, it must be noted that Vattel who champions the rule of non-intervention in relations between States, advocates such a stand, because to him civil war breaks the State into two distinct units, which for all purposes are similar to two States and thus the war is like a war between States, and third

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Op. cit., supra. n.64, p.530.

[81] Friedmann, op. cit., supra. chapter 1, n.129, p.267.

[82] Also, in the Russian Civil War, Britain proclaimed that the contest was a purely domestic affair, whereas in practice it was very active in assisting the rebels. See for details, W.P. Coates and Zelda K. Coates: Armed Intervention in Russia 1918-1922. London, Victor Gollancz Ltd., 1935. See especially, pp.94-95 and 210.

[83] In this context, Bhupinder Singh Chimni criticised the absolutist doctrine on the following basis:

> "But the norm (absolutist norm) has been set out in a mechanical manner. It assumes a priori in that intervention necessarily interferes, say, with the right of self-determination. This does not happen to be true. Moreover, it overlooks the fact that, in some contexts unilateral intervention is considered permissible by the international community. It can be mentioned that the international community today permits assistance to peoples struggling for self-determination in a war of national liberation" and then he added "therefore the presumption would impair the legitimate claims of people struggling for self-determination. The absolute non-interventionist policy demonstrates thereby an adequate understanding of the value preferences of the contemporary international community".

Towards a Third World Approach to Non-Intervention through the Labyrinths of Western Doctrine, 20 IJIL, 1980, p.248.

[84] Vattel, op. cit., supra. chapter 1, n.9, p.299.

parties may assist the party which has a just cause on his side.

Vattel introduces the elements of resisting tyranny and the struggle for liberty as the real criteria of the justice of the cause in internal wars, hence it is ideology rather than legal rules which govern the question of assistance.

This situation led Cutler to state that:

> "Vattel's rules would have suited the Reagan Administration view of the world to perfection. These rules would support the legality of military aid to the Duarte Government, the Nicaraguan Contras and the Afghan freedom fighters. They would provide no legal comfort for the Soviet invasions of Czechoslovakia and Afghanistan...Aid to democratic forces in or out of power would be lawful, aid to tyrants or would be tyrants, would not".[85]

In practice, Vattel's stand would mean that there is no strict rules of non-intervention, everything will depend on the rhetoric of the warring factions in the civil war, and the interpretations given by third parties to that rhetoric.

However, even in era after the UN Charter, some international lawyers argue for assistance to be given to either party to the civil war, the established Government must not have the monopoly of receiving aid and assistance. The arguments advanced to justify that attitude differ from those of Vattel.

In this respect, Falk observes that:

> "...[T]he facts of participation contradict the norms of non-intervention. Behaviour does not conform to the claims of traditional legal order."[86]

In other words, the traditional rules are no longer valid in our world.

In his view whenever the insurgents succeeded in establishing themselves as the de facto Government over a substantial part of the contested territory, third States are legally entitled to deal with the insurgents as with the established Government.[87] On the other hand, he conditionally justifies intervention on the side of the legal Government. He writes:

> "If substantial participation on behalf of the insurgents is identified by the incumbent, then it provokes notes of protest and perhaps a proportionate response especially an appeal for help to third States in order to neutralise the insurgents strength that is claimed to be attributable to external sources".[88]

The result is that both sides to the internal conflict can receive assistance from third parties without a real difficulty,[89] especially in real situations of civil wars, when the two sides of

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[85] L.N. Cutler: The Right to Intervene. 64 Foreign Affairs, 1985, p.97.

[86] Op. cit., supra. n.5, p.235.

[87] See R. Falk: Vietnam War and International Law. Vol. 2, PUP, Princeton, 1968, p.238.

[88] Op. cit., supra. n.5, p.237.

[89] In fact, Falk seems to suggest that international law is beginning to adjust itself to the claim that both parties to a civil war can receive assistance on an equal footing from foreign States. He states:

> "This continuing tolerance by the legal system of participation on the side of one's choice in an internal war gradually assumes a place in the horizontal, self-delimiting portion of

the conflict hold and struggle for different kinds of society, in other words when the two parties champion different ideologies.

Pinto on the other hand, bases his argument for assisting either party in the civil war, on the question of 'effectivity'. Thus, once the insurgents establish their military and civil organisation, and exercise full jurisdiction over the population and the territory, they are entitled to request foreign assistance. In this context, Pinto writes:

> "Sa qualité d'autorité de fait l'autorise à demander et obtenir une assistance étrangère sans que soit par là violés les droits du gouvernement legal dont l'effictivité est limitée par son existence et son action".[90]

It seems to me that such views may be in the end exploited by the big powers.

Moreover, the views which try to justify assistance to both sides in civil wars, are in flagrant contradiction with the law of the UN Charter especially Article 2/4, since they open the way for the use of force in the form of military interventions against the political independence and territorial integrity of States engaged in civil wars.

Furthermore, State practice at least in the form of statements by decision makers, supports the stand of non-intervention in civil wars, rather than interventions on the side of one's choice.[91]

They can assist the faction which is in line with their strategic conceptions, be it the Government or its opponents. Thus, instead of diminishing the illegal activity of inventions these views will lead to its escalation, by offering legal justification. This in my view will not serve the course of international law.

3. The Third School: The Policy-Orientated Approach

According to this school, any search for a single norm which can regulate intervention in civil wars is a useless and unscientific exercise. The reason is that situations of civil strife differ, community policies at stake in such conflicts are also different, values struggled for also differ, and finally, the number of participants in such conflicts and those who may help them vary. Thus, any attempt to go for a single norm would be illogical and irresponsive to the situations involved.

The traditional and the neutrality doctrines were attacked by adherents of the school of

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international law".

Op. cit., supra. n.5, p.237.

[90] R. Pinto: Les règles du droit international concernant la guerre civile. RCADI, 1965/I, p.482.

[91] Thus, many statements issued by States either individually or collectively support the stand of non-intervention, e.g., in the context of the Chinese Civil War, the foreign Ministers of the UK, USSR and the US meeting at Moscow on Dec. 27th, 1945 issued a statement part of which read as follows:

> "The three foreign secretaries exchanged views with regard to the situation in China. They were in agreement as to the need for a unified and democratic China under the national Government, for broad participation by democratic elements in all branches of the national Government, and for a cessation of civil strife. They reaffirm their adherence to the policy of non-intervention in the internal affairs of China".

Op. cit., supra. n.50, p.599. See also the same reference for further examples of State practice, especially pp.460-462.

policy orientated approach, because the first (the traditional rule) could be used as shield against any kind of reform and would encourage totalitarian regimes[92] whereas the second would not cover all forms of interventions especially covert actions.[93]

The search in this school is for different rules to different situations, the whole effort of the school in my view is to find sophisticated ways of interventions and their necessary legal justifications, in order to suit the necessities of the war against Communism. Since Communists can be sometimes in power in countries plagued by civil war, and sometimes they could be insurgents fighting a friendly pro-Western Government; in this atmosphere any single norm will not be in the interest of a big power such as the US.

In this context, Falk maintains that the situation in our world differs fundamentally from the situation in which the traditional rule prevailed, thus the conditions of the interdependence of internal and international conflicts, the attitudes of Communist and Third World countries towards the outcome of internal wars conducted for political reasons and the danger of escalation to nuclear war. These factors impose that:

> "The rules and processes of law must be revised to take appropriate account of these extra-legal developments."[94]

In accordance with this philosophy, he advances that whenever community institutions, chiefly the UN:

"...[F]ail to perform in a situation where an internal war is an arena within which third powers seek to extend their national domain of political influence. Then it is essential to authorise neutralizing participation".[95]

In his view, the rules of non-intervention in internal conflicts will be suspended in the event of their violation by a major international actor in other words counter intervention would be legalised, either on the side of the established Government or the insurgents.

However, among adherents to the school (policy-orientated) it is Moore who devoted much effort to the study of intervention activity. Thus, he classifies six situations in which claims of intervention may arise 'together these six situations make up an intervention in

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[92] In this context, Moore attacks the traditional rule in these terms:

> "[T]he principal dangers of the traditional rule are that it may serve as a Maginot Line for vested privileges, deterring necessary reforms in feudal or totalitarian societies, and that it may be invoked by recognising a puppet Government as in the Soviet-Finish War or the Soviet Intervention in the 1956 Hungarian Uprising".

Op. cit., supra. n.4, p.88. However, he did not add that the US also used the traditional rule to justify many of its interventions in Latin America and Vietnam.

[93] Similarly, Moore maintains that:

> "The principal danger of the newer 'neutral rule' is that by focusing normative weight on the more visible overt response it may provide a shield for aggressive take over through covert attack".

Op. cit., supra. n.4, p.88.

[94] Op. cit., supra. n.5, p.209.

[95] Ibid.

internal conflict spectrum'.[96] Those situations are as follows:

1. Situations, claims not relating to authority structures.
2. Situations, claims relating to anti-colonial wars.
3. Situations, claims relating to wars of secession.
4. Situations, claims relating to indigenous conflict for control of internal authority structures.
5. Situations, claims relating to cold war divided nations conflicts.
6. Situations, claims relating to authority structures.[97]

After an exhaustive study of the above situations, he recommended the rules which should govern intervention in civil wars:

A. Intervention is permissible if authorised by the UN, and it is impermissible once the UN calls for its cessation.

B. It is impermissible to assist a faction engaged in any type of authority-oriented internal conflict or to use the military instrument in the territory of another State for the purpose of maintaining or altering authority structures.

However, this attractive proposition would be subjected to three qualifications, which in effect devoid it from any real sense in practice. The qualifications are:

1. Assistance to the recognised Government is permissible prior to insurgency, when the conflict becomes an insurgency the assistance to the recognised Government can continue, however, it has to be maintained at preinsurgency level, in other words the assistance must be maintained at the preinsurgency level, and must not be increased.

In my view, this is a highly impractical suggestion. First, it is very difficult to State when the internal disorder has attained the insurgency level, secondly third Governments may very well increase their assistance in order that the insurgents will lose any real hope of attaining insurgency level, and finally it is very hard to prove the assistance to the recognised Government has remained at its preinsurgency level, in cases of the recognition that the insurgents have reached insurgency.

2. Assistance to a widely recognised Government is permissible when it is an answer to impermissible assistance to insurgents. If assistance to insurgents or the use of military instruments against another State amounts to an armed attack, within the meaning of Article 51 of the UN Charter, it is permissible to reply proportionally against the territory of the attacking State.

This last point has been developed by Moore who advanced a very wide and dangerous interpretation of Article 51 of the Charter, Judge Schwebel also used the same argument in his Dissenting Opinion in the Nicaragua Case (1986). However, the ICJ refuted their opinions as not reflecting the proper interpretation of Article 51, as I will show later in the sections dealing with the impact of the ICJ decision on the law of intervention in civil war.

3. The use of military force in the territory of another State for the purpose of restoring orderly processes of self-determination in authority oriented conflict involving a sudden

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[96] Op. cit., supra. n.4, p.175.

[97] Op. cit., supra. n.4, pp.175-79.

breakdown of order is permissible, however, according to certain conditions.[98]

This is another dangerous proposition, since it is not difficult for especially the superpowers to 'engineer' an invitation from the 'widely recognised Government'. Also, it is very difficult to imagine a power who intervenes just for the sake of self-determination, bearing in mind that there is a wide disagreement between Governments especially the superpowers on the exact meaning of self-determination.

On the other hand, Reisman has endeavoured to develop the idea of intervention by military force to overthrow Governments which are assisted by foreign States and which violate the right of self-determination of the population, to him such kind of interventions would 'increase the probability of the free choice of peoples about their Government and political structure'[99] in fact he advocates assistance to insurgents, whenever a 'pro-democratic Government' has been ousted, in other words intervention can be legal, whenever it is used against Communist or left-wing Governments who ousted a pro-Western Government.

Schachter rightly attacks Reisman's argument in these terms:

> "The difficulty with Reisman's argument is not merely that it lacks support in the text of the Charter or in the interpretation that States have given Article 2 (4) in the past decades. It would introduce a new normative basis for recourse to war that would give powerful States an almost unlimited right to overthrow Governments alleged to be irresponsive to the popular will or the goal of self-determination".[100]

Moreover, it seems to me that Reisman implicitly advocates a Western 'Brezhnev doctrine' in other words, whenever a pro-Western Government is unseated, Western Governments and especially the US should intervene in order to reinstall the ousted Government and the former constitutional and ideological order.

Cutler advocates the return to Vattel's standards in deciding on what side to intervene in civil wars. In this context, he writes:

> "The most significant thing about how modern international law treats interventions is that Vattel's standards of oppression and justice are not even mentioned. The law as now formulated, appears to treat the democratic or dictatorial nature of government as wholly irrelevant".[101]

He insists that Vattel's ideas can be reconciled with Article 2/4. He adds:

> "I would therefore interpret Article 2/4 as permitting third States to intervene only

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[98] The conditions are: (i) A genuine invitation by the widely recognised Government, and if there is none by a major faction. (ii) Relative neutrality among factions especially neutrality in military operations. (iii) Immediate initiation of and compliance with the decision machinery of appropriate regional organisation. (iv) Immediate full reporting to the UNSC. (v) A prompt disengagement, consistent with the purpose of the action. (vi) An outcome consistent with self-determination 'based on elections which are internationally observed, with the participation of all factions on equal footing'. Ibid, pp.281-282.

[99] W.M. Reisman: Coercion and Self-Determination: Construing Charter Article 2 (4). 78 AJIL, 1984, pp.644.

[100] O. Schachter: The Legality of Pro-Democratic Invasion. 78 AJIL, 1984, p.649.

[101] Op. cit., supra. n.85, p.101.

> when two conditions exist: first an indigenous pro-democratic insurgency is engaged in civil war with the repressive regime, and second some other third States has been giving military assistance to the repressive regime".[102]

Obviously, democracy to him means what the West understands it to be, thus insurgents waging a civil war and holding 'democratic ideas' can expect aid from the West, also implicitly a 'democratic regime' which is involved in a civil war against 'Anti-Democratic insurgents' can receive the necessary assistance from the West, however, on the condition that the insurgents are receiving help from outside.

The heart of the argument then, is for a right of counter-intervention on either side of the internal conflict (Government or insurgents). The crucial element of making the decision of assistance for third States, is which side uphold the democratic ideals as understood in the Western liberal tradition.

This right of counter-intervention in Cutler's opinion:

> "...[H]as solid roots in the principles of the eighteenth century enlightenment that inspired the democratic ideal and remain valid today. It gives meaning to the reaffirmation of this ideal in Article 1 of the Charter. It does so without emasculating the principle of non-intervention set out in Article 2/4."[103]

In my view, this kind of argument which in practice would satisfy the necessities of American interventions, is first inconsistent with the UN Charter, because there is nothing in Article 2/4 which indicates that counter-intervention is allowed, also to hold that Article 1 of the Charter upholds the ideas of the Western liberal tradition is not true, at least the majority of the UN members would not support such an assertion. Secondly the argument supposes from the start that the UN can do nothing in the face of interventions, which is not wholly true. Thirdly, the introduction of highly controversial elements of 'Democracy-justice- oppression' would not support and serve the cause of peace and international law.

Farer, on the other hand, maintains that the traditional rule:

> "...[A]side from the dangerous ambiguity of just when the insurgency has achieved sufficient status to require equal treatment, the norm simply is not respected. It is wholly out of joint with actual practice".[104]

He regards any flat prohibition of intervention would be unenforceable and unacceptable since 'the sheer problem of definition would seriously jeopardise effective application'.[105] Then economic aid the training of personnel and when the norm becomes operative-are thorny problems to solve in practice, different interpretations would confuse the matter. Besides, he stresses that:

"Even if States could agree on a definition of non-participation, I cannot conceive

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[102] Ibid, p.106.

[103] Op. cit., supra. n.89, p.107.

[104] T. Farer: Intervention in Civil War: A Modest Proposal, in R. Falk, (ed.): Vietnam and International Law. Vol.1, PUP, Princeton, 1968, p.514.

[105] Ibid, p.517.

of one which would be generally acceptable as the substance of a norm-ideological passion has made trust a rare possession."[106]

In this context, Farer proposes another approach. He writes:

"A more realistic possibility is a flat prohibition in tactical operations either openly or through a medium of advisers or volunteers, in more concrete this means that a country could not send its own forces on patrol in support of indigenous military units."[107]

Under this proposed norm then, third States would be allowed to send any type of quantity or aid other than direct military involvement to the established Government and also to the insurgents, in fact assistance to insurgents would not constitute an act of aggression against the country in which the civil war is raging.

In my view, this is an attempt to make the Charter of the UN, and the whole legal developments which limit the use of force including intervention as irrelevant. Also although the intention of Farer is to limit the activity of intervention, in practice, his suggested norm would in fact increase that activity, since the intervening States and especially superpowers because of the world public opinion which is against direct military intervention prefer a norm along Farer line, that rule would save them the embarrassment before world public opinion.

To conclude, it is fair to say that many of the opinions expressed in the above school (policy orientated approach) enter in the vision of the confrontation which is taking place between the Communist block and the Western one. These opinions are the reflection in the legal field of that confrontation. The Communists are convinced that social revolutions will sweep the world, and indeed the conditions of explosion are ready in many parts of the world especially in the Third World. The West see the Communist hand in every internal upheaval and reacts by interventions and counter-interventions as the particular situation dictates.

However, in many instances local conditions are the primary causes of revolution and internal strife, but the superpowers see things in absolute terms. They interpret situations of civil wars according to their global strategies, in this atmosphere interventions and counter-interventions, will take place and the rule of non-intervention will have no effect on their actions.

This attitude in my view is against the moral foundation of international law, which is based on diversity and pluralism, and hence in non-intervention. Thus any attempt to shape the world (through intervention) according to a specific need of a philosophical or religious conception, would only lead to more violence, and hence would not serve the cause of international law and peace in the world.[108]

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[106] Ibid, p.518.

[107] Ibid.

[108] In this context, T. Nardin rightly observed that:

"It is one of the greatest achievements of European International law that it acknowledged the claims of pluralism. It reflected an appreciation of the fact that the most likely consequence

Section IV: The Non-Intervention Norm in State Practice

This section will concentrate on the place of the principle of non-intervention in the practice of States. The proposition is that since at least the advent of the UN Charter, there has been a continuing adherence to the principle, despite the frequency of its breach.

In my view, violation does not force us to abandon the principle in the name of realism, instead it strengthens our insistence that the rule should be upheld. This stand would be beneficial in the long run, since the public opinion and probably the UN under the pressure of that public opinion, would grow more and more sensitive to interventions, and intervening States, especially stronger nations, may find it better not to intervene, since any contrary option can be very costly politically, internally and externally.

However, it must be stressed that references to the principle of non-intervention in treaties, statements and resolutions must be taken to include intervention in civil wars because the latter are fought primarily for the control of political power within the State, which is essentially the heart of the internal affairs of States, against which intervention is prohibited.

A. Non-Intervention in Bilateral Treaties

In important bilateral treaties, it is very common to insert a provision on non-intervention, either on the preamble or in the first Articles. This means that States prefer always to build new relationships with other States on strict basis of non-intervention. They view it as an essential ingredient of any lasting and serious relationships.

In this context, the Soviet practice offers a good example. Thus one of the first treaties of the new regime of Russia after the 1917 Revolution, the Treaty of Friendship between Persia and the Russian Soviet Republic of February 26th, 1921 stipulates in Article 4 that:

> "In consideration of the fact that each nation has the right to determine freely its political destiny, each of the two contracting parties formally express its desire to abstain from any intervention in the internal affairs of the other."[109]

This treaty has been concluded in the time of the fierce civil war, which was raging in Russia, hence there is no doubt that the non-intervention clause specifically includes total abstention of intervention in the civil war. However, there is no specification whether the attitude of withholding assistance applies also to the established Government. Also, many 'Treaties of Friendship, Cooperation and Mutual Assistance' which have been concluded between the USSR and many other countries, always include a reference to 'non-interference in the internal affairs'.

However, if reference to 'mutual assistance' in these treaties may be taken to mean assistance in times of peace, reference to 'Principles of Socialist Internationalism' in treaties with Eastern Block countries may indicate that if there is any internal conflict in any

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of attempts to shape international society, according to some particular ideal conception of religious truth, political legitimacy or human good would be perpetual war or universal tyrany".

Law, Morality and the Relations of States. PUP, Princeton, 1983, p.55.

[109] 9 League of Nations Treaty Series, 1922, No.268, p.403.

socialist country, other sister States would have the right to intervene to save 'Socialism'. The Brezhnev Doctrine is, in fact, a codification of that stand. Thus, if nearly all the treaties between socialist countries contain a mixture of references to 'mutual assistance, socialist internationalism and non-interference in the internal affairs',[110] it seems that the principle of 'socialist internationism' overrides the other principles, which in practice empties the principle of non-intervention especially from any real meaning.

It must be stressed that in practice the Soviets have never intervened in situations of internal disorders in other countries without first establishing that they acted under a formal request by the established Government of the country. This happened in Hungary 1956 and Afghanistan 1979, which means that the Soviets cling to the traditional rule which allows assistance to legal Governments only.

That stand it seems is confirmed also in the bilateral treaties concluded by the USSR with non-Communist States, and especially Non-Aligned States. Thus, the first Article of the important Treaty of Peace, Friendship and Cooperation between USSR and India, stipulates that:

> "Each party shall respect the independence, sovereignty and territorial integrity of the other party and refrain from interfering in the others' internal affairs".[111]

However, the consistent Soviet condemnation of the US, China and Pakistan for their alleged assistance to rebel groups in some States of the Indian Federation, and the support given to the legal Indian Government in all fields, suggest that the Soviet Union does not see its assistance to Indian Government as infringement of the principle of non-intervention.

Similarly, the Treaty of Friendship between the USSR and Angola of November 11th, 1976 stipulates in its first Article that:

> "Respect for sovereignty and territorial integrity, non-interference in one another's internal affairs".[112]

This treaty was signed in circumstances of a violent civil war, which is going till now, it (the treaty) was never seen by the USSR as a legal barrier against its important assistance in all fields to the established Angolan Government. The USSR views itself as acting lawfully, whereas those who assist the rebel UNITA especially South Africa and the US, are acting against international law and the character of the UN.

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[110] In this context, the Treaty of Friendship between the USSR and Poland of April 21st, 1965 stipulates in its first Article that:

> "The High Contracting Parties shall in accordance with the principles of Socialist internationalism strengthen their internal and unshakeable friendship, develop all round co-operation and render each other assistance on the basis of equality of rights, respect for sovereignty and non-interference in the internal affairs of the other party".

540 UNTS, 1965, No.7845, p.106.

[111] 10 ILM, 1971, p.905.

[112] Op. cit., supra. chapter 1, n.87, p.485.

This means that the traditional rule still find a very strong friend in the era of the Charter. However, it must be stressed that the Soviets are not alone in that respect, France especially and the Third World seem also the lean toward the traditional view, since in many respects it favours the status quo.

In this respect, France concluded many agreements with the former French colonies in Black Africa, which always includes a reference to the principle of non-intervention.

However, when the legal Governments faced some internal troubles, which vary from a full scale civil war to mere riots, the French intervened on the side of the Government, and always see themselves as acting lawfully. Thus they intervened in Zaire in 1977 and in Chad especially from 1968 up till the present day.

In this context, the General Agreement between the Government of the French Republic and the Republic of Dahomey (now Benin) of February 27th, 1965, stipulates in its preamble that:

> "...Desiring to strengthen their friendly relations on the basis of respect for each other's sovereignty and territorial integrity, the equality of States and non-interference in their internal affairs in accordance with international law and the obligations arising therefrom".[113]

It is interesting to note that the agreement speaks of 'non-intervention in accordance with international law' which means that the two parties take non-intervention as a legally binding principle, and above all that it does not contradict with assisting the legal Government facing a civil war. This interpretation is confirmed by Kiss who writes:

> "Il est admis que les Etats étrangers peuvent aider le gouvernement légal d'un Etat en guerre civile dans l'accomplissement de sa tâche."[114]

Also the accord of non-aggression 'The Accord of Nkomati' signed on 16th of March 1984 between the Republic of South Africa and Mozambique provides in its first Article that:

> "The High Contracting Parties undertake to respect each other's sovereignty and independence and, in fulfilment of this fundamental obligation, to refrain from interfering in the internal affairs of the other".[115]

Article 3 of the same agreement lists with a great detail the practical application of the principle of non-intervention in the circumstances of the civil war which is going on in Mozambique, where the insurgents, the Movement of National Resistance (MNR) are heavily assisted by the Government of South Africa, and also the duty of Mozambique to refrain from giving assistance in whatever form to ANC of South Africa. However, the agreement is silent on the question of the legality of assistance to the established Governments.

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[113] 1088 UNTS, 1979, No.16675, p.332.

[114] A.CH. Kiss: Répertoire Français de droit international public, Tome 2, CNRS, Paris, 1966, p.411.

[115] SCOR, 39th Year, (Supplement January, February and March 1984). UN Doc S/16 451 (Annex), 1986, p.124.

On the other hand, there is strong evidence in the practice of States, that when third countries are blamed for intervention in civil war on the side of the insurgents, their usual answer is the rejection of the blame and the claiming of innocence, which indicates that there is a general agreement between States that assistance to insurgents is always illegal. Thus, when Nicaragua protested against the Honduran help to the Contras, the representative of Honduras in the UN wrote to the President of the UNSC a note of protest, part of which reads as folows:

> "...In rejecting as unfounded the aforementioned protest, I wish to inform you again that the Government of Honduras is not intervening, either directly or indirectly, in the armed conflict besetting Nicaragua".[116]

Moreover, when Sudan accused Libya of conspiracy, plotting and financing all kinds of sabotage against its security and independence,[117] and in this violation of all international and regional charters and customs, which prescribe non-intervention, the Secretary of the People's Committee of the People's Bureau for Foreign Liaison of the Libyan Arab Jamahiriya stated in a letter to the Secretary-General that:

> "The Sudan has, for a number of years, been experiencing continuous revolutions and disturbances by force, using the ugliest means it is trying to find external justifications through empty accusations against the States neighbouring on the Sudan, among them my country".[118]

Implicitly, then, Libya does not view intervention on the side of insurgents as legally justified at least in its rhetoric.

However, Governments engaging in civil wars, are not ashamed of acknowledging their receipt of foreign assistance in fighting their opponents, or even publicly asking for assistance in order to be able to fight effectively and protect their sovereignty.[119]

To conclude we can say, that States accord a very important place to the principle of non-intervention and view it as an important element of any solid relationships. Practice

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[116] Ibid, UN Doc S/16365, p.71. See also UN Doc S/16413, p.97.

[117] Ibid, UN Doc S/16419 (letter of the Sudanese Minister of Foreign Affairs to the Secretary General of the UN), (March 17th, 1984), pp.100-102.

[118] Ibid, UN Doc S/16421 (letter of March 19th, 1984), p.102.

[119] Thus, in a statement by the Ministry of Foreign Affairs of the Democratic Republic of Afghanistan (April 22nd, 1984), it is stated that:

> "It is well known to all that the limited Soviet contingency have been invited by the legal Government of the Democratic Republic of Afghanistan in order to help our people defend their freedom and independence against external dangers and aggressions and against attempts to reimpose on the country a system suitable to imperialism and reaction".

Ibid UN Doc S/16445, p.121. On the other hand, in an official communiqué issued by the governing Junta of National Reconstruction on March 26th, 1984 it is plainly stated that:

> "...[T]he Government of Nicaragua has felt obliged to call upon the governments of the World to provide it with the technical and military assistance necessary for defending itself against the State terrorism practised by the United States Government against the people of Nicaragua".

Ibid, UN Doc S/16440, p.118.

establishes that, within States party to treaties with non-intervention clauses, should a civil war ensue in one of the party States, assistance given to the established Government has never been seen as an infringement of that non-interventionary principle. Whereas any assistance to insurgents is always seen as a breach of the principle, this is a codification of the traditional rule in the era of the Charter.

B. Non-Intervention in Multilateral Treaties

1. The UN Charter

There is no straightforward statement concerning non-intervention in the UN Charter, Article 2/7 being primarily concerned with the relations between the organisation of the UN on one hand, and its members on the other. However, the rule can be deduced easily from other principles of the Charter, such as respect for sovereign equality, and the prohibition of the use of force or its threat in the relations between States. In this respect, Arangio-Ruiz rightly argues that:

> "...[A] sweeping prohibition such as that of Article 2 (4) was found to cover at least some problems met by the principle of non-intervention".[120]

Likewise, Chaumont stresses that:

> "On peut admettre en effet que l'Article 2 (4) en visant à protéger 'l'indépendance politique de tout Etat' contient l'obligation de non-intervention".[121]

However, Shaw maintains that:

> "The United Nations Charter does not provide any guidance as to the legitimacy of intervention in internal conflicts, being primarily concerned with inter-State armed aggression and the corollary of the right of States to self-defence".[122]

In other words, the UN Charter has left the question of intervention in civil wars unresolved.

In my view, the situation has been clarified in the subsequent practice of the UN. A very important range of declarations and resolutions have dealt with the principle of non-interventions in general, and stressed that non-intervention in civil wars is a very important component of the principle. Among the most important resolutions dealing the subject; Resolution 2131 (XX) 1965 on the inadminissibility of intervention-Resolution 2625 (XXV) 1970 the Friendly Relations Declaration. The Charter of Economic Rights and Duties of States Resolution 3281 (XIX) 1974. The definition of aggression and the very important declaration on non-intervention contained in UNGA Resolution 36/103 of September 12, 1981.

It seems to me and without entering the great discussion on the legal force of UNGA

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[120] Op. cit., supra. n.60, p.120.

[121] Op. cit., supra. n.80, p.406.

[122] M. Shaw: International Law and Intervention in Africa. 8 Journal of International Relations, 1985, (David Davies Memorial Institute of International Studies), p.341.

resolutions, one may advance safely, that non-intervention is established as one of the fundamental elements of the actual legal order. The principle also is seen as a legally binding principle, or even a rule of jus cogens.[123]

Moreover, it must be stressed again that the practice of the UN, has upheld the legality of assistance to insurgents waging war against colonialism, racism and alien domination. Thus, the UNGA has affirmed the right to rebel in respect of the said situations in its Resolution 2728 (XXVI) 1971 which 'confirms the legality of the people's struggle for self-determination from colonial rule and foreign domination and alien subjugation...by all means consistent with the Charter'.[124] Also the UNGA made assistance to those peoples a legal duty Resolution 2621 (XXV), in fact, it stipulates that:

> "Member States shall render all necessary moral and material assistance to the peoples of colonial territories in their struggle to attain freedom and independence".[125]

The Friendly Relations Declaration 2625 (XXV) further confirms that in the folowing terms:

> "In their actions against and resistance to such forcible action in the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter".[126]

And lastly, the latest declaration on non-intervention indicates in its Part III/b:

> "The right and duty of States fully to support the right to self-determination and independence of peoples under colonial domination, foreign occupation and racist regimes as well as the right of these people to wage both political and armed struggle in accordance with the purposes of the Charter".[127]

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[123] In fact, even the US seems to agree that the principle of non-intervention has attained the status of a jus cogens rule. Thus, in a memorandum dated December 29th, 1979 to the acting Secretary of State Warren Christopher, the Legal Adviser of the US State Dept. and concerning the legality of the Soviet intervention in Afghanistan it is stressed that the Soviet action violated Article 2/4 and Article 1/2 of the UN Charter and the Friendly Relations Declaration principles forbidding the use of force and non-intervention and specifically it was stated that:

> "3-No treaty between the USSR and Afghanistan can overcome these Charter obligations of the USSR, etc.
> 4-Nor is it clear that the treaty between the USSR and Afghanistan concluded in 1979 between the Revolutionary Taraki government and the USSR, is valid, if it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention of the Law of the Treaties describes as a 'peremptory norm of general internatinal law (Article 53) namely that contained in Article 2, paragraph 4 of the Charter".

And then he adds:

> "...[W]hile agreement on precilsely are what the peremptory norms of international law is not broad, there is a universal agreement that the exemplary illustration of a peremptory norm is Article 2, paragraph 4".

M.L. Nash: Digest of United States Practice in International Law, 1979. US Dept. of State, 1983, p.35.

[124] Djonovich, (ed.), op. cit., supra. chapter 1, n.79, Vol. 13, p.439.

[125] Ibid, p.218.

[126] Ibid, p.340.

[127] 35 UNY, 1981, p.148.

It is clear here there the UNGA does not see assistance to insurgents as a violation of the principle of non-intervention, and also there is no contradiction between the principle of non-intervention and the principle of self-determination.

However, some Western lawyers and Governments see in the pronouncements of the UNGA in the context of assistance to insurgents, a total confusion of the exact relationship between the principles contained in the Charter. In this respect, Pomerance notes that:

> "The impression gathered from a review of relevant Assembly declarations and pronouncements is that of a shopping or sales catalogue. A package of principles, inherently conflicting is presented without any indication of how a desirable balance might be struck between them".[128]

Although the observation is general it was essentially directed at the relationship between the principles of non-intervention and self-determination.

Hasbi insists that there is no contradiction between the two principles. he rightly writes:

> "La question qui se pose, c'est de savoir si la légitimation de l'aide aux peuples et leur mouvements de libération signifie, comme d'aucuns le prétendent, le recul du principe de non-intervention au profit du droit des peuples à disposer d'eux mêmes? S'il y a eu recul, celui-ci ne s'est pas fait au profit de n'importe quel droit des peuples à disposer d'eux mêmes. Il s'agit d'une remise en cause du principe de non-intervention qui ne touche en rien l'Etat en tant que tel. Car si le principe de l'intervention a été toléré, il l'a été en faveur de situations internationales, potentiellement étatique, dans la mésure où la prise en considération des peuples et des mouvements de libération par la société inter-étatique s'est faite sur la base de la vocation étatique des entités reconnues".[129]

The heart of the argument is that since 'the peoples' struggling for self-determination, have been recognised as possessing international personality, then assistance to them by third parties does not offend the principle of non-intervention, since it is in the end an assistance to a 'legal Government'. Moreover, we can say, that Article 1/4 of the first Protocol which made wars of national liberation international conflicts has confirmed that national liberation movements possess international personality at least in connection with humanitarian law, hence assistance to them does not offend the principle of non-intervention.

Apart from self-determination conflicts, the UN practice as reflected in its resolutions, seems to establish non-intervention as the rule which must be adhered to in non-international conflicts.

Thus, in civil wars **stricto sensu**, assistance to insurgents in all forms is made very clearly illegal, whereas there is a total silence concerning assistance to the established Government against whom an internal conflict is fought. Thus, the ILC, in its Draft Code of Offences Against the Peace and Security of Mankind, considered in its Article 2/4 as acts against peace and security of mankind:

> "4- The organisation, or the encouragement of the organisation by the authorities of a State, of armed bands within its territory for incursions into the territory of another

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[128] Pomerance, op. cit., supra. chapter 1, n.182, p.46.

[129] A. Hasbi: Les mouvements de libération nationale et le droit international public. LGDJ, Rabat, Morocco, 1981, p.352.

> State, or the toleration of the organisations of such bands in its own territory as a base of operation or as a part of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions".[130]

However, the UNGA in its Resolution 2131 (XX) on Inadmissibility of Intervention of 1965 listed in a clear way the acts considered to constitute intervention in civil wars, and prohibited their commission by third States. Article 2 of that declaration stipulates that:

> "No State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities, directed towards the violent overthrow of the regime of another State".[131]

The Friendly Relations Declaration made it a duty not to commit any subversive acts against established Governments, it stressed that:

> "Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursions into the territory of another State".[132]

It then adds that:

> "Every State has the duty to refrain from organising, instigating or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."[133]

It is clear here that there is a consensus in the international community that apart from assistance to insurgents in wars of self-determination, the priority is to the respect of the sovereignty of the State and the preservation of the **status quo**. In fact the 1981 Declaration on Non-Intervention is very explicit in that respect. It states that:

> "The Duty of a State to refrain from the promotion encouragement or support, direct or indirect, of rebellious or secessionist activities within other States under any pretext whatsoever or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States".[134]

The Declaration reflects in effect the real concerns of the Third World countries since it speaks about secessionist activities and the need to preserve the unity and political order of States.

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[130] Op. cit., supra. n.50, p.328.

[131] D.J. Djonovich, op. cit., supra. n.124, Vol. 10, (1974), p.108.

[132] Ibid, p.339.

[133] Ibid, p.339.

[134] Op. cit., supra. n.127, p.148.

The Declaration was in the eyes of the Third World countries as the representative of Guyana said 'a shield to be used by all States rather than a sword'[135] and the representative of Yugoslavia stressed that:

> "The Declaration contained precise definitions of all unlawful acts of intervention and should serve as standard for assessing such behaviour from whatever quater it might come".[136]

On the whole the UN practice on the normative level as the resolutions and declarations cited demonstrate, uphold the principle of non-intervention as containing a prohibition on all forms of assistance and aid to insurgents waging war against their legal Government, however, nothing is said explicitly concerning the legality of assistance to the Government in power. The UN itself, is banned from intervention according to Article 2/7, but in the event of the situation becoming a threat to peace and security, there is nothing to prevent the organisation from intervention.

On the other hand, it seems that States act on the basis that the UN prohibition of intervention in civil wars, does not apply to assistance to established Governments. Thus even India, which is a traditional champion of non-intervention, did not hesitate to sign a treaty with Sri-Lanka which specifically states in Article 2/16/A that:

> "India will take all necessary steps to ensure that Indian territory is not used for activities prejudicial to the unity, integrity and security of Sri-Lanka".[137]

In other words India admits the illegality of any assistance to insurgents, however, concerning the position towards the established Government of Sri-Lanka the situation is different the same Treaty (of July 29th, 1987) stipulates in Article 2/16/C that:

> "In the event that the Government of Sri-Lanka requests the Government of India to afford military assistance to implement these proposals the Government of India will cooperate by giving to the Government of Sri-Lanka such military assistance as and when requested".[138]

A more revealing case on the intention of States concerning assistance to legal Government in cases of civil wars, can be seen in the discussions which took place in the UNSC (26-31 March 1976) concerning the Angolan Civil War. Thus, the Angolan representative stressed that:

> "...In reality Angola was exercising its sovereignty by asking assistance from those

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[135] Ibid, p.146. In fact, the Declaration was adopted by 120 votes for, 22 against and 6 abstentions, among the dissenting States were: the US, UK, France, Germany and Japan. The US stated:

> "The text defined rights and duties in vague and sometimes imbalanced language".

Ibid.

[136] Ibid, p.147.

[137] 6 ILM, 1987, p.1181, (India/Sri-Lanka: Agreement to Establish Peace and Normality in Sri-Lanka, July 29th, 1987).

[138] Ibid.

> that from the beginning had a clear understanding of the Angolan struggle. It was Angola's right to appeal to any country for help when necessary. Any concern of that kind about Angola was unquestionably an unjustified interference in its internal affairs".[139]

The majority of those intervening were in support of Angolan view. Pakistan in particular was very clear, concerning the extent of the right of a sovereign State to request assistance, its representative stated that:

> "The representative of Angola was within his right in suggesting that Angola, as sovereign and independent country might choose to seek help where it wished, even to invite and retain within its borders the military forces of foreign countries that it considered friendly to its cause and whose assistance it felt it needed".[140]

The African countries in the Council (The Congo, Guinea-Bissau and Mali) stressed in substance that the socialist States assistance to Angola needed no justification whatsoever,[141]. Only the UK and the US were against Angola's plea,[142] they implied in their statements that the policy of non-intervention, should be applied to the two sides of conflicts. On balance, it seems again that the traditional rule, is still a suitable to the international community, which is still based essentially on distinct independent territorial units.

2. Regional Organisations

2.1. The OAU

The OAU Charter states among the principles of the organisation in Article III/2 that:

> "Non-interference in the internal affairs of States".[143]

At the same time the organisation is dictated to the eradication of colonialism in all its aspects. For that reason a liberation committee was created to coordinate assistance in all aspects (financial, training and educational matters) to liberation movements. This assistance has never been seen as a violation of Article III/2 of the UN Charter.

However, the principle of non-intervention has been upheld strongly in the post-colonial era (Biafra, The Congo, Eritrea, etc.) in those cases the OAU was swift in condemning foreign interference on the side of the insurgents but concerning assistance to the

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[139] 30 UNY, 1976, p.173.

[140] Ibid, p.175.

[141] Ibid.

[142] The US representative in fact, appealed for a complete non-intervention policy. He stated:

> "Just as the end of South Africa's wrongful intervention was very welcome...so the continuing Cuban and USSR interventions was wrong, because it deprived the Angolan people of the ability to exercise self-determination freely and because of its size".

Ibid, p.177.

[143] Op. cit., supra. chapter 1, n.85, p.74.

established Governments, it seems that the organisation does not see it as a violation of the Charter. In fact, in a 1978 resolution the OAU Ministerial Council emphasised that by virtue of its sovereignty each country had the right to call foreign aid when it sees that its independence is in danger.

In my view this is a natural stand, in the circumstances of Africa, where the objective conditions of revolt exist in many countries because, among other things, of ethnic, social and economic problems. Hence, the organisation, which is after all an organisation of States, must appear as favouring the **status quo** and the existing political orders. In this context, any attempt to table assistance to legal Governments as illegal, would be seen as an encouragement to violence and secession.

2.2. The OAS

Latin America has historically been a fertile ground for interventions, especially US interventions, but at the same time it was the place where struggle for non-intervention has never diminished. The Charter of the OAS in its Article 18 provides that:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements".[144]

However, despite this far reaching prohibition, it seems that the practice seems to go in line with the traditional rule, concerning civil wars, in that respect Havana treaty of 1928 is still valid. Thus, on January 7th, 1960 following almost simultaneous armed disturbances in Guatemala and Nicaragua the American President (Eisenhower) issued a statement in which he indicates the readiness of the American Navy to intervene following the requests of the two Governments. On the same day the Department of State issued a statement clarifying the legal basis upon which the US would provide its assistance. It reads as follows:

> "Any assistance which may be given in conformity with the president's announcement will be in response to a request which the respective Government concerned have every right in their sovereign capacity to make and which the United States in its sovereign capacity has a right to provide. It would be carried out within the national jurisdiction of the requesting Governments".[145]

Here again the traditional rule is upheld strongly, only established Government can benefit from assistance.

2.3. The Pact of the League of Arab States

This Pact which was concluded on May 10th, 1945 states in its Article 8 that:

> "Every member State of the League shall respect the form of Government obtaining in the other States of the league and shall recognise the form of Government obtaining as one of the rights of those States, and shall pledge itself not to take any

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[144] Article 15 of the Original Charter became Article 18. 721 UNTS, 1970, p.328.

[145] Op. cit., supra. n.50, pp.535.

action tending to change that form".[146]

This means implicitly that any intervention on the side of insurgents seeking to change the form of Government of member States is a clear violation of Article 8 of the Pact. However, assistance to keep the legal Government in power seems to be perfectly legal. Thus, the intervention of Egypt for many years on the side of the Republican Government in the civil war in Yemen, has never been labled as illegal by the league.

2.4. Other Cases

Many important multilateral agreements stress the principle of non-intervention, examples include:

First, the Treaty of Amity and Cooperation in South-East Asia of February 24th, 1976 between Indonesia, Malaysia, The Philippines, Singapore and Thailand. Its Article 2/3 speaks of non-intervention in the internal affairs of one another.[147] The aim of the treaty was essentially to protect the political orders of the contracting parties against Communist insurgencies, and by consequence non-intervention does not apply to mutual assistance between the legal Governments, in combating any threat of Communist Revolts.

Second, the Charter of the Islamic Conference includes among its principles (Article II/13 2-Respect for the right of self-determination and non-interference in the domestic affairs of member States). However, it seems that in the instance of the Afghan Civil War, the Conference was essentially hostile to the Soviet intervention,[148] because it denied the Afghan people their right to determine their destiny freely. In fact the Afghan insurgents received openly substantial amounts of assistance from Pakistan, Saudi Arabia and Egypt.

Third, the Conference on Security and Cooperation in Europe in its Final Act on August 1st, 1975 under Part VI states that:

> "They [the Contracting Parties] will, **inter alia**, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State".[149]

Thus, there is a clear reference to the prohibition of any assistance to those seeking to overthrow violently the political regime of their States, and an absence of any reference to the legality of assistance of established Governments, however, it must be stressed that the Warsaw Pact and the NATO arrangements were created, among other things, to protect the political regimes of member States, and by consequence their primary object is to assist any Government which is threatened by violence and revolt.

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[146] 70 UNTS 1950, No.241, p.254.

[147] Op. cit., supra. chapter 1, n.87, p.298.

[148] For further details on the work of the Conference and especially on this resolution which was adopted by the Conference on the eve of Soviet intervention in Afghanistan. See 26 Keesing's 1980, pp.30241-42.

[149] 14 ILM, 1975, p.1295.

The conclusion to be drawn from practice of States, is that the principle of non-intervention is declared as essential to any bilateral or multilateral understanding. Also, there is a general consensus that non-intervention in civil wars is a very important component of the principle. However, 'non-intervention in civil wars' applies essentially to insurgents, third States are explicitly prohibited from assisting such insurgents on whatever groud. On the other hand, there is some toleration of the legality of assistance to the legal Government, which means that the traditional rule is with us for some time, if not forever.

This result in my view is not strange, since established Governments would like to keep the monopoly of receiving assistance and aid, for themselves and deny their opponents any such right. This is the logic of an international system which is based upon States and the traditional rule serves it well.

Further, the fertile ground of revolution is the Third World, and the reality is that few Governments in this world, would survive any armed resistance to their rule, without external aid. This means that on the legal field, the traditional rule has no lack of supporters.

C. Non-Intervention in the Context of Protocol II of 1977

From the very start of the efforts to codify an instrument relating to internal conflicts. The question of intervention occupied a central position in all the discussions which took place. In fact foreign assistance has been seen as having the effect at least in some cases, of encouraging the internal conflict or even of creating it, and even the ICRC which is very reluctant to voice its opinion, admitted that its experience in the field has taught it that unless aid is humanitarian "it will always give a greater scope to the conflict and consequently increase the number of victims".[150] This proves that the question of intervention is not only a theoretical problem, in reality it has a direct impact on the application of humanitarian law.

In this respect the majority experts of the ICRC were of the opinion that when assistance by third States to either party of the internal conflict takes the form of the dispatch of armed forces taking regular part in the hostilities, or when these forces are sufficiently large to modify the balance of the warring factions, in that case the nature of the conflict will be modified. The internal conflict becomes an international one,[151] with the consequence that all humanitarian rules would be applicable to the conflict.

It must be noted here that the experts did not distinguish between assistance given to the legal Government or the insurgents, the two parties were treated alike, and it seems that is the reason why their opinion had no real impact on Government experts and later on the draft Protocol II submitted by the ICRC to the DCDHL. In fact, their opinion gave priority to humanitarian motives rather than to demands of sovereignty.

At the CGEDHL (of 1972), some experts, especially from the Third World insisted on

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[150] CGEDHL, (Geneva 24 May-12 June 1971: V. Protection of Victims of Non-International Armed Conflicts). Submitted by the ICRC, p.18.

[151] Ibid, p.19.

including a reference to the principle of non-intervention and sovereignty[152] in the Preamble of the Draft Protocol II. Also, it has been stressed that:

> "The prerequisite for the satisfactory implementation of Protocol II should be the non-intervention of any State in the affairs of another".[153]

This, in fact, expresses the fear of Third World States that humanitarian law might be a vehicle for foreign intervention, hence it was necessary to make it clear that all its application closely connected with a total adherence to the principle of non-intervention.

It must be noted that the discussions did not touch directly on the question of the legitimacy of aid to established Government, although the recurrent insistence upon the right of the Government to build up its own political system and its right to defend that system in events of a conflict arising between the authority and insurgents, may implicitly include the right of that Government to ask for foreign help.

The ICRC Draft Protocol II submitted to the DCDHL a provision (Article 4: Non-Intervention) which reads as gollows:

> "Nothing in the present Protocol shall be interpreted as affecting the sovereignty of States or as authorising third States to intervene in the armed conflict".[154]

It must be noted that at the very start of the DCDHL, some delegations especially from the Third World let it be known that their attitude to the Protocol II as a whole will depend on how foreign interference can be precluded by the Protocol. In that respect the Mexican representative stressed that his delegation:

> "...[C]onsidered it essential that Protocol II should safeguard the sovereign rights of States. In the past and even very recently the protection of actual or possible victims of internal conflict has been the pretext for external intervention.[155]

Moreover, Abi-Saab, the Egyptian delegate expressed the feelings of the Third World States in these terms:

> "Several delegations from the Third World had expressed legitimate anxiety, however, about the possibility of Protocol II being used as a justification for intervention. In

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[152] See the proposal submitted by the Experts of Indonesia and Pakistan concerning the Draft Preamble of Protocol II, CE/COM II/87, Vol.2, CGEDHL (2nd Session Geneva 3 May-3 June 1973. Report on the Work of the Conference) Annexes, p.50.

[153] Ibid, Vol.1., para. 230, p.65. Moreover, some experts felt that 'the primary condition to be stressed for the applications of all provisions was the principle of sovereignty and non-intervention', (ibid, para. 2.539, p.120). In other words, the application of humanitarian law is completely dependent on the adherence to the principles of security and non-intervention.

[154] Vol.1, ORDHL, p.34.

[155] Ibid, Vol.8, CDDH/I/SR.24, para. 14, p.231. The Mexican representative then added:

> "[H]is delegation's attitude to the Protocol as a whole would depend on the extent to which Articles 3 and 4 (dealing respectively with the legal status of the parties to the conflict and non-intervention) precluded the possibility of external intervention in the domestic affairs of States on any ground whatsoever".

Para. 15, p.232.

a world in which threat as well as acts of intervention, military or otherwise, were common, it was important that those misgivings be taken into consideration."[156]

He then suggested that:

"The Conference should try to meet that anxiety to a greater extent and should keep it in mind in drafting each of the Articles of Protocol II".[157]

Thus, the Third World sees behind every humanitarian rule a possibility of intervention. This reaction is sometimes understandable, taking into account the history of those nations with the developed world. In this respect, during the discussions of Draft Article 4, two important amendments were advanced, both with the aim of reducing the possibility of interventions to none. The first was tabled by Nigeria and co-sponsored by Iraq and Venezuela and suggested the deletion of the words 'by other States', at the beginning of paragraph 2 of Article 2 as adopted by Working Group B.[158] The intention of the amendment was to make unlawful all interventions either by States or other organisations and bodies in the international conflict.

This amendment was accepted, but on the clear understanding that it does not prohibit the UN from performing its functions in relations to the questions of the protection of human rights and in keeping peace and security,[159] once the internal conflict threatens international order.

The second amendment to Article 4/2 was submitted by India. It suggested the inclusion of a third paragraph to Article 2 which reads as follows:

"3. Despite the foregoing, any external interference in a non-international conflict as defined in Article 1 of the present Protocol, shall be considered a violation of the present Protocol, which will cease to apply till such time as external interference is removed".[160]

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[156] Ibid, CDDH/I/SR.24, para.28, p.234.

[157] Ibid.

[158] Article 4/2 as adopted on 4 and 5 March 1975 stipulates that:

"Nothing in the present Protocol shall be invoked by other States as a justification for intervening, directly or indirectly for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs".

10 ORDCHL, CDDH/I/238/Rev., p.99.

[159] See in this regard the comments made by Mr. Obradovic (Yugoslavia), Chairman of Group B, op. cit., supra. n.155, CDDH/I/SR.29, para. 50, p.295 and especially the comments of the Italian delegate. The latter stressed that:

"...[He would] raise no objections to amendment CDDH/I/239 with the proviso, however, that it could not be interpreted as preventing the UN and its specialised agencies, or for that matter any other organisations dedicated to the protection of human rights since that was one of their basic tasks".

Op. cit., supra. n.155, CDDH/I/SR 30, para. 8, p.301.

[160] 4 ORDCHL, CDDH/I/240, p.16.

The Indian delegate explained that subversive activities might be financed, backed with equipment or even directed from abroad, hence, it is in his opinion very appropriate to State that it at any time external interference occurs Protocol II would cease to apply. Thus, the Indian amendment was envisaged as a sanction against the breach of the Article banning intervention.

The amendment was not accepted, and was attacked by many delegations, that it would lead to a situation where the victims of internal conflicts would find no protection. Also, it has been argued that the adoption of the Indian amendment would weaken the application of Protocol II, since everything would depend on the subjective assessment of the parties to the conflict.[161]

The discussions, however, revealed that there is some consensus between States that even in cases of foreign interventions in internal wars, the basic humanitarian considerations contained in Protocol II will continue to have effect. This is a very encouraging result for the real victims of civil wars.

Article 3/2 in the final version of Protocol II stipulates that:

> "Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever in the armed conflict or in the internal or external affairs of the high contracting party in the territory of which that conflict occurs".[162]

This is the first Article in the era of the Charter dealing specifically with the question of non-intervention, in the first international instrument dealing with application of humanitarian law in the said conflicts. The Article on the surface seems to prohibit intervention to both sides of the internal conflicts.

The **travaux préparatoires** show that Third World States especially concentrated their efforts on making sure that insurgents will find no legal ground for getting any assistance. Thus, it is clear any assistance to insurgents is a clear that violation of Article 3/2 of Protocol II.

On the other hand, Article 3 read together with Article 1 of the Protocol II (the latter defines the scope of the application of the Protocol II) will lead to the conclusion that established Governments, would easily find a legal justification for getting assistance from outside sources, simply by arguing that the conflict had not attained the character of a non-international conflict as defined by Article 1. However, whenever Protocol II is said to be applicable to the internal conflict, the room for manoevering by the legal Government to get foreign assistance is severely restricted, if not totally closed.

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[161] See the comments of the Canadian delegate, op. cit., supra. n.155, CDDH/I/SR.30, para. 6, p.300. Moreover, the Austrian delegate invoked another ground for rejecting the Indian amendment:

> "...[B]ecause in all conflicts that had occurred over the last two centuries, governments had always stated that there was outside interference, the new paragraph 3...might serve as a pretext for failure to apply Protocol II, since it was difficult to establish whether or not there had been outside interference".

Op. cit., supra. n.155, CDDH/I/SR.30, para.9, p.301.

[162] Op. cit., supra. n.63, p.619.

D. The ICJ Decision in Nicaragua Case and its Impact on Intervention in Civil Wars

The decision in this case is very important, since it addresses a couple of very important questions concerning especially questions relating to the use of force, such as intervention and self-defence.

Before embarking on analysing the judgement and its impact especially on the law governing intervention in civil strife, it is important to say that the present Court had in Corfu Channel Case condemned intervention as contrary to international law. It stressed that:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past, given use to most serious abuses and as cannot, whatever be the present defect of international organisation find a place in international law".[163]

In this respect, Brownlie comments 'the value of the pronouncement is decreased by its generality and ambiguity, its character as **obiter dictum**, and absence of any reference to the provisions of the Charter'.[164] Despite these misgivings, the statement is important since it is the first explicit condemnation of intervention in the history of international Courts.[165]

In the **Nicaragua Case**, the Court addressed many important facts of the question of intervention, and clarified the legal position especially concerning intervention in civil wars. However, it is important to analyse the content of the judgement concerning all questions relating to intervention, because they are closely connected with each other.

1. The Status of Intervention in General International Law

In the above case, the Court stressed first that there is in customary international law a principle of non-intervention. It held:

> "...[T]hough examples of trespass against this principle (of non-intervention) are not infrequent the Court considers that it is part and parcel of customary law."[166]

This means frequent violation of the principle does not undermine its legitimacy and its claim to be an important principle of international law.

The Court stressed the existence of the principle in the Charter despite the absence of its explicit stipulation, it explained that in this way 'it was never intended that the Charter should embody written confirmation of every essential principle of international law in force'.[167] Then, it added:

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[163] Corfu Channel Case (United Kingdom v. Albania), ICJ Reports, 1949. pp.135-6.

[164] Brownlie, op. cit., supra. chapter 1, n.193, p.289.

[165] However, it must be made clear that the PCIJ and later the ICJ had upheld in many instances the principles of sovereignty, political independence and territorial integrity, as cardinal principles of international law, which for all purposes imply a corresponding right of non-intervention.

[166] Op. cit., supra. chapter 1, n.70, para.202, p.1069.

[167] Ibid.

> "The existence in the opinion juris of States of the principle of non-intervention is backed by established and substantial practice.[168]

The Court invoked different resolutions of the UNGA relating to non-intervention, as revealing that **opinio juris**, the Court then, made a very important statement concerning the legal force of those resolutions, among them the Friendly Relations Declaration (Resolution 2625 XXV). In this context, the Court held:

> "The effect of consent to the text of such resolutions cannot be understood as merely of 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves".[169]

This means that the Court treated these UN resolutions as having a legal force by themselves, this is true especially to member States who expressed their consent to those resolutions, hence the Friendly Relations Declaration which was adopted by consensus must be treated as having an independent legal force, and not merely as an authoritative interpretation of the Charter.

2. The Content of the Principle of Non-Intervention

The Court states in general that:

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference".[170]

Thus, non-intervention is seen as the other face of sovereignty, they are closely connected.

The Court indicated that the principle includes among other things :

> "The principle forbids all States or group of States to intervene directly or indirectly in international or external affairs of other States...a prohibited intervention must accordingly be one bearing on matters in which each State is permitted by the principle of State sovereignty, to decide freely, one of these is the choice of a political, economic social and cultural system, and the formulation of foreign policy".[171]

What we notice here is that the Court did not insist on the 'dictatorial' character of intervention, which was advocated for a long time (especially by the Western Doctrine) as the real criteria for a prohibited interventions. This means at least implicitly, that all intervention which have the aim of interfering with the free exercise of all the components of the principle of sovereignty, are prohibited, whatever their character may be.

The Court also treated the delicate question of 'humanitarian assistance', in its opinion to escape the condemnation as a form of intervention. This form of assistance must be given

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[168] Ibid.

[169] Ibid, para.188, p.1066.

[170] Ibid, para.202, p.1069.

[171] Ibid, para.205, p.1070.

'without discrimination of any kind'. This means that it must be given to all parties in the internal conflict, especially to those who need it most, who are under the control of both parties to the internal conflict. The Court emphasised the following:

> "in view of the Court if the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross namely 'to prevent and alleviate human suffering' and 'protect life and health and to ensure respect for human sufferings' it must also above all be given without discrimination to all in need in Nicaragua not merely to the contras and their dependents".[172]

This is a very important statement, since first humanitarian assistance may be used for political purposes by favouring a certain faction in the civil war, secondly even when it is given on purely humanitarian motives to one faction it will be inevitably interpreted by the other faction as an involvement in the internal strife. Thus, the criteria set by the Court are very valuable in assessing the legality of such kind of assistance, also when acted upon in practice, they will really mitigate the sufferings of the civilians on both sides.

On the question of whether cessation of economic aid and reduction of 90% of sugar imports, which the US has decided against Nicaragua, constitute intervention in the internal affairs of the latter, the Court contended by pointing out that:

> "The Court has merely to say that it is unable to regard such actions on the economic plane as is here complained of as a breach of the customary principle of non-intervention."[173]

It is clear her that the Court has abstained from evaluating the legality of the above mentioned acts under contemporary international law, especially under the ever growing numbers of the UN resolutions condemning economic intervention in its different forms.

3. Assistance to Insurgents-Its Legality under International Law

The Court observed in the first place the frequency of foreign interventions on the side of the insurgents, who are fighting their own Governments. However, it did not include assistance given to forces fighting for self-determination in that category, in fact it states that:

> "...[It was] not here concerned with the process of decolonisation. This questions is not in issue in the present case".[174]

This means that the Court excludes intervention on the side of the insurgents fighting for self-determination as understood in the practice of the UN from being as an example of the prohibited intervention.

In his Dissenting Opinion, Judge Schwebel commented on the passage just quoted by emphasising that:

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[172] Ibid, para.243, p.1069.

[173] Ibid, para. 245, p.1069.

[174] Ibid, para.206, p.1070.

> "Yet the implication, or surely a possible implication, of the juxtaposition of the Court's statements is that the Court is of the view that there is or may be not a general but a particular right of intervention provided that it is in the furtherance of the 'process of decolonization', that is to say by these statements, the Court may be understood as inferentially endorsing an exception to the prohibition against interventions in favour of the legality of interventions in the promotion of the so-called 'wars of liberation' or at any rather, some such wars, while condemning intervention of another character."[175]

Obviously Judge Schwebel is not happy with these implications of the Court's statements, but there is no doubt they translate faithfully the legal developments which were taking place since at least the beginning of 1960s.

However, apart from that, the Court considered that intervention on the side of the opposition whether directly or indirectly, with or without armed forces by third States who share the political and moral values of the insurgents, is not a right in international law:

> "...[F]or such a general right to come into existence would involve a fundamental modification of the customary principle of non-intervention".[176]

In other words, the traditional rule which prohibits any assistance to the insurgents is still seen by the Court as the governing rule.

In fact, the Court found that even the intervening States on the side of opposition did not justify their actions by reference to a 'new right of intervention or a new exception to the principle of its prohibition'.[177] The US for instance justified its conduct against Nicaragua on the grounds of the domestic policies of the Government, its ideology, the level of its armaments and the direction of its foreign policy. In this regard, the Court noted that:

> "...But these were statements of international policy, and not an assertion of rules of existing international law."[178]

After that, the Court stated the position of international law **vis-à-vis** assistance to insurgents in the following terms:

> "... the Court therefore finds that no such general rule of intervention in support of an opposition within another State exists in contemporary international law".[179]

The Court also stressed that acts which directly or indirectly involve the use of force and which constitute a breach of the customary principle of non-intervention, will also constitute a breach of the principle of the prohibition of the use of force in international relations. The implication is very clear assistance to insurgents in all forms can be considered as a breach of Article 2/4 of the Charter, with the further implication in that

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[175] Ibid, para.179, p.1192.

[176] Ibid, para.206, p.1070.

[177] Ibid, para.207, p.1071.

[178] Ibid.

[179] Ibid, para.209, p.1071.

case the UN may intervene to stop such assistance under Chapter IIV of the UN Charter.

Moreover, The Court emphasised also that insurgents are not in a position to request aid from outside States, it considered that the principle of non-intervention:

> "...[W]ould certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State".[180]

This means that the Court has pursued a **status quo** oriented approach, where the protection of sovereignty is the corner stone of international order. Social change and revolutions are not however, prohibited but they must be made without any help from outside.

Thus, the Court turned a deaf ear to suggestions for opening the door for exceptions to the principle of non-intervention, in order to assist insurgents especially those who meet certain conditions (such as: effective control over a substantial part of the territory, wide-spread support from the population, organised military command, etc.).

4. Aid to Established Government

The Court it seems has upheld the legality of assistance to the established Government, it stressed it in the followinf terms:

> "...[I]ndeed it is difficult to see what would remain of the principle of non-intervention in international law, if intervention, which is already allowable at the request of the Government of the State, were also allowed at the request of the opposition".[181]

This is an express recognition of the right of the established Government to seek and receive aid from third States in the event of civil wars, even in the era of the Charter.[182] Thus, the Court in effect confirmed the relevance of the traditional rule in our contemporary era.

5. Self-Defence as an Answer to Intervention

The US tried to justify its actions against Nicaragua (these actions include a substantial involvement on the side of the Contras who are fighting the established Government) on the ground of collective self-defence with El-Salvador, which in its opinion was the object of a campaign of destabilisation by Nicaragua, which assisted heavily the insurgents who are fighting the Salvadorian Government. It is interesting to note that the US did not try to justify its actions on grounds of counter-intervention, which indicates they do not offer

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[180] Ibid, para.246, p.1079.

[181] Ibid.

[182] The Court noted that international law does not prohibit intervention on the side of the established Government upon its request. It only does not accept intervention on the request of insurgents, since in its view intervention is accepted on the request of the two sides of civil war. It held:

> "This would permit any State to intervene in the internal affairs of another State, whether at the request of the Government or at the request of its opposition such a situation does not in the Court's view correspond to the present State of international law".

Ibid.

a solid legal ground.

Moore has in fact, advocated that 'collective self-defence' as an answer to substantial involvement by third parties on the side of the insurgents, who are fighting a friendly regime. He considered those efforts of destabilisation as 'a secret war' which Article 51 of the UN Charter applies to them.[183] In this context, the massive support and assistance to the insurgents in El-Salvador given by Nicaragua and Cuba constitutes in his opinion an 'armed attack' in the meaning of the UN Charter's Articles 3 and 53 of the Rio Treaty, which justifies the use of force in the form of self-defence.

He gave a new interpretation to the phrase 'armed attack' which in his opinion means neither armed nor "armed aggression is limited by any language such as 'direct' which could have been expected if the draftsmen had intended to exclude indirect attack."[184]

The main criteria of this 'secret war' is according to Moore, when it is:

> "...[C]onducted through assistance in organising Marxist-Leninist controlled insurgencies, the financing of such insurgencies, the provision and the shipment to them of arms and ammunition, training the insurgents; assistance in command and control, intelligence military and logistic activities, and extensive political support."[185]

Furthermore, that war includes terrorist attacks and subversive activities preliminary to and supportive of all out covert attack. To him, those actions are a real danger to world order. They are a very clear violation of the vision and intentions of the founding fathers of the UN and OAS Charters. He then suggests that:

> "...[A]t the minimum, it must be understood that an attacked State and those acting on its behalf are entitled to a right of effective defence to end the attack promptly and protect self-determination".[186]

In his view, State practice affords many examples which justifies his above assertion.[187]

Judge Schwebel in his Dissenting Opinion in the Nicaragua Case, has developed an argument which does not differ substantially from Moore's view,[188] he concentrated on proving that the US actions in supporting the countries in Nicaragua were necessary and proportionate acts of self-defence, in response to Nicaraguan support to Salvadorian rebels. The Court, however, refuted such a stand. It held:

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[183] He maintains in this respect:

> "The right of individual and collective self-defence embodied in Article 51 of the Charter to apply to secret indirect armed attack as well as to open invasion".

The Secret War in Latin America and the Future of World Order, 80 AJIL, 1986, p.83.

[184] Ibid.

[185] Ibid, p.125.

[186] Ibid, p.117.

[187] He cites the examples of the US who considered the substancial assistance to insurgents in Greece in 1947 by Bulgaria, Albania and Yugoslavia as an armed attack. Similarly, France regarded assistance to Algerian rebels from the Tunisian base of Sakiet-Sidi-Youssef as an act justifying self-defence.

[188] For a critical position vis-à-vis Moore's stand, see J.P. Rowles: Self-Defence and the Charter-A Reply to Professor Moore. 80 AJIL, 1986, pp.568-583.

> "...[T]he Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of provisions of weapons or logistical or other support".[189]

In the opinion of the Court then, the expression of 'armed attack' in Article 51 of the Charter does not include assistance to insurgents. It considered that such assistance may be regarded as a threat or use of force, or amount to intervention in the internal affairs of other States.[190]

Judge Schwebel, it must be stressed criticised bitterly the Court's stand (on the question of whether aid to irregular's may be tantamount to armed attack) he believed that the Court's interpretation of the expression 'armed attack' departs from accepted and desirable law.[191] He maintained that the judgement of the Court will not contribute to the progressive development of international law, because it failed to take into account the realities of the use of force in international relations.

Moreover, Judge Schwebel made it clear that the Court has sided with Third World position on the above subject, that position was stated in the thirteen powers draft submitted during the discussions on the definition of aggression.[192] Judge Schwebel stressed that he agrees with Stone who thought that the Third World proposals were at odds with the Charter and general international law. However, I think that despite these criticisms the judgement of the Court in that respect, is well-founded, it is in line with the letter and spirit of the Charter, since any enlargement of the scope of 'armed attack' will not serve the purpose of the Charter in keeping peace and security in the world.

Also, even if we agree with Moore and Judge Schwebel that substantial assistance to the insurgents may constitute an armed attack, the important question, is who is entitled to determine that the assistance has reached a level where it can be considered as substantial, and what are the elements or criteria of substantial assistance.

It is to be noted that the Court has rejected the claim of collective self-defence on another ground in the following terms:

> "...[Namely] there is no rule of customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation-where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of

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[189] Op. cit., supra. n.166, para.195, p.1068.

[190] Ibid.

[191] Ibid, para.155, p.1182.

[192] The Thirteen Powers Draft on the definition of aggression, submitted by Third World States, specifically stated:

> "When a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organised or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter".

Ibid, para.162, p.1187.

an armed attack."[193]

Those elements in fact were absent, since El.Salvador did not declare itself to be an object of an armed attack and did not request the US to intervene in collective self-defence.

6. Evaluation of the Decision of the ICJ

The US representative to the UN commented on the ICJ decision in the **Nicaragua Case** in a meeting of the UNSC on July 29th, 1986 by making it clear that:

> "We [the US] believe the Court has fundamentally misperceived the situation in Central America. It is simply wrong on many of its facts, and the Court's conception of the relevant international law is seriously flawed in important aspects."[194]

This is the US official position. Moore went so far as to suggest that 'the decision itself, is a tragedy for world order and for hopes to strengthen international adjudication'.[195] The focus of the attack is the ICJ explanation of the important questions of the use of force, intervention and armed attack and the relevant legal standards.

In my view the Court's judgement is a very important contribution to the development of a world ruled by law.[196] It attempted to restrict and not enlarge the spectrum of the situation in which the use of force and intervention are allowed. The vital question of assistance to rebels, on which scholarly controversy has raged for a very long time, has been settled in a very clear way, and if especially strong States adhere to the ICJ standards, the interventionary activity would be significantly curtailed in a very significant manner.

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[193] Ibid, para.195, p.1068.

[194] SCOR, 39th year, Special Supplement.

[195] J.N. Moore: The Nicaragua Case and the Deterioration of World Order, 81 AJIL, 1987, p.152.

[196] For a sympathetic aprraisal of the ICJ's decision, see R. Falk: The World Court's Achievement, 81 AJIL, 1987, p.112-116, and T. Farer: Drawing the Line, 81 AJIL, 1987, p.112-116.

CHAPTER THREE

DEFINITION AND DELIMITATION OF THE SCOPE OF CIVIL WARS

1. Introduction

The aim of this chapter is to reveal the extent to which the concepts of sovereignty and non-intervention, have influenced attempts to define civil wars. States, in general, are reluctant to accept limitations on their 'sovereign power' to qualify the nature of the conflicts which may take place in their territories. The argument of non-intervention, will be used to deny the capacity of any third party to determine the existence of such conflicts in their territory, and the argument of sovereignty will be used to defend their freedom of action, in such cases of extreme crisis.

In situations of upheveals, States want to retain their full sovereignty, in order to combat their internal enemies, without any fear that the latter may claim any special legal status. In my view, States have always resisted the creation of international norms concerning the conduct of civil wars, because such an exercise will inevitably result, in their view, in the opening of the door to intervention by other States in their internal affairs, and in consequences affect their sovereignty.

In my opinion, it is the influence of these two concepts (sovereignty and non-intervention) which made international law very slow in responding to the problems raised by internal conflicts. States will not easily accept restrictions to their power to deal with those who are under municipal law and have committed the most heinous of crimes, namely high treason.

2. The Importance of Defining Civil Wars

The most important reason is that the application of humanitarian rules will depend essentially upon the characterization of the conflict. Higgins correctly pointed out that:

> "...[T]he identification of a major conflict as either civil or international war is essential to the correct application of the relevant legal norms"[1].

This means that in the absence of such identification, the violent situation will be governed by national law, which is very harsh towards rebels and their supporters, it means also that even humanitarian organizations such as the ICRC will have great difficulty, if not face total prohibition in getting any assistance to the population in need, since any attempt on their part will be deemed by the established Government, as an intervention in their internal affairs.

Another important reason for the definition of civil wars, is that since the elevation of wars of national liberation to the status of international wars by virtue of Article 1/4 of the first Protocol of 1977 (This category has been the main form of civil war in the sixties and seventies) we are left now with the real cases of civil wars, which occur inside

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[1] R. Higgins: Internal War and International Law, in C.E. Black and R.A. Falk (eds.): The Future of the International Legal Order. Vol.3: Conflict Management. PUP, Princeton, 1971, p.85.

independent States, which have realised their right to self-determination.

These States are mainly in the third world, and because of the frequency of outside interventions on the side of their internal enemies, the question of definition or in other words the matter of the existence of an internal conflict within their borders, has acquired an enormous importance. Those States combat their internal opponents, among other things, by denying the existence of a situation which has the characteristics of a civil war.

Thus, in practice, States label their opponents, as terrorists, thieves, mercenaries, saboteurs, etc., which means that they do not consider them as other than common law criminals.

In other hand, Nicaragua labels the 'contras' as 'Somozan Mercenaries'[2]. Further, in a letter from the Minister of Foreign Affairs of Nicaragua to George Shultz, the US Secretary of State, it is stated that:

> "The announcement made yesterday by the terrorist forces organized, financed and directed by the United States of America, through the CIA, that the Port of Corinto had been mined, etc."[3].

According to Nicaragua, then, those elements have no status and can receive no protection of humanitarian law; because among other things, they are implicitly the agents of a foreign power set to destroy the State.

Similarly, in a statement by the Foreign Minister of Afghanistan in response to an earlier announcement by the US President Reagan concerning the proclamation of an 'Afghan Day', it is stated that:

> "The pronouncement of the President of the United States of America on this score have nothing new about them, yet it is surprising to see as to how a great demagogic and deceitful effort is made by Reagan to cover the crimes of a handful of executioners and tyrants, masquerading as 'Mujahiddin' and the 'fighters for the cause of freedom'"[4].

It is clear from these statements that the task of applying humanitarian law to internal conflicts, and especially the task of defining them, is by no means an easy exercise.

States may very well cling to their sovereignty, by denying the existence of a civil war, and by characterising any outside attempt to uphold such existence as an indesirable intervention in their internal affairs.

3. Definition of Civil War: Some Terminological Considerations

A host of words are used to denote the violent events which take place within a State and are of a serious nature. Among them civil war, internal war, civil strife, and the most recent notion, 'Armed Conflict of a non-international character'. These all have something in common. They are internal as opposed to international events, they are violent as opposed

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[2] UNSCOR, 39th year, (Supplement for Jan, Feb and March 1984), UN. New York, 1986, UN Doc. S/16343, p.87.

[3] Ibid, UN Doc S/16395 dated March 7th, 1984, p.86.

[4] Ibid, UN Doc S/16445, p.120.

to peaceful.

However, civil war is the classical word for the violent struggles within a State which involve the systematic use of armed force and divide the nation deeply. It is (civil war) the most used word in the literature of international law, it is used as the title of one of the first and original books on the subject by Rougier (Guerres civiles, 1903), and also by some recent works on the subject such as Castren (Civil War, 1965), Falk (International Law of Civil War, 1972) and Moore (Law and Civil War in the Modern World, 1974). Moreover, some recent articles still use this term such as is the case of Cassess (La guerre civile et le droit international, 1986).

Similarly, some Governments use the same term in official documents. Thus, in a communiqué dated March 26th, 1984, the Government of Nicaragua stated that:

"...[F]urthermore the civil war in the fraternal nation of El Salvador..."[5].

In the era of the UN Charter, the term 'war' has been out of fashion it has been replaced by the term 'armed conflict' the reason being essentially, to end all the legal and practical controversies concerning the question of the existence of a 'state of war' which plagued the League of Nations. However, this change has been made essentially in relation to international conflicts.

The Geneva Conventions of 1949 have in fact, extended this change to internal conflict as well, common Article 3 speaks of 'armed conflicts of a non-international character'. The word has since been used frequently, by the UNGA and by the UN Secretary-General, and numerous resolutions used the term especially those adopted in connection with the subject of human rights in armed conflicts. Finally, Protocol II of 1977 used the same term, indeed it designated the subject matter of the whole Protocol.

However, the word civil war will be used together with the term 'Armed conflict of non-international character'. Since the latter, has been interpreted, especially in Protocol II of 1977 to mean the same thing as 'civil war' in classical international law, as I will try to show in the coming sections.

After these preliminary remarks, it seems to me that in order to cover the subject of this chapter, it is necessary to deal first, the various distinctions between civil wars and other forms of violence which occur within States.

Secondly, the legality of civil wars in international law. Thirdly, the definition of civil wars under customary international law. Moreover, the views of classical writers and the influence of the concepts of recognition of insurgency and belligerency on the definition of civil wars will also be dealt with. Fourthly, the definition of non-international armed conflicts in the context of Common Article 3 will be examined. Finally, the definition of non-international armed conflicts under Protocol II will be assessed.

SECTION I: Distinctions between Civil Wars and other Forms of Violence which Occur within the State

The distinction between civil wars or non-international armed conflicts and other forms of

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[5] Ibid, UN Doc S/16440, p.117.

collective violence against the established Government, which may break out inside a given State, such as rebellion, insurrection, riots and internal tensions, is very important, since humanitarian rules may apply only in situations of civil wars, that is in situations which attain a certain degree of intensity, duration and organisation. Lesser forms of violence are covered by the national law of the country.

However, the distinctions are by no means easy to make, especially at the beginning of the violent events, since it is in the interests of the established Government to leave the situation ambiguous, in order to claim their full sovereign right to suppress the violence by all means at its disposal, without any international legal restraints.

Nevertheless, some writers have tried to make such distinctions. Thus, Rougier after observing that:

> "Une grande confusion règne dans la terminologie employée pour désigner les degrés de trouble moindres que la guerre civile; les mots émeute, insurrection, soulèvement, rebellion, sédition sont constamment employés comme synonymes"[6].

He then tried to clarify the matter by dividing these different kinds of troubles, according to their gravity and importance, in the following fashion:

> "Au premier degré: émeute ou insurrection, au 2ème degré: soulèvement ou rebellion, au 3ème degré: guerre civile".

According to him, insurrections are characterized by their localization, usually they do not extend beyond a small region of the national territory, they are of very short duration, however, they may become civil wars, if they spread to the whole territory and be prolonged. Essentially they are crimes under municipal law, as they are not recognized by international law.

Rougier defines rebellion by stating that:

> "D'une manière générale, on peut dire qu'il y a rebellion lorsqu'une partie de la nation est dans un état permanent de résistance et de révolte envers le souverain et qu'elle manifeste son hostilité par des prises d'armes, des violences légères et des émeutes".[7]

He then adds that:

> "Trop faible encore pour se poser résolument en adversaire et en rival du gouvernement assez fort pour lui faire tête, la partie insurgée essaye d'agir par menace et intimidation"[8].

Riots and rebellions may lack organization, and develop to mere acts of looting and disorder. They always fall under the authority of the local law.

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[6] Rougier, op. cit., supra. chapter 2, n.62, p.33.

[7] Ibid, p.38.

[8] Ibid.

Vattel distinguishes between five different kinds of disorders, which may disrupt the State and force the sovereign to use armed forces. They are: (i) popular tumult; (ii) sedition; (iii) insurrection; (iv) rebellion; and (v) civil wars. The classification is made according to the seriousness of the disorder.

(i) Popular tumult is:

> "...[A] disorderly gathering of people who refuse to listen to the voice of their superiors whether they be disaffected towards their superiors themselves or merely towards certain private individuals".[9]

It seems that this form of disorder is very easy to contain, hence it does not pose any real difficulty to the authorities, the sovereign is not directly challenged, local law exclusively governs the situation. Vattel then adds that:

> "...If the anger of the people is directed particularly against the magistrates or other officers invested with public authority, and if it is carried so far as to result in positive disobedience or acts of violence, the movement is called sedition"[10].

(ii) Sedition may develop into insurrection which is more serious when 'the evil extends and wins over the majority of the citizens in a town or province, and gains strength that the sovereign is no longer obeyed'[11].

(iii) Insurrection according to Vattel is essentially a local phenomenon, in other words it is strong but it is based in a specific region of the country as opposed to the country as a whole.

(iv) Rebellion on the other hand 'only applied to an uprising against the lawful authority, which is lacking in any semblance of justice'[12]. Thus, it is 'the injustice of the legal government' criteria which distinguishes rebellion, implying that the uprising is serious and is not confined to a particular region of the country.

(v) Finally, rebellion may develop into full civil war, when the rebels 'become sufficiently strong to make a stand against him [the Sovereign] and force him to make formal war upon them'[13]. According to Vattel then, only civil war, as we will show in the coming sections, can draw the attention of international law, because in fact, it resembles international wars between States.

Implicitly then, all other forms rest exclusively within the domestic jurisdiction of the State, sovereignty overrides any other considerations. Padelford maintains that there is something in common between revolt, insurrection, rebellion, revolution and civil wars. They are essentially different forms of the same thing "opposition to and an endeavour to

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[9] E. de Vattel: The Law of Nations or Principles of Natural Law. Vol.3, translated by C.G. Fenwick, Carnegie Institution of Washington, 1916, p.336.

[10] Ibid.

[11] Ibid.

[12] Ibid, p.338.

[13] Ibid.

bring about an alteration of the institutions or policies of an established government"[14]. He then distinguishes between three important degrees of disorders: (i) insurrection, (ii) rebellion and (iii) civil wars.

(i) Insurrection or revolt "... is usually confined to a small portion of a country, is of a relatively short duration, and is supported by a minimum degree of organization".[15] In this case, the legal Government will resort to its armed forces to quell the revolt, police action cannot cope with the situation.

(ii) He then adds that:

> "An uprising may be said to be rebellion or revolution when the opposition embraces a large part of the country, forms a responsible government assuming the functions and powers of such over the territory controlled, and places disciplined and organized troops in the field against the forces of the established government"[16].

This definition in practice, makes no difference between rebellion and civil war, since rebellion has been defined as a very serious event, involving a real organization of the insurgents, with a real occupation of a part of the territory of the State.

However, the classical statement on this subject is contained in the famous Lieber Code, issued during the American Civil War. Its Article 149 states that:

> "Insurrection is the rising of people against their government, or a portion of it, or against one or more of its laws or against an officer or officers of the government. It may be confined to a mere resistence, or it may have greater ends in view"[17].

This definition, it seems, concentrates on the targets against which the uprising takes place, rather than the means by which the Government fights against such uprising. There is no precision on the duration of the disorder, and no mention of the local character of the revolt. Moreover, there is no mention of the relevance of international law to the situation.

Article 151 defines rebellion as follows:

> "The term 'rebellion' is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own"[18].

Rebellion, it seems is seen as having a definite aim, it is the setting up of a new Government, in a particular region or regions of the old united country, which indicates that the term is employed essentially to designate a war of secession. Again, there is no indication that international law, has any relevance to the situation.

It seems that there is sufficient evidence to the fact that, firstly, insurrections and

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[14] N.J. Padelford: International Law and the Spanish Civil War, 31 AJIL, 1937, p.227.

[15] Ibid.

[16] Ibid.

[17] L. Friedman (ed.): The Law of War: A Documentary History. Vol.1, Random House, New York, 1972, p.184.

[18] Ibid.

rebellions as forms of internal violence against the Government in power, are always seen as less violent than civil wars. Thus, in the case of Pan American Airways v. Aetna Casualty and Surety Company Case (1973), Judge Franbel stated, in connection with all risk exemption clauses in an insurance policy, that:

> "...As the all risk argument develops, it becomes apparent that reliance here is essentially upon the concept of 'insurrection' a somewhat less august (more embryonic smaller scale) attack upon a Government that 'rebellion', and a less momentous and organized conflict than a 'civil war'.[19]

Implicitly then, insurrections and rebellions are left within the domestic jurisdiction of the State, the Government can use whatever means to suppress them, this leads directly to the second observation, to the effect that third States have no right to intervene in those situations even by protest.

In this context, in a note from the US Secretary of State, Stimson to the US Consul at Nogales in Mexico on April 4th, 1929, at the time of an armed rebellion against the legal Government of Mexico, it is stated:

> "The...[US State] Department does not perceive a legal basis upon which to found representations against bombardment of Empalme by the forces of the recognized Mexican government as part of its military campaign, thus far highly successful, to crush out a rebellion against the authority of that government. Nor is this government in a position to substitute its judgement for that of the regularly constituted Mexican authorities as to the wisdom, propriety, or effectiveness of legitimate military measures and operations undertaken by the regular Mexican forces to crush such rebellion, etc."[20].

This statement shows clearly that in cases of rebellions, States accept the duty of non-intervention and acknowledge the full right of the established Government to take all measures necessary to halt and quell the disorder.

The conclusion is that there is no unanimity in stating different criteria which distinguish different kinds of disorder which occur within the State. However, the common denominator between insurrections, riots and rebellions and so forth, is that they are generally considered to be within the domain of exclusive jurisdiction of the State, and thus sovereignty and non-intervention are dominant to the exclusion of any international concern.

The Government in power is free to deal with the situation in accordance with its local laws, which consider violent disorders as crimes against the security of the State, hence harshly punishable. In this area, sovereignty and non-intervention weigh against the interests of humanity.

It must be noted that even in the era of the UN Charter, that is in contemporary international law as witnessed by common Article 3 and the Protocol II, disorders which do not attain the threshold of 'non-international armed conflict' are within the domestic jurisdiction of the State.

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[19] Pan American World Airways v. Aetna Casualty and Surety Company, (Decision), 12 ILM, 1973, p.1466.

[20] Whiteman, op. cit., supra. chapter 1, n.8, Vol.1, (1963), pp.930-31.

These disorders, are officially called 'internal disturbances and tensions'. Thus, Article 1/2 of the Protocol II explicitly states:

> "This Protocol shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts".

This paragraph in fact, excludes those situations from the field of application of Protocol II, and also in my opinion from the field of application of Article 3 since the latter applies only to non-international armed conflict, which must attain some degree of intensity and duration and are more serious. The ICRC in its documentation submitted to the first session of the CGEDHL in 1971, has defined the two concepts of internal 'disturbances' and 'tensions'. The former reads as follows:

> "...[I]nvolves situations in which there is no non-international armed conflicts as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order"[21].

However, internal tensions are defined as:

> "...[S]ituations of internal disorder-and even more, those of civil war-often lead to the arrest of large numbers of persons because of their acts or their political attitudes, this phenomenon is likewise found in situations which are not marked by acts of violence, but which reflect internal tensions of a political, racial or other nature. This evolution is also due to the fact that the established Governments and their police dispose of such powerful means of repression, that an armed insurrection is often practically impossible. This may give rise to situations of internal tensions which are characterized by the fact that the Governmental authorities keep full control of the events and undertake the massive internment of persons they may consider dangerous to their security"[22].

Thus, it seems that in internal disturbances, acts of violence take place, which leads the Government to use force to maintain order, whereas in internal tensions there is no resort to violence by the opponent of the regime. However, because of serious tensions force is used as a preventive measure to maintain law and order. The use of force in these situations takes the form of:

> "...[L]arge scale arrests-a large number of political prisoners. The probable existence of ill-treatment or inhuman conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgations of a state of emergency or simply as a matter of fact; allegations of disappearances"[23].

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[21] CGEDHL, (Geneva 24 May- 12 June, 1971, Documentation submitted by the ICRC: V. Protection of Non-International Conflicts), 1971, p.79.

[22] Ibid, p.89.

[23] Y. Sandoz, C. Swinarski and B. Zimmerman (eds.): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of Aug. 12th, 1949. ICRC, Martinus Nijhoff, Geneva, 1987, para 4476, p.1355.

Meron seems to include internal disturbances and tensions in one single concept, namely 'internal strife' which in his opinion may arise:

> "When a government does not recognize a situation involving collective violence to be internal armed conflict but nevertheless resorts to extraordinary measures such as emergency regulations, martial law or state of emergency, or when a state enacts legislation which permits such measures without categorizing them as such, an internal strife situation may be frequently be implicated"[24].

However, whatever name is given to such situations, one thing is certain, they are not at present within the field of application of humanitarian law.

This has not prevented ICRC from acting on an **ad hoc** basis, indeed Pictet notes in this respect that:

> "Au cours des trente dernières années, le CICR a été autorisé à visiter et assister plus de 300,000 détenus politiques, dans plus de 80 pays. On le voit, c'est devenu l'une de ses activités majeures. Dans la moitié des cas, environ, on se trouvait en présence de troubles intérieures et, dans les autres, de tensions politiques sans troubles intérieures et, dans les autres, de tensions politiques sans troubles caractérisées"[25].

This indicated that the absence of a clear legal basis, has not prevented the ICRC from saving lives and reducing instances of inhuman treatment.

However, despite this optimism, Pictet recognizes that :

> "Une action du CICR en faveur des détenus politiques s'impose donc sur le plan humanitaire, mais elle est délicate et rencontre souvent bien des obstacles, nés des exigences de la souveraineté étatique, de la sûreté publique et du principe de non-ingérence dans les affaires intérieures des nations"[26].

Thus, sovereignty and non-intervention may very well be used to justify the denial of any humanitarian action in favour of the victims of such situations. Indeed there is nothing which can prevent States from denying the ICRC access to places of detention.

Nevertheless, it must be stressed that situations of internal disturbances and tensions are not cases of 'no man's land' where international law has no relevance. Human rights instruments can play a very useful role, since they contain a hard core of non-derogable rights and prohibitions, which must be adhered to in all circumstances including times of emergencies.

In this way, the right to life, prohibition of torture and inhuman treatment, the right to fair trial are mentioned as non-degorable rights in universal and regional human rights instruments. In these situations, the sovereignty of the State is limited by human rights law rather than humanitarian law.

It must be also stated that the ICRC and some international lawyers (especially Meron)

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[24] T. Meron: Human Rights in Internal Strife: Their International Protection. Cambridge Grotius Pub. Ltd., 1987, p.103.

[25] J. Pictet: Une institution unique de son genre: le Comité International de la Croix-Rouge. Institut Henry-Dunant, Genève, ed. A. Pédone, Paris, 1985, p.93.

[26] Ibid, p.91.

have inaugurated a new approach to deal with the situations of internal disturbances and tensions. It is reported that the intention of the new approach:

> "...[I]s not to create a new body of law specific to these situations (internal disturbances and tensions) but rather to recall a number of existing fundamental rules drawn from written law, customary law and general legal principles, rules which will thereby be better applied in situations of internal disturbances and tensions and which cannot be violated without offending the universal conscience of mankind".[27]

In accordance with the spirit of this approach, Grasser proposed a code of conduct[28], likewise Meron suggested a Draft Model Declaration on internal strife[29]. Both texts proposed that certain rules must absolutely be respected. They are:

> "The right to life, the inherent dignity of the human being, the forbidding of murder, torture and other degrading forms of treatment, the taking of hostages, disappearances of persons, acts of terrorism and collective punishment, recourse to force out of proportion with the objectives sought, human treatment of persons deprived of their freedom, the granting of fundamental legal guarantees, the rights of the child, protection of the wounded and sick and the search for missing persons"[30].

The general conclusion of this section is that in customary law the concepts of insurrections and rebellions were widely used to describe situations of internal disorders, which are exclusively within the reserved domain of national jurisdiction, hence international law has no relevance, indeed even civil wars before the recognition of belligerency are purely internal matters. Fenwick stressed rightly that:

> "It is well established that civil wars, in the sense of struggles by different factions to obtain control of the Government of the same territorial area, belong within the class of domestic questions which are outside the control of international law"[31].

This means to me that in traditional international law, all disorders which take place within a State whatever their intensity and duration and whatever their characterization, they are **prima facie** within the domestic jurisdiction of the State, until the recognition of the belligerency has been granted.

In contemporary international law, non-international conflicts within the meaning of either Article 3 or Protocol II, have been regulated by international humanitarian law. Internal disturbances and tensions, which presumably include the old concepts of insurrection and rebellion, are still outside the ambit of humanitarian law, but actions of the ICRC, and the influence of human rights, may mitigate their inhumanity, and States may have to adjust their sovereignty to these demands.

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[27] Internal Disturbances and Tensions: A New Humanitarian Approach. IRRC, 1988, 28th year, No. 262, p.6.

[28] H.P. Gasser: A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct. Ibid, pp.38-58.

[29] T. Meron: Draft Model Declaration in International Strife. Ibid, pp.59-76.

[30] Ibid, p.6.

[31] C.G. Fenwick: Civil Wars Under the Control of International Law. 32 AJIL, 1938, p.538.

SECTION II: On the Legality of Civil Wars under International Law

There is a general agreement that international law does not prohibit civil wars, Pinto observes that:

> "Illégale dans l'orde juridique interne, la guerre civile n'est pas interdite par le droit international general"[32].

He then adds that:

> "Le gouvernement légal exerce librement sur son territoires les compétences étatiques, donc l'emploi de la force armée. Ses adversaires organisés ne sont pas tenus, par une règle de droit international de lui en réserver le monopole"[33].

Thus, resort to civil wars by a section of the population of the State cannot be considered as a breach of international law.

Some writers inferred from the above stand, that international law in fact encourages recourse to civil wars. In this context, Padelford argued that:

> "International law predicts its existence upon a system of sovereign states each with exclusive jurisdiction over its own subjects within the national domain. Nevertheless, it takes cognizance of civil disturbances and accords them an equivocal position in its system. Uprisings that supremely unlawful in municipal law, being attacks upon the personality of the State, are not at all unlawful according to international law"[34].

He then adds:

> "On the contrary it [international law] favours them by advocating admission of insurgents rights at an early stage of hostilities, thereby exempting the rebels from the extreme rigors of their national law, and makes their position quasi-legal"[35].

Padelford interprets then the institution of the recognition of insurgency, as the evidence that international law encourages civil wars.

I think that this suggestion goes too far, it is true that international law, does not prohibit civil wars. This being so, exactly because it sees them as internal affairs of the State to which international law has no relevance. To infer that international law encourages them, is an untenable suggestion, since it goes against the very principle of sovereignty, which is the main pillar on which international law is based.

Concerning the claim that the institution of recognition of insurgency, as an indication that international law favours civil wars, it is my view that it is a very weak argument, since the institution itself is very vague on its contents and effects, also resort to it in practice is very rare, and in any event it is considered as obsolete at least after the era of the UN Charter.

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[32] Pinto, op. cit., supra. chapter 2, n.90, p.477.

[33] Ibid.

[34] Op. cit., supra. n.14, p.228.

[35] Ibid.

Scelle on the other hand, maintains that not only international law but constitutional law as well, legitimizes recourse to civil war, he states:

> "D'une part le droit pénal fait de la rebellion soit individuelle, soit collective et de la sédition, des actes criminelles. D'autre part, ce même droit constitutionel en validant, au moins partiellement les actes des gouvernements de fait, et le droit international en organisant la reconnaissance soit des insurgés belligérents, soit des gouvernements nouveaux semblent bien admettre la légitimité du recours à la force en vue de l'occupation des compétences gouvernementales, puisqu'ils font de cette occupation un mode d'investiture au moins plausible de ces compétences".[36]

According to him, it is impossible to prohibit insurrections 's'il ne garantit par des institutions super-étatiques le libre jeux des constitutions et le respect de la souveraineté populaire'[37]. In other words, only when respect for human rights is adhered to, can recourse to rebellion be prevented.

In fact, Scelle argues that there is in every 'ordre juridique' a norm which authorizes resistence against tyranny. He writes:

> "Nous pensons qu'elle existe parmi celles qui sont fondamentales sans avoir besoin d'être formulées. Elle est postulée par l'existence même de tout ordre juridique"[38].

It seems to me that this argument is not valid, since there is no actual local law which permits the overthrow of the established Government by force, also there is no evidence that even international instruments of human rights contemplate such a course. It is against the logic of State sovereignty.

On the other hand, the argument of Scelle that 'recognition of belligerency' is an indication of encouragement by international law to civil war, seems to be incorrect, since the institution relates primarily to the application of the laws of war to the situation of civil wars, which have been recognized as attaining the level of belligerency. It only indirectly gives some very limited legal status to the insurgents, the institution also has been of rare occurrence.

However, there is, in my view, clear evidence that international law although does not prohibit civil wars, it nevertheless does not encourage them. This is due to the fact that international law essentially favours the status quo, not change, within States. The insistence that States are absolutely prohibited from giving aid and assistance to insurgents is a part of the answer.

Rougier in fact maintains that:

> "...[A] son début la guerre civile est toujours illégale, même quand elle parait bien motivée et légitime en fait"[39].

He then gave the legal rational behind such an assertion. He writes:

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[36] G. Scelle: La guerre civile Espagnole et le droit de gens. 45 RGDIP, 1938, p.267.

[37] Ibid, p.270.

[38] Ibid, p.267.

[39] Op. cit., supra. n.6, p.25.

> "Non seulement elle n'est pas l'exercise d'un droit, mais elle viole les droits de l'Etat attaqué, auquel les insurgés étaient unis soit individuellement, soit collectivement par un lien d'allégiance, une promesse de respect et d'obeissance"[40].

Rougier then arrives at an opposite conclusion from that of Scelle. In fact, he denies the existence of a right to revolt, and implicitly thinks that civil war is forbidden because it violates the rights of States.

Pinto maintains that:

> "Si le droit international ne condamne pas la guerre civile, il ne l'encourage pas l'autorité exclusive du gouvernement légal qui maintaint l'ordre public sur le territoire nationale doit être respectée par les Etats tiers".[41]

It seems to me that this is a correct statement since it goes with the logic of sovereignty and non-intervention. This logic in fact, stands against any pretended claim that international law supports and encourages the ousting of established Governments by the use of force.

The UN Charter, although not prohibiting civil wars, gives no evidence that it encourages them. Shaw rightly observes:

> "The United Nations Charter neither confirms nor denies a right of rebellion. It is neutral"[42].

In my view, the UN practice largely supports this contention. Thus, whenever States facing civil wars contend that third States were behind their troubles, the typical reaction of the UN is to insist on non-interference, however, without pronouncing any view as to the legitimacy of such conflicts. Also States accused of such interferences always deny such allegations, which implicitly means that they accept that international law and the UN Charter do not encourage civil wars.

In this context, in 1958, Lebanon brought a complaint before the UNSC in respect of the intervention of the United Arab Republic in its civil war. The latter rejected categorically any such intervention. The USSR during the discussion considered that:

> "The settlement of questions regarding the Lebanese Government was the inalienable right of the Lebanese people and so no other Government had any right to intervene"[43].

Implicitly then, international law has no relevance in these conflicts. The UNSC, however, decided to dispatch an observer group to 'ensure that there is no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders'[44] which means that the Council supports the contention that civil wars must not be encouraged, because

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[40] Ibid.

[41] Op. cit., supra. n.32, pp.479-80.

[42] Op. cit., supra. chapter 1, n.148, p.555.

[43] UNY, 1958, p.37.

[44] Ibid, p.37.

they will eventually endanger peace and security which the UN seeks to guard.

The UNGA on its third Emergency session devoted to the situation in Lebanon, adopted unanimously a resolution which states:

> "1. Welcomes [the UNGA] the renewed assurances given by the Arab States to observe the provisions of Article 8 of the part of the League of Arab States that each member State shall respect the systems of Government established in other member States and regards them as exclusive concerns of these States, and that each shall pledge to abstain from any action calculated to change established systems of Government."[45]

Implicitly the UN does not see any role for itself in such situations. Thus, change or status quo, the situation must remain within the exclusive competence of the State.

Similarly, in the case of the invasion of Cuba, in 1960, by counter revolutionaries, Cuba accused the US of aggression. The US representative in the UN stressed that:

> "If the Castro regime is overthrown, it will be overthrown by Cubans, not by the Americans"[46].

This means that the US believes that the change of Government even by force is not a matter of concern to international law. In fact, the UNGA did not produce any view as to the matter of changing Governments by force, it adopted a resolution which merely notes that the UN members should take 'such peaceful actions as open to them to remove tensions'[47]. In other words, the main concern of the UN is to keep peace and security and not the promotion and encouragement of civil wars, which may very well endanger such peace.

However, the practice of the organization establishes one very important exception; in regard to colonial situations and peoples under foreign domination and racist regimes. The UNGA especially has established their right to rebel in order to exercise their right to self-determination, and also their right to receive external support. In this respect, the Friendly Relations Declaration 2625 (XXV) provides:

> "Every State has the duty to refrain from any forceable action which deprives people referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to such forcible action, in the pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes as principles of the UN Charter"[48].

In later resolutions adopted by the UNGA, the matter became very clear, armed struggle is mentioned explicitly as a means of achieving self-determination. Thus, Resolution 3070 (XXVIII) stated that:

> "2. Also reaffirms the legitimacy of the peoples' struggle for liberation from colonial

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[45] Ibid.

[46] Keesing's. 1961, p.18155.

[47] Ibid.

[48] Djonovich (ed.), op. cit., supra. chapter 1, n.79, Vol.13, p.340.

and foreign domination and alien subjugation by all available means, including armed struggle"[49].

Therefore, apart from these defined situations, the UN Charter does not in any way encourage civil wars.

The conclusion is that international law in general, old and new, does not in any way encourage civil wars, although it does not prohibit them. It treats them as exclusive matters of domestic concern, any other course will not be favoured by States, it will be against their sovereignty.

In my opinion, this is the best solution, since it is well known that international law does not favour any specific method of Government above another. This is confirmed by the insistence upon non-intervention. Any other course would open the way for open-ended policies of interventions, especially in our contemporary world, where two opposing ideologies are espoused by two powerful blocks and each favours a particular method of running society. In this context, any argument in favour of the claim that international law encourages civil wars, will in practice be in favour of the powerful not the weak.

SECTION III: Definition of Civil Wars in Traditional International Law

This section deals with the question of definition of civil wars in the pre-Conventional phase of 1949, in other words, the definitions of such conflicts in customary international law. The aim of this section is to find out how civil wars were defined in that period, and whether the concepts of sovereignty and non-intervention have played any role in that process.

In my view, the customary attitude towards the question of definition can be sought for in two important sources. Firstly, in the opinions of classical international lawyers such as Grotius and especially Vattel. Their opinions, it must be conceded, have influenced subsequent developments in various fields of international law.

Secondly, it seems that the institutions of recognition of insurgency and belligerency, were real attempts in customary international law to deal with the phenomenon of civil wars. The conditions of their applications, constitute important indices of the definition of civil wars in that law (customary international law).

Moreover, the Lieber Code, even if it is an internal instrument, contains a definition of civil wars, and thus shed some light on what States understood by civil war. Furthermore, many domestic cases also refer to such definition.

A. Classical Writers and the Definition of Civil Wars

Under this heading, I will concentrate on two opinions of two important writers of classical international, namely Grotius and Vattel. The reason for such a choice resides in the fact that their approaches to the question of civil wars differs widely. Grotius is more concerned with the rather philosophical question of whether the population has the right to rebel against their sovereign, rather than the question of actual definitions of such wars.

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[49] Ibid, Vol.14, p.448. See also Resolution 3032 (XXVI), ibid, p.353, also Resolution 3103, ibid, p.512.

On the other hand, Vattel is more positive, he addresses the issue of definition directly and he argued for the first time in the history of international law that whenever the elements of such definition are present in the internal conflict, the whole body of laws of war must be applied.

1. Grotius's Opinion

Grotius argued for the maintenance of the **status quo**, he is in principle against the right to rebel, since the advantages of the former are far better than the latter. He quotes with approval Favonius who 'used to say civil war is worse than evil'[50] and also Cicero who 'declared that peace on any terms between citizens seems more advantageous than civil war'[51]. This position of principle, prevented him from making a detailed study of the characteristics of civil wars, the difference between them and other forms of violence, which may take place within the borders of the State. Most important, he avoided the fundamental question of whether the laws of war apply to such conflicts.

According to him, civil wars, which he labels as 'rebellion' are, as a general rule, not permitted by the law of nature. His reason is that:

> "By nature all men have the right of resisting in order to ward off injury, as we have said above, but as civil society was instituted in order to maintain public tranquillity the State forthwith acquires over us and our possessions a greater right to the extent necessary to accomplish this end"[52].

He then adds that:

> "The state therefore, in the interest of public peace and order can limit that common right of resistence-that such was the purpose of the state we cannot doubt since it could not in any other way achieve its end. If in fact, the right of resistence should remain without restraint there will no longer be a state but only a non-social hold"[53].

Consequently, according to him, the State as a form of the organization of the society, is better than the State of nature, so in order to make the machine of the State work effectively the right of resistence must be taken away. It is clear that he has a Hobsian point of view of the situation in the primitive state of nature, where only the strong survives.

As a result, it seems that he maintains that any pretended right of resistence, will result in a turbulent state of affairs, which nobody wishes to experience. Submission to the will of a tyrant is 'remedy against the dangers of lawlessness'. However, Grotius allowed the right of resistence in very restricted cases[54].

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[50] H. Grotius: De Jure Belli Ac Pacis Libri Tres. J. Brown Scot (ed.), Vol.2, Clarendon Press Oxford, 1925, p.161.

[51] Ibid.

[52] Ibid, p.139.

[53] Ibid.

[54] Grotius allowed resisting the sovereign in the following cases:
A. The right to make war may be conceded against him who has the chief authority among free people.
B. The right to make war may be conceded against a king who has abdicated the sovereign power.
C. The right to make war may be conceded against a king who abdicates his kingdom, but only so far

The conclusion is that in general, Grotius seems to see resort to rebellion against the sovereign as unjust, obedience is better than revolution, the latter will weaken the sovereign power and leads to anarchy. To me, Grotius sees sovereignty as basically a good thing, since it brings peace and stability.

2. Vattel's View

Vattel's opinion is very interesting. He is the first classical writer who attempted a serious study of the phenomenon of civil wars. He explained what civil wars are, he also argued for the application of the laws and customs of war to such conflicts, in this he is innovative.

He distinguishes between different forms of violence, which may take place in the State. He, in fact, reserves 'civil war' for the most extreme form of such events. He writes:

> "Custom applies the name of civil war to every war between the members of the same political society, if the war is between a body of the citizens on one hand and the sovereign with those loyal to him on the other"[55].

According to him, civil war is a contest between he, who holds power, and a body of citizens, or between two claimants to the same throne. He then develops the idea that civil wars are of such intensity that in fact they divide the nation into two distinct nations. He indicates that:

> "...[C]ivil war breaks the bonds of society and of government or at least suspends the force and effect of them; it gives rise within the nation to two independent parties who regard each other as enemies and acknowledge no common judge of necessity, therefore, these two parties must be regarded as forming thenceforth for a time at least, two separate bodies politically, two distinct nations."[56]

Implicitly then, the rift between the sovereign and his opponents must be very deep, that no reconciliation is possible. In these circumstances, then the conflict must be of a very high intensity and must not be confined to only a part of the country. The forces used must presumably be of near of equal strength.

Moreover, it is interesting to note that Vattel did not pay any attention to the justice of cause of the civil war, he is concerned with the factual situation only. It is the latter which reveals whether civil war is present. The justice of the cause for which the people resort to rebellion is irrelevant.

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as to prevent the transfer.
D. The right to make war may be concede against a king who has lost his kingdom in consequence of a commissory law.
E. The right to make war may be conceded against a king who openly shows himself the enemy of the people.
F. The right to make war may be conceded against a king who, possing only a part of the sovereign power, seeks to possess himself of the part that does not belong to him.
G. The right to make war is conceded against a king in case liberty to offer resistence has in certain cases been reserved.
H. Resistence by force may be used against a usurper by virtue of a right of war still continuing.
I. Resistence by force may be used against a usurper of a mandate of one possessing power (ibid, pp.156-161).

[55] Op. cit., supra. n.9, p.338.

[56] Ibid.

This position of principle in my opinion, constitutes the legal rational behind Vattel's revolutionary view that the laws and customs of war should be applied to civil war,[57] in other words it is the factual situation in a given country torn by civil war and not the justice of the context which determines the application of the laws of war.

In fact, his non-interest in the notion of just war at the international level, has been extended to civil wars. Thus, practical problems needed a practical solutions and not philosophical conceptualization.

But, the important question is; how to reconcile Vattel's views on civil wars, with the concepts of sovereignty and non-intervention, both of which he supports. It seems to me that in Vattel's view sovereignty and non-intervention are the pillars of international law and international relations. However, the sovereign, in order to claim the benefit of such principles must be in control of situation within his State.

Thus, whenever he loses such effective control, he can no longer prevent other States from aiding the insurgents. In fact, Vattel gave States the right to choose whether to intervene or not in a civil war, and also the right to decide which side will receive their help. In doing so, they are not infringing any rule of international law. In this way, sovereignty and non-intervention are intimately linked to effectivity and not to legitimacy.

This advanced position, has implicitly gained certain success in customary international law, in my view the concept of recognition of belligerency attests to that effect. Since in order to apply the laws of war, the internal conflict must attain certain degree of intensity, duration and discipline, which in practice means that the nation has been divided into two separate States. This is not far from Vattel's view.

Apart from this case, Vattel's views have never gained a wide acceptance in the practice of States. Thus, the proposal of the ICRC to apply all the provisions of the Geneva Conventions of 1949 to internal conflicts, was not successful as I will show in the section dealing with common Article 3. Protocol II of 1977 also has not changed that attitude.

B. Definition of Civil Wars and Recognition of Belligerency and Insurgency

There is no international instrument which defines civil war, in customary international law. The only international instrument dealing with that subject (civil wars), the Havana Treaty of 1928 contains no definition.

However, elements of such definition can be found in the Lieber Code, which is a national instrument, also in some cases brought before national courts, and especially in the concepts of recognition of insurgency and belligerency, which were in essence the legal response of customary international law, to different problems raised by civil wars such as intervention, international responsibility for damages to foreign persons and properties in such conflict, and also the question of application of the laws of war to internal conflicts.

Before analyzing the definitions contained in those instruments, it is interesting to note that civil wars, which were the concern of customary international law, were those which occur in 'civilized nations'. 'Savage' and 'semi-savage peoples' were not recognized either as international belligerents (as States) or as belligerent in the meaning of the recognition

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[57] Ibid. For a full quotation, see infra chapter 4, n.89 and accompanying comments.

of belligerency (that is as insurgents in a civil war). As a result, they were completely banned from benefitting from the laws and customs of war.

In this context, in 1927 a Captain in the US Army observed that:

> "...[W]hen combatants and non-combatants are practically identical among a people, and savage or semi-savage peoples take advantage of this identity to effect ruses, surprises, and massacres on the 'regular' enemies, commanders must attack their problems in entirely different ways from those in which they proceed against western peoples"[58].

In practice, this meant that there is no room for the application of the laws of war in such conflicts whatever their intensity, magnitude or duration, which means that no quarter is given even to children and women. Since the western armies have at their disposal superiority in fire power and military tactics, those wars were practically genocide. Similarly, a Colonel in the British Army wrote:

> "In small wars against uncivilized nations, the form of warfare to be adopted must tone with the shade of culture existing in the land, by which I mean that against peoples possessing a low civilization, war must be more brutal in type"[59].

The British Manual of Military Law of 1914 states:

> "It must be emphasised that the rules of international law apply to warfare between civilized nations, where both parties understand them and one is prepared to carry them out. They do not apply in wars with uncivilized States and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommended themselves in the particular circumstances of the case"[60].

'Savages' were then seen as incapable of attaining the status of a lawful belligerent, wars with them were neither international nor civil wars. They were of a special nature, since military necessity overrode any concern for humanity.

In my view, these past attitudes are responsible in a large part, for the present Third World lack of faith in and suspicion of European humanitarianism. They prefer to cling to their sovereignty rather than believe the European cry for humanity.

Turning now to the definition of proper civil wars, those which take place in Europe and the Americas, I will begin with the Lieber Code, which is a national instrument, however, it reveals what an important State like the US understands to be civil war.

1. The Lieber Code

The code stipulates in its Article 150 that:

> "Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion when the rebellious provinces or portion of the State are contiguous to those containing the seat of government"[61].

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[58] G.L. Bridge-Colby: How to Fight Savage Tribes. 21 AJIL, 1927, p.279.

[59] J.F.C. Fuller. cited by Bridge-Colby. Ibid, p.280.

[60] Ibid.

[61] Schindler and Toman (eds.), op. cit., supra. chapter 2, n.63, p.21.

This definition in fact, stresses the objectives of civil wars. They are either the taking of the political authority in the State, or secession. However, the definition does not define with precision the factual criteria of the conflict. Although, it must be admitted that the definition characterises the contest as 'war'. This implies that the confrontation must be of high intensity, as in the war between States. But, there is no indication on whether the laws of war apply in such conflicts.

It must be noted that in 1862 (before the adoption of the Lieber Code) the US Supreme Court in the Prize Cases, had an opportunity to make an important statement concerning the meaning and scope of civil war. It stressed that the parties to 'war' are not exclusively independent states. It held:

> "...[I]t is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states"[62].

Then it added:

> "A civil war is never solemnly declared; it becomes such by its accidents-the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy in a hostile manner a certain portion of territory; have declared their independence; have commenced hostilities against their former sovereign. The world acknowledges them as belligerents and the contest a war"[63].

In the opinion of the US Supreme Court, it seems that the actual existence of a civil war is a matter of fact, that is when the political bound is broken and the confrontation resembles war between States in its intensity duration, organization and occupation by the insurgents of a substantial party of the national territory, the civil war erupts. The influence of Vattel is very clear, the Court in fact, had quote him extensively. It is factual effectivity which makes the contest civil war.

However, the Court noted that the insurgents:

> "...[C]laim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason"[64].

In other words, even when the strong factual elements of the civil war are present, there is nothing to prevent the established Government from applying its penal laws against its opponents. Sovereignty even in such circumstances still plays a very important role by giving full backing to all the actions of the established Government.

Similarly, when under Diab v. Attorney-General, the Israeli Supreme Court had an occasion to define civil war. It stated:

> "...We find that civil war is a war of the citizen against the State, or of citizen against citizen, for the purpose of obtaining power in the whole state or in part of it. The

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[62] F. Deak (collected and ed. by): American International Law Cases 1783-1968. Vol.17, Oceana Pub., Inc/Dobbs Ferry, New York, 1977, p.382.

[63] Ibid, pp.382-3.

[64] Ibid, p.383.

> emphasises is on the word 'citizen'. That is to say, civil war always implies an armed struggle by a group of citizens against the established order or in order to obtain power over its own State, and not a war against another state trying to impose its will over the territory and the citizens of that state, that is to say, a foreign country. This is the legal meaning of the word, and it is also its nominal and natural meaning for the general public and for historians"[65].

The Court emphasised that this definition is a summary of customary definitions of civil war found especially in the jurisprudence of the US courts. It must be noted that there is nothing in the definition which indicates, that civil wars are seen other than internal matters, the relevance of international law is not mentioned, sovereignty still holds the balance.

2. The Recognition of Insurgency and Belligerency and their Impact on the Definition of Civil Wars

Customary international law has as a matter of principle considered civil wars, as matters falling inside the domestic jurisdiction of the State. This stand is consistent with the basic aim of that law, namely respect for the sovereignty of the State and non-intervention in its internal affairs even when the Government in power is challenged by a portion of its population. However, in the 19th century, the situation began to change, civil wars could become of interest to international law, when the recognition of belligerency is granted. Thus, according to Zorgbib:

> "le message de Vattel semble au XIXeme siècle, en voie de se couler dans le droit positif, il prend forme dans l'institution dite de la reconnaissance de belligérence, c'est-à-dire dans l'assimilation des insurgés à des belligérents réguliers par le gouvernement établi"[66].

The influence of Vattel is important in the emergence in positive law of the recognition of belligerency. Rougier supports this line of thinking, he stresses:

> "...[C]ette assimilation de la guerre civile à la guerre étrangère, demandée par Vattel, est ce que l'on nomme aujourd'hui la 'reconnaissance des insurgés comme belligérants' ou encore la reconnaissance de belligérence"[67].

It must be stressed that the institutions of insurgency and belligerency do not apply to every civil war, certain conditions of fact and law, must exist before their legal effects come into operation. This state of affairs, necessitates, in my view, a thorough identification of the criteria of civil wars to which those institutions apply.

This process of definition and clarification, would in my opinion, reveal the kind of civil war to which States may concede certain of their sovereign privileges and accept certain limitations of their sovereignty.

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[65] Diab v. Attorney General, Israeli Supreme Court sitting as Court of Criminal Appeals, Dec 2nd, 1952. Sir H. Lauterpacht (ed.): ILR, 1952. Butterworth & Co., Ltd., London, 1957, p.552.

[66] Zorgbib, op. cit., supra. chapter 2, n.66, p.37.

[67] Op. cit., supra. n.6, p.196.

2.1. Recognition of Insurgency

It seems that the status of recognition of insurgency, has less legal significance than the status of the recognition of belligerency in customary international law, it is in the words of Visscher:

> "...[M]ore limited in its effects, and still more elusive in its criteria than the recognition of belligerency, it is adjusted to a situation of fact and modelled on the course of events"[68].

However, there is a general support for the view that recognition of insurgency is necessitated by the existence of an internal conflict. Thus, the Assistant Legal Advisor to the US State Department, Mr. Yingling, stressed that:

> "...[S]uch recognition [of insurgency] is an acknowledgement by a foreign State of the fact that a political revolt exists."[69]

Also, the recognition of insurgency has often been the first official notice that third States have taken of the eventual possible success of the insurrection.

The implication is that recognition of insurgency admits to the existence an insurgent forces which challenges the legal Government. They occupy a part of the territory, and exercise effective control over the persons and properties within that area, including foreign persons and properties, and have a quasi-political organization which may deal with foreign States.

Moreover, whenever the recognition of insurgency has been granted by foreign States, the reasons behind such moves were essentially to regulate the political and economic intercourse with the insurgents, also such recognition signals that foreign States do not intend to treat the rebels as mere law breakers. Higgins stated rightly that:

> "The recognition of insurgency whether implied or express, is an indication that the recognizing State regards the insurgents as legal contestants and not mere law breakers"[70].

However, it seems that the internal conflict, in the eyes of the established Government, always remains an internal matter, even when the recognition of insurgency has been granted by foreign States. An eminent scholar on the subject, Padleford argued:

> "Admission of insurgency does not alter the legal status of the insurgents within their own states. They remain as previously, engaged in an unlawful attempt to overthrow the established government."[71]

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[68] Ch. De Visscher: Theory and Reality of International Law. Rev. ed. Translated from French by P.E. Corbett. PUP, Princeton, New Jersey, 1968, p.245.

[69] Whiteman, op. cit., supra. chapter 1, n.8, Vol.2, (1963), p.486.

[70] Op. cit., supra. n.1, p.88.

[71] N.J. Padelford: International and Diplomacy in the Spanish Civil War. MacMillan Co., New York, 1939, p.196.

This means that the legal Government, can claim its full sovereignty in suppressing the insurgents, customary international law does not limit its sovereignty in any way. Lauterpacht remarks that:

> "...[W]ith regards to the acts of the insurgents on land when such acts do not cause injury to foreign States or their subjects but merely manifestations of a revolt against the constituted authority, outside States have no reason to express an opinion or to adopt an attitude".[72]

In other words, in cases of insurgency the Government is not obliged to respect the laws of war in its relation with the insurgents. They are mere criminals, who would be treated according to penal laws.

In State practice, it is considered that the institution was used especially in the practice of the US vis-à-vis the Cuban revolt against Spanish rule in the late 19th Century. The US did not recognize the revolt as an international war, because of the lack of elements which are requisite to constitute such a war, however, it recognized the existence of an insurrectionary State of affairs to which the laws of neutrality must apply.

On June 12th, 1895 a formal proclamation issued by the president, informed the American people that Cuba was:

> "The seat of serious civil disturbances accompanied by armed resistence to the authority of the established government of Spain, a power with which the US are and desire to remain on terms of peace and amity"[73].

The Proclamation prohibited American citizens from taking part in those hostilities in whatever form. These pronouncements enabled American courts to acknowledge a difference between insurgency and belligerency.

Thus, in the Three Friends Case, the US Supreme Court stated:

> "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of a war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a **de facto** belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare, etc."[74].

The implication is that it is the political interests of the recognizing State and not the reality of civil war, in the field, which play a major part in the determination of the existence of the status of insurgency.

Also, it is apparent that international law does not place any legal obligations upon the recognizing States, it is left to such Government to decide freely what steps they can take in that situation, national interests are generally the basis upon which to decide such questions.

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[72] Op. cit., supra. n.69, p.489.

[73] Op. cit., supra. n.63, Vol.20. Oceana Pub. Inc., Dobbs Ferry, New York, 1978, p.296.

[74] The Three Friends Case, (1897), ibid.

The Spanish Civil War is another case where it is speculated that the recognition of insurgency took place, in fact Lauterpacht observes that:

> "The Spanish Civil War of 1936-39 is an instructive example of what may be regarded as recognition of insurgency"[75].

However, it seems to me that a better view is that the case must be seen as an example of recognition of **de facto** Governments rather than recognition of insurgency. The acts of the British Governments and the jurisprudence of British courts seems to support that view.

In a letter to the Appeal Court (dated May 28th, 1938), the Foreign Office indicated the position of the British Government **vis-à-vis** the Franco Government in these terms:

> "His Majesty's Government recognizes that nationalist Government as a Government which at present exercises **de facto** administrative control over all the Basque provinces of Spain, etc."[76].

Thus, there is no mention of insurgency. Similarly, in the Arantzazu Mendi Case, the Court of Appeal concentrated on the issue of whether the recognized **de facto** Government must be treated as a Government of a sovereign State. The answer was positive[77] and the House of Lords upheld its decision, recognition of insurgency was not stressed[78].

The main conclusions concerning the status of the recognition of insurgency are:

1. It was not a well defined legal category, with the result that the conditions of its existence and its legal effects are not always very clear in customary practice.

2. It seems that the granting of the recognition does not in any way challenge the legal Government, since the latter still enjoys the rights of its sovereignty, among them, its right to suppress its opponents by all its means, without outside interference.

3. It is political considerations, rather than legal and ethical criteria which are taken into account in its granting.

2.2. Recognition of Belligerency

Recognition of belligerency, was the institution through which customary international law become relevant to violent events which take place inside the State, in that sense it may be said that it involves a limitation upon State sovereignty.

Rougier pointed out in 1903 that:

> "C'est l'acte [of recognition of belligerency] le plus gros de conséquences juridiques, qui donne à la guerre civile une portée internationale. Aussi peut-on dire que c'est par cette théorie qu' a commencé l'étude juridique des guerres civiles"[79].

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[75] Op. cit., supra. n.69, p.500.

[76] British Institute Studies in International and Comparative Law: British International Law Cases. Vol. 2, Stevens & Sons, London, Oceana Pub., Dobbs Ferry, New York, 1965. p.184.

[77] Arantzazu Mendi Case, Court of Appeal, Oct. 31st-Nov. 1st, 1938, ibid, pp.188-197.

[78] Government of the Republic of Spain v. SS "Arantzazu Mendi" The Arantzazu Mendi, ibid, 198-204.

[79] Op. cit., supra. n.6, pp.373-4.

In fact, recognition of belligerency makes civil war a 'war' in the legal sense, in the sense that it is the same as recognition of a 'state of war' between States.

What concerns me in this context, is the question of the conditions necessary for the recognition of belligerency since they throw some light on what is considered civil war in customary international law, and by consequence in what circumstances that law can be said to restrict the sovereignty of the State, in dealing with its internal problems.

2.2.1. The Conditions for the Granting of Belligerency

President Grant in his address to the US Congress in 1869 touched directly on the conditions which must be present in a civil war, in order to be a 'legal war' in the sense that it would be treated according to international law. He declared that:

> "...[T]he question of belligerency is one of fact, not to be decided by sympathies for or prejudices against either party. The relations between the parent state and the insurgents must amount, in fact, to war in the sense of international law. Fighting though fierce and protracted does not constitute war. There must be military forces acting in accordance with the rules and customs of war, flags of truce, cartels, exchange of prisoners etc.,-and to justify a recognition of belligerency there must be above all, a **de facto** political organization of the insurgents sufficient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and or meeting the just responsibilities it may incur as such towards other powers in discharge of its normal duties"[80].

Accordingly, the insurgents must have in fact, the characteristics of a real State, in order to be considered as belligerents. The conditions of the civil war must be very hight indeed, which means that only a very limited number of civil wars can qualify for such conditions.

Many eminent scholars, in the 19th century have advocated that when certain conditions of fact exist in internal war, belligerency must be accorded. Thus, De Martens states:

> "...[U]n parti politique qui a pris les armes contre son gouvernement légitime...est reconnu comme belligérent s'il est régulierèment organisé, s'il est independant de fait et s'il respecte les lois et usages de la guerre"[81].

Bluntschli[82] is of the same view together with Hall[83].

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[80]Cited by W.L. Walker: Recognition of Belligerency and Grant of Belligerent Rights. 23 Transactions of Grotius Society, 1937, p.188.

[81]F. de Martens: Traité de droit international. Traduit du russe par A. Léo, tome III, Paris, Librairie Marescq Ainé, 1887, p.195.

[82]M. Bluntschli wrote:

> "La notion de belligérence, et par suite, l'application du droit du gens, en opposition avec le droit pénal, au lieu de se restreindre à deux Etats étrangers en guerre l'un avec l'autre, a été étendue à une partie intégrante de la population d'un Etat qui:
> a. Est de fait, organisée comme force militaire.
> b. Observe dans la conduite des hostilités les lois de la guerre.
> c. Croit de bonne foi lutter au lieu et place de l'Etat pour defendre son droit public".

Opinion impartiale sur la question de l'Alabama. 1 RDILC, 1870, p.157.

In recent times, it is Lauterpacht who advocated such course, he maintains when certain conditions of fact exist recognition of belligerency must be accorded: These conditions are:

1. There must exist within the State an armed conflict of a general character.

2. The insurgents must occupy and administer a substantial portion of national territory.

3. They must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority.

4. There must exist circumstances which make it necessary for outside States to define their attitude by means of the recognition of belligerency"[84]. He then adds:

> "...[R]ecognition of belligerency is in essence a declaration ascertaining the existence of these conditions"[85].

This view in fact, is in accordance with Lauterpacht's general theoretical position vis-à-vis recognition, he thinks that recognition is a strictly legal institution, which must be declared whenever, the factual conditions as required by law are present.

To me, these assertions are not wholly true, recognition in general and especially that of belligerency has never been a purely legal institution, political interests are the real factors behind its granting.

In my view, there is a strong evidence to the fact that recognition of belligerency or its withholding, were animated by political rather than legal considerations. The logic of the system of international law, which is based on sovereign States favours such an approach. States want to keep their freedom of recognition, since it is in their view a political game rather than a legal act.

In this respect, the insurgents in Chile in 1894[86], were not recognized as belligerents, despite the fact that they fulfilled the criteria laid down by Calvo and Bluntschli, also the US refused to recognize the insurgents in Columbia in 1885, Haiti in 1889 and Brazil in 1893[87], likewise, Britain recognized the Greek insurgency in 1825 that is after full four

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[83] Hall stated:

> "As soon as, it is said, that a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a State too nearly for it to be possible to treat individuals belonging to such population as criminals, it would be inhuman for the enemy to execute his prisoners, it would be still more inhuman for foreign States to capture and hang the crews of warships as pirates, humanity demands that members of such communities be treated as belligerents, and if so there must be a point at which they have the right to demand what confessedly must be granted to them".

W.E. Hall: A Treatise on International Law. (Sir) A.P. Higgins, (ed.), Clarendon Press, Oxford, 1924, pp.37-38.

[84] H. Lauterpacht: Recognition in International Law. CUB, London, 1947, p.176.

[85] Ibid.

[86] Op. cit., supra. n.6, p.214.

[87] See E.H. Riedel: Recognition of Belligerency: in Bernhardt (ed.): Encyclopedia of Public International Law. Instalment 4, 1982, North Holland Pub. Co., p.169.

years from the uprising, in which the insurgents fulfilled the condition of real insurgents[88]. Similarly, the US recognized the belligerency of the insurgent forces in Canada on January 5th, 1838, although they did not satisfy any real conditions of a real civil war.[89]

Writing in 1895, Beale summarised the position of the US vis-à-vis recognition of belligerency as follows:

> "In the first place, we have not recognized belligerency prematurely...We never recognized the belligerency of Greece, because the civil war in that country did not inconvenience us at all, or call for our interference. We recognized civil war in Canada when our own soil was invaded; and we recognized the belligerency of Spanish America; eight years after it was a fact, when our ocean commerce became involved in the contest, which was largely naval"[90].

This means that recognition of belligerency depended in the final analysis on subjective criteria, rather than legal considerations.

Recognition of belligerency, is then always discritionary, the established Government especially is not legally obliged to grant such recognition and by the same token it is not bound to take into account any recognition granted by third States, the rebels can be treated as criminals. Thus, it is not the British Government recognition of the belligerency of the Southern States in the American civil war, which obliged the US Government to treat the insurgents as belligerents, but it was the recognition of the US Congress on July 4th, 1861 of the existence of a state of war against the 11 States of the South, which had that effect[91].

This is, in my view, the natural consequence of State sovereignty as understood by international law in that era. Under the latter the State has overall jurisdiction over its territory and citizens, its relation to its citizens is an internal matter, in the absence of a clear legal obligation, no State can intervene and dictate the kind of treatment to be given to its citizens by their States. The concept of human rights was not yet born.

To sum up, classical international law gave the full priority to the sovereignty of the State and non-intervention in its internal affairs, the rule is that when the basic units of that system (the States) are faced with internal upheavals, they have the full protection of the law to deal with the situation.

In my view, this is implicit in the fact that even when the internal conflict is serious (in terms of its intensity, duration, effective control of a certain portion of the national territory, and the existence of a political organization of the insurgents), there is nothing which obliges the recognition of belligerency of the insurgents especially on the part of the established Government.

On the other hand, it must be noted that the institution (of the recognition of belligerency) has to some extent clarified the criteria of civil wars to which international

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[88]See J.H. Beale, Jr.: The Recognition of Cuban Belligerency. 9 HLR, 1895-96, p.412.

[89]Ibid, p.409-10.

[90]Ibid, p.416.

[91]See for a detail discussion of this very point Zorgbib, op. cit., supra. n.66, pp.40-42.

law may become relevant, and consequently it has made civil war not a term of art, but in the words of De Lupis 'it could be possibly defined as the traditional type of conflict when insurgents have been 'recognized' as belligerent'.[92]

In other words, recognition of belligerency has afforded the legal framework for the definition of civil wars in customary international law since it set out certain conditions, which States can take into account, if they want to acknowledge the belligerency of the insurgents.

It seems to me that the notions of sovereignty and non intervention, were against the spirit of such an institution, mainly because it involves restrictions on the discretion of States to deal with their enemies and it may give some legitimacy to the struggle of their opponents.

The institution (of recognition of belligerency) in my view has tried to bring the notion of objectivity into the realm of international law. But, in a decentralized system of international relations such an attempt was bound to conflict with the principles of sovereignty and non-intervention, since objectivity cannot be applied without the existence of an objective central agency, which is above the States, and has the power to take binding decisions.

In its absence (which is in itself a manifestation of the preference by States of sovereignty and non-intervention) the possibility that especially third States might be guided by political and economic considerations in their decision to grant recognition of belligerency rather than objective legal criteria remains open. This fact raises the possibility of the breach of sovereignty and interference in the internal affairs of States faced with civil wars.

It is my view, that the notions of sovereignty and non-intervention, were in the first place responsible for the rare occurrence of recognition of belligerency in the practice of States in the 19th and the first half of the 20th century, despite the frequency of civil wars, because the established Governments prefer to conduct their war in accordance with their discretion and not according to the laws of war, the latter will tie their hands in dealing with the insurgents and gives them legitimacy and signals that the established Government is not in control of the situation.

Moreover, sovereignty and non-intervention were among the causes of the obsolescence of the recognition of belligerency. Thus, Cassese rightly states that such obsolescence is:

> "...[M]ainly due to the desire of the Government involved in civil commotions to wipe out rebellion as soon as possible, as well as to the interest of third States in either holding aloof or meddling **de facto** in the conflict without, however, going to the length of granting insurgents international legitimisation"[93].

In other words, the obsolescence of the institution meant that States retained all their sovereign rights to quell the insurgents without any restrictions whatsoever, and third States wanted not to be seen as intervening in the internal affairs of States dealing with civil wars,

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[92] I.D. de Lupis: The Law of War. CUB, Cambridge, 1987, pp.9-38.

[93] A. Cassese: International Law in a Divided World. Clarendon Press, Oxford, 1986, p.281.

at least formally.

SECTION IV: Common Article 3 of the Geneva Conventions of 1949 and the Definition of an Armed Conflict of a Non-International Character

First of all, Common Article 3 of the Geneva Conventions of 1949 opens the way for a new terminology concerning internal conflicts, the term 'civil war' is not found in the actual text of the Article, instead a new term is used: 'An armed conflicts of a non-international character'.

In my view, this change of terminology goes in line with the attitude adopted after the second world war, which consists of abandoning the term 'war' and its substitution by the term 'Armed Conflict' the latter being of a broader scope, and it avoids the fruitless discussions about the definition of war.

However, in the context of internal conflicts, there is no evidence that this change of terminology has any legal significance[94]. Thus, in one of the reports drawn up during the Diplomatic Conference of 1949, it was stated that:

> "It was clear that this [Armed conflict not of an international character] referred to civil war and not to a mere not or disturbances caused by bandits"[95].

It must be stressed that Common Article 3 proved to be one of the most controversial subjects during the Diplomatic Conference of 1949, 25 meetings of the Committee charged with its drafting were necessary, before agreement was reached.

The reason for such difficulty lies in the fact that Article 3 was the first instance of an international regulation of internal wars in an international instrument. This fact meant that such effort may very well involve a restriction upon State sovereignty in one area, in which States customarily claimed to be the masters of the situation, namely civil wars, since even recognition of belligerency has been always seen as of a discretionary nature, which means that it was not a real threat to the sovereignty of the State. Article 3 provides in part that:

> "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, etc."

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[94] Thus, J.A.C. Gutteridge points out that:

> "An entirely new conception which has been introduced into the Geneva Conventions of 1949 is that the parties to each convention undertake certain obligations in respect not of an international war but of 'a conflict not of an international character' occuring in the territory of one of the high contracting parties which must mean a civil war".

Thus, according to her, the change of terminology has not introduced any new legal dimension to internal war. (The Geneva Conventions of 1949. 24 BYIL, 1949, p.300. For a discussion on the concept of armed conflict, see K.J. Partch: Armed Conflict, in Bernhardt (ed.), op. cit., supra. n.87, Instalment 3, 1982, pp.25-28.

[95] Report drawn up by the Joint Committee and presented to the Plenary Assembly, Final Records of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section B, Federal Political Dept, 2950 Berne, p.129.

The text of the Article then did not define what is meant by 'Armed conflict not of an international character' and did not indicate what is the authority competent to determine the existence of such a conflict. This section tries to elucidate the meaning of an armed conflict not of an international character, through a thorough study of the travaux **préparatoires** of the Diplomatic conference of 1949. It tries to expose fully the role of sovereignty and non-intervention, in influencing the question of the delimitation of the scope of Article 3.

Recourse to subsequent practice, will show in which actual situations of internal disorders Article 3 had been seen by States as relevant, and whether sovereignty and non-intervention have played any role in that process.

A. Travaux Préparatoires and Definition of Armed Conflict not of an International Character, the Role of Sovereignty of Non-Intervention in that Process

The traumatic effects of the second world war signalled the urgent need to revise the Geneva Conventions. In the context of internal conflicts, the absence of any regulation of those conflicts, coupled with the atrocities of the Spanish civil war and the movement towards the protection of human rights within the UN. All these factors have led the ICRC, to include a common Article in its proposed Geneva Conventions, which were submitted to the Diplomatic Conference of 1949. Common draft Article 2/4 stipulates:

> "In all cases of armed conflict not of an international character which may occur in the territory of one or more of the high contracting parties, each of the parties to the conflict shall be bound to implement the provisions of the present convention, subject to the adverse party likewise acting in obedience thereto"[96].

This draft article was approved at the 17th Conference of the ICRC. The Article in fact does not precisley define the kinds of internal conflict to which it is supposed to apply, in other words no definition is provided, and in the same time it envisages the application in toto of the draft conventions to internal conflicts, however, on the basis of reciprocity.

This stand of the ICRC seemed to be ahead of its times, it in fact ignored that States are still very sensitive to any efforts at limiting their sovereign rights to deal with the situation of internal conflicts without any international interference.

The first discussions, which were of a general character revealed that a considerable divergence of opinion exist between States. Three main positions can be detected from those primary discussions. The first group was composed of Socialist States Norway, Denmark and Mexico. These States favoured the ICRC approach, in regulating internal conflicts and extending all the provisions of the Convents to such conflict.

The USSR led the attack, by rejecting the UK claim that the regulation of civil wars is outside the scope of international law, its representative Stated at the very first meeting of the joint committee that:

> "The UK delegation has alluded that colonial and civil wars were not regulated by

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[96] Ibid, p.120.

> international law, and therefore that decisions in this respect would be out of place in the text of the conventions. This theory was not convincing since although the jurists themselves were divided on this point, some were of the view that civil war was regulated by international law. Since the creation of the United Nations, this question seemed settled. Article 2 of the Charter of the United Nations provided that member States must ensure peace and world security. They would therefore not be indifferent to the cessation of hostilities, no matter the character or localization of the conflict. Colonial and civil wars therefore come within the purview of international law".[97]

Implicitly then, at least to this delegation, the developments which took place after the adoption of the UN Charter have made civil wars a matter of international concern, hence the regulation cannot be considered as an infringement of State sovereignty or an intervention in the internal affairs of the State faced with such conflicts.

Hungary went even further, it regrets the inclusion of the idea of reciprocity[98] in the ICRC draft Article 2/4. This means that Hungary would like to see established Governments bound to apply the conventions without waiting the insurgents to do so. Mexico specifically stressed that humanitarian considerations should be placed above the rights of States[99], in other words, it advocates that humanitarian considerations should limit the sovereignty of the State.

In my view, this position reflects the influence of the emerging idea of human rights, protection of human beings must not be seen as a breach of the sovereignty of the State or an intervention in its internal affairs.

It seems to me that this group of States, was of the opinion that the omission of any definition of internal conflict in the context of draft Article 2/4 was a wise decision by the ICRC. This was in the interest of a wider application of the humanitarian rules to a wide range of internal conflicts, any mention of some factual or formal conditions as to the nature of the armed conflict would in practice give the established Government an opportunity to deny the application of the conventions simply by denying the existence of such conditions[100]. This group of States was in the minority.

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[97] Ibid, p.14.

[98] Thus, the Hungarian delegate maintained that:

> "...[H]e was of the opinion that the essential aim of the conference was to extend the field of action of the Convention as much as possible for the protection of the victims of conflicts. He regretted that the Stockholm Conference restricted the scope of the text submitted by the ICRC by including the idea of reciprocity. He did not think there was any justification for the fear expressed by certain previous speakers that the convent might operate as an inducement incitement to take up arms".

Ibid, p.11.

[99] Ibid.

[100] That was the implication of the statement of Romania and Norway. The former stressed that:

> "Humanitarian considerations should prevent the conference from introducing restrictions in the text, the whole object of which was to extend the protection of the conventions to the greatest possible number of persons."

(Ibid). The latter put it in this way:

However, the important thing is that they basically saw no contradiction between sovereignty and international regulation. They seem to insist indirectly that the development in the field of human rights have placed some restrictions upon the discretion of States in dealing with their own citizens.

To some authors the position of the Socialist countries, especially the USSR, which advocates the application of the whole body of Geneva Conventions to internal conflicts, is motivated by political designs rather than humanitarian concerns, Cassese argued that:

> "Ce n'est pas un hasard si le délégué Soviétique parlait toujours de 'guerres civiles' et 'guerres coloniales', entendant clairement par ces dernières une catégorie de guerres civiles. Si on pense à la vision politique de l'Union Soviétique à la fin des années quarante (quand la guerre froide était dans sa phase la plus aiguë) il semblait évident qu'une grande protection et donc la légitimation internationale de ceux qui combattent lors des guerres civiles et de guerres coloniales étaient dans la ligne des programmes et des intentions politiques de l'Union Soviétique: celle ci visait à favoriser le plus possible le démantellement des empires coloniaux comme la déstabilisation des pays occidentaux"[101].

Despite this, it appears the Soviets who generaly cling to a very rigid conception of sovereignty and non-intervention are nevertheless, ready to admit the relevance of international regulation to internal conflict.

The second position was championed in fact by only one country; Burma, a Third World country at the time experiencing civil war. To that State, any regulation of internal conflict by an international instrument was a flagrant violation of State sovereignty and an intervention in its internal affairs in the guise of humanitarianism.

Burma accordingly opposed the inclusion in the Geneva Convention of any article concerning civil war. It argued that from its own experience it knew of foreign intervention its representative General Oung stressed that:

> "...[T]he proposed convention should not give legal status to insurgents who sought by undemocratic methods to overthrow a legally constituted Government by force of arms"[102].

In other words, no matter how serious, the internal conflict must be left entirely within the sovereignty of the State. In fact the Burmese Delegation was not only opposed to the ICRC's Draft Article 2/4 (for which it submitted an amendment for its deletion) but was against the inclusion in the Geneva Conventions of any reference to internal armed conflict in whatever form. In its view any such inclusion would be an encouragement to rebellions and

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> "When belligerency was recognized in an internal conflict serious legal consequences were entailed but it was to be hoped that the conference would agree that purely humanitarian rules should be applied in armed conflicts independently of any recognition of belligerency". (Ibid).

In other words, absence of defunct is better for the cause of applying humanitarian rules.

[101] A. Cassese: La guerre civile et le droit international. 90 RGDIP, 1986, p.564.

[102] Op. cit., supra. n.95. p.15.

uprisings against the established Governments, hence a flagrant violation of the '...high principles laid down by the United Nations Organization'[103]. The reference here is implicitly to the principles of sovereignty and non-intervention.

This Delegation clung to a very rigid concept of sovereignty which admits of no restriction, especially when it touches the relationship between the State and its own citizens.

The third position was espoused by the majority of the States present at the Conference, most western States were supporters of this position, the USA, Britain, France, Canada, Australia, Spain among others.

These States supported the principle that international regulation of internal conflicts was needed. However, they were opposed to the phraseology of the ICRC draft Article 2/4; the latter in their view would in practice lead to the unqualified application of the conventions to any form of disorder within the State, it would cover all forms of rebellion, insurrection, anarchy and brigandage. They claimed that the application of the conventions might give the insurgents some kind of legal status despite the express stipulation to the contrary in the instrument.[104]

The French delegate, in fact has expressed the theoretical basis by which the attempts to regulating internal conflicts must be guided, he stressed:

> "...[I]t was impossible to carry the protection of the individuals to the point of sacrificing the rights of States"[105]

In other words, respect for the sovereignty of the State must be placed before humanitarian considerations. The American Delegate seems to express in concrete terms what the French delegate had in mind when he stated:

> "Every Government had a right to put down rebellion within its borders and to punish the insurgents with its penal laws"[106].

These attempts to protect individuals might well jeopardise the legitimate concern of the State, to keep law and order within its borders.

It seems to me that this important group of States, have not attempted to characterise the international regulation of internal wars as an intervention in the internal affairs of States, they accepted in fact the relevance of international law to such conflicts. However, they insisted that such international regulation must proceed from the premise of placing sovereignty over humanitarian concerns.

Faced with this initial objection and varying opinions, the Conference referred Article 2/4 to a small committee (the special committee of the joint committee). The latter

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[103] Ibid, p.15.

[104] Ibid, p.330.

[105] Ibid, pp.101-102.

[106] Ibid, p.17.

produced a number of amendments and proposals. They revealed that only one amendment proposed the deletion of Article 2/4 and also only one proposal for the retention of that Article as it was drafted by the ICRC. However, all other amendments stressed that if the conventions are to be applied to internal conflicts, the latter must have the characteristics of an internal war.

In other words, the majority of amendments exposed directly the question of definition of internal conflicts. This means that States accept limitation of their sovereignty (in this context by applying humanitarian law) only when the conditions of internal conflicts are made fully clear. The legitimate interests of established Governments must be wholly protected.

The different proposals before the Committee reveal, it seems a general pre-occupation by the majority of States, to include formal or factual criteria which must be met before the application of the conventions.

Thus, the French thought that the insurgents must be '... organized military forces belonging to a responsible authority capable of respecting, or enforcing respect for the Convention in a given territory'[107]. This means that the Conventions would apply only ,in cases in which the insurgents have the characteristics of a real State. However, the Spanish proposal was less stringent, the Conventions within view would apply only when the established Government is obliged to have recourse to the regular military forces against the insurgents who are organized military and possess a portion of the national territory[108].

For the US, the Geneva Conventions can apply in two situations. First, when the parent Government itself recognizes the belligerency of the insurgents, in this situation then the established Government accepts voluntarily to limit its sovereignty, by extending the application of the Convention to its opponents.

In the absence of such recognition, the second eventuality arises, in this case according to the USA certain factual elements must be met by the insurgents in order to be recognized as belligerent and qualify for the application of the Conventions;

These conditions are:

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 determined territory.

3. The rebel armed force must act under the direction of an organized civil authority and be prepared to observe the ordinary laws of war.

4. The insurgent civil authorities must agree to be bound by the provisions of the Conventions[109].

In the US view in the presence of those conditions, third States may recognize the

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[107] Ibid, p.10. and p.121.

[108] Ibid, p.11. and p.121.

[109] Ibid, p.12. and p.121.

belligerent status of the insurgents whether or not such recognitions was accorded by the parent Government[110].

The curious fact is that there is in reality no difference between those conditions advocated by the USA in 1949 and the conditions of the recognition of belligerency mentioned in the message of President Grant to the American Congress in 1879, which indicates that despite this considerable lapse of time, and the developments which took place after it, a country like the USA still clings to a very rigid idea of State sovereignty, since the latter cannot be limited easily. Canada proposed first the deletion of Draft Article 2/4, having failed in that attempt, it proposed a rigid test for the application of the Conventions to internal conflicts. It stated:

> "...[B]efore saying that a civil war was of the kind in which the Conventions should be applied, the test should be recognition of belligerency of the rebels by the lawful Government"[111].

This Canadian position is more stringent than that of the US. It will simply lead to the non-application of the conventions in many internal conflicts, since established Governments rarely acknowledge that their enemies are more than breakers of the local law, any other course of action, would give their enemies some legal status and may restrict their attempts to crush their opponents quickly.

Australia, on the other hand, thought that for the internal armed conflict would quality for the application of the proposed Geneva Conventions as a whole, that conflict must satisfy certain formal and factual criteria. Thus, the conflict must be 'a full scale war, and when there was an organized form of Government which effectively controlled definite portions of the national territory and inhabitants there in'[112]. These are the factual conditions, and they are by no means easy to obtain. In addition Australia stressed that some formal criteria must be present in order to apply the conventions.

1. The de jure Government had recognized the insurgents as belligerents; or
2. The de jure Government had claimed for itself the right of belligerent; and
3. The de jure Government had accorded the insurgents recognition as belligerents for the purpose only of the present conventions.
4. That the dispute had been admitted to the agenda of the UNSC or of the UNGA of the UN, as a threat to international peace, beach of the peace of an act of aggression[113].

Thus, in three situations, the power of the established Government to determine the existence of an internal conflict is affirmed at least implicitly. However, the fourth criteria is interesting, here the initiative to determine the existence of the internal conflict is taken out of the direction of the established Government, in the words of Elder:

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[110] Ibid, p.12.

[111] Ibid, p.13.

[112] Ibid, p.15.

[113] Ibid.

> "The latter's [the fourth criteria] departure from the traditional discretionary nature of recognition and its move towards a quasi-collective legitimization of the qualitative nature of internal conflict would escape, as a matter of procedure, the great power veto"[114].

The Greek representative was more specific, he suggested the return to the notion of recognition of belligerency as a standard for the application of the Conventions to internal conflicts, but he proposed that the majority of the UNSC should be competent for the purpose of determining the presence of the conditions of such recognition.[115]

This is a new approach to belligerency, since it takes into account the new development which took place after the second world war, especially the creation of the UN, it will be a good progress in international law, if serious internal conflicts are treated by the UN. Falk rightly notes in this respect that:

> "Belligerent status, if objectively determined by the community would enable supranational actors to have a technique to justify treatment of serious internal wars as international war".[116]

In that case then rebellions and internal disorders would remain within the domestic jurisdiction of the State, whereas serious challenges may very well be internationalized in the sense that humanitarian law would be applicable to them if the international community may decide so.

The problem with this approach is that traditions of sovereignty, and the ideological rift between the two great powers would stand as a barrier against any attempt at centralising the decisions about the existence of internal conflicts.[117]

This explains in part why the Greek proposal did not gain any support. The Soviet delegate in fact emphasised that the mission of the UNSC is to find a peaceful solution to conflicts which threatened the world security and not to determine the existence of such conflict and recognizing the status of belligerency to its parties.[118]

These initial amendments and proposals produced by the special committee of the joint committee reveal clearly that the majority of States did not in principle oppose international regulation of internal conflicts, which must be seen as a welcome step in the direction of making international law relevant to serious violent crises which arise, not only between

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[114] D.A. Elder: The Historical Background of Common Article 3 of the Geneva Conventions of 1949. 11 Case W Res. JIL, 1979, p.45.

[115] Op. cit., supra. n.95, p.15.

[116] R. Falk: Legal Order in a Violent World. PUP, Princeton, 1968, p.122.

[117] In this respect, Falk rightly argues that:

> "...[T]raditions of sovereignty and the split associated with the cold war are formidable obstacles to this recommended centralisation of suprational authority over serious internal wars".

Ibid, p.122-23.

[118] Op. cit., supra. n.95, p.14.

States, but also to those occurring within States.

However, the majority emphasized that definition of internal conflicts is necessary, since the non-definition attitude adopted by the ICRC coupled with the extension of application of the whole Conventions to such conflict, would not be in the interests of the established Government since their power to deal with violent upheavals would be jeopardised because any insurgent group, however small, and insignificant can claim the benefits of the Convention hence creating legal and political embarrassment for the Government.

Thus, through the device of definition, the majority of States raised the thresholds of internal conflict. They appealed to factual and formal criteria found in the customary institution of recognition of belligerency, and in the majority of cases left it to the established Government to determine the existence of internal conflicts. The rational behind such attempts is very clear. It is to protect the sovereignty of the State and to close any door to unwanted intervention in their internal affairs.

The proposals and amendments produced by the special committee of the joint committee made clear that the majority of States were not in a position to accept draft Article 2/4 of the ICRC as it stands. Thus, the later discussions in the joint committee, led to the rejection of the draft Article 2/4 by 10 votes to 1 with 1 abstention. The main reason behind such rejection as it appears from the above mentioned Statements and amendments is that draft Article 2/4 was too wide in scope, which means that it covered situations which States considered as matters within their domestic jurisdiction.

This rejection led to the appointment of a working group on May 11th, 1949 with the mission of drafting a new Article dealing with internal conflict taking into consideration the views and amendments made by States on the ICRC proposal. It was composed of 5 States (US, France, Norway, Australia and Switzerland) on the May, 1949, a new draft was produced; it states:

> "(I) In the case of armed conflict not of an international character occurring in the territory of one of the hight Contracting Parties, each party to the conflict shall be bound to implement the provisions of the present convention, provided:
> (a) that the **de jure** Government has recognized the status of belligerency of the adverse party without restrictions or for the sole purposes of the application of the present or
> (b) that the adverse party presents the characteristics of a State, in particular, that it possesses an organized military force, that it is under the direction of an organized civil authority which exercises **de facto** Governmental functions over the population or a determinate portion of the national territory, and that it has the means of enforcing the Convention and of complying with the laws and customs of war; application of the Convention in these circumstances shall in no way depend upon the legal status of the parties to the conflict.
> (c) This obligation presupposes, furthermore, in all circumstances, that the adverse party declares itself bound by the present Convention and as is the **de jure** Government, by the laws and customs of war (and that it complies with the above conditions in actual fact).
> (II). The provisions relating to the protecting powers shall, however, not be applicable, except in the instance of special agreement between the parties to the conflict. An impartial humanitarian body such as the international committee of the Red Cross, may offer to the parties to the conflict to undertake the duties conferred by the present Convention on the protecting powers.
> (III) In the case of armed conflicts which do not fulfil the conditions as determined above, by means of special agreements, all or part of the provisions of the present

> Convention, or, on all circumstances, to act in accordance with the underlying humanitarian principles of the present convention.
> (IV) In all circumstances stipulated in the forgoing provisions, total or partial application of the present Convention shall not affect the legal status of the parties to the conflict."[119]

This draft in fact combines the factual and formal criteria included in the French, Australian and the American amendments referred to above. The general tone of the draft is plainly in favour of the rights of the State rather than humanitarian considerations, since the thresholds of the internal conflict are set very high and in practice very few conflicts would satisfy the stringent conditions contained in that draft.

Moreover, there is nothing in the text of the draft, which indicates that the discretionary power, of the established Government to determine the existence of the internal conflict is limited in any way, even when the high factual criteria are present. This is a further example of favouring the rights of States.

However, despite the stringent conditions contained in the draft of the working group, some important delegations were not pleased with it. Thus, France expressed its inability to accept the application of the whole Conventions to internal conflicts, especially the impossibility of such application in the case of the civilian Convention. Britain on the other hand was not happy with the mention of 'belligerency' since the latter 'implied rights exceeding the scope of the Conventions'.[120] Others were against the expression 'possessing the characteristics of State' which they feared, might be interpreted that the rebels have some legal status.[121]

The objections, led the joint committee to ask the same working group (on the May 25th, 1949) to submit another draft. This was done, the new draft Article dropped any language which might suggest that the insurgents possess any legal status. Also a new provision was included specifically for the application of the civilian Convention in internal conflicts. Thus, recognition of belligerency does not suffice to apply the convention, it will be applied only, either in part or as a whole, by special agreements between the parties to the conflict.[122]

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[119] Ibid, p.124.

[120] Ibid, p.47.

[121] Thus, Italy proposed "to delete the terms 'present the characteristics of State' which gives the impression that the rebels already constitute a subject in international law". Ibid.

[122] The Second Draft of the first working group in fact, included a new Article 2 (a) for the Civilian Convention. It provides:

> "In case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, the parties to the conflict should endeavour to bring into force, by means of special agreements, all or part of the provisions of the present convention, and in all circumstances shall act in accordance with the underlying humanitarian principles of the present convention".

Ibid, p.125.

In practice, then we may very well faced with a situation in which the established Government may recognize the belligerent status of their opponents (so that the wounded and sick and captured combatants would be treated in accordance with the laws of war) and can still refuse to enter into special agreement for the protection of the civilians.

This situation underlines the fact that Governments would not like to be seen as losing the control over their own civilian population since that would hurt their claim, that they are (established Governments) the sole representative of the State.

Apart from the changes mentioned above, the second draft does not differ much from the first draft. The two drafts followed the method of limiting the cases of conflicts of non-international to which the conventions would apply. This has been done by adopting definitions which contain very rigid criteria, which would in practice exclude any internal conflict which would not attain the gravity and seriousness of an international war.

It seems that the approach which was followed by the working group in its two drafts was not accepted by the majority of States. The main reason for that is, in my opinion, that States feared that the application of the convention **in toto** would give their opponents certain legal status, that being so, despite the fact that the two drafts expressly stressed that the application of the conventions would not give any legal status to insurgents.[123]

During the discussion of the second draft, the French Delegation hinted at another approach in the drafting of the Article concerned with internal conflicts. Instead of limiting the cases of internal conflicts, to which the conventions would apply **in toto**, it was proposed to restrict the provisions of the conventions, which would apply in such cases. The immediate effect of such an approach would have been the abandoning of the attempts at defining internal conflicts, and rather concentrating on the substantive humanitarian rules which may apply in those conflicts.

Thus, the French delegation introduced the new approach by wishing that:

> "...[T]he humanitarian rules contained in the preamble of the civilians convention to be applied also to war of non-international character, such a preamble should be added to the three other conventions, and contain also a definition of judicial guarantees in penal matters".[124]

This led to the appointment of a second working group, with the mission of drafting a new Article dealing with internal wars. This group adopted a method which was in line with the French proposal.

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[123] In this context, the French delegate attacked the method followed by the first working group. He stated:

> "...[S]ignatory Governments who were confronted with an insurgent movement would be in a dilemma: either they would never apply the clauses of the convention, or they would implicitly recognize that the adverse party had a character which was tantamount to that of State".

Ibid, p.78.

[124] Ibid, p.78.

The new draft Article[125] produced by the second working group did not define non-international conflicts. However, it contained the humanitarian rules to be respected in such situations. Thus, only basic humanitarian rules would apply and not the whole convention.

This draft was subjected to various criticisms. The most important criticisms were made by the Soviet Union and Burma. The former thought that the obvious outcome of the approach of the second working group would be that a large number of important provisions concerning the protection of war victims will not be put into operation,[126] the Russian Delegation then proposed a series of proposals, with the object of widening the range of humanitarian rules applicable to each category of the victims of internal wars (the wounded, POW's and civilians), however, no attempt was made at defining non-international conflicts.

Burma on the other hand, criticised the non-definition of 'armed conflicts of a non-international character' this phrase in its view may 'include banditing, uprisings, disorders, rebellion and civil war'[127]. Its delegate tried to convince the Conference that any inclusion of any Article in whatever form dealing with internal conflict is very dangerous. He stated:

> "...[S]o the only help that the Article will give, if you adopt it, will be to those who desire loot, pillage political power by undemocratic means, or those foreign ideologies seeking their own advancement by inciting the population of another country. If you agree that this will be the result, we are sure you will not adopt this Article, especially if you will realize that no Government of an independent country, can, or will ever, be inhuman or cruel in its actions towards its own nationals. If you will adopt it you will not only be embarrassing the de jure Government, but you will also

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[125] The Article adopted by the second working group stipulates that:

"Paragraph 1. In the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party of the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, and those placed hors combat by sickness, wounds, captivity or any other cause, shall be treated humanly in all circumstances and without any discrimination. To this end, the following acts are and shall remain prohibited 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, humanity and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularatory constituted court affording all the judicial guarantees which are recognized as indispensable by civilized parties.
(2) The wounded and sick shall be collected and cared for.
(3) No adverse discrimination shall be practised on the basis of differences of race, colour, religion or faith, sex, birth or wealth.
Paragraph 2. An impartial humanitarian body, such as the ICRC may offer its services to the parties to the conflict.
Paragraph 3. 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 convent.
Paragraph 4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict".

Ibid, pp.125-126.

[126] Ibid, p.326.

[127] Ibid, p.329.

> seriously endanger its sovereignty as you will be taking away from it its own legal machinery to maintain the security of its population and the prosperity of its State"[128].

Neither of the two extreme views, was adopted, in fact the Russian proposals were defeated by the joint committee by 9 votes to 1.

With some minor modifications, the essentials of the draft proposed by the second working group adopted first by the joint committee and later by the conference as Article 3. The Article as adopted contains no definition of 'armed conflict of a non-international character'. However, in my view, the **travaux préparatoires**, reveal clearly that the majority view holds that the term does not apply to every kind of internal disorder, only conflicts which reveal certain gravity and intensity could be included.

In this respect, in the 19th Plenary Meeting July 29th, 1949 which adopted the future Article 3, the Delegate of Venezuela stressed:

> "...[W]e must be quite certain of what is meant by 'armed conflict of a non international character'. There is no doubt that this does not apply to the exploits of bandits or the riots of any kind but to civil wars, a sociological phenomenon of political history which often in essence is a form of class struggle".[129]

The representative of Switzerland, who was one of the sponsors of the actual Article 3, argued in response to the Burmese delegate who sees any inclusion of rules dealing with internal conflicts as an encouragement of insurgency. He stated:

> "The Burmese delegate is afraid that the Article 2A [which became Article 3 in the final draft] might be invoked against the legitimate Government, in cases of individual outbreaks of banditism or organized movement of the kind, but I do not consider that this apprehension is well founded. These provisions are applicable in the event of an armed conflict, in other words, an armed conflict must actually be going on but outbursts of individual banditism, or even movement of the kind, complicated or aggravated by the existence of a conspiracy, do not really constitute an armed conflict in the proper sense of the terms. Nor does a mere riot constitute an armed conflict. An armed conflict as understood in this provision, implies some form of organization among the parties to the conflict. Such organization will, of course generally be found on the Government side; but there must also be some degree of organization among the insurgents".[130]

It seems to me that this interpretation is interesting, since it reveals the intentions of the sponsors of Article 3. It shows clearly that 'an armed conflict not of an international character' has some kind of definition. The threshold of the conflict are not very high, in other words such conflicts do not have to resemble international conflicts, however, riots and internal tensions are excluded they remain in the domestic jurisdiction of the State.

The other main conclusion to be drawn from the **travaux préparatoires** are in my opinion the following:

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[128] Ibid, p.329.

[129] Ibid, p.333.

[130] Ibid, p.335.

1. There was a wide acceptance that international law is relevant to internal crisis in certain specific cases. To me this is in fact a result of the influence of the humanitarian spirit which arose after the second world war. States came to terms with the idea that their treatment of their citizens has to be guided by certain fundamental principles. Human rights ensured the protection of human beings during peace times in general, humanitarian law would have the same effect during times of armed conflicts either internal or international. No State (except Burma) has in fact attempted to characterise such international regulation as an intervention in the internal affairs of the State or as a breach of sovereignty.

2. However, the majority of States (mostly colonial States, US, Canada, Greece and Burma) were concerned about the effects of such regulations on their sovereign rights to keep law and order within their own borders.

Those States sought to limit incursions into their domestic jurisdiction, by advocating first strict definitions of internal conflicts. In fact, these definitions contained such high and serious criteria, that in practice very few cases would qualify. Thus, the technique of definition was used at that stage for a very specific reason, and that is the protection of the sovereignty of State.

Later in the conference, however, the tone has changed, States concentrated on limiting the humanitarian rules applicable to such conflicts. This would enable them to keep more discretion and liberty in the crushing of their opponents and would reduce the chances of the insurgents of obtaining legal status.

It must be stressed that there is no direct indication in the **travaux préparatoires** which suggests that by adopting the second method (of restricting the rules applicable in the internal conflicts) the States which tried to define the internal armed conflicts have abandoned their earlier definitions, and have opted for a more liberal interpretation. Although for more humanitarian spirit, it seems that the Statement made by Switzerland (quoted above) must be taken to express the feeling of the majority of States.

3. Moreover, in my opinion, States wanted to limit incursions into their sovereignty, by rejecting the competence of any UN organ body to determine the existence of internal conflict. Which means implicitly that they wanted to remain the sole authority competent to make such a determination. The argument that when certain objective criteria exist, the State is obliged to apply Article 3 finds no real support in **travaux préparatoires**. Also, it seems to me that in a world still dominated by sovereignty and in the absence of a central agency above the States any talk of objectivity is out of place.

However, what is needed in my view, is that the established Governments should act in good faith in their determination of the existence of an armed conflict. To me, it would be absurd for instance, to demand that the insurgents must occupy a substantial part of the national territory in a very effective way, in order to apply Article 3 since in guerilla warfare, which is the dominant method of warfare in our present world, that requirement would never be fulfilled.

B. Subsequent Practice and Situations to which Common Article 3 Applies

In this context, Row writes:

> "...[I]n practice Article 3 has been of little direct significance, simply because it attempts to control the manner in which a State treats its own citizens in circumstances where the Government concerned may be fighting for its very existence. In addition, a State may take the view that any trouble that it is having with armed groups intent on bringing down the Government is really only criminal and that its laws are adequate to stamp out that activity".[131]

In other words, the reason for the lack of interest of Government in the application of Article 3, is that it may restrict its discretion in dealing with its opponent and also it may give them some legal status.

Many international lawyers interested in humanitarian law hold similar views[132] suc as De Lupis who notes that:

> "In spite of the modest ambitions of common Article 3 states have still attempted to evade the application of this Article, claiming that a conflict did not fall within its ambit but constituted a mere police action".[133]

This means that the absence of definition of internal conflict, coupled with the absence of any mechanism for the determination of such internal conflict have resulted in practice in limiting the role of Article 3 in actual civil wars situations, and this gave precedence to the claims of established Governments. In this way, France, the UK and Portugal refused to acknowledge the application of Article 3 to their colonies, they acted under the presumption that established Governments have the right to put down uprisings, by all means required by the situation. The example of France is flagrant, it refused in the first years of the Algerian war to recognize that the conflict falls within Article 3, even when more than 400,000 soldiers were used against the insurgents.

Baxter attributes this state of affairs to:

> "...[T]he deceptively simple expression 'armed conflict not of an international character' has not proven easy to apply to the multiplicity of circumstances under which violence may break out in a state".[134]

However, despite the above misgivings, State practice shows that in certain cases, the Article has been recognized to apply either explicitly or implicitly. In this context, Forsythe established a chart on the initial relevance of Article 3 to the situation of violence during the period from 1949 to 1975, three categories emerge from his study:

1. In the first category, the belligerents signed Ad hoc agreements in which all the four

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[131] P. Rowe: Defence: The Legal Implications. Brassey's Defence Pub., 1987, p.142.

[132] Thus, Bond notes that 'States have generally ignored it [Article 3]'. J.E. Bond: The Rules of Riot: Internal Conflicts and the Law of War. PUP, Princeton, 1974, p.58.

[133] Op. cit., supra. n.92, p.169.

[134] R.R. Baxter: Jus in Bello Interno: The Present and the Future Law, in Moore (ed.), op. cit., supra. chapter 2, n.4, p.521.

Geneva Conventions or their basic principles were applicable to their internal conflicts. Examples of this are: The Congo in 1960-4, The Yemen in 1963-67 and Nigeria in 1967-70.

2. In the second category, explicit acceptance of the applicability of Article 3 either by Government officials or by a non-Governmental party (the insurgents). The former include: Guatemala in 1954, The US (Vietnam) in 1964, The Dominican Republic in 1965, Uruguay in 1972 and Chile in 1973.

The latter (the recognition by the insurgents) comprise the cases of Algeria in 1956, Lebanon in 1958, Cuba in 1959 and Yemen in 1962.

3. In the third category, Forsythe lists possible situations for the application of Common Article 3, not acknowledged by Governments but in which the ICRC visited detainees. He cites several examples such as Algeria (France) in 1955, Cyprus (UK) in 1955-58, Hungary in 1956, Malaysia in 1956, Kenya (UK) in 1956-59, South Vietnam in 1957-66, Rhodesia (UK) from 1959 till independence, Laos in 1961-72, Indonesia in 1966-69, Aden (UK) in 1966-67, Bolivia in 1971, Guinea-Bissau (Portugal) in 1971-74, Mozambique in 1971-74, Burundi in 1972, and Angola (Portugal) in 1973-75. In addition, he also refers to instances where the ICRC still visits detainees as illustrated by the cases of Ethiopia since 1974-present, Lebanon since 1975-present, Northern Ireland (UK) since 1971-present, and Philippines since 1972-present.[135]

The conclusion to be drawn from this survey, is that in the overwhelming majority of cases, States do not feel obliged to declare themselves bound by Article 3, this would tie their hands in finishing off the insurgents at the earliest possible moment. However, if the conflict intensifies and prolongs for a long time, States to save their faces accept the ICRC humanitarian initiatives, without committing themselves openly. But, it has to be made clear that States can accept the offer of the ICRC, but refuse to acknowledge the application of Article 3, in other words, they can still deny the existence of an armed conflict of a non-international character. Thus, the UK accepted the visits of the ICRC to the 'H' block prison in Northern Ireland, on the clear understanding that such permission did not imply that the UK Government recognize the application of Article 3 to the situations in that region.[136] This explains in part why the ICRC is present at the moment in nearly every internal conflict. In this way, in 1990 it still is present in Afghanistan, Angola, Burma, Burundi, Chad, Chile, Colombia, East Timor, El-Salvador, Ethiopia, Kampuchia, Lebanon, Mozambique, Nicaragua, Paraguay, Philippines, Sri-Lanka, Sudan, Surinam, and Uganda.[137]

Clearly, the majority of these States have never issued declarations in which they

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[135] D.P. Forsythe: Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts. 72 AJIL, 1978, pp.275-276.

[136] Op. cit., supra. n.131, p.142.

[137] See the following issues of the IRRC:
March/April 1989, 29th Year, No.269, pp.147-152.
May/June 1989, 29th Year, No.270, pp.229-235.
Sept/Oct 1989, 29th Year, No.272, pp.474-479.

recognized the applicability of Article 3 to their conflicts. They maintain that such an act would inevitably carry with it the implication that the insurgents have some legal status, thus weakening their claim to be the masters of situations and the holders of legitimacy.

1. The ICRC and the Definition of an Armed Conflict not of an International Character and the Question of Determining the Existence of such a Conflict

The Official Commentaries of ICRC on the Geneva Conventions of 1949, seem to be guided by two principles, first the conflict to which Article 3 is to apply must satisfy some conditions of fact and that despite the absence of definition in the text of the Article. It is stressed that:

> "It must be recognized that the conflict referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities-conflicts in short, which are in many respects similar to an international war but take place within the confines of a single country"[138].

The ICRC in the same commentaries suggested some criteria which can be useful in distinguishing "a genuine armed conflict from a mere act of banditry or an organized and short lived insurrection".[139] They are as follows:

> "1. That the party in revolt against the de jure government possesses an organized military force, an authority responsible for its acts acting within a determined territory and having the means of respecting and ensuring respect for the conventions.
> 2. That the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> 3. (a) That the de jure government has recognised the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present convention; or
> (d) That the dispute has been admitted to the agenda of the UNSC or the UNGA of the UN as being a threat to international peace, a breach of peace or an act of aggression.
> 4. (a) That the insurgents have an organization purporting to have the characteristics of a state
> (b) That the insurgents civil authority exercises de facto authority over persons within a determinate territory
> (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war
> (d) That the insurgents civil authority agrees to be bound by the provisions of the Convention."[140]

These criteria in fact are a summary of the proposed definitions which some States advanced during the discussions of Article 3 in the Diplomatic Conference of 1949.

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[138] Op. cit., supra. n.114, p.53.

[139] J. Pictet (ed.): Geneva Conventions of 12 August 1949, Commentary. Vol.1, Geneva Conventions for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field. Geneva, ICRC, 1952, p.50.

[140] Ibid, pp.49-50.

However, the second principle contained in the ICRC Commentaries, is that 'the Article should be applied as widely as possible'[141] meaning that the conditions cited above are not necessarily indispensable, since in its view no Government may in practice claim even in cases of mere disturbances that it is not bound by the purely humanitarian rules contained in Article 3. Thus, in its view the matter is not clear cut. It wanted to satisfy two opposing demands, a demand for respect for the sovereignty of State on one hand and the demand of more humanity in all internal conflict whatever their intensity. Later on, it seems that the ICRC adopted an approach which favours the demands of humanity as opposed to claims of sovereignty and non-intervention.

In its report to the CGEDHL (1971), the ICRC stressed that:

> "To be sure, Article 3, **de lege lata**, does not contain a definition of the non-international armed conflict. But although the article fails to specify the concept of 'non-international armed conflict', it is none the less true that the authorities involved would not be in a position to interpret it erroneously, and that, when the conditions of such are conflict are realized the humanitarian standards of Article 3 must apply. In addition, certain elements of the existing text can be singled out: a non-international armed conflict exist in the case of hostilities engaging armed forces within the same State. Thus Article 3 leave a broad power of appraisal to the parties to the conflict, but nevertheless does not give them the power of sovereign decisions as the application of its provisions".[142]

In fact, the ICRC here confirms what a Commission of its Experts on Humanitarian Assistance of Victims of Internal Conflicts has arrived to in 1962.[143]

Thus, armed conflicts not of an international character, are not supposed to have the same characteristics of an international war, only moderate criteria can exist, such as a minimum of organization, existence of armed hostilities against the established Government, also a collective character of the conflict.[144]

The ICRC stressed the objective character of those conditions, and thus tried to restrict the discretion of the established Governments in the matter of the determination of the existence of an internal conflict, which eventually leads to the limitation of their sovereignty in that domain.

Despite the obvious humanitarian intent behind such an approach, the fact remains that States rarely acknowledge the existence of internal conflict even when the existence of those 'objective conditions' is in no doubt.

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[141] Ibid, p.50.

[142] CGEDHL (Geneva 24 May-12 June, 1971), V. Protection of Victims of Non-International Armed Conflicts, pp.36-37.

[143] That Commission in fact, stressed that:

> "La determination de l'existence d'un tel conflit interne répond à des conditions objectives. Elle ne peut résulter de l'appréciation discretionnaire des Etats parties aux conventions". Op. cit., supra. n.32, p.525. See also Ibid, p.44-45.

[144] Also, other considerations may be taken into consideration such as "la durée du conflict, le nombre et l'encadrement des groupes rebels, leur installation ou leur action sur une partie du territoire, le degré d'insécurité, les moyens mis en oeuvre par le gouvernement légal pour rétablir l'ordre, etc." Ibid, p.526.

Ethiopia is a flagrant example today, after 30 years of conflict in Eritrea, and 14 years in Tigre provinces, where two well armed insurgent groups conduct a war of secession, and despite the deployment of nearly 180,000 soldiers in Eritrea and 40,000 in Tigre and despite the undeniable popular support for the insurgents in those two regions,[145] there is no indication whatsoever that the Government is ready to accept the application of Article 3.

Thus, there is a real doubt that States can adhere to a theory of objectivity in matters which they see as vital to their survival, in fact ideological and political interests and the decentralised nature of the international system, would militate against such an approach.

The UN practice, in my view, supports indirectly the above contention, since the organization dealt with only a few cases of internal conflict, and only rarely referred directly to Article 3. Also, most of these cases concerned wars of national liberation movements (especially in Africa)[146] and above all the UN dealt with internal conflicts which threatened international peace and security, however, even in those cases, the established Government in bringing the matter before the UN never claims the existence of an internal conflict but always complains of foreign intervention.

In this context, when Guatemala in the summer of 1954 was in the midst of a civil war, its foreign Minister announced on June 2nd, 1954 that it (the Government) had uncovered "a wide internal conspiracy directed from 'outside, and which was planned by' military technicians separated from the army of another country".[147] Guatemala later brought a complaint (before the UNSC) of aggression invasion and intervention in its internal affairs. The UNSC unanimously adopted a resolution calling:

> "...[F]or immediate termination of any action likely to cause bloodshed and requests for all members of the United Nations to abstain in the spirit of the United Nations Charter from giving assistance to any such action"[148].

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[145] The Daily Telegraph, June 2nd, 1988, p.9.

[146] Thus, in Resolution 2395 (XXIII), the UNGA:

> "12. Calls upon the Government of Portugal, in view of the armed conflict prevailing in the territories and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949".

Djonovich, (ed.), op. cit., supra. chapter 1, n.79, Vol.12, p.172. See also Resolution 2649 and especially Resolution 2674 (XXV) Respect for Human Rights in Internal Conflicts, para 3, 4 and 5 in Ibid, Vol.13, 1970-1971, pp.289-292. See also Resolution 2918 (XVII) Question of Territories under Portuguese Adiminstration, in particular para.3/b which states:

> "The just treatment of the freedom fighters of Angola, Guinea Bissau and Cape Verde and Mozambique captured during the struggle for freedom as prisoners in accordance with the principles of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12th, 1949, and in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12th, 1949".

Ibid, (1972-1974), p.321.

[147] Keesing's, 1954, p.13678.

[148] 9 UNY, 1954, p.99.

This means that the UNSC abstained from declaring the existence of an internal conflict, it concentrates rather on its main mission which is keeping peace and security in the world.

It must be conceded that recently (in the 1980s) with the idea of combatting widespread violation of human rights, the UN through its UNCHR, the Sub-Commission of Non-Discrimination and Minorities and the UNGA, have stressed the importance of the application of the rules of Article 3 as a means of elimination of those violations and by this they indirectly took it as their mission to indicate the existence of an internal conflict of a non-international character.

The case of El-Salvador is typical, The UNGA did not hesitate to proclaim the applicability of Article 3 to the situation which prevails in the country. In this respect, Resolution 36/155 of December 16th, 1981 in its 4th paragraph stipulates that:

> "The United Nations General Assembly draws the attention of all parties concerned to the fact that the rules of international law, as contained in Article 3 of the Geneva Conventions of 1949 are applicable to armed conflicts not of an international character and requests the parties involved to apply a minimum standard of protection to the affected persons".[149]

The most interesting in this sphere, is that El-Salvador, although it rejected the resolution because in its opinion:

> "...[I]t overstepped the humanitarian sphere and included highly political considerations which fell exclusively under internal jurisdiction".[150]

It did not specifically question the competence of the UNGA to characterise its internal conflict as being governed by Article 3. In fact, the UNGA made it, from 1981, a custom in adopting resolutions calling for the applications of Article 3 to the conflict.[151]

In my view, this is a very important development, it signals that the international community, even in the atmosphere of a decentralised world system, can act in matters which are very sensitive to States, such as the determination of the existence of an internal conflict, and this can restrict the discretion of established Governments in that sphere.

The idea of human rights serves as a vehicle for such enterprise since it is accepted as valid limitation on State sovereignty. This concern for the protection of human rights, which is a recognized mission of the UN, may very well include in some circumstances the application of humanitarian rules of Article 3, and by consequence, Governments have to accept that verdict.

However, the main weakness of the UN activity in this field is that its actions are very selective, many internal conflicts are simply ignored, politics and super power rivalry play

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[149]This resolution was adopted by 90 votes in favour 2 against and 53 abstentions. 35 UNY, 1981, p.962.

[150]Ibid, p.959.

[151]Thus, Resolution 37/185 (Dec. 17th, 1982) referred in its para 2 to the application of Article 3. 36 UNY, 1982, p.1127 and Resolution 38/101 (Dec. 16th, 1983) referred also to Article 3 in its para 3. 37 UNY, 1983, p.889.

a major part in this failure.

The general conclusion from State practice, is that in the over whelming majority of cases, States still cling to a very rigid concept of sovereignty in the matter of definition and determination of the existence of internal conflicts. The idea of objectivity, seems to be perceived by those States, as non-existent or in the best of circumstances, it is only their decisions which are objective.

However, a very slow process is beginning to emerge, whereby the recognized mission of the UN to look after the protection of human rights is exploited by the organization to declare in some instances the application of Article 3. This confirms in my view that human rights as limitation of State sovereignty have an important role to play in the context of internal conflicts.

2. The Doctrine and their Interpretation of the Situations to which Article 3 Applies

The doctrine is divided on their interpretation of the situations to which Article 3 of the Geneva Convention applies. Their readings of the legislative and the subsequent practice of States differ. In my opinion, three main tendencies may be detected.

The first view is advocated by Bond. He writes:

> "...[S]tates are bound to observe only those rules to which they agree, 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 international character a civil war by any other name and voted in favour of applying a limited number of principles to a limited range of conflicts."[152]

According to this opinion, then Article 3 is very restricted in scope, it implies that the Article is not in any way broader than the traditional concept of belligerency, sovereignty and its demands it seems are behind such interpretations, since established Governments will not consider any uprising as internal conflict to which Article 3 is applicable. This would tie their hands in dealing with opponents.

Schindler and Higgins advocate a milder position, the former after studying the practice of the ICRC in internal conflicts,[153] maintains that armed conflicts within the meaning of Article 3 are to be differentiated from internal disturbances and tensions. The latter remains under the exclusive control of the established Government, he stresses that the armed conflict in the context of Article 3:

> "...[M]ust show certain similarities to a war without fulfilling all conditions necessary

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[152] Op. cit., supra. n.132, pp.56-57.

[153] He writes:

> "The practice of the ICRC has set up the following criteria to delimit non-international conflicts from internal disturbances: In the first place, the hostilities are meant to be of a collective character, that is they have to be carried out not only by single groups. In addition the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting humanitarian requirements".

D. Schindler: The Different Types of Armed Conflicts According to the Geneva Conventions and the two Protocols. RCADI, 1979/III, p.147.

for the recognition of insurgency"[154].

According to this view, then, armed conflicts within the meaning of Article 3, are of a lower intensity than the traditional concept of civil war and recognition of belligerency.

In fact, Schindler thinks that Article 3, is a clear progress in comparison to the old classical international law, and especially the traditional institution of recognition of belligerency, and then states that:

> "...[T]he provisions of Article 3 differ in three ways from the traditional rules on civil wars and recognition of belligerency. First, they are to be applied automatically in case of an armed non-international conflict no recognition is necessary. Not even reciprocity in the application of these provisions is required.
> Secondly, Article 3 sets lower requirements to the intensity of an armed conflict as would be necessary for the recognition of the insurgents. Neither is it necessary that the insurgents exercise control over a part of the state territory nor must they embody attributes of a government.
> Thirdly and finally, in case of a non-international conflict according to Article 3, not all the laws of war are applicable - Article 3 contains only an absolute minimum of duties for the opposing party"[155].

It seems to me that in practice the differences stated by Schindler, are relative, since as it has been shown above, some internal conflicts, which have taken place in the last 30 years would fulfil at least in part some of the conditions of the application of the status of recognition of belligerency, but States claimed that the Article is not applicable (Algeria at least as from 1956). The question of the automatic application of Article 3, is very problematic, States do not accept easily to waive their discretion in that important matter, practice shows this clearly.

Higgins's opinion does not differ much from Schindler's view. She writes:

> "...[T]he Article is binding on both parties, and is not subject to reciprocity. It does not itself define an 'armed conflict not of an international character', but given its humanitarian purposes, it would seem to be applicable to major insurgency and probably also to rebellion as well as to civil war".[156]

The third view goes very far, it advocates the application of Article 3 even to internal disturbances and tensions. The main argument used, is that since the rules of Article 3 are very limited in number and humanitarian in spirit, they should be applied to all ranges of tensions which occur within the State, the main advocate of such an approach is Pictet, he asked:

> "...[W]hat 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

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[154] Ibid.

[155] Ibid, p.146.

[156] Op. cit., supra. n.1, p.91.

torture and mutilations and to take hostages".[157]

Despite the humanitarian spirit involved in such a statement, the fact remains that the legislative history and even the subsequent practice concerning Article 3, makes it clear that Article 3 does not apply to situations of riots and civil disturbances.

The three opinions in my view are, in fact, different answers to the central question of the relation between humanity and sovereignty in the context of internal conflicts. The first view stressed the priority of sovereignty over humanity, the second view tries to reconcile the two principles, whereas the third view gives an absolute priority to the demands of humanity over the claim of sovereignty.

To me, the absence of a clear definition of the expression 'armed conflicts of a non-international character' in the text of the Article itself, and the absence of any indication of who can determine the existence of such a conflict, have in practice led in large part to the weakening of Article 3. Such absence of definition is itself a manifestation of the strong position of sovereignty and non-intervention in international relations.

SECTION V: Definition of Armed Conflicts of a Non-International Character in Protocol II of 1977

The ambiguity of the situations to which common Article 3 applies, the absence of specific rules concerning the protection of civilians, the need for effective restrictions on means and methods of combat, the tragic experiences of the Vietnam War, Nigerian and Bangladesh civil wars, the efforts of the ICRC and its calls for more humanity in internal conflicts, and the influence of the idea of human rights, which stressed the sacrosanct obligation of every State to protect the fundamental rights of the individual and groups of individuals. These different elements have played different roles, in revealing the need for a new international instrument which will develop Article 3.

In this section, I will concentrate on analyzing the definition contained in Article 1 of Protocol II of 1977, the criteria involved in that definition, the relation of Article 1 of the Protocol to common Article 3 of the Geneva Conventions and finally the evaluation of Article 1 of Protocol II.

A. Definition: The Criteria

Article 1, is the corner stone of the whole Protocol II, it has been termed as 'the keystone of the instrument'[158] or '... l'article premier du Protocole en est reallement la pierre angulaire'.[159] The Article in fact, defines the scope of the application of the Protocol, and by implication restricts the sovereignty of the State in all cases covered by that Article. In

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[157] Op. cit., supra. n.139, p.50.

[158] Op. cit., supra. n.23, p.1348.

[159] R. Abi-Saab: Droit humanitaire et conflits internes. Institut Henry-Dunant, Ed. A. Pédone, Paris, 1986, p.149.

this respect, Romania expressed the view that it :

> "...[A]attached considerable importance to the field of application of draft Protocol II, since the sovereignty of the State was involved".[160]

In fact, this view was shared by many States, especially Third World countries, they emphasised the close relationship between the protection of their sovereignty and the need to restrict the field of application of Protocol II.[161]

The ICRC draft Article 1, submitted to the Diplomatic Conference of 1974-1977, defines the non-international armed conflict as follows:

> "Article 1. Material field of application
> 1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 1949, taking place between armed forces or other organized armed groups under responsible command.
> 2. The present Protocol shall not apply to situations of internal disturbances and tensions, inter alia riots, isolated and sporadic acts of violence and other acts of a similar nature.
> 3. The foregoing provisions do not modify the conditions governing Article 3 common to the Geneva Conventions of August 12 1949".[162]

The definition here is very broad indeed, only two factual criteria are necessary to make the internal disorders 'armed conflict not of an international character'. First, the contest should be between armed forces and other organized armed forces. Secondly, the organized armed groups should be under a responsible command.

It must be noted that in accordance with the first criteria only contests between Government forces and insurgents armed groups are 'armed conflicts', which means that when the established Government is not a party to such conflict, Protocol II is not relevant. Thus, situations of civil wars like those which took place in Angola in 1975, and currently in Lebanon are not covered by the Protocol's Article 1, although there is no doubt that Article 3 is applicable.

The ICRC's representative at the Diplomatic Conference explained on February 14th, 1975 the rational behind their approach to draft Article 1 in these terms:

> "The ICRC had had the difficult task of determining the field of application of draft Protocol II, it had chosen a broad field to cover all non-international armed conflicts, and for that purpose had endeavoured to specify the characteristics of a non-international armed conflict by means of objective criteria so the Protocol could be applied when those criteria were met and not be made subject to other considerations".[163]

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[160] 8 ORDCHL, CDDH/I/SR. 23, para.33, p.221.

[161] Thus, Mexico argued that it "attached the greatest importance to scope and field of application of the draft Protocol concerned with the victims of internal armed conflicts it considered it essential that the Protocol should safeguard the sovereign rights of States". Ibid, CDDH/I/SR. 24 para. 14, p.231.

[162] Ibid, Vol.1, p.33.

[163] Op. cit., supra. n.160, CDDH/I/SR. 22. para. 12, p.203.

The ICRC's object is clear, first, it made the definition broad in order to cover a wide range of conflicts, secondly, it excluded, at least implicitly, the competence of the established Government in determining the existence of such conflicts. The aim is to make the Protocol apply automatically, once the two objective criteria are present in the conflict, and thus, surpassing the claims of sovereignty and non-intervention by Governments facing such challenges.

It must be stressed that draft Article 1, was one of the most discussed provisions of the ICRC's draft Protocol II, many amendments and proposals were introduced in connection with it, a working group was created to find a suitable definition. That group had to create a sub-group, which had to meet six times in order to reach an agreement.[164] This difficulty of reaching an agreement, arises from the fact that the Article touches directly on the sovereignty of the State, and its ability to control events inside its borders without any interference.

The legislative history of draft Article 1, reveals that States held two different opinions concerning the field of application of the Protocol. The first view was held by Socialist States (except Romania) and some moderate western States, like Norway, Sweden, Italy, Switzerland and New Zealand. This group was largely happy with the ICRC's draft Article. However, some States of this group were against the introduction of two kinds of internal armed conflicts (those covered by Article 1 of the Protocol and those covered by Article 3) they advocated a single category of those conflicts.

East Germany submitted an amendment which gave an identical definition to the two kinds of internal conflicts, only two criteria have to be present in order for the Protocol II to apply. The armed conflicts must: (i) take place between armed forces or organized armed groups; and (ii) under responsible command.[165]

Thus, East Germany, adopted in fact the criteria of the ICRC's definition and simply extended it to Article 3. However, Norway submitted an amendment which simply states:

> "The present Protocol shall apply in situations referred to in Article 3 common to Geneva Conventions of 12 August 1949 for the protection of the war victims".[166]

In my view, this amendment despite its humanitarian intent, is unrealistic since it brought back the imperfections of Article 3 to the Protocol II such as the absence of definition.

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[164] 10 ORDCHL, CDDH/1/238/Rev 1., p.93-94.

[165] East Germany in fact, submitted the following amendment:

> "Redraft paragraph 1 as follows:
> 1. the present Protocol which specifies and supplements Article 3 common to the four Geneva Conventions of August 12th, 1949, shall apply to all armed conflicts which in conforming with common Article 3 have not an international character and take place between armed forces or organized armed groups under responsible command".

4 ORDCHL, CDDH/1/88, p.8.

[166] Ibid, p.9.

As to the East German position, which can be safely said to represent the socialist States view,[167] it seems to me that its real aim was to restrict the field of application of Protocol II, so that it would not be applicable to their possible internal problems, which can usually be tackled by police action. Also it was especially directed to prevent any possibility of intervention in the internal affairs of States.[168]

Socialist States, later in the Conference, and after it became clear that wars of national liberation movements are to be considered as international armed conflicts, tacitly supported Third World countries, in playing down the importance of Protocol II.

The second group of States which included Third World countries and many other States, was generally critical of the ICRC's draft Article 1, to them the definition contained in the article, was broad and thus it will open the way for outside intervention, and would tie the hands of the established Government in crushing violent disorders inside the country.

Argentina expressed the feeling of the majority when its delegate stated:

> "...[H]is delegation appreciated that draft Protocol II had been based on the idea of the protection of humanity. It was however, unrealistic in some respects, certain articles, and particularly Article 1, to some extent infringed the jurisdiction of the State."[169]

To this delegation, in order for the sovereign States to accept such an instrument (Protocol II), the approach must be 'realistic', realistic in the context of draft Article 1, meant that the Article must be in line with the requirements of States interests. In other words, its definition must be strengthened, it must contain strong criteria which only limited cases of internal wars can satisfy, and by consequence leave a considerable margin of manoeuvre to the established Government.

In fact, many States which belonged to this group submitted amendments, which contain their understanding of what constitutes an 'armed conflict not of an international character'.[170] Indonesia in fact, considered that Protocol II dealt with matters coming within the domestic jurisdiction of a sovereign State, hence a cautious and practical view is needed in order in give due respect for the principle of sovereignty and integrity of States. It suggested that to attain that aim, Article 1 should take into account the following criteria:

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[167] See for further details on the socialist position: J. Toman: La conception soviétique du conflit armé non-international, in St. Trechsel and Y. Hangartner, (eds.): Volkerrecht im Dienste Des Menschen Festschrif Für Hans Haug. Haupt, Bern/Stuttgart, 1986, pp.309-335 (especially 327-331). See also J. Toman: The Socialist Countries and the Laws of War in: Modern Wars: The Humanitarian Challenge. A Report for the Independent Commission on International Humanitarian Issues. Zed Books Ltd London to New Jersey, 1986, pp.164-165.

[168] In fact, the East German delegate at the Conference stated in defence of his country's amendment that:

> "The introduction of new categories and difficult distinctions was not calculated to strengthen the development of international humanitarian law, instead, it might encourage interference in the internal affairs".

Op. cit., supra. n.160, CDDH/I/SR.22, para. 27, p.207.

[169] Ibid, CDDH/I/SR.23. para. 9, p.216.

[170] Op. cit., supra. n.165, pp.6-9. [Pakistan CDDH/I/26, p.6; Indonesia CDDH/I/32, p.7; Brazil CDDH/I/79, p.8].

1. It should apply to regular armed forces under responsible command which took up arms against the legitimate Government, or to armed conflicts taking place between regular armed forces and organized armed groups.

2. The armed forces or organized groups hostile to the legitimate Government must exercise continuous and effective control over a substantial or non-negligible part of the territory of the high contracting party.

3. The armed conflict must reach a certain degree of intensity and continue for a prolonged period.[171]

These are very hard factual criteria, no insurgent movement which took arms against established Government since the second world war, can satisfy them, thus, the occupation of 'a substantial part of the State territory' criteria in fact can never be satisfied, in conditions of guerilla warfare, also the subjective elements of duration and intensity, may very well be abused by the established Government.

Brazil also introduced other very stringent criteria in its amendment to draft Article 1; first, the insurgents must act under a responsible and identifiable authority, secondly, they must clearly distinguish themselves from the civilian population and thirdly the insurgents must exert continuous and effective control over a non-negligible part of the territory.[172]

These in fact, are impossible criteria to satisfy by guerillas where camouflage among the civilian population, is the essence of their tactics, especially when they are engaged in actual combats.

The Delegation of Vietnam, after emphasising the necessity of defining the concept of 'non-international armed conflict' as precisely as possible, stressed that:

> "...[I]n order to justify the application of humanitarian law and reconcile it with the principles of non-intervention in the internal affairs, this delegation considered that the scope of Protocol II should be limited to situations of armed conflicts of a particularly serious nature".[173]

To this country which experienced a whole range of deadly conflicts, fear of intervention is the reason behind its attempt at raising the threshold of the internal conflict.

Vietnam, in fact introduced a proposal, to include in the definition of armed conflicts of non-international character, two serious elements:

1. Popular support for the cause of the insurgents and secondly the occupation of a considerable part of the territory by the insurgents. Vietnam explained the rational behind the first criteria, in these terms:

> "...]T]he party in conflict with the lawful Government should at least be fighting for a just cause, in order to have that popular support, which was not a purely subjective factor but could be easily evaluated on the basis of actual demonstration".[174]

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[171] Ibid, p.7. and supra. n.160, CDDH/I/SR. 22, para. 55, p.212.

[172] Ibid, p.8.

[173] Op. cit., supra. n.160, CDDH/I/SR. 22, para. 55, p.212.

[174] Ibid, CDDH/I/SR. 22, para. 59, p.213.

The necessity of the second criteria was explained in the following way:

> "...[T]he occupation of a considerable part of the national territory implied control of that portion of territory by the responsible command and was proof of the seriousness and high degree of intensity of the hostilities between the Government of a State on one hand, and one or more factions on the other".[175]

Vietnam in fact, tried to introduce the idea of just war, in the context of internal conflicts. The requirement of 'popular support' is very hard to prove, and it is always absent in the first period of the internal conflict. Moreover, the legal Government may use very harsh methods against the civilian population, in order to terrorise them and consequently suppress any explicit show of support for the insurgents.

In my opinion, the criteria of just cause must be eliminated in the sphere of the application of humanitarian law, since what is just for the insurgents is obviously unjust for the Government, no Government on earth can admit that its opponents have a good reason to overthrow it by the use of force.

Introducing such highly political and moral criteria in the definition of internal conflicts, would mean in practice that established Governments would be in the position to treat their enemies inhumanly, only by claiming they are not fighting for a just cause. The criteria of just cause in my opinion hides in effect a return to very rigid concept of sovereignty.

As to the criteria of 'occupation of considerable part of the country', it seems to me that even the Vietnamese conflict shows that despite the intensity and duration of the contest, the insurgents could not claim that at any time, they controlled a considerable part of the country, this assertion will go against the logic of guerilla warfare.

However, Pakistan tried to appear as a moderate it introduced an amendment, which emphasised some factual and psychological elements. They are the following:

A. The conflict must take place between the armed forces of the Government and organized armed forces

B. The hostilities must be of some intensity and last for a reasonable period of time.

C. The insurgents, must occupy a part of the territory.

D. The insurgent armed forces must be represented by a 'responsible authority' and have the intention to apply the obligation contained in Article 3 and the Protocol.

E. The established Government may recognize the existence of a conflict not of an international character before the above conditions are satisfied.[176]

What has been done in this amendment is that it tried to tone down some of the onerous conditions advanced by the hardliners, it in fact, dropped the adjectives of 'non-negligible' and 'considerable' which have been attached to the quality of the territory which must be occupied by the insurgents. Moreover, the hostilities must be of 'some intensity' and not high intensity, the duration has been said to be of 'a reasonable period of time' instead of

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[175] Ibid, p.213.

[176] Op. cit., supra. n.165, CDDH/I/26, p.6.

prolonged duration. Also, it opened the way for the established Government's discretion in determining the existence of the internal armed conflict.

It must be noted that some Third World countries have let it be known that after the inclusion of wars of national liberation in Article 1 of the first Protocol. They saw no need at all in pressing for any international regulation, since any attempt to that would be an infringement of their sovereignty, and would open the door for foreign interference in their domestic affairs. They considered that internal laws are sufficient for dealing with such events.[177]

However, Article 1 was adopted by the conference in June 2nd, 1977, after lengthy discussions.[178] It must be noted that the Article was not the object of any revision in the simplified version of Protocol II, which was presented by Pakistan in the very last days of the diplomatic conference,[179] and which led to acceptance of Protocol II by consensus Article 1 as adopted, reads as follows:

> "1. This Protocol which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949, without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflict (Protocol 1) and which take place in the territory of high contracting party between its armed forces and dissident armed forces or other organized armed groups which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".[180]

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[177]The main spokesman of this stand was India. Thus, even after the vote on draft Article 1, he stated:

> "My delegation believes that the provisions of Protocol II, will only militate against the sovereignty of States and will interfere in their internal affairs. The internal law and older situations are the sole concern of sovereign States and these problems are to be dealt with according the domestic laws of the country".

7 ORDCHL, CDDH/SR.49, p.81.

[178]In fact, the Chairman of working group B of Committee 1, which drafted Article 1, stressed in the 49 Plenary Meeting in which the Article was adopted that:

> "...Article 1 represented a very fragile consensus reached only after lengthy considerations".

Ibid, CDDH/SR.49, para.38, p.66.

[179]Pakistan at the last session of the Diplomatic Conference and after consultations with Canada, Egypt and the ICRC, submitted an amendment which amputated nearly the half the provisions of Protocol II as adopted at the Committee level. The reasons advanced were:
1. A majority of States (especially from the Third World) firmly held the view that the text (as adopted at the committee level) entered into unnecessary details, rendering it not only cumbersome but difficult to understand and to apply in the peculiar circumstances of a non-international conflict.
2. Consequently the provisions of the Protocol must be within the perceived capacity of those involved to apply them, and therefore, precise and simple and,
3. Those provisions should not appear to affect the sovereignty of any State Party or the responsability of its Government to maintain law and order and defeat national unity, nor be able to be invoked to justify any outside intervention. See ibid, CDDH/SR.49, para.10-12, p.61.

[180]Op. cit., supra. n.61, p.121

The article was adopted on a roll call vote, with 58 in favour, 5 against and 29 abstentions.[181] The Indian delegate who voted against the Article, interpreted the result of the voting as follows:

> "...[J]udging by the voting pattern it is seen as many as 34 delegates-more than one third present in the conference-did not vote in favour of this Article, which is indeed the very basis of this Protocol. Clearly, 34 delegations have expressed their disapproval of this Protocol.
>
> Moreover, further analysis of the vote shows that all the delegations which did not vote in favour of Article 1 are from the developing world, with the exception of Norway".[182]

Columbia on the other hand expressed the feeling that Article 1:

> "...[H]ad been adopted by a fragile majority, and that in the last resort and after much discussion it had been approved through sheer fatigue".[183]

It seems that only the consensus vote to the whole Protocol, which saved Article 1. This Article then is a compromise formula and as such it will be the subject of different interpretations.

On the other hand, what we can note in Article 1 as adopted is a real shift towards the point of view of the group of States which put sovereignty and non-intervention before the requirements of humanity, in internal wars. Thus, there is a real emasculation of the criteria of the internal armed conflict, so as to make the application of the Protocol very limited in practice.

In fact, the Article, as it is drafted, ignores implicitly demands of guerilla warfare, it is silent on the point of who determines the existence of the internal conflict, and it applies only to the contests in which the established Government is a party to, all these elements, in my opinion, are examples of the triumph of those who advocate more protection for State sovereignty.

Thus, if the overwhelming majority of States during the conference, supported the need for a clear definition of armed conflicts not of an international character, in order to avoid the imperfections of Article 3 (which contains no definition). The **travaux préparatoires**, in my opinion, clearly show that the majority of States used the device of definition as a real vehicle of strengthening their sovereignty, and preventing any intervention in their internal affairs, simply by making the criteria of internal conflict very difficult to obtain.

It must be stressed that Third World States were the main driving force behind such a stand. The reason in my opinion, is not because they were inhuman, but for the simple fact that they see themselves as the main seat of internal conflicts, and they are suspicious and

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[181] States which voted against the Article were: Argentina, Cameroon, Chile, India and Syria. Among the abstaining States were: Algeria, Angola, Brazil, Indonesia, Lebanon, Mozambique, Nicaragua, Nigeria, Norway, Philippines, Sudan, Sri-Lanka, Thailand, Turkey, Uganda and Zaire. Op. cit., supra. n.177, CDDH/SR.49, p.70.

[182] Ibid.

[183] Ibid, p.78.

fearful of any international regulation of their behaviour during times of such conflicts, since that regulation may be used to limit their discretion in putting down the rebellion, and may give those who want to intervene in their internal affairs, an acceptable legal basis.

B. Analysis of the Criteria of Armed Conflicts of a Non-International Character Included in Article 1 of Protocol II

The criteria included in the definition of armed conflict not of an international character, in the text of Article 1 of the Protocol II are the following:

1. The contest should be bewteen the armed forces of the State and dissident armed groups: This implies first; that the established Government must resort to the use of its armed forces in order to quell the rebellion, the use of police action suffice to render the Protocol inapplicable, the use of armed forces itself is a manifestation of the gravity of the situation. Secondly; only when the established Government is a party in the conflict does Protocol II apply. The ICRC official commentary to Protocol II, states that:

> "...[T]his criteria illustrate the collective character of the confrontation, it can hardly consist of isolated individuals without co-ordination".[184]

2. The insurgents must be under responsible command. This means that the insurgents must have some kind of organization with a responsible leadership, which is capable of directing the operations in an effective way, and can ensure discipline within the fighting forces. The ICRC commentary, however, stresses that the existence of a responsible command '...does not necessarily mean that there is a hierachical system of military organization similar to that of regular armed forces'.[185]

3. Control of a part of the territory by the insurgents: To me this criteria in fact signals the triumph of the advocates of sovereignty, since they are aware of the fact, that it will never be fulfilled in the first period of the conflict, and even after that, the criteria is very difficult to ascertain in situations of guerilla warfare.

Similarly, there is no precise and express indication as to what is the proportion of the territories which has to be controlled, and how this control is to be exercised. Bothe stresses that:

> "...[T]he extent of the control must be only such 'as to enable' the adverse part 'to carry out sustained and concerted military operations'. Nor can the proportion of the territory over which control must be exercised be indicated precisely. It seemed preferable to determine the extension of such territory by indicating its function ('as to enable...') instead of fixing that it should be a 'considerable part'... in a 'non-negligible part'."[186]

In my view, there is no reason why States could not use a contrary argument and demand

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[184] Op. cit., supra. n.23, para.4460, p.1351.

[185] Ibid.

[186] M. Bothe, K.J. Partsch and Waldemar, A. Solf: New Rules for Victims of Armed Conflicts. Martinus Nijhoff, The Hague/Boston/London, 1982, pp.627-28.

that the control must be of a non-negligible part of the territory, the possibility is there, and the fear for sovereignty may very well lead to such an interpretation.[187]

4. The insurgents must conduct sustained and concerted military operation. This criteria emphasises implicitly the elements of duration and intensity of the conflict,[188] and this will bring, in practice, subjective elements to bear upon the determination of the conflict. This is another loophole which may be used by the established Government to resurrect the application of the Protocol.

5. The ability of the insurgents to implement the Protocol. This criterion is closely linked to the criteria listed above, in a way it is the existence of these criteria, which can indicate in part, that the insurgents can be capable of implementing the rules of Protocol II.

This criterion is in my view highly subjective, in practice, it may very well open another loopholes for the legal Government to avoid the application of Protocol II.

It must be stressed that even with the high criteria included in the definition of internal conflicts in Article 1, some Third World States still insist that:

> "...[T]he conditions in Article 1 (1) did not provide adequate safeguards 'for the protection of State sovereignty'".[189]

This in my view, explains in part the reticence of the majority of States and especially those who experience internal wars, to ratify the Protocol II. In fact, only 3 States who are engaged in such contests dared to ratify that Protocol on the 31st October 1989 (El-Salvador, Surinam and the Philippines).[190]

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[187] In fact, Indonesia advocated such a stand. Thus, even after the adoption of Article 1, it stressed that it would like to see the last three lines (of Article 1/1) amplified on the following lines:

> "...[E]xercise continues and effective control over a substantial non-negligible part of its territory for such a prolonged period as to enable them to carry out sustained and concerted military operations of a high intensity and to implement this Protocol".

Op. cit., supra. n.177, CDDH/SR.49, para.71, p.71.

[188] The ICRC Commentary is opposite to such a contention it stressed that:

> "The criteria of duration and intensity were not retained as such in definition because they would have introduced a subjective element".

He then adds that:

> "On the other hand, the criterion whether military operations are sustained and concerted, while implying the element of continuity and intensity, couples with an objective assessment of the situation".

Op. cit., supra. n.23, para.4469, p.1353.

[189] Statement made by Indonesia after the vote on Article 1 of the Protocol II. Op. cit., supra. n.177, CDDH/SR.49, p.71.

[190] On Oct., 31st, 1989, 88 States were parties to Protocol I and 78 were parties to Protocol II. See: IRRC, 1989, 29th year, No.272, p.490. The reason for such reluctance (in the ratification of Protocol II) seems to be in the words of Gasser:

> "...[i]s not so much a lack of enthusiam for one or other of the provisions of Protocol II which appear well-balanced. These governments seem to reject the very idea of creating international rules relating to events considered to be internal affairs of sovereign states".

C. The Situations to which Article 1 of Protocol II Applies

The majority of the doctrine supports the contention that the conditions of Article 1 of the Protocol II are very high, they in fact introduce through a back door the classical concept of civil war and belligerency.

In this respect, Herczegh a Hungarian international lawyer, stresses that:

> "Protocol II, holds the traditional concept of civil war whose cardinal element is the virtual control over a part of the territory of the country in question".[191]

Green supports such an interpretation, he states:

> "This definition is so framed as to require a level of military organization and sophistication that ensures its application only in the traditional type of civil war".[192]

Another writer maintained that:

> "Protocol II has in effect reStated the general rule of international law relating to the status of belligerency. Before a situation assumes such a status the conflict is to be considered as a purely domestic affair".[193]

In practice then, the Article will apply only to rare cases. This point has been pointed out clearly by Schindler who stated that:

> "...[T]he fact that Protocol II only covers conflicts of high intensity will mean that this Protocol will only be applied in relatively few cases. The Spanish civil war and the civil war in Nigeria were mentioned as examples at the Geneva Conference".[194]

Cassese also supports the same view. He states:

> "...[Protocol II] ne régit pas n'importe quelle guerre civile, mais seulement des guerres de longue durée et de grande intensité. Le Protocol a donc la même sphère d'application que les normes coutumières formées pendant la guerre civile Espagnole".[195]

I think that the conditions laid down in Article 1 leave no doubt that the above statements

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Some Legal Issues Concerning Ratification of the 1977 Geneva Protocols, in M.A. Meyer, (ed.): Armed Conflicts and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention. British Institute of International and Comparative Law, London, 1989, p.97.

[191] G. Herczegh: Protocol Additional to the Geneva Convention on the Protection of the Victims of Non-International Armed Conflicts, in Gryorgy, Harazti, (ed.): Questions of International Law. Vol.2, Akadeemiai Kiado Budapest 1981, p.75. See also the same author: Development of International Humanitarian Law. Akademiai Kiado Budapest, 1984, p.208.

[192] Cited by K.J. Keith: The Present State of International Humanitarian Law. 9 AYIL, 1985, p.18.

[193] M.R. Rwelamira: The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949 in Swinarski (ed.), op. cit., supra. chapter 1, n.1, p.234.

[194] Op. cit., supra. n.153, p.149.

[195] Op. cit., supra. n.101, p.571. See also the same author: Respect of Humanitarian Norms in Non-International Armed Conflicts in Modern Wars: The Humanitarian Challenge. A Report for the Independent Commission on International Humanitarian Issues. Zed Brooks Ltd, London and New Jersey, 1986, p.91.

are correct, and that the Protocol will apply only to internal wars, which have, to a large extent, the characteristics of international wars. This opinion is supported by the majority of States, which made explanation of their votes when Article 1 was adopted.

Thus, Canada stressed that the conditions laid down in Article 1 'could only exist in a civil war situation'.[196] Bindschindler, as the delegate of Switzerland, stressed that:

> "...[T]he text which had just been adopted, however, fell short of everyone's hopes since its scope was too narrow and it covered only cases of conventional civil war, which had become rare".[197]

Pictet on the other hand, as a representative of the ICRC in the conference argued:

> "...[T]hat draft Protocol II had been criticized as committing States too far, but its field of application had been so precisely limited that it could be only in clearly defined civil conflicts".[198]

These statements confirm in my view my contention that claims of sovereignty and non-intervention, have been used effectively, in limiting the cases of internal conflicts to be regulated by humanitarian law to the minimum. In fact, the conditions of Article 1, contradict the spirit of guerilla warfare, which is the main form of the overwhelming majority of internal wars which are going on at the moment.

D. Who Can Determine the Existence of a Non-International Armed Conflict within the Meaning of Article 1 of Protocol II

The Article itself is silent on this important question. However, two diametrically opposed views have been advanced during the conference and even after the adoption of the Protocol.

The first view advocates that Article 1 containing objective criteria, which need no special mechanism or authority for their determination. This view was held by ICRC and some western States. Thus, the ICRC delegate stressed at the very start of the discussions of draft Article 1 that:

> "...[I]t [the ICRC] had chosen a broad field to cover all non-international armed conflicts and for that purpose had endeavoured to specify the characteristics of a non-international armed conflict by means of objective criteria so that the Protocol could be applied when those criteria were met and not be made subject to other

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[196] Op. cit., supra. n.177, CDDH/SR.49, p.77.

[197] Ibid, CDDH/SR.58, para.194, p.300.

[198] Ibid, CDDH/SR.49, p.60. However, it must be noted that a minority of States expressed the view that the conditions of Article 1 resemble those of insurgency in traditional international law, rather than belligerency. Thus, Ecuador took the view that:

> "Protocol II brings under humanitarian law the terms laid down by international law for the recognition of insurgency".

Op. cit., supra. n.168. CDDH/SR.49, p.79. In my opinion, such assertions have no real weight since the concept of insurgency and its conditions is not very clear even in traditional law and in the State practice at that point.

considerations".[199]

The implication is that the established Government has no power of determination of the existence of an internal conflicts in its borders.

Some delegations also supported such a stand. Thus, the US delegates stressed that:

> "...[T]he conditions it [Article 1] laid down for application of the draft Protocol to internal conflicts were reasonably objective and could be applied without great difficulty".[200]

Belgium also stated the same point of view, it stressed that:

> "...[N]o provision introduced in the present text of Article 1 could constitute an arbitrary or subjective prerequisite enabling a high contracting party to evade the application of the Protocol".[201]

Egypt for its part thought that any attempt to introduce the right of the Government to determine the existence of an internal conflict, would mean the return to the concept of the recognition of belligerency.[202]

The ICRC, in its recent official commentary, advocates also the idea of the automatic application of Protocol II. It states clearly that:

> "...[T]he Protocol applies automatically as soon as the material conditions as defined in the Article are fulfilled. The aim of this system is the protection of the victims of armed conflict should not depend on an arbitrary decision of the authorities concerned".[203]

Bothe and others support the same view. They advocated that:

> "...[A]ll the qualifications required in paragraph 1 are of an objective nature. There is no room for discretion on the part of the high contracting party in whose territory a conflict covered by the provisions of Article 1 occurs, to decide whether this conflict fulfils the requirements and from which date".[204]

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[199] Op. cit., supra. n.160, CDDH/I/SR.22, para.12, p.203.

[200] Ibid, CDDH/I/SR.29, para.32, p.292.

[201] Ibid, p.291.

[202] The Egyptian delegate, Abi-Saab, in fact, stated that:

> "Amendments to Article 1 requiring the recognition by the established Government of the existence of a situation of an internal armed conflict, introduced a purely subjective and voluntary criterion; they revived the old-fashioned doctrine of recognition of belligerency. But, if there were a recognition of belligerency there would be no need for a Protocol II because according to general international law, the whole body of the law of war would then apply including the four Geneva Conventions of 1949 and their Additional Protocol I".

Ibid, CDDH/I/SR.24, para.31, p.235.

[203] Op. cit., supra. n.23, para.4459, p.1351.

[204] Op. cit., supra. n.186, p.628.

Then, they added:

> "Independent of any position taken by the Government in power, the adverse party and the members of its forces, and the civilian population and all persons affected by the armed conflict are entitled to the protection provided in the Protocol".[205]

Many States especially from the Third World together with Romania were against the above view during the conference. Similarly, even after the adoption of Article 1 they stressed the inalienable right of the established Government to determine the existence of an internal conflict within its borders. The rational behind such claims, lies obviously in the arguments that any other course would compromise State sovereignty and inevitably constitute an intervention in the internal affairs of the State concerned.

Romania in fact submitted in the first Diplomatic Conference (1974) an amendment, which proposed to add at the end of Article 1/1 the following:

> "In cases where the State, on whose territory the events are taking place, recognizes the existence of the conflict, its character and its constituent elements."[206]

It seems that the proposal did not gain much support in working group B. Although one delegation at least, (Brazil) still insist on the spirit of the Romanian amendment.[207]

At the 1977 session of the Diplomatic Conference, and in the 49 Plenary Meeting in which Article 1 was adopted, Columbia tried to introduce an oral amendment to Article 1, which specifies that:

> "The determination of the conditions referred to above shall be a matter for the State in which the conflict occurs".[208]

This amendment was withdrawn, but on explaining its vote (it abstained) Columbia made it clear that:

> "...[W]ithin the context of this Article [Article 1] the insertion of subjective elements gives rise to difficulties of interpretation, and my delegation believes that in the exercise of sovereignty resides the right to determine such situations the text approved does not contradict that in any way".[209]

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[205] Ibid.

[206] Op. cit., supra. n.165, p.7.

[207] Thus, Brazil supported by some States request the sub-group of working group B, that the following text be incorporated in Article 1/1 after the words "...Protocol 1: 'recognizes as such by the High Contracting Party in whose territory the armed conflict is considered to exist...". Op. cit., supra. n.164, CDDH/I/REV/1, pp.93-94.

[208] Op. cit., supra. n.177, CDDH/SR.49, para.56, p.84.

[209] Ibid, p.78.

Many States supported the Columbian position in the explanation of their votes for Article 1.[210] Chile for instance, stressed that the application of Protocol II was determined by criteria whose definition by third parties would constitute interference on the internal affairs of the State.[211]

Moreover, it must be stressed that States confronted by internal conflicts may resort to Article 3 of the second of the Protocol, (on non-intervention) to characterise any attempt by third parties to determine the existence of such conflicts, as intervention.

I think that the whole argument is between those who cling to a very rigid concept of sovereignty, because they see themselves the main target of internal wars, and those who are inclined to see some limitation to State sovereignty to grant human beings some protection against the cruelty of internal conflicts.

In my view, in practice, the objective character of the criteria of Article 1, can be apparent, if the established Government acts in good faith in the fulfilment of its international obligations. In fact the argument of human rights, and the need for the protection of the victims of internal wars, militates in favour of limiting the State power in the issue of the determination of the existence of the internal conflict, since Governments faced with such conflicts, are always tempted to abuse their power, and thus deny protection to the victims in need.

The experience of El-Salvador is a case in point, the Government is a party to the Protocol II. However, until now there is no official recognition of the application of Protocol II to the conflict. Despite the fact that all the elements of Article 1, are objectively present. Thus, the insurgents apparently control 5 of the 14 provinces of the country, such control has enabled them to conduct sustained and concerted operations against the Government forces. The insurgents also have shown their ability to implement the humanitarian rules, by accepting the distribution of relief in the zones controlled by them, and by accepting the exchange of prisoners through the ICRC.[212]

This state of affairs, has led the international community through the UNCHR and especially the UNGA to declare the application of Protocol II to the situation in El-Salvador.

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[210] Thus, Tanzania stressed in the explanation of its vote on Article 1 (it abstained) that:

"Our delegation would specifically not allow this determination to be made by a body that is not a representative of the State in which the conflict takes place".

Ibid, p.84.

[211] Ibid, p.75. It must be noted that Chile after joining in the adoption of Protocol II by consensus, stated that:

> "The Chilean delegation joined the consensus of the adoption of Protocol II; as it explained when Article 1 was voted on, it did so on the understanding that the determination of the conditions for its application lies with no authority other than the State in whose territory the conflict takes place, for reasons of sovereignty and non intervention...".

Ibid, CDDH/SR.56, p.232.

[212] See Americas Watch Report: Protection of the Weak and Unarmed: the Dispute over Counting Human Rights Violations in El-Salvador. Feb. 1984, p.37-38.

Thus, in Resolution 38/101 of December 16th, 1983, the UNGA drew the attention of the parties to the conflict that:

> "...The rules of international law, as contained in Article 3...and additional Protocol I and II thereto, are applicable to armed conflicts not of an international character, such as in El-Salvador. etc".[213]

The case of El-Salvador has in my opinion established that the legal Government will fortify its supposed right to the determination of the existence of an internal conflict, when it acts in an arbitrary way.

Concern for human rights protection can be established as a legal bias for international community intervention to declare the application of Protocol II, in certain cases of internal conflicts. To me this is the logical consequence of accepting human rights as a valid limitation on State sovereignty.[214]

E. The Relation of Article 3 to Protocol II

In its draft Article 1 submitted to the Diplomatic Conference, the ICRC gave a broad definition to non-international armed conflicts, excluded situations of internal disturbances and tensions from the application of humanitarian law, and lastly paragraph 3 of the Article (1) stated that:

> "The forgoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Convention of August 12, 1949".

Thus, Protocol II sets out two kinds of non-international armed conflicts, on one hand those which must satisfy the conditions of Article 1 and on the other hand those covered by Article 3.

The intention of the ICRC, was to keep the conditions of application of Article 3 unchanged, in other words the ICRC wanted to keep an autonomous existence of Article 3, in order that the rising of the thresholds of the definition of Article 1 does not react upon Article 3.[215]

During the conference, four opinions concerning the position of Article 3 in the Protocol II can be noticed:

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[213] 37 UNY, 1983, p.887.

[214] Cassese, however, advocates the establishment of a 'comité de sages' which consists of prominent individuals of great prestige from the Third World countries, which would have as a main function the determination of the existence of an internal armed conflict in the meaning of Protocol II. See A. Cassese: Respect of Humanitarian Norms in Non-International Conflict, in: Modern Wars: The Humanitarian Challenge. A Report for the Independent Commission on International Humanitarian Issues. Zed Brooks Ltd. London & New Jersey, 1986, pp.96-97.

[215] See the comments of the ICRC delegate in connection with this subject. Op. cit., supra. n.160, CDDH/I/SR.22, para.16. p.204.

1. Some States tried to drop any hint or reference to Article 3 in the text of Article 1, of the Protocol II,[216] the implication is that all internal conflicts, other than riots and internal disturbances and tensions, will be covered only by Protocol II. This position in fact gives sovereignty priority over any humanitarian considerations. However, this view, it seems had not attracted States, since even hardliners concentrated on raising the thresholds of conflicts covered by Protocol II, rather than eliminating Article 3.

2. Some other States tried to establish the identity of the field of Application of Article 3 and Protocol II, by extending the definition of armed conflicts covered by Protocol II to Article 3. This was the position of socialist States. These States wanted in fact to establish only one kind of internal conflict, the rational behind such a stand was advocated by East Germany, which stressed that the introduction of new categories and difficult distinctions:

> "...[W]as not calculated to strengthen the development of international humanitarian law. Instead, it might encourage interference in the internal affairs of States".[217]

It seems that the real motive behind the socialist stand was to exclude any possibility of applying Article 3 to situations of internal disturbances and tensions, which may constitute the main forms of internal disorder in those States[218] and thus, protect State sovereignty.

3. Norway,[219] however, tried to establish the identity of the field of application of Protocol II and Article 3, however, unlike socialist States, it did not attempt to give any definition to that unique kind of internal conflict. Clearly, the intention of Norway was to make the overwhelming majority of internal conflicts benefit from the application of Protocol II and thus restrict the discretion of States to a greater extent.

4. However, the majority of States opted for the importance of keeping an independent scope of application for Article 3. This in fact was to compensate for the emasculation of the definition of conflicts covered by Protocol II.

Abi Saab (Egypt) during the Conference gave the rational behind such an approach in these terms:

> "It was a step in the right direction of gearing the scope of protection to the level of intensity of the conflict rather than to abstract legal categories such as internal and international armed conflicts. Such an approach by stages was more in conforming with the spirit and purpose of humanitarian law and with the multiple forms of contemporary armed conflicts, especially guerilla warfare and low intensity conflicts. For the same reason, it was essential to safeguard the independent scope of application of Article 3 common to Geneva Conventions of 1949".[220]

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[216] Romania advocated such course In fact, it submitted an amendment, proposing the deletion of paragraph 3 of Article 1 of the ICRC draft. Op. cit., supra. n.165, CDDH/I.30 (March 12th, 1974), p.7. Romania explained later that it considered para 3 of Article 1 as unnecessary. Op. cit., supra. n.160, CDDH/I/SR.23, para.34, p.221.

[217] Op. cit., supra. n.160, CDDH/I.SR.22, para.27, p.207.

[218] For further details, see Toman, op. cit., supra. n.167, pp.328-331.

[219] Op. cit., supra. n.165, CDDH/I/218 (17.2.1975), p.9.

[220] Op. cit., supra. n.160, CDDH/I/SR.24, para.30, pp.234-235.

The implication then, is that humanitarian law will be served by keeping an independent scope of application for Article 3, since that Article would be applicable in situations which are not covered by Protocol II. The actual text of Article 1 as it was adopted establishes the relationship between the Protocol and Article 3 in the following fashion:

> "This Protocol which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application. etc".

The suggestion is that, when the Protocol applies, Article 3 applies automatically. However, when the thresholds of the Protocol definition are not present Article 3, will be applied only when the situation is not characterized as internal disturbances and tensions.

It must be noted, that in the 49th plenary meeting, in which Article 1 as it stands now has been adopted. Cameroon submitted an oral amendment which would have reduced the significance of Article 3, it suggested that:

> "...[I]n his view [the delegate], the words 'without modifying its existing conditions of application' in paragraph 1 were unnecessary and could be deleted."[221]

It seems that the immediate implication of this amendment, would be the establishment through a back door of the similarity of the field of application of Protocol II and Article 3, and thus indirectly extending the high thresholds of the definition of armed conflict in Protocol II to that of Article 3. This suggestion in fact, would kill the autonomy of Article 3 and at the same time enlarge the number of internal conflicts, which can escape any international regulations. The proposal, however, was withdrawn. Mexico made a very interesting observation in connection with the Cameroonian amendment when it stressed that:

> "...[T]hat Committee I had considered the phrase to be very important, in so much as it ensured that the application of Article 3 common to Geneva Conventions of 1949, should not be jeopardized".[222]

This observation, underlines the general feeling of States that there are two sorts of internal conflicts, to which humanitarian law contained in the Protocol II and in Article 3 can be applied. It also implies that the field of application of Article 3 is broader than that covered by Protocol II.[223]

However, one writer has gone so far as to suggest that:

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[221] Op. cit., supra. n.177, CDDH/I/SR.49, para.46, p.67.

[222] Ibid.

[223] In this context, the Syrian delegate expressed the view that "Article 1 was retrogressive when compared with the provisions of Article 3". This implies among other things, that he sees Article 3 as having a broader field of application, since it applies to conflicts which are of some lower intensity. Ibid, para 47, p.67.

> "...[N]either Protocol II nor Common Article 3 contain any criteria to determine their exact relationship with each other".[224]

In my view, this suggestion is not wholly true, the legislative history of Protocol II affords some very important indication as to that relationship.

Moreover, Egypt and Belgium referred specifically to that question in their explanation for their votes for the two Protocols. The former stated that:

> "Protocol II develops some aspects of Article 3 common to the Geneva Conventions of 1949, without completely covering its scope. Consequently Article 3 still represents the minimum protection for everything that is not covered, and better covered by this Protocol".[225]

The latter explained that:

> "...[W]hile this Article (1) which develops and supplements common Article 3 does not cover all possible applications of Article 3, neither does it modify the conditions of applications...in other words the entire philosophy of the provisions of common Article 3 whether explicitly reaffirmed or not, is included in the Protocol".[226]

No State has contradicted such an interpretation.

Furthermore, the relationship between the Protocol II and Article 3, is based upon the autonomy of their respective fields of application. In case of the absence of the conditions of application of Protocol II, in that situation only the minimum rules of Article 3 will apply. However, when the conditions of the application of Protocol II are present, all the rules contained in Article 3 as developed in the Protocol II apply. The ICRC commentary and the doctrine confirms such interpretation. It states:

> "...[I]n circumstances where the conditions of application of the Protocol are met the Protocol and Common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only Common Article 3 will apply".[227]

Abi Saab stresses the same point. He writes:

> "Le Protocole complète l'article 3 commun par rapport à un seul espace de conflits armés régis par ce dernier. Mais il n'exclut ni ne limit l'application de l'Article 3 à ce même type de conflit; et c'est dans ce sens qu'il ne modifie nullement ces conditions d'application".[228]

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[224] Op. cit., supra. n.193, p.234.

[225] Op. cit., supra. n.177, CDDH/SR.49, p.76.

[226] Ibid.

[227] Op. cit., supra. n.23, para.4457, p.1351.

[228] G. Abi Saab: Conflits armés non-internationaux, in: Les dimensions internationales du droit humanitaire. Institut Henry Dunant, ed. A. Pédone, UNESCO, 1986, p.267. Also S. Junod and Bothe Stated the same view. The former indicates that when Protocol II is applicable due to the existence of its conditions, Article 3 will "retain an autonomous existence, its applicability is neither restricted

This kind of interpretation, in my view, is consistent with the object and purpose of the Protocol II. The latter in fact, stipulates that:

> "This Protocol shall not apply to situations of internal disturbances and tensions and other acts of a similar nature, as not being armed conflicts".

However, the question is whether Article 3 as opposed to Protocol II is applicable to such situations. One view stresses the application of Article 3 to such situations; only Protocol II is precluded. In this respect, Bothe writes:

> "...[P]uisque le Protocole II, ne modifie pas les conditions actuelles de l'application de l'Article 3 common aux Conventions, la définition négative du conflit armé contenu au paragraphe 2 de l'Article 1 ne peut concerner que le Protocole II et non pas l'Article 3. La question du champ d'application de l'Article reste donc ouverte".[229]

In fact, Bothe is defending a position which has been advocated by West Germany, in its explanation of its vote for Article 1 of the Protocol. In this context, it stated that:

> "...The existing conditions of application of Article 3 common to the Geneva Conventions are not modified. This is clearly expressed in Article 1, paragraph 1 of Protocol II. It also applies to paragraph 2 of the same Article. Consequently the negative definition of the term 'Armed Conflict' in paragraph 2 applies only to Protocol II, not to Article 3 Common to Geneva Conventions. This is the understanding of the Federal Republic of Germany as to the interpretation of Article 1 of Protocol II".[230]

Whatever the humanitarian motives behind such assertions, it is very doubtful whether the

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nor subjected to the scope of Protocol II". Junod: Additional Protocol II, History and Scope, 33 AULR, 1983, p.35.

The latter notes in this respect, that:

> "...It is the idea behind common Article 3 which is developed and supplemented, not the provisions of the Article itself. The field of application of Article 1 is different from that of Common Article 3".

Op. cit., supra. n.186, p.623.

[229] M. Bothe: Conflits armés internes et droit international humanitaire, 82 RGDIP, 1978, p.90. Similarly, Gasser advocated such views. He stated:

> "'This minimum standard' of international humanitarian law, contained in Article 3, largely corresponds to the body of guarantees from which Governments cannot derogate, even in emergency situations. These rules are binding in armed conflicts, including non-international armed conflicts, and hence also logically in internal disturbances and tensions".

Proposals for a Code of Conduct. IRRC, 1988, (28th year), No.262, p.45.

[230] Op. cit., supra. n.177, CDDH/SR.49, pp.79-80. Italy earlier in the Diplomatic Conference (in 1975) seems to support such interpretation (advocated by West Germany) it stated:

> "The situations provided for in paragraph 2 did not fall within the scope of application of draft Protocol II since that Protocol did not regard them as armed conflicts; though that would clearly not exclude the possibility that some of them might come within the field of application of Common Article 3".

Op. cit., supra. n.160, CDDH/I/SR.29, para.25, p.290.

majority of States would support such a view, since it leads to the restriction of State sovereignty to a large extent.

In fact, it seems certain that socialist and Third World States do not support any extension of Article 3 to situations of internal disturbances and tensions. Thus, in its explanation of vote for Protocol I and II, East Germany expressed the feeling of the majority when it stressed that:

> "Many countries have expressed their fears that Protocol II might lead to an infringement of their sovereignty. Because of that fact it seems important to us that Article 1 of Protocol II unambiguously States that Protocol II as well as Article 3 common to the Geneva Conventions do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".[231]

This interpretation is supported also by the ICRC Commentary, where it is stressed that internal disturbances and tensions are not within the field of application of humanitarian law and that the ICRC acts in that area only on an ad hoc basis.[232]

This interpretation would in my view, satisfy the limits to which States are ready to accept limitations on their sovereignty.

F. Evaluation of Article 1 of Protocol II

It is my opinion, that the high and serious threshold of application of Article 1, coupled with the absence of a definition of armed conflict regulated by Article 3 common to Geneva Conventions and the express provision that the Protocol does not apply to situations of internal disturbances and tensions will mean that in practice many internal conflicts, will not be covered by any rule of humanitarian law.

Keith rightly stressed that the Protocol II cannot apply to situations of urban guerilla warfare, since it (the Protocol) requires some kind of territorial control. Moreover, it is very doubtful whether those situations can be regulated by Article 3.[233] This is a concrete example of an armed conflict, which may very well find no protection by humanitarian law. Although, human rights as an accepted restriction of State sovereignty may still play a useful role in the protection of the fundamental human rights such as the right to life,

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[231] Op. cit., supra. n.177, CDDH/SR.56, p.243. See also J. Toman: The Socialist Countries and the Laws of Armed Conflict in: Modern Wars: The Humanitarian Challenge. A Report for the Independent Commission on International Humanitarian Issues. Zed Books Ltd, 1986, p.166.

[232] Op. cit., supra. n.23, p.1356. Similarly, Meron seems to support this view: Draft Model Declaration on Internal Strife. IRRC, 1988. 28th year, No.262, p.60. Likewise, Bedjaoui takes the same stand, he state:

> "In its present, humanitarian law does not provide a sound legal basis for the ICRC to intervene in such situations, frequent though may be involving all kinds of racial riots, violent strikes and social tensions".

Humanitarian Law at a Time of Failing National and International Consensus in Modern Wars. The Humanitarian Challenge, a Report for the Independent Commission on Humanitarian Issues. Zed Books, London, 1986, p.20.

[233] Op. cit., supra. n.192, p.20.

prohibition of torture and the need for humanitarian treatment in those situations.

Furthermore, I think that in practice, States faced with violent challenges to their authority, will have a very wide discretion to choose between the categories of armed conflicts contained in Article 1 of the Protocol. This may result in delays in the application of humanitarian rules.

Similarly, it seems to me that, despite the argument that the development and codification of humanitarian law has not to be seen as an infringement of State sovereignty, or an intervention in its internal affairs,[234] the majority of States especially from the Third World were not convinced. Consequently, even after the adoption of the two Protocols, many States in their explanation of their votes asserted that Protocol II touches on their sovereignty.[235] This will have in practice, a negative effect upon the application of that Protocol. In this way, Article 1, is very rigid in the sense that it did not take notice of the

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[234]Thus, Pictet as a delegate of the ICRC argued that:

> "Despite the misgivings of some delegations, the Protocols did not represent a danger to the Governments... nothing in the texts was prejudicial to national sovereignty".

Op. cit., supra. n.177, CDDH/SR.49, para.4, p.59. Similarly, the USSR delegate stressed that:

> "... Protocol II contained a number of Articles of great weight, while at the same time avoiding language which could be interpreted as attempting to interfere inthe internal affairs of States".

Ibid, CDDH/SR.58, para.93, p.297.

[235]Thus, Mauritania stressed that:

> "...[I]it considers that its provisions [Protocol II] are essentially a matter of national sovereignty".

Ibid, CDDH/SR.58, p.324. The Philippines made it clear that:

> "...[I]t would have abstained as well if a vote had been taken on Protocol II, because it adheres strongly to the principle that it is the sovereign right of every State to deal with rebel movements within its territory in any manner it deems fit, and to apply its national law according".

Ibid, CDDH/SR.56, p.243. Turkey also expressed the view that:

> "Protocol II, even in its present form presents aspects which seem to conflict with the sovereign right of the State". Ibid, p.249.

Zaire noted that:

> "...[H]owever good the intentions of its authors might have been, the fact remained that several provisions of Protocol II encroached upon the rules of State's domestic law and thereby dangerously compromised the sovereignty and territorial jurisdictions of those States".

Ibid, p.219. Uganda emphasised also that it has:

> "...[R]eluctantly joined the consensus on the adoption of Protocol II and, if the text of Protocol II had been put to the vote, our delegation would have abstained because some of its provisions infringe the sovereignty of States".

Ibid, p.251. Finally, Iran declared that:

> "The simplified text nevertheless contained some provisions that were lacking in clarity and that might be interpreted as a threat to State sovereignty".

Ibid, CDDH/SR.58, p.309.

development of methods of warfare in internal conflicts. Guerilla tactics are the main method of the weak, and insurgents are always weak in matters of arms and equipment, intelligence and personnel.

Established Governments faced with such methods, will be at ease in denying the application of Protocol II, since the insurgents will hardly be able to assert control over a certain part of the territory.

It has also been suggested that Article 1 contains objective conditions, their existence does not need any formal determination by any one, be it the established Government, the rebels or a third party. It is asserted that in practice many problems of interpretation concerning such 'objective conditions' will arise. This would not be in the interests of the victims of internal conflicts. In my opinion, the concept of sovereignty and non-intervention will play a major role in the raising of the problems of interpretation.

However, on the positive side, I think that the definition of non-international armed conflicts in Article 1, and its inclusion of Article 3 Common to Geneva Conventions can be interpreted as a positive step in the development of humanitarian law in internal conflicts, since the implication is that Common Article 3 has been given a definition which the text of the Article (3) had left out.

Such a definition must be seen against the high threshold of application of Article 1, in other words Article 3 must be interpreted as containing a lower threshold of application compared to Article 1, which means in practice that many internal conflicts which do not satisfy the conditions of Article 1 may very well be covered by Article 3.

Despite the limited number of humanitarian rules contained in Article 3, they are to be observed by all States, hence they are now an established legal limitation upon State sovereignty. Also due to the very low number of States who challenged the reference to Common Article 3, in the text of Article 1 (in fact only Romania did so). It is suggested here, that the Article (3), must be seen as becoming a rule of **jus cogens** in the meaning of Article 53 of the Vienna Convention on the Law of Treaties of 1969, which every State must observe in internal conflicts which satisfy at least two conditions. First, they are not internal disturbances and tensions within the meaning of Article 1/2 of the Protocol II. Secondly, they do not satisfy the thresholds of application of Protocol II laid down in Article 1/1 of the same Protocol.

Moreover, on the positive side, it seems that Article 1 is a positive limitation of State sovereignty, since it codifies some conditions of the traditional concept of belligerency, in an obligatory international instrument.

When the conditions of Article 1 exist in an internal conflict, the sovereignty of the State give way to the applications of a host of humanitarian rules, which are essentially of a human rights nature. This means that the movement for the application of human rights in peace time, has, as a limitation upon the sovereignty of State, found another extension to periods of violence and times of war.

CHAPTER FOUR

THE PROTECTION OF THE VICTIMS OF INTERNAL WARS

Introduction

Civil wars are well known for their cruelty and inhumanity since sentiments run very high and the temptation to indulge in committing atrocities is very present. In this respect, Vitelius in the battle of Bepriar, exclaimed:

"Le corps d'un ennemi mort sent toujours bon, surtout si c'est un compatriote".[1]

Similarly, General Sherman who committed many atrocities during the American civil war believed that 'the only possible way to end this unhappy and dreadful conflict is to make it terrible beyond endurance.'[2] This means that the question of the protection of the victims of internal conflicts acquires a pressing importance, since lives of human beings are at stake.

It must be indicated that the term 'victims of internal wars' will include the civilian population, the wounded and the sick and the captured combatants held prisoners. In general, it includes those who do not bear arms or those who are unable to continue the fight because of their injury, sickness or capture.

My assertion in this chapter is that, even if States still use the argument of sovereignty and non-intervention to block or limit the regulation of their conduct towards their own citizens especially in times of emergency, nevertheless, they gradually began to accept some timid curtailment of their absolute rights especially in the context of the subject matter of this chapter.

It is asserted that the concept of human rights has helped to a great extent the acceptance by States of some important humanitarian rules, concerning the protection of the victims of internal wars, first in common Article 3 and especially in the context of Protocol II.

In order to cover the subject of this chapter, the latter will be divided into 3 sections. First, the protection of the victims of internal conflicts in customary international law. Secondly, the protection of the victims of internal conflicts in Common Article 3 of the Geneva Convention. Thirdly, the protection of the victims of internal conflicts in Protocol II.

Section I: The Protection of the Victims of Internal Conflicts under Customary International Law

In this section, my aim is to search for, first, the roots of the protection of victims of wars in general, secondly, to state what are the customary rules on the protection of victims in wars in general whatever the nature of the conflict, and lastly, to see whether those rules

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[1]Cited by M. Veuthey: Les conflits armés de caractère non-international et le droit humanitaire, in Cassese (ed.): Current Problems of International Law. Giuffrè, Milan, 1975, p.181.

[2]Cited by F. Kalshoven: Applicability of International Customary Law in Non-International Armed Conflict, ibid, p.274.

of customary law apply in situations of civil wars. This will be done essentially by studying the State practice and throughout the whole section, the influence of the principle of sovereignty and non-intervention on these issues will be sought and elucidated.

A. The Roots of the Protection of the Victims of War

It is claimed by some writers that if rules relating to the conduct of hostilities find their roots in the usages and traditions of what is called chivalry. The roots of protection victims of war to be found in the writings of the publicists,[3] such as Grotius, Vattel, Montesquieu and Rousseau.

However, before analysing the contributions of these writers and the State practice vis-à-vis victims of wars, especially in the 17th and 18th centuries, it is interesting to note that even if the roots of modern law of war in general, and that of the protection of the victims of war especially, are to be found in the writings and the State practice.

Other civilizations, especially the Islamic one, which was in direct contact with the West, has developed a very coherent body of rules of warfare, wherein they stressed the importance of the protection of victims of wars. Thus, the rules on the protection of non-combatants in general, were to apply in wars between the Islamic States and other States and also in wars between Moslems that is in 'internal wars'.

It is to be noted that the main reason for the interest of Islam in the laws of war and the protection of victims springs from the fact, that the 'Jihad' (the holy war) was a component part of the religion. It was a duty for the Islamic State and moslem individuals. This being so, its regulation was very important.

The examples of good treatment of the victims of war can be found in the Islamic history[4] such as it is illustrated by the treatment of the Algerian Emir Abdelkader during his war against the French occupation (1830-1847). Prisoners were kept by him and treated well and in many instances released upon the intervention of Catholic priests.[5]

However, it is interesting to note that the idea of non-combatancy and the humane treatment of those who lay down their arms because of injury or capture, have developed essentially in the context of Europe. Theoretically, it is the 17th and 18th centuries that witnessed the seeds of such developments. Those developments it seems were essentially a reaction against what was going on in practice, war was more or less total, no one escaped its horrors.

One witness of that epoch, Sorel wrotes:

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[3] Best, op. cit., supra. chapter 1, n.1, pp.63-64.

[4] See in this respect, Muhamed Tal'at Al-Ghunaimi: A General Review of Humanitarian Law in Islam, in: First Egyptian Seminar on International Humanitarian Law. ICRC, Egyptian Society of International Law, Cairo, November 1982, pp.43-93. See also General Samir Muhamed Fadel: Contemporary Developments in International Humanitarian Law applicable in Armed Conflicts: A Comparison with Islamic Principles (in Arabic), ibid. pp.95-105.

[5] D. Borrer: Narrative of a Campaign against the Kabailes of Algeria with the Mission of M. Suchet to the Emir Abd-Elkader for an Exchange of Prisoners. Longman, Brown, Green & Longmans, London, 1848, pp.274-321.

> "...[La guerre] dépouille l'homme du vernis d'emprint dont il se part; elle le met à nu, découvrir toutes ses infermitées; lâche tous ses vices, débride toutes ses passions".[6]

He then observes that:

> "Les hommes du dix-huitième siècle restent bruteaux et emportés. La plupart dissertent également sur l'humanité, pour peut sont humains. La 'sensibilité' est pure affaire de modes".[7]

He then describes how war was conducted in the 18th century as follows:

> "Le fait de la guerre tombe sur le pays occupé et l'écrase. On proscrit les habitants réputés dangereux ou simplement suspects les autres prennent peur, et pour se soutraire au péril qui menace non-seulement leurs biens, mais leur personne, l'honneur de leurs femmes et de leurs filles, ils émigrent. Alors, on met une taxe sur les absents, puis on démolit les maisons de ceux qui ne le payent pas".[8]

Thus, the population of the State against which war is declared are considered as 'enemy', their property can be taken.

The war against the prince is a war against every individual in his realm, those indivuduals are therefore destined to suffer every disruption of family ties and every loss of property and honour. It is against this background, that publicists began to urge moderation and humanity in dealing with the victims of war. In this context, Grotius even if he regarded the population of the adversary as 'enemies', he nevertheless maintained that moderation must prevail. He approved Cicero who in his "first book to his officers, advises the sparing of those who have committed no acts of atrocity and cruelty in war and that wars undertaken to maintain honour should be conducted upon principles of moderation".[9]

However, he did not rule out the possibility of killing the innocent, if, in the language of today, military necessity requires it. He writes that:

> "Though there may be circumstances in which absolute justice will condemn the sacrifice of lives in war, yet humanity will require that the greatest precaution should be used against involving the innocent in danger except in cases of extreme urgency and utility".[10]

We can see in this statement the seeds of the distinction between combatants and non-combatants, we can infer also that he sees that the hardships of war must be directed essentially against those who bear arms, innocents and their belongings should be protected from the horrors of war.[11]

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[6]A. Sorel: L'Europe et la révolution Française. 1ere. partie, Les moeurs politiques et les traditions. 4ieme ed. Librarie Plon, Paris, 1897, p.81 .

[7]Ibid, p.82.

[8]Ibid, p.83.

[9]H. Grotius: The Rights of War and Peace, translated by A.C. Campbell. M. Walter Dunne (Pub.), London and Washington, 1901, p.30.

[10]Ibid, p.360.

[11]Ibid.

However, in the context of the protection of prisoners of war he observed that:

> "It is the practice among Christian powers to detain prisoners of war, till their ransom be paid; the amount of which depends upon the will of the conqueror unless it has been settled by express treaty."[12]

This means that on the question of POW's, Grotius was pragmatic, since it seems that he regards that paying a ransom is better than enslavement or outright killing.

On the other hand, Vattel states his general principle in somewhat harsh words:

> "When the ruler of the state, the sovereign declares war upon another sovereign, it is understood that the whole nation is declaring war upon the other nation... The two nations are therefore enemies and all the subjects of one nation are enemies of the subjects of the other".[13]

He also emphasized that:

> "All citizens are exposes to losses and it is his misfortune upon whom they fall. If in civil society we must risk our lives for the State, we may well risk our property".[14]

However, this sweeping statement of the general principle on the effects of war is followed by excluding women, children, feeble old men, the sick, ecclesiastics, men of letters, husbandmen and generally those who are not armed. These categories which we may call them non-combatants if they offer no resistance 'the belligerent has no right to maltreat or otherwise offer violence to them much less put them to death'.[15]

Moreover, Vattel argued that if the Sovereign desires to keep his conscience clear, and fulfill the duties of humanity, he should keep in mind that the right to wage war upon his fellow-men, must be a matter of necessity and a remedy against a wrong done. He then stressed:

> "If he [the Sovereign] is impressed with that great truth he will not push the remedy beyond its just limits, and he will be careful not to make more severe or more disastrous to mankind than the care of his own safety, etc."[16]

In other words, if the war between States is inevitable, its conduct must not be without any limits. This is the anti-thesis and theoretical foundation of the Declarations of St. Petersburg of 1868 and of Brussels of 1874, and indeed the whole movement of codification of the laws of war which has been undertaken in the 19th century.

The impact of Rousseau and Montesquieu, to name but two, is considerable in the development of the concept of combatants and non-combatants and human treatment of the victims of war in general. In this context, Montesquieu stressed that:

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[12] Ibid, p.347.

[13] Op. cit., supra. chapter 3, n.9, p.259.

[14] Ibid, p.321.

[15] Ibid, p.282.

[16] Ibid, p.279.

> "...[N]ations ought to do to one another in peace the most good and in the war the least evil".[17]

The implication is that war is not mutual destruction, and that massive inhuman treatment of enemy's subjects will not help future relations with that same enemy.

Montesquieu, then outlined his basic theory concerning what nations ought to do to each other in war. He noted that:

> "It is false that killing in war is lawful, unless in case of absolute necessity".[18]

He gave priority to the standard of civilization, lives are to be protected unless military necessity intervenes. However, it is obvious that attacks against the innocent civilians, killing of helpless sick and wounded soldiers, refusing to give quarter, or inhuman treatment of those who laid down their arms, can never be justified by the claim of absolute military necessity. This is the likely implication of what Montesquieu advocates.

He also stated in clear terms his position vis-à-vis prisoners of war, he was against their enslavement or killing, his reason was that:

> "...[W]ar gives no other right over prisoners than to disable them from doing further harm by securing their persons. All nations concur in detesting murdering of prisoners in cold blood".[19]

Once the soldier is hors-de-combat, he must be treated humanely, he is no longer a lawful object of attack or killing. These humanitarian views were, in fact, the real basis upon which the protection of the victims of war was to be built as we will see later.

Rousseau is considered widely as the main architect of the theoretical foundation of the laws of war, especially its aspect dealing with the protection of persons. He writes:

> "C'est le rapport des choses et non des hommes qui constitue la guerre, et l'état de guerre ne pouvant naître des simples relations personnelles, mais seulement des relations réelles, la guerre privée où l'homme à homme ne peut exister ni dans l'état de nature, ou il n'y a point de propriété constante, ni dans l'état social, où tout est sous l'autorité des lois".[20]

This observation shows that Rousseau believes that men are essentially good, by their nature. They are not directed to inflict pain on each other. This assumption has led him to pronounce his much quoted observation that:

> "...[L]a guerre n'est donc point une relation d'homme à homme, mais une relation d'Etat à Etat, dans laquelle les particuliers ne sont ennemies qu'accidentellement, non point comme des hommes, ni même comme citoyens mais comme soldats, non-point

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[17] C. de Montesquieu: The Spirit of the Laws (1748), translated by T. Nugent. Hafner Pub. Co., New York, 1949, p.5.

[18] Ibid, p.236.

[19] Ibid.

[20] J.J. Rousseau: Du contrat social. Une introduction. E. Dreyfus-Brisac, Paris, 1896, pp.22-23.

comme membres de la patrie, mais comme ses défensseurs".[21]

This important observation has since then become the classical introduction in any dealing with the subject of the laws of war, and especially the protection of its victims. The implication in this pronouncement is that the civilian population is protected against the evils of warfare, since war is essentially the business of the soldiers in the field of combat. Rousseau also stressed that:

> "...[L]a fin de la guerre étant la destruction de l'Etat ennemi, on a le droit d'en tuer les défensseurs tant qui'ils ont les armes à la main; mais aussitot qu'ils les posent et rendent, cessant d'être ennemis ou instruments de l'ennemi, ils redevienment simplement hommes, et l'on n'a plus de droit sur leur vie".[22]

This observation laid the ground for the protection of the prisoners of war who were in the past the object of brutal treatment. Thus, when they laid down their arms because of capture or injury, they are no longer enemy soldiers. They revert to their ordinary human nature.

The maxims of Rousseau have exercised a deep influence upon writers of international law, and also upon the State practice in the form of later codification. As a result, the predominance of the liberal political theory with its insistence upon the individual and his private property as the foundation of the whole political and economic life produced the essential distinction between combatants and non-combatants. Consequently, it gave much more protection to the individual and his property, and also protection to the soldiers once he became a mere human being.

In this context, a writer observed in 1912 that:

> "The civilised view of war is that it is an affair of Governments acting through and against officially organised forces, and that the peaceful private citizens of both countries should be as little disturbed as possible...it is more and more recognised that only the regular armed forces should fight, that only Government property should be captured and that the private citizen should suffer only through increased taxation. Naval prize is an exception but it is recognised as such and its scope is more and more limited by international conventions."[23]

This passage shows clearly the influence of Montesquieu and especially Rousseau on legal writings in the 19th and the beginning of the 20th centuries.

However, Best took a radical interpretation of Rousseau. According to him, Rousseau's maxim was a good piece of propaganda but, it was doubly defective and disadvantageous when adopted and announced as a guide to practice. What Rousseau actually said in Best's view is that:

> "...[W]ars were between 'states' not 'peoples' therefore (if you swallow this) people(s) were not objects of military operations. But people(s) nevertheless got hurt, often very badly. How else could that be explained by a Rousseauite, except as some sort of unavoidable accident or incidental feature of war, more or less beyond your own

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[21] Ibid, p.24.

[22] Ibid, p.25.

[23] H.T. Kingsbury: Capture after Capitulation: A Juristic Anachronism. 6 AJIL, 1912, p.657.

control and responsibility".[24]

In accordance with this line of argument, Best concludes by stressing that:

> "Thus a huge realm of civilian wartime experience was, so to speak, lifted beyond the primary range of judicial scrutiny and placed in a second category of things that just happened in war".[25]

Then, Best cited the practice to prove his point, he concentrated on the French Revolution. Thus, General Deflers, who was the commander of the Army of Pyrenees Orientales, answered the Spanish General Ricardos, who demanded that combatants must be clearly distinguished from non-combatant by saying:

> "...[L]a force générale de la République se compose du peuple entier, tous les Français sont des soldats".[26]

Moreover, the French Decree on **Levée en Masse** (August 23rd, 1793) proclaimed that:

> "Young men shall go to battle; married men shall forge arms and transport provisions, women shall make tents and clothing and shall serve in hospitals, children shall turn old linen into lint; the aged shall betake themselves to public places in order to arouse the courage of the warriors and preach hatred of kings and the unity of the Republic".[27]

However, despite such misgivings, Rousseau's influence upon the later development of the laws of war cannot be denied. Thus, the Declaration of St. Petersburg of December 11th, 1868 stipulated that:

> "The progress of civilisation should have the effect of alleviating as much as possible the calamities of war; that the only object which states endeavour to accomplish during war is to weaken the military forces of the enemy".[28]

In order to achieve this end (weakening of military forces of the enemy), it is sufficient to disable the greatest possible number of enemy men and by implication this declaration goes in the 'Rousseauite' tradition of limiting the war to the field of combat, thus preserving the civilian population of the horrors of war. Wars are not regarded as a vengeance, they are regulated so that at least, those who are not members of the armed forces must be spared in their lives and property.

The Brussels Conference of 1874 stated in its final protocol that:

> "...[I]t had been unanimously declared that the progress of civilisation should have the effect of alleviating as far as possible the calamities of war and that the only legitimate object which states should have in view during war is to weaken the enemy

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[24] Op. cit., supra. n.3, p.58.

[25] Ibid.

[26] Ibid, p.336.

[27] Ibid, p.59

[28] Schindler and Toman, op. cit., supra. chapter 2, n.63, p.96.

without inflicting upon him unnecessary sufferings".[29]

Then the same declaration adds that:

> "...[W]ar being thus regulated would involve less sufferings, would be less liable to those aggravations produced by uncertainty, unforeseen events and the passions excited by the struggle, it would tend more surely to that which should be its final object; the re-establishment of good relations and a more solid and lasting peace between the belligerent states".[30]

The implication of these pronouncements is that the object of the regulation of warfare is to limit its horrors. Victims of war are the prime beneficiaries from that regulation. It is to be observed that the declaration puts into practice Montesquieu's view, concerning the final object of war.

The project of the International Declaration Concerning the Laws and Customs of War, adopted at the Brussels Conference of 1874 which was signed but never ratified, contains extensive references to the protection of the victims of warfare such as Article 38 which provides for the protection of family honour, rights and the lives and property of persons, their religious convictions and property.[31]

Thus, it seems that States began to feel that civilians must be protected. Sovereignty has, then, actually been limited, since military necessity which is the name of sovereignty during the war, cannot be invoked to destroy the lives and property of persons when no real military advantage can be gained.

Article 23 of the same Declaration, after establishing that POW are in the power of the enemy Government rather than of the individuals or units who captured them, stressed that they must be treated humanely and according to Article 26 they must not be compelled to participate in the operation of war.

The Oxford Manual on the Laws of war on land published in September 9th, 1880, provides as a general principle in Article 1 that:

> "The state of war does not admit of acts of violence, save between the armed forces of belligerent states".[32]

Article 7 forbids the maltreatment of the non combatant population. Article 10 stresses that the wounded and the sick should be brought in and cared for, without any discrimination.

The interest of the Manual, which has been drawn by the most distinguished authors of international law, lies in its stress upon that "it 'the manual' has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and

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[29]Ibid, p.26.

[30]Ibid.

[31]Ibid, p.32.

[32]Ibid, p.37.

practicable".[33] This statement appears in its Préface. The phrase 'accepted ideas of our time' includes in my opinion the whole intellectual production of the later Enlightenment concerning war in general. Among this of course, stands the work of Montesquieu and Rousseau.

The conclusion to be drawn is that the theoretical basis of customary international law concerning the protection of the victims of war is to be found in writings of Grotius, Vattel, Montesquieu and Rousseau; none of them saw sovereignty as going in the direction of allowing atrocities against the victims of war.

B. Customary Rules Concerning the Protection of the Victims of War in General

In rejecting the claim that Germany was not bound by The Hague Convention of 1907 because of the general participation clause contained in that Convention, the Nuremberg Tribunal stated that:

> "...[B]y 1939 these rules [The Hague rules] laid down in the conventions, were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter".[34]

In other words, the rules contained in those instruments are considered as customary rules. However, those instruments do not contain any express rules on the protection of civilians, but many references can be interpreted as containing the fundamental distinction between combatants and non-combatants. Thus, Article 46 of the Fourth Convention of 1907 provides for the protection of family honour, rights and lives of persons, respect for their religious convictions and prctices, and private property. Articles 22, 23, 25, 26 and 28 of the same Convention contains also indirect references to the protection of civilians.

Nevertheless, if the distinction between combatants and non-combatants is easily deduced from the Hague Conventions and regulations, it is difficult to find specific rules on the protection of civilians. The codification of such specific rules was not made until the end of the Second World War.

However, it must be indicated that the customary distinction between combatants and non-combatants has come under heavy pressure. Thus, the whole economic structure which contribute to the efforts of war is regarded as a legitimate target.

Moreover, the advent of aerial warfare especially, has been regarded as making the concept of total war a reality. In this context, Spaight writes:

> "War is now a totalitarian affair, affecting all the individuals of a nation, and there are no 'non-combatants' today, for all contribute in some way to the national effort. The coming of the bombing aircraft has increased the difficulty of differentiating between the soldier and the civilian".[35]

However, it seems that the advent of total war has led, if not to the killing of the traditional distinction between combatants and non-combatants, to the division of the civilians to

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[33] Ibid, p.36.

[34] L. Friedman: The Law of War. Vol.2, Random House, New York, 1972, p.961.

[35] J.M. Spaight: Non-Combatants and Air Attack. 9 Air Law Review, 1938, p.372.

different categories.

Thus, in general, civilians involved in the military and economic efforts of war were considered in the opinion of some as a lawful object of attack. In this context, Rolland stressed that:

> "...[S]euls sont illégitimes et condamnables les bombardements aeriens de nature, étant données les circumstances dans lesquelles ils sont opérés, à atteindre principalement ou exclusivement la population civile ne coopérant pas à la production du material militaire".[36]

Nevertheless, the prevailing view still holds that the distinction between combatants and non-combatants must continue. The argument that 'total war' has suspended it, or even abrogated many important rules of customary international law was not accepted, indeed the spirit of the whole judgment of Nuremberg goes in that direction.[37]

The conclusion is that customary international law does not contain a wholly developed system of protection of the civilian population. Nevertheless, there is no doubt that the general distinction between combatants and non-combatants is well entrenched in that law. Many references in The Hague Conventions can be interpreted as establishing some essential guarantees for the protection of civilians, especially the rule that civilians must never be an object of attack.

With regard to the POW's, the Hague Conventions of 1899 and 1907 regulate their status (Articles 4 to 20 of the IV Convention of 1907 respecting the laws and customs of war on land). Thus, Article 4 of the IV Hague Convention makes the general principle that they must be treated humanely. Article 7 obliges the State into whose hands the POW's have fallen to treat them as regards food, lodging and clothing on the same footing as the troops of the Government who captured them.

In the **Nuremberg War Trials**, the defense lawyers of the Nazis accused of maltreatment and killing of Soviet POW's tried to justify the German atrocities on the grounds that the Soviet Union was not a party to the Geneva Convention of 1929 dealing with POW. The tribunal then had an occasion to make clear the position of POW's in customary international law. In fact, it supported the Soviet protest of September 15th, 1941 to Germany against the regulations for the treatment of Soviet POW's signed by the German General Reinecke on September 8th, 1941. The protest stated:

> "The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law apply. Since the 18th century these gradually have been established along the lines that war captivity is neither revenge nor punishment but solely protective custody, the only purpose of which is to prevent the POW from further participation in the war. This principle was developed in accordance with the

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[36] L. Rolland: Les pratiques de la guerre aerienne dans le conflit de 1914 et le droit des gens. (Extrait de la RGDIP), Ed. A. Pédone, Paris, 1916, p.70.

[37] In this context, Lauterpacht affirmed:

> "...These problems raised by air warfare cannot be deemed to have affected the validity of the general principle of immunity of non-combatants from direct attack".

H. Lauterpacht, (ed.): International Law: A Treatise. Vol.2, 7th ed., Longmans, Greene & Co., London, New York & Toronto, 1952, p.525.

> view by all armes that it is contrary to military tradition to kill or injure helpless people".[38]

The Tribunal considered that this Soviet protest 'correctly stated the legal position'.[39]

As to the sick and wounded, they were the first to receive international protection in international codification efforts. The movement was initiated by the famous Swiss national, Henry Dunant. Thus, in 1863 at a conference in which 16 States were present, a resolution was adopted. In its preamble, the States present expressed their desire :

> "...[O]f coming to the aid of the wounded should the military services prove inadequate".[40]

The conference resolved then that each country shall have a committee whose duty of war would be to assist the army medical services by every means at its disposal. The conference also recommended that in time of war the belligerents shall proclaim the neutrality of ambulances and military hospitals and that official medical personnel, voluntary medical personnel and the inhabitants who aid in the relief of the wounded must be recognized.

From that Resolution began the whole history of the Red Cross movement. Thus, the first international Convention on the Condition of the Wounded was adopted on August 22nd, 1864. It made the undertakings of the first Resolution of 1863 obligatory. Article 6 of that Convention poses, in fact, the fundamental humanitarian rule concerning the wounded and the sick:

> "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for".[41]

The convention went so far as to encourage inhabitants to care for the wounded and sick.[42]

That convention (of 1864) has been revised by an Additional Protocol of October 20th, 1868 which essentially extended its benefits to naval forces. Then, it was replaced by the Convention of 1906. The latter being replaced by the Convention of 1929 and finally the Geneva Convention (the first) of 1949 replaced that of 1929. It seems that these conventions are viewed by all as reflecting now the customary rules on the subject since their application over the last 100 years had achieved, in the words of Solf 'a remarkable measure

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[38] Op. cit., supra. n. 34, p.647.

[39] Ibid.

[40] Op. cit., supra. n.28, p.209.

[41] Ibid, p.214.

[42] Article 5 of the Convention stipulates:

> "Inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent powers shall make it clear it is their duty to notify the inhabitants of the appeal made to their humanity and of the neutrality which human conduct will confer.
> In the presence of any wounded combatants receiving shelter in a house shall ensure its protection. An inhabitant who has given shelter to the wounded shall be exempted from billeting and from a portion of such war contributions as may be levied".

Ibid.

of success'.[43]

The conclusion is that customary international law contained some general principles and even some specific rules for the protection applicable of POW's and of the wounded and sick which are only applicable in inter-States wars. This situation can be explained in my view, by two reasons. The first, is that humanitarian ideas exercised important influence toward restricting the horrors of war, in relation to these helpless categories of the victims. Secondly and more importantly, because such humanitarian protection is in the interest of States. Pragmatism led the latter to look for better treatment of their soldiers who fall into the enemy's hands in exchange for doing the same to those enemy soldiers who fall into their hands.

However, as concerning the civilians, the matter is a little different. There were no specific rules for their protection although the essential distinction between combatants and non-combatants is there. The lack of precise regulations even in inter-State wars can be explained in my view, on the basis that States do not welcome any international regulation of their behaviour towards their citizens. This is a matter of domestic jurisdiction and sovereignty. They allowed some protection of their citizens only when some parts of their territory fell under occupation.

C. Customary Rules on the Protection of the Victims of War and Internal Conflicts

It must be stressed that the above developments concerning the protection of the victims of wars have been conceived only to apply to inter-States and not intra-States conflicts.

Humanitarian rules were to apply only to those who are giving their lives to preserve and defend the territorial and political sovereignty of the State. Thus, at first glance, it is very difficult to imagine that States will give any humanitarian protection to those whose declared aim is to overthrow them. The interplay of the notions of sovereignty and non-intervention will not help the cause of the rebels. The crime of high treason, as a natural product of the concept of sovereignty, has been developed to deal with the rebels.

Harsh treatment always awaits those who attempt to fight the State, from within or outside. State practice shows that since the 12th Century, internal conflicts and those who fomented them, received attention in treaty practice.[44] Thus, in a Treaty of September 1177 between King Henry II and King Louis of France, it was agreed, among other things, that both sides undertook to banish, on request, each other's enemies from their dominions. Another treaty 12 years later, between King Richard I and King Philip of France again provided for the extradition of each other's malefactors.[45]

However, in customary law, the laws of war can be applied only when the recognition of belligerency takes place, especially when that recognition emanates from the established Government itself. The problem, as we have seen earlier in Chapter III, is that in practice,

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[43] W.A. Solf: Development of the Protection of the Wounded and Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions, in Swinarski (ed.), op. cit., supra. chapter 1, n.1, p.236.

[44] G. Schwarzenberger: International Law as Applied by International Courts and Tribunals. Vol.2, The Law of Armed Conflicts, Stevens, London, 1968, p.713.

[45] Cited by G. Schwarzenberger: The Frontiers of International Law. Stevens, London, 1962, p.111.

States experiencing civil wars do not easily recognise or accept the belligerency of their enemies. Sovereignty gives them the right to deal with their citizens at their discretion, especially those who take up arms against their authority. Other States, by the same token, have no right to demand any better treatment for those rebels.

The doctrine of humanitarian intervention, it seems, is not accepted in State practice, especially in times of internal conflict. In the very rare cases of recognition of belligerency, States acknowledged that recognition, mainly because the conflict has attained a very high degree of intensity that it resembles, in fact, an international war.

1. The State Practice in Cases of Civil Wars in which Recognition of Belligerency has Taken Place

It must be noted that in the actual cases of recognition of belligerency in State practice, the established Government stress that the recognition is given due to humanitarian motives, in order to dismiss their opponent's claim to a legal status.

Thus, in the American Civil War, Articles 153 and 154 of the Lieber Code are revealing. The former States, in substance, that the extension of humanitarian rules to the rebels does not confer on them any legal status, they remain rebels and only victory in the field settles the future relations between the warring parties. The latter Article (154) made it clear that the application of the customs and usages of warfare in the field between the Government forces and the rebels does not prevent the former from trying the leaders of the rebellion on a charge of high treason.

All this can be explained, in my view, by the fact that the established Government, even when it recognizes the belligerency of its enemies, it does not feel that it has done so because of a legal obligation, but only because of humanitarian motives.

States do not wish to weaken their sovereignty by recognizing that another party can share their monopoly of representation over the territory and its inhabitants. In this context, Article 152 explicitly states that:

> "When humanity induces the adoption of the rules of regular war toward rebels whether the adoption is partial or whole, it does in no way whatever imply a partial or complete acknowledgement of their Government, if they have set up one, or of them as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed Government toward rebels the ground of their own acknowledgement of the revolted people as an independent power".[46]

This Article spells out the limits of the recognition of belligerency in regard to the application of the laws of war. Sovereignty and non-intervention are not suspended on the recognition of belligerency, which means among other things, that other States cannot use that recognition as a pretext for demanding the application of the norms of the laws of war to the conflict.

However, it seems that in practice once the recognition of belligerency has been granted, Governments usually respect the laws of war, especially the rules relating to the protection of the victims of war. Fear of reprisals and the idea of reciprocity ensure that, in general,

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[46] Op. cit., supra. n.28, p.22.

those rules are respected.

1.1. The American Civil War

In this war, the institution of recognition of belligerency as a concept had reached its fullest requirements (since basically nothing had been added in future similar conflicts), affords in fact, a good example of how the laws of war have been applied in civil wars. The Lieber Code covers, in effect, a very large part of the laws of war, and it seems as Wright correctly observed:

> "...[T]he standards set by the Code seem to have been generally observed by both sides during the civil war".[47]

The Code recognizes the distinction between combatants and non-combatants (Article 155). However, since the concept of belligerent occupation cannot be applied in civil war, mainly because it is in contradiction with the territorial unity of the State which the established Government is set to guarantee and because also any recognition of belligerent occupation would mean that the insurgents have legal status. Hence, special regulation must then determine the relation of the legal Government with, especially its 'own citizens' who are in the zone controlled by the insurgents. This raises, in effect, the question of the treatment of the civilian population in civil wars.

The Lieber Code stresses in its Article 155 the following:

> "The military commander of the legitimate Government, or war of rebellion, distinguishes between the loyal citizens in the revolted portion of the country and the disloyal citizens. The disloyal citizens may be further classified into those citizens know to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without bodily forced thereto".[48]

Article 156 then envisages the kind of treatment of each category of those citizens. Thus, loyal citizens must be protected from the rigours and horrors of war while disloyal citizens must bear all the hardships and deprivations of war, the military commander has to throw all the burden of war on them.

Thus, the civilian population, at least its "disloyal" portion are to suffer greatly. This is the logic of sovereignty, the State protects only those who obey its power and authority. Those who disobey must not expect any mercy.

Moreover, it is interesting to note that the Lieber Code did not incorporate the idea of the levée en masse. This means that it does not exist in civil wars, since any resistance against the approaching army of the established Government, will be considered as high treason, death being the penalty. In fact, Article 157 of the Lieber Code makes it plain that:

> "Armed or unarmed resistance by citizens of the United States against the lawful movement of their troops is levying war against the United States and is therefore

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[47] Q. Wright: The American Civil War, in Falk (ed.), op. cit., supra. chapter 2, n.8, p.56.

[48] Op. cit., supra. n.28, p.22.

treason".[49]

As to POW's, the Lieber Code establishes that category and stresses that POW is not subjected to any punishment, the status of POW's were recognised in fact, by both sides to the conflict.

In practice, it seems that even if generally the laws of war were adhered to, nevertheless many instances of cruelty were present. The civilian population was the main target of such violations of the laws of war. In this respect, General Sherman wrote to the Mayor of Atlanta, when the latter city was under siege by the Federal forces:

> "War is cruelty, and you cannot refine it and those who brought war into our country deserve all the curses and maledictions a people can pour out. I know I had no hand in making this war and I know I will make more sacrifices today than any of you to secure peace. If the United States submits to a division now, it will not stop but will go on until we reap the fate of Mexico, which is eternal war".[50]

General Sherman was generally very harsh in the treatment the civilians and their belongings. During the siege of Atlanta, he wrote to General Hood, the Confederate Commander of Atlanta that:

> "Atlanta is no place for families or non-combatants".[51]

The General replied :

> "And now sir, permit me to say that the unprecedented measure you propose transcends, in studied and ingenious cruelty, all acts ever before brought to my attention in the dark history of war. In the name of God and humanity, I protest, believing that you will find you are expelling from their homes and firesides the wives and children of a brave people".[52]

As to POW's, on both sides of the conflict, nearly 30,000 men died out of some two hundred thousand. In the north, from cold weather and disease and in the south from inadequate food and epidemics.[53]

1.2. The Boer War

In this conflict, the insurgents resorted to the methods of guerrilla warfare which meant that they used the countryside as their main logistic and intelligence source. This led the British to resort to the questionable policy of establishing concentration camps which were first used by the Spaniards during the Cuban insurrection in order to isolate the insurgents and thus, making their defeat feasible. In those camps, civilians were badly treated and they suffered greatly.

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[49] Ibid, p.23.

[50] W.T. Sherman: From Atlanta to the Sea. B.H. Liddel Hart (ed.), Folio Society, 1961, p.121.

[51] Ibid, p.113.

[52] Ibid, p.114.

[53] Op. cit., supra. n.47, p.61.

The policy was inaugurated by a memorandum of December 21st, 1900 signed by General Lord Kitchener. It stated:

> "The General, Commander in Chief, desires that all possible means be taken to stop the present guerrilla warfare of the various means for the accomplishment of this object, one which has been strongly recommended and has lately been successfully tried on a small-scale is the removal of all men, women and children and natives from the districts which the enemy's band particularly occupy".[54]

Inside these concentration camps, a policy of discrimination in the treatment of the civilian population was instituted. Families of neutrals and insurgents who had surrendered were to be afforded better treatment than families whose fathers, husbands and sons were in the opposing force. The policy of establishing concentration camps was justified by the British on the ground of humanity (example: the protection of the occupants of lonely farms) and also for inducing the insurgents to surrender.

In practice, the picture was different. The camps witnessed a very high rate of mortality due to the lack of sanitation, medicine and doctors. The harsh treatment of the families of the insurgents did not encourage the latter to surrender, on the contrary, their numbers increased. It is also to be mentioned that General Lord Kitchener, by means of his instructions of January 24th, 1901, ordered his commanders in the field to clear the countryside systematically of supplies, horses, cattle, crops, transport vehicles and non-combatant families. He directed that supplies and crops if not used were to be burnt; bakeries and mills were to be destroyed.[55]

This policy led to a growing opposition in Britain. In Parliament, Lloyd George asked:

> "Why make war against women and children? It was the men that were their enemies".[56]

Then he added:

> "...[B]y every rule of civilized war, we were bound to treat women and children as non-combatants".[57]

The implication is clear, rules of war must be adhered to even in cases of civil war. The distinction between combatants and non-combatants is the golden rule of these 'rules of civilized war'. Thus, humanity demanded the full protection of women and children, pragmatism also demanded the same since:

> "...[B]rave men will forget injuries to themselves much more readily than they will insults, indignation and wrongs to their women and children."[58]

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[54] E. Childers (ed.): The Times History of the War in South Africa. Vol.4, Sampson Law, Martson, London 1907, p.86.

[55] T. Pakenham: The Boer War. Wiedenfeld & Nicolson, London 1979, p.162.

[56] Ibid, p. 506.

[57] Ibid.

[58] Ibid.

The policy of concentration camps was later abandoned, however, not on moral ground or legal principle but it seems simply because it was too expensive in financial terms since it was estimated that the Boer war, apart from the Napoleonic wars, was the most expensive war in the British history.

On the other hand, it seems that the treatment of the sick and wounded was in general humane. In this respect, when the famous siege of Ladysmith was imposed by the insurgents, from October 1899 to the end of February 1900, the Boers allowed the establishment of a neutral camp some four miles from the town where the wounded and non-combatants could be protected and cared for.[59]

Despagnet in fact, described the attitude of the Boers vis-à-vis prisoners and wounded soldiers in the following fashion:

> "Aussi les témoignages abondent-ils pour prouver que pleins d'humanité pour les prisoniers, les malades ou les blessés tombés en leur pouvoir, ils ont souvent poussé les égards envers eux jusqu'a la bonté et même jusqu'à la délicatesse. On peut croire d'ailleurs, qu'ils avaient le souci de s'assurer complètement le beau rôle aux yeux des puissances neutres dont ils ne cessaient pas de réclamer l'intervention".[60]

The conclusion to be drawn from the American Civil War and the Boer War, as examples of civil wars, in which the recognition of belligerency has been granted, is that such recognition brings into operation the body of the laws of war, as if the war is between States. This concession, on the part of the established Government is directed especially by pragmatic motives, in order to save the life and mitigate the suffering of its captured and wounded soldiers.

It appears, that the first beneficiaries from the application of the laws of war are especially the soldiers of the two sides since, whenever they become hors de combat, either by capture or injury, they will benefit from the status of POW's, they are not criminals.

However, it seems that the civilian population and especially those who are labelled as 'disloyal' citizens, were in general treated with harshness and severity. Their essential objects of livelihood were considered as military targets. They were (the civilians) sometimes interned in camps. This is due among other things to the absence of specific legal rules as to the treatment of civilians in case of customary law itself.

2. The State Practice in Cases where the Recognition of Belligerency has not Taken Place

It appears that customary international law, recognized only a certain minimum standard of protection of individuals in civil wars, only when they are foreigners. However, the

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[59]Colonel Mapleton, who was the principal medical Officer of Ladysmith hospital, wrote in this regard:

> "I have seen some of the Boers, as I am in charge of the hospital out there. I have several times met the Boers under the flag of truce to discuss sundry matters. Those I have seen have all been very pleasant fellows indeed and very friendly. They have behaved extremely well to our wounded prisoners, attending them and giving them everything they had themselves. All our wounded speak highly of the kindness they have received at their hands".

D. Judd: The Boer War. Hart-Davis McGibbon, London, 1977, p.89.

[60]F. Despagnet: La guerre sud-africaine au point de vue du droit international. Ed. A. Pédone, Paris, 1902, p.126.

citizens of the country, either in peace or war times were only under the protection of their own local laws.

Thus, in the absence of the recognition of belligerency, international law affords no protection whatsoever to the victims of internal wars. In other words, sovereignty gained the upper hand, it is more important than caring for those who arose in arms against their sovereign. The era of human rights was not yet born.

In this context, Wilson writing in 1907 summed up the British practice with its colonies in this way:

> "The English law and practice maintaining that insurrection in a dependent community 'is waging war against the Queen' and this act may involve the annexation of the revolted territory".[61]

Accordingly, the uprising in Manipur in 1891 was treated as a crime, to which criminal law extended, thereby justifying the execution of the revolt leaders as criminals.

State practice in civil wars, where the recognition of belligerency was absent, shows that cruelty was the order of the day and that there is little evidence that other States considered their behaviour as illegal.

2.1. The Greek War of Independence

In this case, Turkey refused to recognize any status to the rebels, instead considered them as mere bandits to whom the most cruelty must be applied. Siotis notes in this regard that:

> "...[T]oute étude de la révolution Grèque ne peut que nous amener à la constatation que pendant le déroulement des hostilités les cruautés les plus atroces furent commises de part et d'autre et que tout souci d'humaniser le conflit était complètement absent des intentions des responsables de la conduite de la guerre".[62]

In this respect, a Turkish Commander (Ibrahim Pasha, Pasha of the Peloponnese) declared in 1825:

> "I am determined to put them down [the rebels]....everything shall be destroyed and the inhabitants in the mountains must perish whether of cold or hunger."[63]

This means that he clearly did not distinguish between combatants and non-combatants, the war is conducted against all Greeks.

However, the insurgents also behaved in the same fashion. Thus, when they captured Tripolitsa, the principal inland town of the Peloponnese in October 1821. First hand reports established that:

> "..[W]omen and children were frequently tortured before they were murdered, after the Greeks had been in possession of the city for forty-eight hours, they deliberately collected together about two thousand persons of every age and sex but principally

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[61] G.G. Wilson: Insurgency and International Maritime Law. 1 AJIL, 1907, p.52.

[62] J. Siotis: Le droit de la guerre et les conflits armés de caractere non-international. LGDJ, Paris, 1958, p.71.

[63] Cited by C.M. Woodhouse: The Greek War of Independence. Hutchinson, London, 1952, p.112.

> women and children and led them to a ravine in the nearest mountain, there they were all murdered. The writer saw heaps of unburied bones bleached by the winter rains and summer suns in passing this spot two years after the catastrophe."[64]

This means in fact, that the rebels in reprisal against the authorities resorted to genocidal tactics.

Thus, in order to secure the unity of the Empire, hence its sovereignty over Greece, human lives and sufferings were not considered worthy of any regard. Law was totally absent and the dictates of barbarity prevailed. The racial and religious hatred between the two communities seems to play a major role in the actions mentioned above.

2.2. The Wars of Independence in Latin America

In the wars of independence which swept Latin America in the beginning of the 19th century, the institution of belligerency has not yet been developed. This meant, among other things, that there were no legal restrains on the conduct of States vis-à-vis their 'disloyal' subjects, who took up arms to fight their sovereign. In fact, there is abundant evidence that the Spaniards were very cruel towards the insurgents and even to the civilian population.

In a letter by Jose de Martin, one of the famous Generals of the Revolution to his British friend, the Earl of Fife on December 9th, 1817, wrote:

> "What emotions of grief, my dear friend, must excite in your breast the destiny of these delightful regions! It would seem as if the Spaniards were bent upon making a desert of them, such is the war which they wage. Neither age nor sex is spared from the sword and the block. They have laid in ashes a vast number of places."[65]

He then added:

> "In short, speaking without any prepositions, they appear to be brutes rather than beings imbued with reason. I can verify this charge by the conduct of the Spanish captain himself who held the supreme command in this province [Chili]. A few days previous to my entrance, he threatened in the public papers to inflict upon me not the sort of death which is adapted to military men, but the gallows, as if I had been a highwayman".[66]

By implication then, the Spanish despite the widespread and organized revolt, still consider that there is no room for any rules of the laws of war, therefore the insurgents, the civilians and their essential objects of livelihood were all lawful targets of war.

On the other hand, it seems that the insurgents were largely restrained in their actions, in this respect Jose de San Martin emphasised in the same letter mentioned above:

> "...I might have retaliated, instead of which he [the Captain, Commander of Chili] as well as one hundred and fifty officers, in common with upwards of three thousand men that were taken prisoner have been treated with all the consideration dictated

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[64] Ibid, p.77

[65] C.K. Webster: Britain and the Independence of Latin America 1812-1830. Selected Documents from the Foreign Office Archives, Vol.1, OUP, for the IBRO American Institute in Great Britain, London, 1938, p.556.

[66] Ibid, pp.556-557.

by our enlightened age".[67]

This statement in fact, makes it clear that some leaders of the insurgents at least, have embraced the ideas of Rousseau and Montesquieu. They understood very well that POW's are not criminals. They must be treated in accordance with the dictates of humanity.

On the other hand, it seems that the insurgents were not ready to accept this unequal position for long. They signalled that they could and would resort to reprisals. In this context, Jose de San Martin made clear to his British friend that:

> "Your Lordship will exclaim that this is fighting on very unequal terms. Indeed, the period of so much generosity is drawing to a close. If they continue the infamous system of warfare which all along they have been pursuing, your Lordship may rest assured that to my great sorrow, I shall find myself under the dire necessity of sacrificing them".[68]

Despite the apparent readiness of the insurgents to apply some minimum rules of custom and usages of warfare, the Spanish conduct led them to behave in some instances in the same manner, especially in relation to captured Government soldiers. In fact, in a letter dated April 11th, 1818 from San Martin, the General summed up the Spanish conduct of war in a very clear fashion thus:

> "No one is ignorant of the conduct pursued by the Spaniards with respect to their colonies, and of the kind of warfare they have adopted for subjugating them. It was reserved to the age of liberality, mental improvement and philanthropy to witness the horrors committed by the Spaniards in peaceful America, horrors which humanity shudders to contemplate and which are inflicted upon us Americans for having incurred the crime of asserting the rights of the general will of her inhabitants."[69]

The strange thing is that no Government has condemned the Spanish conduct vis-à-vis its colonies. Thus, Britain which was the leading great power in that period had no special reason, it seems to desire the independence of the Spanish colonies. In fact, it (Britain) had tried for a while to mediate between the insurgents and Spain in order to keep them under Spanish rule. The main interest of Britain was to keep its trade with South America, by protecting its shipping fleet from seizure, either by the Spaniards or the insurgents.

The question of the recognition of the independence of Latin America Republics was decided by taking into consideration only those interests; there was no protest from Britain that Spain was violating certain customary rules of war, the assumption is Britain might have thought that any protest is a violation of Spanish sovereignty.

2.3. Other Cases

In other cases of civil war, where the recognition of belligerency was not granted, the evidence suggests that cruelty was the order of the day, no restraints seem to be observed especially by the established Governments. They used their full freedom of discretion in

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[67] Ibid, p.557.

[68] Ibid.

[69] Ibid, p.558.

crushing their enemies. Thus, during insurrection in Cuba of 1869, General Balmacida, the Commander in Chief of the Government forces, made killings, assassinations and arson the rules of his fight against the insurgents. He, in fact, signed a Proclamation in which it was expressly stated:

> "Toute mâle agé de plus 15 qui sera rencontré hors de sa demeure pourra être fusillé. Toute maison, habitée ou inhabitée, sur la quelle le drapeau blance ne flottera pas pourra être brulée, les femmes pourront être transportées de force à Jiguani où à Bayano".[70]

These draconian measures, made the distinction between combatants and non-combatants obsolete, since the war is mainly waged against civilians. Actually, it was in this war that the use of concentration camps was first resorted to.

In the War of the Commune of Paris, Marx wrote:

> "The Commune knew that its opponents cared nothing for the lives of the people of Paris, but cared much for their own Paris buildings".[71]

In this bloody war, shooting prisoners, especially by the established Government, was common practice. The Communards took hostages in the hope of protecting their captured soldiers. However, the continuing shooting of the prisoners by the Government led the insurgents to act in the same way.

In the Russian civil war, it was also the prisoners who suffered most, especially at the hands of the 'Whites', i.e. the insurgents. Thus, when White Officers were asked about the fate of captured Government soldiers, their usual answer was:

> "...[W]e kill all of them that are communists. Jews and commissaries stood no chance, of course, but it was somewhat difficult to ascertain which of the others were communists. The system generally followed was this. From among the prisoners, a man who looked like a Bolshevik was led aside, accused with great violence of being a notorious communist but afterwards promised that his life would be spared if he gave the names of all those among his companions whom he knew to belong to the Bolshevik party. This ingenious scheme which was tried on more than one victim in each party of prisoners generally resulted in a number of Red soldiers being executed."[72]

Thus, the insurgents acted without any mercy, hatred was the order of the day.

In the Spanish Civil War, it was estimated that the total number of those killed on both sides, including military and civilians casualties, was approximately 1,200,000 of whom 450,000 soldiers and 750,000 civilians.[73] It seems that the war was conducted in a way which ignores all restraints. Maurras stated, in this respect:

> "L'anarchie Espagnole comme l'anarchie Russe exprime avec clarité un recul

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[70] Rougier, op. cit., supra. chapter 2, n.62, pp.240-41.

[71] K. Marx: The Civil War in France. Martin Lawrence Ltd., London, 1933, p.59.

[72] W.P. Coates & Zeldak Coates: Armed intervention in Russia 1918-1922. Victor Gollanz Ltd., London, 1935, p.209.

[73] Keesing's, 1937-1940, April 19-20, 1939, pp.35-36.

incontestable de tout ce qui a distingué l'homme de l'animal".[74]

The terror method was resorted to especially by the insurgents, in order to neutralise the masses, which sympathized either actively or passively with the Republicans. Conclusive evidence of the deliberate and systematic nature of Franco's terror, was provided by a document found on Manual Canacha, a rebel officer, who was taken prisoner. It was a copy of a circular addressed to the high officers in the insurgents army; it stressed the following:

> "One of the most important tasks, if victory is to be assured is the undermining of the morale of the enemy troops. The army has neither sufficient troops nor sufficient arms to resist; nevertheless the following instructions must be rigidly observed:
> 1. In order to safeguard the provinces occupied, it is essential to instal a certain salutary terror into the population. When the troops occupy a place, the local authorities must first be taught a lesson in respect; if they have escaped,a similar procedure must be adopted towards the members of their families. In every case the methods resorted to must be of a clearly spectacular and impressive character and must indicate clearly that the leaders of the troops are determined to proceed with like severety against anyone who offers resistance".[75]

The document also indicated in clear terms that:

> "4. Every town along the enemy's line of retreat and all the areas behind the enemy lines are to be considered as battle zones. In this connection, no differentiation must be observed between the places harbouring enemy troops and those not doing so. The panic experienced by the civilian population along the enemy's line of retreat is a factor of the utmost importance in contributing towards the demoralisation of the enemy troops. The experience of the last world war shows that accidental destruction of enemy hospitals and ambulances has a highly demoralising effect on troops."[76]

The Circular also noted that after the entry into Madrid of the rebel forces, and in any event of any opposition on the part of the populace:

> "The streets should be put under fire without any further parleying. In view of the fact that large numbers of women are fighting on the enemy side, there should be no distinction of sex in such cases. The more ruthless we are the more quickly shall we quell hostile opposition among the population, the more quickly will the restoration of Spain be effected".[77]

It is clear, therefore, that the rebels, behaved in such a way that no distinction whatsoever between combatants and non-combatants must exist. Total war is the only way to success. Terror, in fact, was not employed to defeat the Republicans; but to destroy them completely. The German press hailed the practice:

> "The principle of modern Nationalism 'no opponent but shall be destroyed' is thoroughly carried out...just as here in Germany".[78]

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[74] Ch. Maurras: Vers l'Espagne de Franco. Ed. du livre moderne, Paris 1943, p.74.

[75] A. Koestler: Spanish Testament. Victor Gollancz Ltd., London, 1937, p.81.

[76] Ibid, p.82.

[77] Ibid.

[78] Ibid, p.83.

It must be stressed that rebel leaders publicly acknowledged that no political opponent should be spared. All have to die in order to win the war effectively. Thus, the famous broadcaster and Commander of the second division of the rebel army, General de Llano, talked openly on the radio of that intention. On July 23rd, 1936, he stated:

> "Our brave legionnaires and the regulars have shown the red cowards what it means to be a man. And incidentally the wives of the Reds too. These communist and anarchist women, after all have made themselves fair game by their doctrine of free love".[79]

In another broadcast, on August 19th, 1936, he insisted that:

> "Eighty percent of the families of Andalusia are already in mourning. And we shall not hesitate, either to adopt even more rigorous measures to assure our ultimate victory. We shall go on to the bitter end and continue our good work until not a single marxist is left in Spain".[80]

When Seville was occupied by the rebels this policy was put into practice; in one day more than 9000 workers were slaughtered.[81]

Killing of prisoners and the taking of hostages was resorted to on both sides. In this context, a Red militiaman told Maurras that:

> "...[I]l était difficile, sinon impossible de faire des prisoniers ceux qui nous avaient mitraillés et que nous venions de prendre les armes à la main avaient été condamnés à mort. Le flagrant délit ne nécessitait pas les formalités d'un procés".[82]

The Government, however, used to judge those accused of sedition in regular courts, but, later in the war the practice changed "men were taken from their houses, hustled into cars and thrown out and shot by the roadside".[83] The rebels proclaimed publicly that they resorted to the taking of hostages. In this respect, General de Llano stated in August 18th, 1936:

> "I have to inform you that I have in my power as hostages a large number of the relatives of the Madrid criminals who are answerable with their lives for our friends in the capital".[84]

The Spanish Civil War shows that the conflict was conducted in an atrocious inhumane fashion. The modern methods of war such as aerial bombardment helped the rebels

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[79] Ibid, p.31.

[80] Ibid, pp.31-32. See also L. Dundas: Behind the Spanish Mask. Robert Halle United, London, 1943, pp.52-69.

[81] P. Brové and M. Temime: The Revolution and the Civil War in Spain. (Translated from French by T. White), Faber & Faber, London, 1972, p.105. See also Koestler, op. cit., supra 76, pp.85-86.

[82] Op. cit., supra. n.74, p.75.

[83] J. Langdon-Davies: Behind the Spanish Barricades. Martin Secker & Warburg Ltd., London, 1936, p.101.

[84] Op. cit., supra. n.75, p.31.

especially to apply their methods of terror. One explanation of such a state of affairs lies in the fact that the rebels wished to destroy and put to an end all the 19th century spirit which was:

> "...[L]iberal, decadent, masonic, materialist and Frenchified and to return to impregnate ourselves with the spirit of the sixteenth century, imperial, heroic, proud, Castilian spiritual mythical and chivalrous".[85]

One sign of this attitude was not only the change of street names but especially on the methods of war. By the return to the sixteenth century methods. In fact, a memorandum drawn up by the governing body of Madrid faculty of law in 1936, specifically supports that contention. It is stated:

> "...[C]ivil wars that divide families and breed hatred have always been prosecuted in a particularly ruthless manner; the crimes that are being committed by the insurgents at the moment, however, surpass anything that has hitherto been known in the way of organized savagery. The spirit that inspires these retrograde hordes is that of the Carlist wars, the spirit that existed under the fanatical and intolerant regime of Ferdinand VII. Once more the Red caps of the 'Requetes' have risen up from the blood drenched Spanish soil; once more bishops and priests play their part in dastardly guerrilla warfare".[86]

In the Spanish Civil War, no recognition of belligerency took place which meant in the first place, as we have seen, that no legal standards were adhered to in the area of protection of the victims of war, by both parties and especially the insurgents who behaved like an invading army in the sixteenth and seventeenth centuries. All the legal and moral standards of the enlightenment were forgotten.

It must be stressed on the other hand, that foreign intervention, especially on the side of the insurgents, was decisive in their victory. In fact, it helped them to apply their ultra-modern tactics of terror in a perfect way, by bombarding, attacking and destroying civilians and civilian objects essential for their livelihood.

2.4. Conclusions as to State Practice in Customary International Law in Cases where the Recognition of Belligerency has not Taken Place

The main conclusion to be drawn from State practice, in customary international law, is that the ideology of the State and sovereignty gained the upper hand. That law had no place for the protection of those who take arms against their sovereign. Protection was reserved for entities (States) rather than individuals, the latter were mere objects, in the sense that they have no rights directly enjoyable under the law (international law), their relation with their State is the business of the State alone. The idea that the individual has a legitimate right to be protected on his life and property, on the international plane, irrespective of his nationality had to wait until the birth of the concept of human rights.

On the level of humanitarian law, this meant that States accepted the protection of victims of war only in their mutual wars. The ideology of State and sovereignty required

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[85] H. Thomas: The Spanish Civil War. Hamish Hamilton, 3rd ed., London, 1977, p.509.

[86] Op. cit., supra. n.75, p.85.

that stand; those who fight for their sovereign must be protected when they fall into enemy hands. Thus, the enlightenment's production in the field of humanitarianism were exploited for the benefit of those who obey the State and not for those who challenge its authority.

Thus, in the absence of the recognition of belligerency it seems that the parties behaved as though no restraints existed. This meant that the defenceless civilian population particularly was fair game between the two parties, the struggle for power seems to overshadow any other consideration.

It is also to be observed that foreign assistance, especially to insurgents, led the rebels, as the Russian and particularly the Spanish case show, to adopt strategies of total warfare with its inevitable horrendous consequences to civilians and civilian objects.

On the other hand, the Spanish Civil War shows the rebels had an organized and disciplined armed forces, unlike the Government forces who were essentially militia units which:

> "...[W]ith a few exceptions had no staff of officers they would trust to lead them into the field and were for the most part ignorant of the organization of war".[87]

Even with that advantage, the insurgents seem to have acted on the premise that, in order to conduct an effective war, civilians must be attacked. They used their organizational skills in that direction. The reason would seem to be that they wanted to exterminate any leftist opposition, so when they came to power, their authority would never be challenged.

D. Can the Laws of War Apply in Situations of Civil Wars then the Recognition of Belligerency is Absent

It must be indicated that on the level of doctrine, some writers have insisted that even when the recognition of belligerency is absent, the laws of war and especially those of its rules relating to the protection of the victims of war must be applied. Their justification, however, differs. It was Vattel, who was the first international lawyer to try to argue for the extension of the laws of war to internal conflicts. He maintained that civil war gives rise to two independent parties within the Nation who must be considered as forming two political bodies, in other words, as two separate States.[88]

The implication is that in order to be considered like a war between States, the civil war must have the real characteristics of those wars (between States) in intensity and magnitude. He then argued that once the situation had attained the level described above:

> "It is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness and honour which we have earlier laid down should be observed on both sides in a civil war. The same reasons which make those laws of obligation between State and State render them equally necessary and even more so in the unfortunate event when two determined parties struggle for the possession of their common fatherland".[89]

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[87] B. Bolloten: The Spanish Revolution. University of North Carolina Press, Chapel Hill, 1979, pp.249-250.

[88] For the full citation, see Vattel, op. cit., supra. chapter 3, n.56, p.338.

[89] Ibid.

Thus, it seems that pragmatism, among other things, has led Vattel to this conclusion, since cruelty and maltreatment will result in cutting all bonds between the warring factions and hence makes the chances of a speedy peace very remote. The spirit of vengeance will grow and reconciliation will be very hard to achieve.

In other words, political wisdom and also humanity, demand that either in internal or international wars, the maxims and dictates of humanity must be respected in the conduct of the war. However, it seems that Vattel's view and advice has not been acted upon in the overwhelming majority of cases of civil wars which took place at that time and afterwards. States choose to stick to the freedom of discretion in dealing with their enemies, which sovereignty affords them.

In the modern era, some international lawyers, continue to stress, that there is a minimum standard which emerges from the customary law of war which must be respected, in all conflicts, irrespective of their nature or formal characterization. McDougal and Florentino argued that:

> "...[B]ecause the law of war is designed for the benefit of all mankind and not merely of certain belligerents, most observers agree further that this most basic policy of minimum unnecessary destruction of values applies to all forms of hostilities, irrespective of the characterization of the resort to violence as lawful or unlawful, of the formal character of one or the other participants as an intra-state rebel group or unrecognised Government or an international organization, of the intensity of the violence and its extension in time and space and of recognition or non-recognition of the existence of a technical state of war".[90]

However, the main criticism of this approach, in my opinion, is that it is built on the assumption that the laws of war are designed for the benefit of all mankind, which is not true. Laws of war were designed for those who fight only for the State, in traditional international law. The reason of State sovereignty and its protection favoured that only when the recognition of belligerency takes place can those laws be extended to internal conflicts, in all other cases of civil wars, sovereignty takes precedence.

On the other hand, Kalshoven has also tried to indicate that customary rules of warfare apply to civil wars. According to him:

> "It would be very strange indeed if completely different codes of conduct or standards of civilization would apply according as the conflict would have to be classified as an international or non-international."[91]

He then went on to suggest that:

> "Notwithstanding this sharp difference [between civil and international wars] in legal regimes as they appear from the written instruments, it would be astonishing indeed to find that the underlying customs, codes of conduct applicable in the two situations really have nothing in common."[92]

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[90] M.S. McDougal and P. Florentino: Principles of the Law of War, 67 YLJ, 1958, pp.827-828.

[91] Op. cit., supra. n.2, p.272.

[92] Ibid, p.273.

He supported his contention by noting first that the Lieber code was written for a civil war situation, despite all its contents being drawn from the rules which apply between States, and secondly by concentrating on some general pronouncements, made by Britain in the first Peace Conference in The Hague in 1899, and some pronouncements by the US concerning the Protocol of 1925 Concerning the Use of Gas.[93] Lastly Cassese indicated that:

> "As to customary international law very few rules concerning inter-State wars have evolved in such a way as to also cover internal conflicts. Mention can be made of some general norms concerning the protection of civilians".[94]

He then cites these rules which are: The rule prohibiting attacks upon civilian population, the principle whereby military objectives only be can attacked, and the rule providing that reasonable care must be taken in attacking military objectives so that through carelessness a civilian population in the neighbourhood is not bombed.[95]

However, it seems to me, and despite the manifest humanitarian motives behind the statements and opinions made above, it is very difficult to suggest, and especially difficult to prove that States which were involved in civil wars in which no recognition of belligerency had taken place, behaved or considered themselves as restricted in their actions vis-à-vis their opponents, by any legal standards, or some general rules of customary international law.

A strict approach, in fact, suggests that in customary international law the laws of war apply only in cases of the recognition of belligerency. Demands of sovereignty and non-intervention, in the absence of such recognition, repulse any claim to treat the insurgents according to the customary rules of warfare. Hence the claims of sovereignty and non-intervention overrode the claims of humanity and moderation in these circumstances.

Furthermore, there is no practice which suggests that States have acted in any way which indicates that they had accepted that there were some legal constraints on their actions by virtue of customary international law. On the contrary, there is evidence to suggest the opposite, in the sense that established Governments saw themselves as free from any legal restraints in their actions against their opponents. Thus, when in 1912 the ICRC

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[93] Thus, when discussing the prohibition of dum dum bullets, the main objections came from Britain. Its representative maintained that the bullets had been found to constitute an indispensable means of stopping the attack of the indigenous enemy (in the British Indies). Kalshoven suggested that:

> "...[C]learly the relevance of experiences gained in the internal military actions in the Indies for the debate on prohibition of the use of certain bullets in an international war was never doubted by this representative".

Ibid, p.275. See also the view of the US concerning the 1925 Protocol on the Prohibition of the Use of Gas, is that the protocol cannot be used to prohibit the use of gas by the police. Kalshoven comments that:

> "The distinction made here by the USA is between use in war and use for police purposes, not between internal or international conflicts".

Ibid. p.276.

[94] A. Cassese: A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict, in Cassese (ed.): The New Humanitarian Law of Armed Conflict. Ed. Scientifica S.R.L., Naples, 1979, p.490.

[95] Ibid.

Conference, an US motion was proposed for the possibility for Red Cross societies to extend their assistance and relief to the wounded and sick and generally to all non-combatants in situations of civil war,[96] to the warring factions. Despite the plain humanitarian sense of this proposition, it was rejected out of hand by the Russian delegate, General Yermolov, who insisted that:

> "I consider, in addition that the Red Cross societies should have no duty towards insurgents or bands of revolutionaries whom the laws of my country regarded as criminals".[97]

Schlögel observed that:

> "This statement met with such general approval that it was not possible to have a mere exchange of views on the subject".[98]

This plainly means that there is no feeling whatsoever that States are bound by any rules in dealing with their opponents.

Again it seems to me that in the absence of the recognition of belligerency, civil wars functioned largely beyond international legal rules, and even when some instances of respect of some rules of war can be traced in a few cases of civil wars, usually the motive was humanitarian or more precisely mere pragmatism, but never under the sense of legal obligation.

Thus, in the Spanish Civil War which witnessed many acts of cruelty and inhumanity as we have seen above. Nevertheless, it witnessed some instances of apparent compliance with the basic rules of war, such as the treatment on both sides of each other's captives as POW's, but this practice has never been acted upon as emanating from legal obligations since many flagrant violations of the rights of the POW had occurred on a large scale.

Despite the claim of the Republicans that they would treat POW's in accordance with their military code, and the claims of the Nationalists that they will respect the laws of war:

> "It was reported that the Republicans still execute POW's who were members of fascist organizations or of the civil guard. Prisoners who could convince their Republican captors that they had been forced to fight for the Nationalists against their will were enrolled in the Republican Army".[99]

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[96] The American motion suggested in fact that:

> "6. Such Red Cross societies of other countries extending their assistance in time of such disturbances shall confine their aid strictly to the care and nursing of the sick and wounded, as provided in the Geneva Conventions and in The Hague Conventions for the adaptation to naval war of the principles of the Geneva Convention, or to relieving the suffering of non-combatants, inhabitants of the country and such societies shall render such aid and assistance with the utmost impartiality as between the opposing factions, etc."

Cited by A. Schlögel: Civil War. IRRC, March 1970, p.124.

[97] Ibid, p.125.

[98] Ibid.

[99] A. Van Wyaen Thomas and A.J. Thomas Jr.: The Civil War in Spain, in Falk (ed.), op. cit., chapter 2, n.8, p.125.

Nationalists also, as we have seen, practised outright execution of captured Republican soldiers.

Thus, it appears that the parties to the civil war, did see themselves as free from any legal bounds when dealing with their enemies. Their local law prevailed over any other consideration, and that law is always severe towards all those who challenge the authority and legitimacy of the established order.

The conclusion is that in the absence of the recognition of belligerency, there is no evidence that States feel that they are bound by any other rules, other than the dictates of sovereignty, even the general principles of the laws of war, such as the protection of combatants, human treatment of POW's and the caring for the sick and wounded can hardly be said to be applicable to civil wars without the consent of the established Government.

This is a sad state of affairs but it reflects what the international community believes to be right, since the logic of absolute sovereignty demands it. This State of affairs also reflects that in a decentralised world when no common ethics are shared by its components the claims of sovereignty and non-intervention will be held by the State to be the most important thing to care about.

However, the tragic fact is that when recognition of belligerency is not in use any longer and in the absence of customary rules applicable to internal wars, the only rule which regulates the conduct of the State towards its citizens is sovereignty, absolute sovereignty. This situation coupled with the tragic events of the Spanish civil war and World War II, clearly demonstrated, in general, the need for some kind of international regulation to render such conflicts more humane. The advent of the UN with its emphasises on human rights has also accentuated that need for regulation. All these elements have led to the first international attempt at regulation in the form of common Article 3, which will be the subject of the next section.

Section II: The Protection of the Victims of War in Article 3 of the Geneva Convention

The non-recourse of States to the recognition of belligerency which was the only door through which the rules of warfare may apply to civil wars. The horrors of the Spanish Civil War especially highlighted the terrible sufferings of the civilian population. These elements coupled with the humanitarian spirit that arose after the Second World War, as a reaction to the terrible crimes committed by the Nazis against the civilians, the POW's and even against a section of the German population itself, and which were exposed fully by the judgments of the Tokyo and Nuremberg tribunals.

Moreover, the inclusion of the concept of human rights in the UN Charter and especially the efforts of the ICRC to induce States to agree to some kind of regulation of internal conflicts. All these factors have in different degrees influenced States to try to regulate internal conflict.

However, it must be noted that although, States reluctantly accepted the principle of regulation of internal conflicts in the context of an international instrument, they tried (at least the majority) to reduce its significance by several means. One was to minimise the kind of substantive rules that are to be applied, in line with the requirements of the protection of their sovereignty from major incursion. This occurred in the Diplomatic

Conference of 1949 and again in the subsequent application of that Article.

A. The Travaux Préparatoires of the Diplomatic Conference of 1949 and the Protection of the Victims of Internal Wars

The need for adequate humanitarian protection of the victims of internal wars had been expressed especially in the ICRC conferences long before 1949, i.e., as beginning from 1921 (at the Xth Conference), the Conference adopted Resolution XIV,[100] which was wholly concerned with the question of relief in the circumstances of civil wars. At the XVIth Conference in London, a very important Resolution (XIV)[101] dealt with the role and activity of the Red Cross in times of civil war. The Conference by that resolution requested the ICRC and the national Red Cross societies to endeavour to obtain the application of the 'humanitarian principles' contained in the 1929 Geneva Convention and the Xth Hague Convention of 1907 relating to the Treatment of the Wounded and the Sick, the POW and the Protection and Safety of Medical Personnel. The Resolution also demanded the protection and respect of life and liberty of non-combatants, especially children.

This Resolution, it must be noted, was adopted when the Spanish Civil War was raging with all its cruelties, hence, it shows clearly the progress made in the public opinion, in the sense that sovereignty and non-intervention cannot bar the protection of human beings even in internal conflicts.

On the other hand, it seems to me that the Conference of 1938 laid the first step toward Article 3 of the Geneva Convention. The Second World War prevented the holding of the Diplomatic Conference that was to revise the Geneva Convention of 1929. However, after the war, the atmosphere was appropriate for a new effort for the revision and development of humanitarian law in general. Three conferences[102] took place between 1946 and 1948 and produced the famous Article 2/4, which became, after a heated and prolonged discussion at the Diplomatic Conference of 1949, the Common Article 3.

The general view of these conferences was that the conventions which should be adopted must apply to internal as well as international conflicts. The Diplomatic Conference of 1949 shows that the hopes of the ICRC, were ahead of their time. They neglected the fact that States, both old and new, still hold to their sovereignty and to non-intervention in their internal affairs. Hence, Draft Article 2/4, which in general envisaged the application of the whole Convention to civil wars, was quickly the object of a vigorous attack. Sovereignty was the essential element of the argument. Rosemary Abi-Saab rightly observed that:

> "Les thèses en presence tournent autour d'un point essentiel, celui du principe de la souveraineté de l'Etat. L'attitude adoptée à l'égard de ce point fondamental déterminera l'attitude aussi bien quant au champ d'application des Conventions et de la définition du conflit armé de caractère non-international que quand aux modalités

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[100] For the text of the Resolution (XIV), see CGEDHL (Geneva 24 May-12 June 1971, V. Protection of Victims of Non-International Conflicts Submitted by the ICRC), Geneva, January 1971, Annex VI, p.013.

[101] Ibid, Annex VII, pp.15-16.

[102] These conferences were: (i) Preliminary Conference of the National Societies of the Red Cross, 1946. (ii) Conference of Government Experts 1947; and (iii) The XVII International Conference of the Red Cross (Stockholm 1948).

d'application et au contenu de la réglementation proposée".[103]

The discussions at the Diplomatic Conference revealed to a large extent the correctness of that observation. Thus, in the first meeting of the Joint Committee on April 26th, 1949, the French delegate noted concerning Draft Article 2/4 that:

> "The Conference at Stockholm had been mainly concerned with the protection of the individual but it was also necessary not to lose sight of the rights of the States".[104]

He, in fact, stressed that it was inconceivable to carry the protection of the individuals to the point of sacrificing the rights of States. Moreover, the French delegate, with the blessing of the majority of the delegates present in Geneva, implicitly placed the rights of States before human rights in the context of internal conflicts. This means that when individuals rise in arms against their own Governments, they should expect that the rights of their Government override their individual rights as human beings.

However, it seems important to see how each category of the victims of internal conflicts has been treated by the Conference. This will show how the principles of sovereignty and non-intervention have been used to limit the extension of humanitarian rules to those victims.

1. The POW

The Greek delegate led the opposition to the proposal of the ICRC to extend the POW status to captured insurgents. His view, in fact, reflects what a State which has just finished a drama of a civil war thinks about the fate of its captured enemies. He stressed that:

> "The adoption of the text as at present [Draft Article 2/4] would entail the application to the latter 'The rebels' of the provisions of Articles 74 and 100 of the POW Convention. The rebels could not, therefore, be charged with crimes against common law committed before their arrest and they would be automatically granted a pardon at the end of the disturbances. Furthermore, they could claim the protection of a protecting power. The possibility of such protection might incite political opponents to take up arms against a legitimate Government".[105]

Captured insurgents then, were singled out as the category which needs no international protection, States it seems were not prepared to treat insurgents as a legitimate and bona fide belligerents. The US delegate, in fact, stressed that:

> "...[E]very Government had a right to put down rebellion within its borders and to punish the insurgents in accordance with its penal laws".[106]

Other delegations suggested that the need for humane treatment for captured insurgents did

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[103] R. Abi-Saab, op. cit., op. cit., supra. chapter 3, n.159, p.54.

[104] Final Records of the Diplomatic Conference of Geneva, 1949, Vol.2, Section B, Federal Political Dept., Bern, 1950, p.10.

[105] Ibid, p.11.

[106] Ibid, p.12.

not entail the application of the POW status, to them local penal law can guarantee such humane treatment in a very effective way.[107]

Burma in fact, went even further. Its representative, General Oung stressed that:

> "The proposed Convention should not give legal status to insurgents who sought by undemocratic methods to overthrow a legally constituted Government by force of arms".[108]

In other words, only the deletion of any reference to civil wars would satisfy the requirements of sovereignty. The argument of sovereignty, at least implicity, was used to deny any legal status or any international regulation of the most hated category of the victims of internal wars.

2. The Civilian Population

The British delegate led the attack against the Civilian Convention by pointing out that:

> "Careful consideration of the provisions of the Convention concerning civilians, in particular, left little room for doubt that their application to civil wars would strike at the root of national sovereignty and endanger national security".[109]

The problem is that the Civilian Convention was essentially based on the concepts of nationality and occupation. These concepts are really strange in the case of civil wars, since the civilian population holds the nationality of one State in the whole territory, even in that portion which is under the control of the insurgents. Thus, the established Government is not expected to apply different sets of laws to its nationals.

Moreover, occupation by the insurgents of certain portions of territory, even if effective, can hardly be admitted by the established Government as analogous to occupation by a foreign power, since the question of the applicable law will raise fundamental difficulties and serious problems in connection with the concept of sovereignty of which the established Government claims to be the sole holder.

The Canadian delegate expressed the difficulties described above in this manner:

> "The introduction of the fourth paragraph into Article 2 seemed even more impossible in the case of the civilian convention. Here the persons protected were essentially enemy nationals residing in the country. It would be inconceivable to suggest that even in a large-scale civil war supporters of the rebels could justify demands from the lawful Government that they be treated as protected persons under the civilian convention, although they were not living in the part of the country controlled by the rebels. No lawful Government would be able to quell a rebellion under these circumstances".[110]

It appears then that the status of the captured insurgents and the civilians, as the main

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[107] Ibid, p.13.

[108] Ibid, p.15.

[109] Ibid, p.10.

[110] Ibid, p.13.

victims of internal wars were not considered worthy of complete protection (at least at the beginning of the discussion of Draft Article 2/4). In my view, the reason of the concept of sovereignty is still seen by a large number of States to exclude the protection of those individuals who take up arms against their lawful Government or those individuals among the civilian population who support them.

Individuals who do not obey the lawful Government cannot expect any better protection than that provided in the laws promulgated by the Government which they are fighting. Paradoxically, the Nuremburg judgment did not influence the attitude of States on the particular point of the 'protection of the civilians'. Its effect (of the judgment) is obvious in the Fourth Geneva Convention as a whole. However, that convention was to be applied only in the context of international wars. Sovereignty it seems was stronger than the humanitarian spirit of the Nuremburg judgment in the context of civil wars.

The preliminary opposition described above to the Draft Article 2/4 submitted by the ICRC, opened the way for the establishment of two working groups, with the express mission of drafting a new common draft Article 2/4, which would satisfy the majority of States present at the Conference.

In Chapter III, I dealt with the work of these two groups in relation to the question of the definition of civil wars. Here I will concentrate on their contribution, if any, to the protection of the victims of internal wars.

3. The First Working Group and its Work

In its first new Draft (Article 2/4), the working group (the first) accepted the idea of the application of the whole convention to civil wars on two important conditions. First, it raised, as we have seen in Chapter III, the thresholds of the definition of civil wars, so they will in effect resemble international wars. Secondly, the institution of the protecting power will not operate automatically, only special agreements between the belligerent parties will bring it into operation. Thus, according to this version, the victims of internal wars will enjoy the same treatment accorded in the case of international conflicts.

However, many delegations were not satisfied with that solution, among them being the French delegate. Although, he was in support of the extension of the humanitarian principles of the convention to internal conflicts, he felt that:

> "It was impossible to extend all the clauses of the convention to internal conflicts. This impossibility was particularly obvious in the case of the civilian convention".[111]

He was strongly supported by the British[112] and the Burmese delegates who were unable to accept the proposition of the working group.[113] On the other hand, the Soviet Union expressed the view of the minority when its representative stated that the proposed draft "rendered still more difficult the application of the convention to cases of armed conflict

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[111] Ibid, p.47.

[112] Ibid.

[113] Ibid.

not of an international character".[114]

In the light of these divergent positions, the same working group was directed to draw up a new Draft Article 2/4. The second Draft distinguished between two kinds of non-international armed conflicts to which different rules would apply. The first kind resembles international wars, in this case, the Conventions on POW and the Sick and Wounded would be applicable on the strict condition of reciprocity.

In cases of internal conflicts, which do not attain the intensity of the first kind, the conventions or part of them can be applied only through special agreements failing the conclusion of such agreements. The belligerents are directed to conform to the humanitarian principles of those conventions.

Concerning the civilian conventions, the second Draft contained a completely new article,[115] according to which the convention or part would be applicable only through special agreements whatever the intensity of the war.

Thus, in effect, even in cases of major civil wars, civilians would not have effective protection, States wanted to have a free hand to deal with their subjects and punish severely those who help or try to help the 'traitors' who took up arms against their legitimate Government.

However, the new Draft of the first working party was not accepted. Many delegations submitted amendments. The most important were those tabled by Britain and France. Britain in effect, demanded that even in the case of a major civil war, the provisions of the conventions would apply only after six months from the beginning of the conflict.

The British proposal was very dangerous from a humanitarian point of view, since as the experience of civil wars shows the cruelty and brutality are always present in the first period of the conflict. The effect of the British amendment was to give a free hand to the Government to finish off the insurgents in six months by whatever means, since at the end of that period the Government would be obliged to apply the conventions. Thus, the Government will be in a race against time, emdeavouring to end the conflict before the deadline.

The French delegation supported by many other delegations, attacked the second Draft of the first working group on the grounds that it contained dangerous elements. It considered that:

> "...[S]ignatory Governments who were confronted with an insurgent movement would be in a dilemma; either they would never apply the clauses of the conventions or they would implicitly recognise that the adverse party had a character which was

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[114] Ibid, p.48.

[115] This second Draft drawn up by the first working party contains a special Draft Article (new Article 2A) which stipulates that:

> "In the case of armed conflict not of an international character, occurring on the territory of one of the high contracting parties, the parties to the conflict should endeavour to bring into force, by means of special agreements, all or part of the provisions of the present convention, in all circumstances shall act in accordance with the underlying humanitarian principles of the convention".

Ibid, p.125.

tantamount to that of a State".[116]

Therefore, to that delegation any attempt to apply the conventions to internal conflicts will give a legal status to the rebels, hence, it touches indirectly on the sovereignty of the State and its freedom of action.

Similarly, the USSR was unable to accept the working party's second Draft, but for different reasons. In its view, the Draft was too restrictive, it considered that at the outbreak of an internal conflict, the application of the convention should be automatic. Special agreements might be taken into consideration in the course of the conflict but, the USSR added, it would not be acceptable to leave persons who require protection without defence.[117] However, the USSR was in the minority and it seems that the voice of sovereignty won the day.

4. The Work of the Second Working Group

After the failure of the first working group to satisfy the majority, a second working group was appointed with the mission of drawing up another Draft Article (Article 2/4). The working group chose a new approach. There is no room for the application of the whole convention to internal conflicts, only some fundamental humanitarian rules would be applicable.

The French delegate chaired the group and introduced the new Draft by stating that:

> "It offered in all cases and circumstances the chief advantage of permitting the automatic implementation of concrete and precise provisions which were the essence of humanitarian rules to be observed in cases of armed conflicts not of an international character".[118]

In fact, these 'concrete and precise provisions' were some general and fundamental principles of humanitarian law which in practice, need more precision and elaboration if they are to have any effect at all in the protection of victims of internal wars.

The US delegate criticised the second working group's approach, because it did not oblige the contracting States to apply the whole conventions in certain serious cases of internal wars.[119] Furthermore, he thought that the new Draft Article 2/4 had simply prohibited some acts of violence, which in fact had been forbidden by other international instruments and would serve no useful purpose in practice.[120] It appears that the US delegate was referring to the Genocide Convention and to the Universal Declaration of Human Rights.

Norway raised a very important question concerning the fate of captured insurgents. It pointed out that:

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[116] Ibid, p.78.

[117] Ibid, p.79.

[118] Ibid, p.83.

[119] Ibid.

[120] Ibid.

> "...[A]ccording to the proposal under discussion, a Government with the intention of executing combatant insurgents or of taking them as hostages instead of capturing them would be at liberty to do so".[121]

No precise answer was given to this question. However, an important delegation (the US) was quick to point out that the de jure Government should treat insurgents as regular combatants.[122] The same delegation went even further. It stressed that the law of combat has to be applied even in internal conflicts. It stressed that:

> "Combatants should also be entitled to some protection. The use of poison or gas, for instance, was prohibited by international law but international law only applied to wars between states and the prohibition should also be extended to cover civil wars."[123]

This proposition is very interesting since Article 3, as adopted, does not contain any express reference to the regulations of methods and means of warfare. To this important State (the US), the means of injuring the enemy are not unlimited even in cases of civil wars.

At the 37th meeting of the Special Committee, the USSR introduced a proposal which in the opinion of that delegation was a compromise between all drafts and observations made during the discussions on Draft Article 2/4. It conceded that it was impossible in the light of the discussions which took place to apply all the provisions of the Conventions in a conflict of a non-international character. Its proposal selected some fundamental humanitarian principles which would apply to each category of the victims of internal conflicts (civilians, POWs and the sick and wounded). Inhuman treatment and other cruel acts and discriminations are prohibited in the case of all these categories of victims.

It seems to me, that despite the humanitarian flavour of the Soviet proposal it does reflect the Soviet political stand which encouraged national revolution against colonialism. However, the Soviet proposals were quickly attacked by the French and even by the Italians. They concentrated their attack particularly, on the proposal extending the term POW to captured insurgents, which would impair the sovereignty of the Government and its freedom of action.[124] In my opinion, only on the ground of arguments for sovereignty can we understand the failure of attempts of giving POW status to insurgents.

The Soviet proposal which is in effect milder than the ICRC's Draft Article 2/4, was rejected in the Special Committee by 9 votes to 1 (July 8th, 1949). This is a revealing case, States were not ready to commit themselves in any manner concerning the treatment of rebels and of the civilian population. To them, this would impair their sovereignty and would give a legal status to their opponents which would open the door for foreign

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[121] Ibid.

[122] Ibid, p.84.

[123] Ibid, p.90.

[124] Throughout the conference the French delegate defended the 'rights of States' against the rights of individuals and pointed out in connection with the Soviet proposal on POW's that all rules governing the regime for treatment of POWs could not be applied in civil wars because the protecting powers conferred by the Mandate would impair the sovereignty of the Government. The same points hold for the Civilian Convention. Ibid, p.99.

intervention in their internal affairs.

At the end, it must be indicated that the second working group Draft, after being amended slightly by the Special Committee was adopted by the conference in its plenary session by 34 in favour, 28 against and 1 abstention, that Draft became the well-known common Article 3.

The voting showed clearly that Article 3 was adopted by a slim majority which indicates that an important number of States were not happy with it, since it made vulnerable their exclusive jurisdiction over events which occur in their territories.

5. Conclusions to be Drawn from the Travaux Préparatoires

1. From the start of the Conference, the majority of States felt that any general extension of the Geneva Convention to all the victims of internal wars would not be acceptable whatever the magnitude and intensity of the conflict, the reason being that the sovereignty of the State would be impaired. However, Schlögel attributed such failure to the following:

> "The little legal protection from which the victims of civil war benefited was the logical outcome of the impossibility for Governments to agree on what should be demanded of the rebel party for it to have recognition of equal rights under the Geneva Conventions".[125]

2. The majority of States resisted all attempts to give captured insurgents POW status. Established Governments closed the door to any international regulation in that domain in the name of preserving their discretion.

3. Because civilians hold the nationality of their State and are thus bound by the duty of allegiance, they were not regarded as eligible for extensive international protection as in the case of international war. Sovereignty closed the door to real protection.

4. However, there was a general consensus that the sick and wounded should be treated with humanity. No detailed provisions were made for the effective application of the principle that those victims (the sick and wounded) should be 'collected and cared for' which, in practice, brought many problems.

5. There was no detailed discussions concerning the actual principles included in Article 3, which in practice, led to different interpretations of the concepts involved. For example, the concept of 'human treatment' which is a central principle in the context of Article 3, has not been defined in any precise form.

B. Analysis of the Actual Contents of Common Article 3

Article 3 signals, in my view, the rapprochement between humanitarian law and human rights, since human rights apply in peace time and most of them will be suspended in times of emergencies. The remaining few rights after the suspension will be protected by humanitarian law. Those rights that are protected, represent the point of meeting between human rights and humanitarian law.

On the other hand, it must noted that before the adoption of the Geneva Convention of 1949, two events in particular, contributed to the eventual meeting between human rights

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[125] Op. cit., op. cit., supra. n.96, p.129.

and humanitarian law.

First, the UN Charter mentions human rights as one of the purposes of the organization (Article 1/3). The UN Secretary-General, in one of his reports in the late 1960s, made the argument that the human rights disposition of the UN Charter did not distinguish between periods of peace and war, between military and civilian personnel. He wrote:

> "...[L]a terminologie de la Charte s'applique dans sa généralité aux civils aussi bien qu'aux militaires, elle englobe les personnes vivant sous la juridiction de leurs propres autorités nationales et les personnes vivant dans les territoires occupés".[126]

This interpretation of the dispositions of the UN Charter extends implicitly the application of the regime of human rights to internal conflicts, since apparently there is no distinction between different kinds of conflicts in the application of human rights.

Secondly, it must be remembered that in 1948, the first international instrument of human rights was adopted (the Universal Declaration of Human Rights). That Declaration, in effect, contains no derogation clause in times of emergencies. This may be interpreted that all human rights must be respected at all times or at least some of them: such as the right to life, prohibition of torture and the right to a fair trial. Although, participants present at Geneva in 1949 were military men, diplomats and those who in general, defend the rights of States, nevertheless, they had to take into account what happened in Paris in 1948. In this context, Quentin-Baxter wrote:

> "The proof of this lay in the new Article 3 common to all four Conventions, providing a simple Code of Human Conduct in conflicts not of an international character".[127]

It seems to me, that there are three views regarding the question of what kind of rules are included in Common Article 3.

1. The First View

This view holds that Article 3 does not bring anything new, its guarantees are stipulated in general in all civilized States' laws. In this connection, Pictet maintains that 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".[128]

Similarly, Siotis argued:

> "...[L]es principes humanitaires, qui sont à la base des règles dont l'application est prévue, n'ont nullement besoin d'explication et constituent des éléments essentiels de

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[126] UN Doc A/7720, para 23, cited by Meyrowitz: Le droit de la guerre et les droits de l'homme, 88 RDPSPFE, 1972, pp.1080-81.

[127] R. Quentin-Baxter: Human Rights and Humanitarian Law: Confluence or Conflict, 9 AYIL, 1985, p.101.

[128] Cited by Bond, op. cit., supra. chapter 3, n.132, p.57.

toute morale humaniste, rationaliste ou religieuse".[129]

He then added that:

> "...[N]ous avons là des règles de droit international dont l'application ne peut en ancune manière nuire au maintain de l'ordre".[130]

In his view, the rules of Article 3 do not constitute any derogation from the State's sovereignty.

In my opinion, this approach ignores that Article 3 was not easily accepted by the majority of States present at Geneva. Because States mainly considered that it touches upon their freedom of action and their right to maintain law and order within their borders. Moreover, even if we concede that the rules included in the Article are already found in the Codes of Conduct of civilized States, their (the rules) inclusion in an international agreement was not easy, since it brings with it, in their opinion, the prospect of intervention in their internal affairs.

Other viewpoints differ in their interpretation of the fundamental notion of 'humanitarian treatment'. This principle, as it is known, is a fundamental principle of human rights, and of the laws of war.

This divergence of interpretation led to different conclusions as to the rules embodied in Article 3. Thus, when the notion of 'human treatment' is interpreted as a human right principle, it is said to mean respect for the right to life and prohibition of torture and the right to fair trial.

To me, the right to life in this context, must include the means of survival, it is not a negative right in the sense that the State must abstain from doing certain things. It is also a positive right in the sense that the State must provide, or allow other humanitarian agencies such as the ICRC to provide, essentials namely food, shelter and medical supplies.

However, it must be indicated that Article 3 does not prohibit capital punishment therefore, the right to life for captured insurgents does not include protection from the death penalty. In such circumstances, the notion of 'human treatment' must be interpreted as excluding summary execution. A fair judgment is a necessary element of human treatment in the case of the worst treated victims of internal wars (captured insurgents).

This brings us to the conclusion that the human rights approach in the interpretation of Article 3 leads to indicate that all these rights to life, prohibition of torture and fair trial are now cardinal elements of the human rights system and thus, they constitute a fundamental limitation upon the State's sovereignty.

No State can claim that it will not respect them, and it has no right to characterise as an intervention in its internal affairs any attempt by the international community to state its views on the subject, or demand respect for those rights. The emergency situation has no relevance in this respect. Such approach affords the benefit that the instruments of human rights may be used to protect the civilians and even the combatants in times of emergency.

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[129] Op. cit., supra. n.62, p.212.

[130] Ibid.

2. The Second View

Another view concerning the contents of Article 3, hold that the article must be seen as an attempt to state a 'resumé' of the essential principles of 'Geneva Law', which deals with the protection of the victims of war. They stress that the principle of humane treatment and other principles included in Article 3 such as 'the taking of hostages' and 'caring for the wounded and sick' must be seen and interpreted within the perspectives of the law of the Geneva tradition and not that of human rights. However, they admit that the influence of human rights appears at least in two instances in Article 3: 'The prohibition of outrages upon personnel dignity, in particular, humiliating and degrading treatment' and of non-discrimination.

In this context, Wilhelm observed that:

> "Quand au contenu des garanties fondamentales de l'Article 3, on peut dire en un mot qu'elles correspondent au système des Conventions de Geneva de 1949, c'est-à-dire qu'elles protègent les blessés et les malades aussi que les personnes combattant ou non qui sont tombées ou se trouvent au pouvoir de l'adversaire".[131]

According to him, the central notion of 'humane treatment' comes directly from the tradition of the law of Geneva and to some extent The Hague. It can be found in the Geneva Convention of 1929 and in what is called 'Martens Clause' in the Preamble of the IV Hague Convention of 1907.

He also stresses that other rules included in Article 3 can be found in the Geneva Conventions of 1949. The prohibition of taking hostages is stipulated in Article 34 of the IV Geneva Convention, collecting and caring for the sick and wounded in Article 40 of the first Convention and so on.[132]

It seems to me, that although this kind of argument is not without solid foundation, the human rights approach may afford the benefit that States will be at odds in denying the application of certain fundamental rules of human rights in situations of internal conflicts. Because in demanding respect for those fundamental rules, third States cannot be seen as making an intervention in the internal affairs of the State concerned, as their position, cannot in any way, be interpreted as giving rebels any legal status or giving the conflict any characterisation.

However, to interpret Article 3 in the light of the tradition of Geneva Conventions, may be considered by an established Government engaged in an internal conflict, as an attempt of giving the rebels some kind of legal status and also as a way of inducing that Government to accept that the conflict is an internal one, to which certain rules must be applied.

3. Third View

This view goes very far and tries, in my opinion, to interpret the clause of 'humane treatment' in the light of the law of war **stricto sensu**. In this connection many principles

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[131] J.R. Wilhelm: Protection de la personne humaine. RCADI, 1972/III, p.369.

[132] Ibid, p.366.

and rules of **jus in bello** are inferred from that principle, i.e. 'the principle of humane treatment'.

Thus, the fundamental rule of the laws of war, namely 'the protection of non-combatants' is deduced, and from that rule many other rules were inferred such as the prohibition of bombardment of open towns and villages, the distinction between lawful and unlawful targets of attack and even the nature of weapons which may be used. The principle of military necessity is introduced. All military acts must be decided in the light of the necessities of the situation. In other words, the idea of humane treatment and the general object of Article 3, has been interpreted as prohibiting total war in civil wars.

An example of this exercise is what has been done by Bond, Pinto, O'Brian and others. Pinto interpreted the prohibition of violence to life and murder of all kinds, mentioned in Article 3 (A), as prohibiting bombardment, indiscriminate aerial attacks and also all means of combat which cause unnecessary sufferings.[133]

Bond, after observing that the idea that the laws of war should govern internal conflicts, argued that the use of biological and chemical weapons, resort to strategic bombings, committing of reprisals, relocation of the civilian population, defoliation of farm and forest lands and destruction food stores and the claim to treat captured insurgents as common criminals or traitors rather than POW's. To all these important issues, he maintains that although, Article 3 does not prohibit them specifically, he stressed that a broad interpretation, especially of the principle of humane treatment, would render most of the acts listed above as illegal because most of those actions would affect non-combatants, hence they would in one way or another violate the obligations to treat them humanely.

O'Brian does not base himself on a broad interpretation of Article 3 in order to introduce the application of certain rules of **jus in bello**, in internal conflicts. Rather, he seems to argue from what experience shows. In this context, he writes:

> "...[I]n a serious contemporary revolutionary war both sides are likely to resort to means proscribed or limited by **jus in bello**, rules prohibiting the use of disproportionate or indiscriminate firepower against heavily civilian targets and banning measures of population control which exceeds the standards set for belligerent occupations".[134]

He then adds:

> "...[A]dmittedly no international convention has accepted these standards as binding on belligerents in civil war but, as will be argued, these limits should be the basis for evaluating the treatment of civilians in such conflicts."[135]

However, it seems to me that O'Brian argument does not find real support in practice. The Vietnam war is a case in point. In this context, Falk was right when he wrote:

> "...[F]or a number of reasons it is equally complicated to apply the laws of war to the conduct of a large-scale counter-insurgency war. The virtually inevitable illegality

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[133] See Pinto, op. cit., supra, chapter 2, n.90, p.533.

[134] W.V. O'Brian: The Jus in Bello in Revolutionary War Law. 18 VJIL, 1978, p.204.

[135] Ibid.

> of insurgents methods and tactics tends to vindicate recourse to effective responses. Governments generally maintain the right to request external help to defeat such internal armed struggles. In addition, counter-insurgency weaponry and tactics are a somewhat recent development. International law is generally accorded a very limited sphere of applicability in relation to a largely internal war".[136]

Then, he arrived at a different conclusion concerning the applicability of certain rules of jus in bello in internal conflicts.

It seems to me, however, that the views of those who support the broad interpretation of Article 3, in order to include some fundamental rules of jus in bello, face in practice, some legal and political obstacles which States may resort to. First of all, according to the law of treaties, the aim of any interpretation is to elucidate the intentions of the parties. Consequently, it is very hard to prove that the parties to the Geneva Conventions envisaged such broad interpretation. No words, no preparatory work and in a way no subsequent practice concerning Article 3, supports such contention. The only legal device for the acceptance of such broad interpretation is the conclusion of special agreements between the parties.

In my view, Baxter, appears to be correct when he stressed that:

> "...[T]he obligations of Article 3 are cast in such general terms and leaves so many things unsaid that they cannot, even under the best of circumstances, be an adequate guide to the conduct of belligerents in civil strife".[137]

4. Conclusion

It seems that the fundamental defect of Article 3 is as Schlögel argues "...lies in the lack of balance between the principle in heading 1 and the enumeration as examples of particular violations under sub-headings (a) to (d)".[138] The same idea was expressed by Veuthey, who observed that:

> "l'Article 3 concrétise le general principe 'le traitement humain' non par une description du traitement à accorder mais d'une manière négative en énumérant ce qui est incompatible avec un tel traitement humain".[139]

Therefore, what is absent from Article 3 in my view is a positive formulation of the idea of 'humane treatment' which can include amongst other things, some fundamental economic and social rights, such as the supply of food to those in need in situations of internal strife and their right to receive such supplies through independent channels. Moreover, the prohibition of any kind of forced labour, the right to receive medical care for the sick and wounded and the duty of the medical staff and the civilian population as a whole to give the necessary assistance are not mentioned in Article 3.

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[136] See P.D. Trooboff: Law and Responsibility. Univ. of North Caroline Press, Chapel Hill, 1975, p.51.

[137] R. Baxter: Jus in Bello Interno: The Present and Future Law, in Moore (ed.), op. cit., supra. chapter 2, n.43, pp.528-9

[138] Op. cit., supra. n.96, p.133.

[139] Op. cit., supra. n.1, p.214.

C. Subsequent Practice Concerning Article 3

To what extent has Common Article 3 in practice protected the victims of internal wars? This is a very important question since it shows us how far States are ready to honour their obligations and especially how they interpret their obligations contained in the Article, and finally how the two principles of sovereignty and non-intervention were sometimes used to limit these obligations.

In this respect, I will deal with three points: (i) The State practice in actual civil wars; (ii) the UN and the protection of the victims of internal wars and, finally, (iii) the judgment of the ICJ in the Nicaragua Case and Article 3.

1. The State Practice in Actual Civil Wars

This reveals beyond any doubt that the protection of victims of such conflicts is not wholly satisfactory. Thus, the civilians, the POW's, were not effectively protected and even the sick and wounded were not afforded the real conditions of protection since Article 3 does not protect the persons who may afford assistance to persons in need e.g. the medical staff.

This practice, as will be seen, reveals many instances of those attempting to give assistance to the sick and wounded being considered as committing a crime punishable in law. In order to cover this point, I will deal with the fate of the civilians, captured insurgents and finally the sick and wounded, in actual civil wars.

1.1. The Civilian Population

In a civil war more than an international conflict, civilians are in general intimately involved in the contest. Victory will be on the side of those who can muster the support of the population. In this context, Mao Tse-Tung stressed that:

> "The people may be likened to water, the troops to fish who inhabit it".[140]

They 'the civilians' are the source of food, shelter, intelligence and care for the wounded and sick. Because of that, the civilians have sometimes become military targets themselves especially in the eyes of the established Government. They are the victims of terrorist acts, bombardment, displacement, etc. Their property too, which is an essential element of their survival, is at the mercy of the two sides of the conflict.

It appears that the practice revealed that the use of the guerrilla method of warfare has led Governments fighting in such situations to act as if the general distinction between combatants and non-combatants which is implicit in Article 3 is non-existent, they behave in a total warlike manner. The guerrilla method of warfare seems to negate the application of any humanitarian rules. The cases which I will deal with point in that direction.

1.1.1. In Vietnam

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[140] Cited by J.B. Kelly and G.A. Pelletner: Legal Control of Populations in Subversive Warfare. 5 VJIL, 1965-6, p.174.

In Vietnam both the US and the Government of the Republic of Vietnam acknowledged the application of the Geneva Conventions to the conflict.[141] The NLF gave the assurance that it did not consider the Conventions applicable to the conflict, it did, however, assure the ICRC that POW's would be treated humanely.

The field manual (April 1964) of the US forces stressed that when the US forces are involved in fighting the insurgents, they will apply the rules contained in Article 3 and will encourage their local allies to do likewise. In fact, the manual in its point D stipulated that:

> "Civilians taking no part in the hostilities are entitled to the protection in Article 3 above. The US forces coming into contact with the civilian population will apply these provisions, will urge the insurgents and counter-insurgency forces to likewise apply the provisions."[142]

However, the reality was otherwise. The civilians were the main victims of the war since in order to destroy the insurgents, they must first be separated from the civilians. This was basically, an impossible task as only political means could achieve that result, military means could only lead to disaster.

The Americans and their allies relied on their military superiority to achieve victory. They resorted to saturation bombing, use of anti-personnel weapons, air and artillery bombardment of small villages which resulted in heavy casualties among the civilians. A total war policy was admitted even by the American administration itself. In this context, John McNaughton, then the US Assistant-Secretary of Defence, was able to state:

> "We seem to be proceeding on the assumption that the way to eradicate the Viet Cong is to destroy all the village structures, defoliate all the jungles and then cover the entire surface of south Vietnam with asphalt".[143]

The US and their allies have, in fact, resorted to many tactics that resulted in making the civilians the first target of the war. Special forces composed of Cambodians, tribesmen, Chinese and Vietnamese were used by the CIA, these were indiscriminately violent. The CIA also hired people to disguise themselves as Viet Cong and discredit communists by

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[141] The US Secretary of State, Dean Rusk, wrote to the ICRC on 10th August, 1965 stating that:

> "The United States has always abided by the humanitarian principles enunciated in the Geneva Convention and will continue to do so. In regard to the hostilities in Vietnam, the US Government is applying the provisions of the Geneva Convention and we expect other parties to the conflict to do likewise."

Likewise, the Minister of Foreign Affairs of the Republic of Vietnam, Dr. Tran Van Do, sent a similar letter to the ICRC in which he stated that:

> "The Government of the Republic is fully prepared to respect the provisions of the Geneva Convention and to contribution actively to the efforts of the ICRC to ensure their application".

Cited by L. Petrowski: Law and the Conduct of the Vietnam War, in Falk, (ed.), op. cit., supra. chapter 2, n.8, p.483.

[142] Cited by Kelly and Pelletner, op. cit., supra. n.140, pp.185-86.

[143] Cited by T. Farrer: The Laws of War 25 Years after Nuremberg. IC, 1971, No.583, p.28.

committing atrocities against the civilians.[144]

Farrer summarised the attitude of the higher echelons of the American administration as follows:

> "In the eyes of President J.F.Kennedy-the high priest of counter-insurgency-and certain of his advisors, Vietnam was the doctrine's acid test. His successor observed that the tough and cocky guerrillas were still swimming in their life-preserving human sea. More subtle means failed and President L.B. Johnson turned to blunter weapons. No one apparently bothered to tell him about the laws of war".[145]

In other words, no legal constraints were respected, total war with its inevitable lack of distinction between combatants and non-combatants, was accepted both as a policy and a practice.

Falk describes the war in Indochina as follows:

> "...[The war in Indochina] was the first modern instance in which the environment has been selected as a 'military target' appropriate for comprehensive and systematic distinction".[146]

In practice, such a policy will hit the civilians hard, rather than anyone else, since it is directed at drying up the sea of civilians, so that the insurgents will die immediately.

Falk notes in this respect, that:

> "This drying up process is translated militarily into making the countryside unfit for civilian habitation. To turn Indochina into a sea of fire and compel peasants to flee their ancestral homes was embodied in a series of war policies including 'free-fire zones'; 'search and destroy' operations and various efforts to move villages forcibly into secure areas".[147]

The result is that the war tends toward genocide with respect to the people and ecocide with respect to environment. The US Department of Defense has, in fact, estimated that between 1965 and 1968 annual expenditure on chemicals rose from $10 million dollars to $70 million.[148]

It would seem that the destruction of people and environment has been considered by officers in the field as a matter of military necessity. Petrowski states that:

> "In some officers eyes, it would be considered a matter of 'military necessity' to burn down an entire village to kill one sniper".[149]

This causes civilians to be caught in the middle, they were used as a means of fighting insurgents.

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[144] S. Melman, (Director of Research): In the Name of America: The Conduct of War in Vietnam by the Armed Forces of the United States as Shown by Published Reports. 1968, pp.92-94.

[145] Op. cit., supra. n.143, p.25.

[146] R. Falk: The Vietnam War and International Law, Volume IV, PUP, princeton, 1976, p.287.

[147] Ibid.

[148] Op. cit., supra. n.141, p.497.

[149] Ibid, p.496.

1.1.2. Malaya

In this country, the British used between 275,000 and 395,000 soldiers in order to defeat 8,000 to 10,000 communist guerrillas[150] and it seems that much of the weight of the terror fell on the Chinese citizens from whom the guerrillas tried to gain support.

Thompson, a very well-known expert on counter-insurgency tactics, explained the means by which the Government fought the communist insurgents in the following fashion:

> "Some very tough laws were enacted in Malaya. One enabled the Government to seize and deport all Chinese found in a declared bad area. Another allowed the Government to impose a collective fine on all the inhabitants of an area where the people were unco-operative. On the other hand, laws imposing strict curfews, a mandatory death penalty for carrying arms, life imprisonment for providing supplies or other support to terrorists restricted residence or detention for suspected terrorist supporters and so on were effectively used".[151]

With these measures, no room was left for the freedom of civilians, their lives and deaths were virtually left at the discretionary power of the established Government. It is also clear that the main characteristics of the above listed crimes, is that they were broadly stipulated, in order to make any act or movement of the civilians suspected. The accused always had to explain the suspicious conditions of their acts which meant that the action of the Government forces could easily degenerate into a wholesale restriction of the fundamental rights of the citizens.

1.1.3. Algeria

The official Algerian figure of those who died for the cause of independence 'The martyrs' is one and a half million. It is estimated that the majority of those who died were civilians since the highest figure mentioned by the FLN for its forces during the war was 130,000. However, after the war, 250,000 claimed to have been fighters for the FLN.[152]

The estimated figures on the French side were 20,000 military personnel and 25,000 civilians. It appears to me that the French, especially from 1956, had resorted to a policy of total war. Every Muslim Algerian was considered as a political sympathiser of the FLN, if not an actual member. In this context, the Report of the French Commission 'de sauvegarde des droits et libertés individuels' established by the Government of Guy Mollet cited the General Director of the National Security as saying that:

> "la police Algérienne comme la gendarmerie, se livraient sur les inculpés suspects ou simple prévenus à des méthodes d'investigation relevant beaucoup plus de la Gestapo que d'une police démocratique".[153]

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[150] F.E. Armbruster, R.D. Gastil, H. Kahn, W. Pfaff and E. Stillman: Can We Win in Vietnam?. F.A. Paegel, Pub., New York/Washington/London, 1968, p.113.

[151] R. Thompson: Defeating the Communist Insurgency: Experiences from Malaya. Chatto & Windus, London, 1966, p.53.

[152] A. Fraleigh: The Algerian Revolution as a Case Study in International Law, in Falk (ed.), op. cit., supra. chapter 2, n.8, p.192.

[153] Cited by Siotis, op. cit., supra. n.62, p.214.

The same report quotes a high ranking official as saying that:

> "les méthodes brutales d'interrogation-violence, sévice ou torture ont une efficacité nettement supérieure aux procédés autorisés par les réglements".[154]

Teguia stresses that the majority of those who died during the war were not armed combatants. They were, in fact, defenceless; women, children and the old. He then gives some examples of the methods and pictures of the repression practised by the French army. He writes:

> "Des agglomérations rurales totalement effacées de la carte par des bombardement au napalm, une multitude de charniers, de fosses communes, dont certaines restent inconnues de nos jours, des exécutions sommaires innombrables, des déplacements de population par millions, des prisons et des camps de concentration bondés, la loi faisant fonctionner fréquement la guillotine, des régions entières vidées de toute vie humaine et soumises à un bombardement incessant pour l'entrainement des artilleurs, des aviateurs où l'écrasement des 'rebelles', ont marqué les sept ans et quart de guerre".[155]

Scherer describes the methods used by the French army in the famous 'la Bataille d'Alger' in these terms:

> "...[L]a répression atteint un degré de brutalité rarement surpassé dans l'histoire de l'armée Française. Des unités d'élite sont gangrenées par le racisme, à force de 'casser du bougnoule' et cherchant un exutoire à leur besoin de violence dans des méthodes fascistes".[156]

Lebjaoui, a nationalist leader, quotes some examples used by the French, as revealed by published reports of some French officers and soldiers:

> "Début mai (1956), près de Batna à la suite d'une embuscade où deux soldats trouvant la mort, quinze suspects sont interrogés, torturés, quatorze sont fusillés sur les quinze. Vallée de la sommam: trois suspects arrêtés, enterrés jusqu'au cou, après avoir eux-mêmes creusé leur trou, en plein soleil. Une gamelle d'eau est placée à cinquante centimètres de leurs lèvres. Ils sont laissés aussi deux jours environ. N'ayant pas parlé, deux sont abattus. Le troisième parle, mais abattu après".[157]

Torture in fact, became nearly an official policy. Thus, the famous 5ème Bureau which specialised in extracting information from suspects, was a body whose main function was torture and inhumane treatment. A leaked ICRC report was published by Le Monde (dated January 5th, 1960) which the Government unsuccessfully tried to seize. The report revealed that torture and inhumane treatment were systematically used, in fact, many prisoners died from lack of medical attention and conditions of internment were disastrous.

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[154] Ibid, pp.214-5.

[155] M. Teguia: L'Algérie en guerre. OPU, Alger, p.321. See also pp.320-523.

[156] P.P. Scherer: Le rôle de la police et de l'armée dans la bataille d'Alger. Cited by M. Teguia, ibid., p.333.

[157] M. Lebjaoui: Bataille d'Alger ou bataille d'Algérie?. ED. Gallimard, 1972, pp.150-151.

However, the FLN also used terror against civilians. The justification was that they were convicted by revolutionary courts for their acts in collaborating with the enemy. It is estimated that the Muslim Algerians were the hardest hit. The tactics of the urban guerrilla used by the FLN in the big cities such as Algiers, Constantine and Oran resulted in the killing of innocent civilians by the French. In the famous 'la Bataille d'Alger' in 1957, the FLN estimated that 6000 persons were killed in the town.[158]

However, Siotis writing in 1958 observed that the use of terrorist tactics by the FLN against the collaborators of the French had declined because in his view:

> "...[D]ès le moment où l'organization politique et militaire de l'insurrection prit des formes plus poussées et que ses responsables acceptèrent l'application des dispositions des contentions de Genève, le nombre et l'ampleur de tels attentats a diminué".[159]

He then notes:

> "Il n'est pas impossible que cette diminution soit due à d'autres causes, mais nous somme de l'avis que l'acceptation des lois de la guerre accompagnée par une tactique militaire beaucoup plus conforme aux usages de la guerre, constitue une preuve de la maturité politique indispensable à toute mise en oeuvre des dispositions des conventions".[160]

The explanation is also that the fight for the hearts and minds of the population both in Algeria and especially, in France were of the utmost importance in the strategy of the FLN.

In the legal field, throughout the conflict the French position either in the application of Article 3 or the entire Conventions of Geneva, was unclear. Thus, in 1954, the French argued that the matter was a mere police action, which meant that there is no room for the application of Article 3. However, in 1955, the French PM, Mr. Faure, noted in the Assemblée Nationale that Article 3 is applicable to the situation. This acknowledgement had never been published in the Journal Officiel de la République Française.[161]

On the other hand, in 1956, Mr. Guy Mollet, the then French PM recognized that the conflict was no longer a matter of penal law but had attained the level of an armed conflict of a non-international character. Thus, the communiqué of 'la Presidence du Conseil' of June 23rd, 1956 relative to the mission of the ICRC in Algeria, stated the following:

> "En conformité avec l'Article 3 des Conventions de Genève relatives aux cas de conflits armés ne presentent pas un caractère international et surgissant sur le territoire de l'un des parties contractantes, le Comité International de la Croix-Rouge a offert ses services au gouvernement Français. Le gouvernement l'a autorisé à envoyer en Algérie une mission en vue de visiter les camps d'hébergement et l'éloignement dans lesquels ont été rassamblés les internés administratifs et d'entreprendre des visites des lieus de détention où se trouvent les personnes poursuivies à la suite des évenements".[162]

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[158] Op. cit., supra. n.155, p.336.

[159] Op. cit., supra. n.62, p.213.

[160] Ibid.

[161] Cited by T. Farrer: International Armed Conflict. 71 CLR, 1971, p.53.

[162] Cited by Siotis, op. cit., supra. n.62, p.211.

Despite these pronouncements, the French never admitted in a clear cut way that the war was either civil or an international one. Therefore, on July 25th, 1960, when the war was at its height and resembled an international war, the French Government rejected the capacity of the GPRA set up by the FLN in 1958 (which has been recognised by many foreign States), to adhere to the Geneva Conventions in the following terms:

> "The French Government recalls that the self-styled 'Provisional Government of the Algerian Republic' set up on foreign territory by the leaders of the rebellion in the French Department of Algeria, cannot on any grounds, claim the capacity of 'state' or that of 'power' consequently. It does not possess the requisite competence to 'adhere' to the said conventions, according to the text itself".[163]

The French Government raised the question of legitimacy of the representativity of the insurgents and the question of sovereignty over Algeria to reject the capacity of the insurgents to adhere to the conventions and, by implication, its refusal to apply the humanitarian standards set in those conventions to this conflict even when France was attempting to enter into negotiation with the GPRA.

1.1.4. Nigeria

In Nigeria, the civilians especially in the Biafran side, were cruelly treated; bombings and starvation were used extensively, coupled with a lack of food and medicines. Genocide was a reality. Shepherd wrote:

> "A question must be posed whether there is uncontrollable genocidal movement in the Nigerian army. Evidence of indiscriminate killing of non-combatants is incontrovertible".[164]

O'Brian also wrote that the killing of the Ibos in Benin and mid-western regions 'leaves no doubt that the war is being waged in a genocidal spirit'.[165] The insurgent's Leader, Lt. Col. Ojukwu, in fact, repeatedly made allegations of genocide.[166]

This situation led the Federal Government on September 6th, 1968 to invite the Governments of Britain, Canada, Poland and Sweden, the UN Secretary-General and the OAU each to send a representative to Nigeria to observe the Federal Army's operation in the areas affected by the conflict.

In their first consolidated report, the observers found that the Federal Government was following its declared policies of protecting the Ibo people and Ibo property in Federal held areas. They insisted that they had neither seen nor heard evidence that the Federal Army was practising a policy of genocide against the Ibo people and they then concluded that the term 'genocide' was unwarranted.[167]

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[163] Cited by Fraleigh, op. cit., supra. n.152, p.195.

[164] Cited by Z. Cervenka: The Nigerian War 1967-1970: History of the War, Selected Bibliography and Documents. Bernard & Graefe Verlag für Wehrwesen, Frankfurt am Main, 1971, p.88.

[165] Ibid, p.88.

[166] Ibid, pp.87-88.

[167] Ibid, p.89.

However, on the controversial question of bombing of civilians, the observers made clear that 'it was impossible to receive proof that allegations are false'[168] which means that the allegations that indiscriminate bombings against the civilian population were true.

It must be noted that at the beginning of the conflict, the head of the military Government and Commander-in-Chief of the armed forces issued instructions to the Nigerian army, air force and navy in which he insisted that:

> "...[N]o mercy will be shown to the rebel clique and their collaborators anywhere. The task of the Federal military Government is to save the country from disintegration and uncontrolled bloodshed".[169]

In other words, in the name of preserving the territorial integrity which is a central component of sovereignty, everything is justified in order to eliminate the insurgents and their collaborators, the latter being civilians. The result of such policy was well known over 2 million people died, most of them civilians.

On the other hand, it must be made clear that on the legal side, the Federal Government, because of its insistence on the unity of Nigeria and its sovereignty had never acknowledged officially the applicability of Article 3 of the Geneva Convention to the situation. However, many implicit acts can be interpreted that the Federal Government considered very important parts of the Geneva Convention as applicable. Thus, the Nigerian Foreign Minister referred to Article 23 of the Civilian Convention in order to allow the ICRC free passage.

The Federal Government also issued a code of conduct to its forces which indicated among other things:

> "The aim of the war is to keep Nigeria and Nigerians together. To ensure this noble task, maximum and sincere efforts will be made to preserve as many lives as possible".[170]

It then made clear to Federal forces:

> "...[Y]ou will not repeat not bomb any non-military targets. Any gathering of the civilian population will be avoided. Military targets will not normally be towns. You will endeavour to maintain a maximum restrain on your activities over the rebel forces".[171]

However, in practice, Biafran towns, ports and villages were the primary targets of attack which inevitably resulted in huge civilian casualties as Stated above.[172]

Examples of genocide are not rare in this respect. The New York Review (dated

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[168] Ibid, p.91.

[169] Ibid, p.58.

[170] Ibid, p.91.

[171] Ibid.

[172] For an accurate account of the atrocities, see F. Forsyth: The Biafra Story. Penguin Books, 1969, pp.208-221; J. de St. Jarre: The Nigerian Civil War. Hodder & Stoughton, 1972, pp.203-253; and C. Odumegwu Ojukwu: Biafra. Perennial Library, Harper & Row Publishers, 1969, Vol.1, pp.318-325.

December 21st, 1967) noted:

> "In some areas outside the east which were temporarily held by Biafran forces, as at Benin and the midwestern region, Ibos were killed by local people with at least the acquiescence of the Federal forces. About 1,000 Ibo civilians perished at Benin in this way".

Moreover, it was reported in The Washington Morning Post (dated September 27th, 1968)that:

> "The greatest single massacre occurred in the Ibo town of Asaba where 700 Ibo males were lined up and shot".

Ojukwu, the Leader of the insurgents, repeatedly accused the Federal Government of carrying out a policy of genocide against the Ibo people.[173] This means, in fact, that the Code of Conduct of the Federal army had not been respected in practice, it was a propaganda tool for the Federal Government and it was the civilians who paid the price.

1.1.5. Yemen

The civil war in the Yemen broke out in September 1962 and ended formally in 1969, fought between the Republicans supported by the Egyptians and the Royalists supported by the Saudis.[174] The war was long, costly and bitterly divisive. Egypt sent a 60,000 strong army[175] to help the new republic and Saudi Arabia offered money and refuge to the royalists. The Yemen war, in my view, was the Vietnam of the Arabs. The hatred between the two factions and their supporters was intense.

The royalists resorted to guerrilla methods and the republicans relied on their superiority in the air. The use of bombardment resulted inevitably in the loss of civilian lives.[176]

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[173] In his speech of January 27th, 1968 Ojukwu stated:

> "Gowon conspired with his Northern Nigerians to massacre more than 3,000 Eastern Nigerians in May, 1966. This is genocide.
> Gowon murdered his supreme commander, stole his mantle of office and proceeded to direct the extermination of army officers and men of Eastern Nigerian origin. This is genocide.
> Gowon plotted and carried out the wholesale massacre throughout Nigeria of persons of eastern origin in September 1966, killing more than 30,000 defenceless men, women and children. This is genocide.
> Gowon, in 1966, organised the pillage and destruction of properties belonging to Eastern Nigerians in Northern Nigeria. This is genocide.
> Gowon's genocidal acts precipitated the mass exodus of millions of Eastern Nigerians resident in different parts of Nigeria, abandoning all their properties, businesses and means of livelihood. This is genocide. Gowon refused to compensate Eastern Nigerians who had lost all their property as a result of his activity. This is genocide.
> Gowon permitted the wanton destruction of properties, looting and rape throughout those areas of Biafra overrun by his troops. This is genocide.
> Gowon ordered the forcible transfer of Biafran children from their homes in Biafra to Nigeria. This is genocide.
> For all these acts, Gowon stands condemned for genocide-a crime condemned by the civilized world under international law, a crime against humanity, a crime against God".

Ibid, p.241.

[174] For a background to the events see: 14 Keesing's, 1963-64, pp.19297-19303.

[175] 16 Keesing's, 1967-1968, p.21893.

[176] Ibid.

Numerous reports alleged that the Egyptians used poison gas against royalists and dissident republican villages.[177]

It must noted that in January 1963, the contending parties agreed 'to respect' the 'principles of the Geneva Conventions'. Boals suggests that:

> "These pledges appear to go beyond acceptance of the provisions of Article 3 and supports a more far-reaching interpretation of the obligations of the parties with respect to the laws of war than might otherwise be the case in an internal conflict".[178]

However, the practice of the warring factions in the field diverged from what was proclaimed. This situation led Boals to concede that:

> "...[I]nternational law was extremely ineffective in regulating the conduct of the parties in the Yemen internal war and hostilities went forward largely without reference to applicable standards of conduct embodied in existing or evolving State".[179]

It seems to me that foreign intervention was a factor which accentuated the suffering of the civilian population and made the war more cruel. As Stookey stressed that:

> "Yemen, in effect, again had two regimes under respective sponsorship of rivals for influence in the Arab world".[180]

It was those foreign powers who introduced sophisticated arms capable of mass destruction, which had previously been unknown and prohibitively expensive in the under developed and tribal Yemen.

1.2. Captured Combatants

As we have seen, during the Geneva Conference in 1949, States have rejected conferring the status of POW on captured insurgents since this will mean, among other things, that they have to :

> "...[R]epeal their treason laws and confer on their domestic enemies a licence to kill, maim or kidnap security personnel and destroy security installations, subject only to honourable detention as POW's until the conclusion of the internal conflict".[181]

In the eyes of established Governments, the extension of the POW status to captured insurgents, would encourage rebellion and insurrection since the personal risks of those who

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[177] Ibid.

[178] K. Boals: The Relevance of International Law to the Internal War in Yemen, in Falk (ed.), op. cit., supra. chapter 2, n.8, p.315.

[179] Ibid, p.313.

[180] R.W. Stookey: The Politics of the Yemen Arab Republic. Westview Press, Boulder, Colorado, p.232. See also: M.A. Zabarah: Yemen: Traditionalism vs. Modernity. Praeger Pub., New York, 1982, pp.72-85; and R.D. Burrowes: The Yemen Arab Republic: The Politics of Development: 1962-1986. Westview Press/Croom Helm, 1987, pp.22-27.

[181] W.A. Solf: The Status of Combatants in Non-international Armed Conflicts under Domestic Law and Transnational Practice. 33 AULR, 1983, p.59.

rebel are greatly diminished. Therefore, even when insurgents carry out their operation in conformity with the laws of war, they are not immune from prosecution upon capture. Common Article 3 of the Geneva Conventions, in fact, does not take away the right of the established Government to prosecute its enemies according to its own laws, it only forbids summary executions without trial.

Hence, the law in the words of Myrowitz:

> "...[G]ives the Government in power a very strong protection, establishing for their benefit, a discrimination whose most striking expression consists of the fact that the law of civil war ignores the status of the prisoner of war" [182].

The practice, however, shows that in some cases of large-scale civil wars, Governments and especially insurgents, try at lease on a **de facto** basis to grant the status of POW's to their respective captured combatants.

A typical case is Nigeria, where the Federal Government extended on a **de facto** basis, a treatment similar to that of POW's to captured Biafran soldiers. They were not prosecuted for the sole act of taking arms against the legal Government.

The Military Code of conduct for the Nigerian army issued by the Federal Government in July 1967, suggests that in all their actions against the rebels, the Federal army has to observe the rules contained in the Geneva Conventions and on the more specific question of POW's. The Code stipulates that:

> "Soldiers who surrender will not be killed. They are disarmed and treated as POW's. They are entitled in all circumstances to humane treatment and respect for their person and their honour". [183]

However, since only 'surrendered soldiers' can be treated as POW's, the number of those who can enjoy it would be insignificant due to the hatred between the two warring factions.

It must be pointed out that the situation in Nigeria was bad for the captured combatants. In his interim Report of January 17th, 1969, the representative of the UN Secretary-General in Nigeria expressed his concern for the POW's. He stressed that:

> "...[R]elatively few prisoners had been taken in the course of the war". [184]

He then described their treatment as follows:

> "The care and custody of the POW once they had been moved away from the divisional areas was assigned to the civil prison authorities and consequently POW were subjected to much the same regime as common law offenders and civilian detainees. The limited prison facilities resulted in extreme overcrowding and the available medical services were inadequate. Prisoners also lacked opportunities for exercise and spent too little time in the open". [185]

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[182] H. Myrowitz: The Law of War in Vietnam, in Falk (ed.), op. cit., supra. chapter 2, n.8, p.521.

[183] Cited by A. Rosas: The Legal Status of POW's. Suomalainen Tiedeakatemia, Helsinki, 1976, p.197.

[184] Op. cit., supra. n.164, p.91.

[185] Op. cit., supra. n.165, p.92.

Moreover, Biafra had never indicated its views on the applicability of the Geneva Convention to the war, either in toto or only Article 3. However, in relation to POW's, Rosas argues that:

> "...[I]n view of her general position on the legal nature of the conflict, it may be assumed that Biafra acknowledged, as a minimum, the applicability of the customary law relating to POW's".[186]

It seems to me, that the practice in general indicates that when the conflict intensifies and the insurgents became capable of sustaining a prolonged war, the situation will lead the established Government to treat captured insurgents as POW's at least, on a de facto basis, in the hope that the insurgents will reciprocate, therefore protecting Government soldiers.

At the same time, the Government would play down any legal significance of such moves by insisting that only humanitarian norms are behind its actions. On the other hand, and as a general rule, insurgents frequently seem willing to grant POW status to captured Government soldiers, despite their scarce resources. The political and legal significance of such moves are clear. They made the insurgent organizations appear respectable and capable of assuming obligations like Governments.

Guerrilla organizations even liberate captured soldiers when unable to maintain them. In this context, Che Guevara stated the policy of the Cuban insurrection as follows:

> "What can never be done is to keep prisoners unless a secure base of operations invulnerable to the enemy has been established. Otherwise prisoners will become a dangerous menace to the security of the inhabitants of the regions or to the guerrilla band itself because of the information he can give upon rejoining his army. If he has not been a notorious criminal, he should be set free after receiving a lecture".[187]

1.2.1. Algeria

The FLN in Algeria insisted throughout the conflict that it had conferred POW status on French soldiers. The FLN also issued a detailed procedure to be followed by its forces in cases of capture of French soldiers,[188] and in its 10 commandments of the Armée de Libération Nationale (ALN), the military wing of the FLN, the combatants were instructed to 'se conformer aux principes de l'Islam et aux lois internationales dans la destruction des forces ennemies'.[189] It is well known that according to Islam, the captives must be treated well and in a good manner.[190] A well-known military Commander wrote in the FLN newspaper "El Moudjahid":

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[186] Op. cit., supra. n.183, p.196.

[187] E. Che Guevara: Guerrilla Warfare. Penguin books, p.49.

[188] Op. cit., supra. n.152, p.196.

[189] Cited by M. Veuthey: Guerrilla et droit humanitaire. Henry Durrant Institute, Genève, 1976, p.202.

[190] In this respect, see: M. Khadduri (translation and Introduction): The Islamic Law: Shaybani's Siyar. The John Hopkins Press, Baltimore, Maryland 1966, pp.75-138 and Sheikh Abdul-Aziz Khayyat: International Humanitarian Law and Islamic Law. First Arabic Middle East Seminar on International Humanitarian Law, Amman, 5-13 April 1981, Report presented by the ICRC and the Jordanian National Red Crescent Society, 1981, pp.131-32.

> "L'ALN s'est toujours efforcée de traiter le plus humainement possible les prisonners Français. Nos Moudjahidines vont jusqu'à sacrifier leur maigre confort au profit des soldats capturés".[191]

However, the French Government refused for a very long to grant POW status to the captured rebels, they were treated as common criminals and they were often sentenced to death for terrorist activities.[192] Torture and various forms of inhumane treatment of captured insurgents and suspects were systematically resorted to. In this context, Hutchinson wrote that:

> "...[P]unishment, often in the form of physical torture was meted out to guilty and innocent alike in contrast to the more discriminating and subtle violence of the FLN".[193]

In fact, numerous cases of alleged beatings, torture and starvation of prisoners in order to extort 'confessions' had been cited in the French press and even in the debates of the French Assemblée Nationale.[194]

On the other hand, it must be pointed out that the continued policy of France in executing the captured insurgents led the FLN to declare on April 30th, 1958 that the insurgents would 'respect the laws of war only if the enemy does the same'[195] and that a French soldier would be shot for every rebel guillotined. Thus, the FLN resorted to the execution of French soldiers on at least two occasions (in May 1958, two POW's) and in August 1960. It must be noted, however, that the FLN tried to justify these executions not as reprisals but rather as punishments meted out by special courts of the Liberation Army for alleged war crimes committed against the civilian population such as torture, rape and murder.[196]

In general, it seems that the FLN has tried very hard to comply with the details of the third convention despite the harsh conditions of guerrilla warfare, which made it very difficult to organize and maintain POW camps. The FLN sent lists of POW's captured by its units; prisoners received parcels from their families; were able to send letters and tape recordings and in one instance, at least the ICRC was able to visit captured French soldiers. This occurred in 1957. The FLN also handed over to the ICRC on January 11th, 1958, four French soldiers.[197]

In the later years of the war, France began to change its attitude toward the problem of

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[191] Op. cit., supra. n.189, p.202.

[192] In this respect, see 10 Keesing's, 1955-1956, p.14432A, and particularly, Y. Saadi: La bataille d'Alger., Vol.1 (L'embrasement). ENAL, Alger, 1984, pp.229-245.

[193] M.C. Hutchison: Revolutionary Terrorism: The FLN in Algeria, 1954-1962. Hoover Institute Press, Stanford Univ, Stanford, California, 1978, p.128.

[194] 11 Keesing's, 1957-1958, p.16556.

[195] Ibid.

[196] Op. cit., supra. n.183, p.147 and also M. Bedjaoui: The Algerian Revolution and the Law. Brussels 1961, p.215.

[197] Keesing's, op. cit., supra. n.194, p.16556.

captured rebels. They (the French) allowed the ICRC to visit camps and prisons on at least 10 occasions. Thus, on January 13th, 1959, some important measures of amnesty and clemency for Algerian captives were announced. It was decided that:

1. All persons condemned to death would have their sentences commuted to life imprisonment (179 persons were to benefit from this measure).
2. Seven thousand suspects would be released from the internment camps in Algeria.
3. Sentences on all Algerian rebels, other than those on whom the death sentence had been passed or those serving terms of less than three months, would be reduced by one-tenth.
4. Rebels serving sentences of three months or those who had been wounded in military operations, would be immediately released, etc.[198]

On January 19th, 1959, it was announced in Algeria that 7,188 suspects had been released from internment camps in application of the amnesty.[199] These measures it must be stressed, were essentially taken to mark the beginning of General de Gaulle's seven year presidential office. They were politically motivated and they did not in any way amount to a recognition of the POW status since captured insurgents were still considered criminals. However, a partial recognition of the status of FLN POW's came indirectly, and under strict conditions, in 1959 in a memorandum to the French Minister of Justice. In this context, a member of General Massu's staff declared that:

> "Rebels captured with guns in their hands, guiltless of any crimes before joining a rebel group are not prosecuted but are interned in military camps. They are treated as members of an enemy army".[200]

In practice, this means that insurgents in order to benefit from such treatment, the captured insurgents must satisfy the conditions of Article IV/2 (a) of the third Geneva Convention.[201] The implication is that the irregular forces of the FLN, members of the OCFLN who work among the population and do not bear arms or carry weapons, would still be treated as terrorists.

The Algerian case suggests that even the elementary humanitarian rules of Common Article 3, were not respected especially in the first period of the conflict. Summary

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[198] 12 Keesing's, 1959-1960, p.16628.

[199] Ibid.

[200] Op. cit., supra. n.161, p.54.

[201] Article IV/2 (a) provides, inter alia, that:

> "2. Members of other militia and members of other volunteer corps, including those of organized resistance movement, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militia or volunteer corps, including such organized resistance movement, fulfil the following conditions:
> (a) That of being commanded by a person responsible for his subordinates;
> (b) That of having a fixed distinctive sign recognizable at a distance;
> (c) That of carrying arms openly;
> (d) That of conducting their operations in accordance with the laws and customs of war.
>
> Friedman, op. cit., supra. chapter 3, n.17, pp.590-591.

executions in the field, torture and inhumane treatment were used systematically.[202] in this context, a close confidant of General de Gaulle who worked in Algeria from 1958 until 1962 wrote:

> "Quand, dans une situation comme l'Algérie, la justice, si je peux dire, légale, ne peut plus faire entièrement face à sa tâche, qu'elle est encombrée et que son nécessaire formalisme laisse impunis des crimes certains, il se forme une justice parallèle".[203]

He then added that:

> "On n'envoie plus les gens devant les tribunaux on les interne, ou, si le cas est grave, ils sont censés avoir été abattus en cherchant à s'enfuir. Et comme la lenteur de la justice affaiblit beaucoup l'exemplarité de la repression, on cherche par d'autres moyens à rendre celle-ci terrifiante: l'habitude s'était prise ainsi, à une époque d'exposer sur la place des villages les cadavres des terroristes abbatus. Sinistres pratiques, dont on peut penser que, plutôt que d'inspirer la crainte elle attisait les haines".[204]

It must be noted that even when France recognised the limited protection from prosecution for a limited number of FLN soldiers only a small number of captured insurgents had benefitted from it. Thus, at the close of conflict, they were only 3600 persons. On the other hand, no formal acknowledgement of POW status was declared by the French Government, the latter tried to make sure that no legal status was given to the FLN.

However, it seems that the FLN in general was willing, despite their limited resources, to apply the whole third Geneva Convention, especially from 1958, the year of establishment of the GPRA. Of course, the benefits from such a course of action were evident, since in practice, it is the French who held a large number of FLN soldiers and sympathizers; also from a legal and political viewpoint, it enhanced the cause of the FLN.

1.2.2. Vietnam

In Vietnam, the most significant factor is the enormous divergence between what the Government issued as standards of behaviour towards captured enemy soldiers and the atrocities committed by the army in the field.

Thus, the Republic of Vietnam armed forces guide book for handling combat captives stated that:

> "Viet Cong have been warned by their commanders that once we capture them, we will kill them. Therefore, captured VC's are 'wise' to seek a quiet death rather than be tortured...We must make them realise that they have been subjected to false VC propaganda by handling them in a good manner".[205]

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[202] See in this respect: D. Amrane: L'extention de la lutte armée pendant les premières années de la guerre de libération nationale, in: Le retentissement de la Révolution Algérienne. Colloque international d'Alger (24-28 Nov. 1984), ENAL, Alger, 1985, pp.90-108. See also H. Greer: A Scattering of Dust. Hutchinson of London, 1962, pp.150-181.

[203] B. Tricot: Les sentiers de la paix: Algérie 1958-1962. Plon, Paris, 1972, p.85.

[204] Ibid.

[205] Cited by R. Miller (ed.): The Law of War. Lexington Books, Lexington & London, and D.C. Heath & Co., 1975, p.167.

Moreover, in a wallet-size plastic card which was written in Vietnamese and was given to the Republic's army, it stated that:

> "When a communist rebel prisoner is captured he will be treated humanely by you although he is not recognized as a POW in accordance with the meaning normally used internationally...do not seek revenge under any reason".[206]

In substance, the South Vietnamese, who collected a great number of prisoners, were not prepared to grant POW status to their captives. However, they indicated they would implicitly conform to Article 3 since the captured are to be treated humanely. Furthermore, the evidence suggests that the standards of humane treatment were not adhered to by the South Vietnamese Government. Thus, the Viet Cong captives were executed in the field, or tortured to death,[207] revenge was the norm.

The issue of treatment of detainees was raised with regard to the Provincial Interrogation Centers. These centers were built by American funding, (44 centers were built) and were run by the Vietnamese special police who specialised in interrogating VC suspects. They were advised directly by the CIA. The Vietnamese police, as Guenter Lewy remarked that:

> "...[W]as not a highly professional organization and the South Vietnamese generally were reputed to have a low regard for human life and suffering".[208]

However, it seems that the inhuman practices of the South Vietnamese army towards captured Viet Cong insurgents, which were largely reported by the mass media, have led the US staff advisers and comman personnel to persuade their Vietnamese allies to change their politics and practices. The Americans stressed to their allies that they had overlooked the value of trying to gain military intelligence from their captives.[209] It must also be noted that the Americans would greatly benefit from that change of policy since American prisoners in the hands of the insurgents would not be the object of reprisals and it would give them a favourable international propaganda.

Nevertheless, the practice of the US forces **per se** toward captured Viet Cong soldiers, reveals two distinct periods. In the first period, Viet Cong soldiers captured by US forces were simply turned over to the South Vietnamese in the field, the latter resorted to acts of

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[206] Ibid.

[207] The evidence is abundant. The Christian Science Monitor of Feb. 5th, 1967 reported that:

> "There have been news reports and pictures of rough treatment of prisoners by the South Vietnamese military units in the field. There also have been substantial accounts of on-the-spot executions of prisoners. Torture of prisoners in the field has not been uncommon".

[208] G. Lewy: America in Vietnam. OUP, New York, 1978, p.285.

[209] In this context, Lewy wrote that:

> "Most American advisers, it appears tried to get across the proposition that the use of force was not productive of reliable intelligence and even though the South Vietnamese were not always receptive to this advice, there is reason to think on the whole, American influence helped somewhat to mitigate the cruelties to be encountered in any civil war".

Ibid, p.288.

summary execution and maltreatment. This led to accusations of the US that it had violated Article 12 of the third Geneva Convention,[210] and as result, captured North Vietnamese and Viet Cong fighters were sent to American divisional headquarters and kept by the Americans. They would then be transferred to the South Vietnamese only when a new POW's compound was made ready.

The US Commander in Chief in Vietnam stressed that:

> "These prisoners are not being mistreated. They are handled in accordance with the Geneva Convention".[211]

Moreover, every American soldier was issued with an instruction card for the treatment of prisoners. It is directed that prisoners were to be handled 'firmly, promptly, but humanely'.[212] Furthermore, 'mistreatment of any captive is a criminal offence',[213] and lastly it is stressed in the same card that 'whether civilians or combat captives' they are to be protected against 'violence, insults, curiosity and reprisals of any kind'.[214]

It must also be noted that the US tried very hard to encourage the North Vietnamese and the Viet Cong to treat its captured soldiers as POW's by indicating that it will act reciprocally. In this context, Directive 20-5 of September 21st, 1966 (as amended on December 16th, 1966), the US Military Command in Vietnam (MACV) indicated that in addition to the persons qualifying under Article 4 of the Third Geneva Convention, the protection of the latter Convention was to be extended to:

> "1. Persons who are captured while actually engaging in combat or a belligerent act other than an act of terrorism, sabotage or spying against the Republic of Vietnam or the United States and other free world military assistance force.
> 2. Any captive member of the North Vietnamese armed forces or of the Viet Cong, whether captured in combat or not, except a terrorist, saboteur or spy".[215]

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[210] Article 12 of the Third Geneva Convention stipulates that:

> "POW's are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the detaining power is responsible for the treatment given to them.
> POW's may only be transferred by the detaining power to a power which is a party to the convention and after the detaining power has satisfied itself of the willingness and ability of such transferee power to apply the convention. When POW's are transferred under such circumstances, responsibility for the application of the convention rests on the power accepting them while they are in their custody.
> Nevertheless, if that power fails to carry out the provisions of the convention in any important aspect, the power to whom the POW's were transferred shall, upon being notified by the protecting power, take effective measures to correct the situation or shall request the return of the POW's. Such requests must be complied with".

Friedman, op. cit., supra. n.201, p.594.

[211] Cited by H.S. Levie: Maltreatment of POW's in Vietnam, in Falk (ed.): The Vietnam War and International Law. Vol.2, PUP, Princeton, New Jersey, 1969, p.378.

[212] Op. cit., supra. n.141, p.512.

[213] Ibid.

[214] Ibid.

[215] Whiteman, op. cit., supra. chapter 1, n.5, Vol.10, p.216.

Similarly, in a reply to a letter from the ICRC concerning the application of the Geneva Convention of 1949 to the hostilities in Vietnam, the US Secretary of State, Dean Rusk wrote that:

> "Among the particular measures being taken to implement the convention at the present time, the United States Government is developing plans to assist the Government of the Republic of Vietnam to expand and improve facilities and procedures to process and care for an increased number of captives taken in combat. The two Governments are also increasing programs of instruction for personnel in the details of the provisions of the Convention".[216]

However, despite this official policy, information existed, and it is well-documented, as to the atrocities of American troops in the field where the policy of 'body count' was followed.[217]

As to the insurgents (the NLF) their policy was at first Stated in general terms. It stated that:

> "The NLF applies a lenient policy toward military men and members of the enemy administration as well as toward captured foreigners, including Americans".[218]

The NLF explained that policy on the ground that the majority of the military men in the southern army were workers, peasants and labourers who came from the poorer strata and who have been induced or forced to enlist.

This policy was, in fact, confirmed by a letter from 90 men captured in June 1962, they wrote:

> "We have been well treated by the revolutionary soldiers. They appeared before us with a smile, full of clemency and humanitarianism...we, victors and vanquished, have been living together with fraternity and full affection".[219]

In its programme of 1967, the NLF made its policy towards enemy prisoners clearer, 'captured officers and soldiers of the puppet army will enjoy humane treatment and leniency...captured US and satellite troops will receive the same treatment as captured puppet troops'.[220]

The NLF also delivered to every captured American soldier a declaration in English which explained their policy toward them. The Declaration stated specifically:

> "1. POW's are not maltreated or insulted.
> 2. POW's shall receive sufficient food, receive care when they are ill or wounded.
> 3. They have occasion to understand that the liberation forces are not 'rebels' but organized and disciplined patriots struggling for peace, independence and democracy, for friendship with all peoples of the world including the American people, for a free and happy life without the U.S. monopolists and their valets in South Vietnam.

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[216] Ibid, p.245.

[217] See also supra. n.141, pp.512-13, supra. n.183, p.172 and supra. n.208, pp.50-73.

[218] D. Pike: Viet Cong. The MIT Press, Cambridge, Mass., London, 1966, p.259.

[219] Ibid.

[220] Op. cit., supra. n.183, p.174.

4. They shall be liberated."[221]

Besides, it seems that primitive prisons were maintained by the NLF. They were small and transient, their favourite place was the jungle which was an ideal place for hiding.[222] It appears that US servicemen were treated humanely. However, the South Vietnamese were subjected to some indignity. Treatment of prisoners were in general subject to their co-operation and participation in the seminars organized by the political officers in the camps. They were in practice, courses of political indoctrination.

The NLF, it must be noted, has resorted in some instances to the killing of American prisoners.[223] The killings were specifically justified as reprisals against the execution of the Viet Cong soldiers by the US forces.[224] The US considered these reprisals as murder and violations of the third Geneva Convention.[225]

On the other hand, it must be made clear that throughout the conflict the NLF has never committed itself to be bound by the obligations contained in the third Geneva Convention, Rosas thinks that 'the NLF committed itself to certain humanitarian principles, presumably akin to customary international law'.[226]

The conclusion is that in Vietnam, the internal elements of the struggle played a significant role in the conduct of the principal parties of the struggle, (the NLF and the Government of South Vietnam) towards captured soldiers of both sides. The hatred and cruelty that accompanied internal conflicts was obvious in the conduct of the South Vietnamese despite official statements made under US pressure.

However, the insurgents, for obvious political and propagandist reasons, abstained from massive inhumane treatment of the South Vietnamese prisoners. Instead they resorted to political indoctrination in the hope of giving the newly captured prisoners a new outlook on Communism.

1.3. The Wounded and Sick

Article 3 states simply that the sick and wounded shall be cared for. In fact, it repeats in general, the customary principle codified in the 1864 Geneva Convention. Article (3) contains no further explanation on how, what and who should give that protection. In

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[221] Op. cit., supra. n.218, p.267.

[222] For a detailed description of the camps and daily life in them, see Miller, op. cit., supra. n.205, pp.172-174.

[223] Op. cit., supra. n.218, p.267.

[224] Op. cit., supra. n.205, p.332.

[225] The Director of the Office of News in the US State Department stressed on Sept. 27th, 1965 that:

> "These murders not only violate the sense of decency of all civilized men but are also in direct violation of the prisoners' provisions of the 1949 Geneva Convention by whichthe Viet Cong masters, that is the Government of Hanoi, is bound. Article 13 of the Geneva Convention expressly prohibits reprisals against prisoners".

Op. cit., supra. n.205, p.333.

[226] Op. cit., supra. n.183, p.175.

particular, there is no protection of those who try to give assistance to the sick and wounded.

The ICRC in its report submitted to the CGEDHL in 1972, summed up the practice vis-à-vis this section of victims of international wars as follows:

> "Improper knowledge of the rules of humanity combined with partisan quarrels, too often interfere with the free exercise of the medical profession in internal conflicts. It endangers the lives of doctors and nurses and hampers the availability of medicaments and dressings. In the long run it is the wounded and sick who suffer, while they should be kept out of the fighting".[227]

It must be stressed that in practice, it was the insurgents who suffered most since the established Government had resorted to banning sale to them of certain medicaments. It was a crime to aid wounded and sick insurgents. Moreover, generally speaking the Government had at its disposal hospitals to care for its wounded personnel.

Che Guevara stressed that the insurgents must treat wounded enemies with care and respect 'unless his former life had made him liable to the death penalty in which case he will be treated in accordance with his desserts'.[228]

1.3.1 In Vietnam

Miller summarised the situation as follows:

> "It appears that concern for collection and protection of the wounded and sick was among the few principles of the Geneva Convention honoured in spirit, if not the letter, of the law".[229]

To him, mistreatment of the wounded combatants was not a major characteristic of the Vietnam war, the explanation given is that:

> "...[B]oth Vietnamese and US cultural values and published policies debate compassion for the wounded and sick of any nationality".[230]

Therefore, US personnel were instructed not to refuse medical aid.[231] However, atrocities were not absent from time to time.[232]

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[227] Op. cit., supra. n.100, p.53.

[228] Op. cit., supra. n.187, p.49

[229] Op. cit., supra. n.205, p.194.

[230] Ibid.

[231] Op. cit., supra. n.141, p.512.

[232] It appears that:

> "...[U]nlike American casualties, who were taken directly by helicopter to large hospitals with full surgical facilities, it was the practice to interrogate wounded Viet Cong and North Vietnamese soldiers before evacuation while providing first aid for one badly hit Viet Cong. I was told by a senior officer, 'We just need to keep him alive for a few minutes so we can question him, after that he can die, it does not matter'. On another occasion, an intelligence officer, objected to my giving morphine to a wounded prisoner, saying 'I think they talk better when they are in a little pain".

It should also be pointed out that aerial bombardment resulted inevitably and in many instances, in big numbers of civilian wounded and sick who were not collected and cared for; coupled with the inadequacy and lack of medicaments this resulted in many wounded and sick being left to die.

1.3.2. In Algeria

France in fact tried from the beginning of the conflict to establish a 'blocus sanitaire' against the insurgents. From 1955, the French Government forbade the sale of certain medicaments which were used to treat injuries. Chemists were ordered not to deliver medicines or surgical instruments without medical prescriptions. The identity of buyers and their addresses had to be taken. Doctors too, who assisted an Algerian whose injuries were suspect had to take all necessary information i.e. name, address, names of those who accompanied him, failing to do so would result in prosecution. Thus, an Algerian doctor (B.M. Zemliri) was sentenced to 8 years imprisonment for having assisted a wounded insurgent.[233]

Hence, assistance to injured insurgents and the banning of the free sale of medicine which were necessary for any effective protection of the wounded may be used as an element of the whole strategy of war against the insurgents. Veuthey went even further when he suggested that 'on ne cherche qu'à blesser plutôt qu'à tuer, dans le but de surcharger la troupe et les services sanitaires adverses'.[234]

It must be noted that it is the insurgents who were the hardest hit by this practice since they lacked hospitals, medicines and trained medical personnel. In one instance, Fidel Castro in July 1958 released without any conditions 253 wounded regular soldiers; the main reason being that the insurgents were not in a position to care for them because of lack of medicines.[235]

The practice shows that in many instances collaboration between the insurgents, the established Government and the ICRC in respect of the wounded and sick was possible. No party used such attitudes to infer some legal status for the insurgents, indeed in these circumstances it is the humanitarian ideals which play the leading role.[236] On the other hand, it appears that in some instances, the ICRC medical teams, material and vehicles that were used to assist the wounded and sick were the object of attack (especially in the Lebanon).

However, in general it seems that the ICRC was able, despite these problems, to do a

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Cited by Veuthey, op. cit., supra. n.189, p.181. The Evening Standard in Washington of June 30th, 1965 reported that:

> "It is a hard fact of war in South Vietnam that hospitals become a target for both sides. Vietnamese troops rate the destruction of Viet Cong hospitals probably higher than anything short of killing Viet Cong troops.

[233] Op. cit., supra, n. p.182.

[234] Ibid, p.181.

[235] Ibid.

[236] The ICRC Worldwide 1986, pp.14 & 17.

superb job in this area (the protection of the wounded and the sick). In its worldwide report of 1986 the ICRC stressed that:

> "The tasks of the ICRC Medical Division have diversified to keep pace with the changing nature of warfare since the end of the Second World War. In addition to meeting the priority need for medicines and medical supplies to treat the wounded, a global approach was adopted to the health problems affecting the victims such as epidemics, inadequate hygiene conditions and poor nutrition".[237]

It seems to me, that since all cultures of the world encourage compassion for the sick and wounded, it is difficult, especially morally, to use claims of sovereignty and non-intervention to bar the necessary assistance to such victims. Any such attempts must be condemned as being against the very basis of the idea of humanity.

Even if Article 3 does not expressly protect those persons involved in assisting and caring for the sick and wounded, it would be morally wrong to build an argument on such absence of protection (of medical personnel) in that Article, in order to try those persons as having committed a crime against the State. This explains in part why in Protocol II, the situation of the wounded and the sick had been improved dramatically. Claims of sovereignty and non-intervention in this instance, go against the idea of humanity itself.

2. The UN Practice and the Protection of the Victims of Internal Wars

The work of the UN has been based upon the extension of human rights standards to all kinds of armed conflicts. However, it must be noted that the interest of the UN in civil wars was primarily a reaction to what was happening in colonial wars especially in Africa. Thus, it is primarily politics that brought the attention of the UN to this field.

The first **rendez-vous** between the UN, the **jus in bello** in armed conflicts and human rights took place in Tehran in 1968 on the occasion of the 20th anniversary of the Universal Declaration on Human Rights. Resolution XXIII of May 12th, 1968 stipulated in substance that those who struggled against colonial and racist regimes should, upon capture, be treated humanely and 'if detained should be treated as POW's or political prisoners under international law'.[238] In the same Resolution, it was recognised that the Geneva Convention of 1949 was not sufficiently broad in scope to cover all armed conflicts.

However, from that date the UNGA took it as a custom to recommend each year the application of humanitarian principles, human rights and fundamental rules of the law of war to 'all armed conflict' which could be interpreted as including not only internal conflicts in colonial territories, but also internal conflicts in the strictest sense which occurred in territories of an independent State. The title of these resolutions 'Respect of Human Rights in Armed Conflicts' is revealing. Human rights are to be enjoyed by individuals and groups, in order that these rights can effectively be protected, not only humane treatment is necessary, but some limitations on the methods of means of warfare became necessary as well. If these means do not distinguish between combatants and non-

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[237] Ibid, p.4.

[238] Final Act of the International Conference on Human Rights 1968, Chap. 3, Res. XXIII, May 12th, 1968.

combatants, the protection of the individual and groups becomes meaningless.

Respect for human rights, such as the right to life, which is included both in Article 3 and Human Rights Instruments, would be useless if certain legal restraints on the use of certain methods of war are not imposed. As we have previously seen in this section, the issue is very important in the context of internal wars, since Article 3 does not specifically impose any restraints on the means and methods of war. The UN, through its resolutions, has stressed the necessary link between all these elements in 'all conflicts'.

In this context, the UNGA, despite the controversy around the legal force of its resolutions, has led to the further limitations of the State sovereignty in the sense that means and methods of its war against enemies of the State are not wholly free of limitations, at least theoretically. Resolution 2674 (XXV) of December 9th, 1970 was adopted by 77 in favour, 2 against (Portugal and Brazil) and 36 abstentions. It stipulated that:

> "3. Considers [the UNGA] the principles of the Geneva Protocol of 1925 and Geneva Convention of 1949 should be strictly observed by all States. That States violating these International Instruments should be condemned and held responsible to the world community".[239]

The same Resolution in its 5th paragraph considers that air bombardment of civilians and the use of gas and all analogous liquids, materials, devices and bacteriological weapons constitute a flagrant violation of The Hague Convention of 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949. This meant that all inhuman means of war should be prohibited.

Although the Resolution speaks about obligations between States and not intra-States, there is no question that an effective protection of human beings in times of internal conflicts is not possible without respect of the prohibitions of some methods and means of warfare. This interpretation is somehow confirmed by UNGA Resolution 2677 (XXV) of December 12th, 1970 that was adopted by a majority of 111 in favour to 0 against and 4 abstentions. After the proclamation in the Preamble of the continuing value of existing humanitarian rules to armed conflicts, it is stipulated in paragraph 1 that:

> "...[The UNGA]...calls upon all parties to any armed conflict to observe the rules laid down in the Hague Convention of 1899 and 1907, the Geneva Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts and invites those States who had not yet done so to adhere to those instruments".[240]

No doubt an interpretation in good faith and in accordance with the object and the purpose of the resolution (that is the protection of human rights in all conflicts) would extend the application of the rules laid down in the instruments cited in the Resolution on internal conflicts, since human rights protect individuals and groups, whatever their nationality and without any discrimination.

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[239] 24 UNY, 1970, p.539.

[240] Ibid, p.541.

In Resolution 2853 (XXVI) of December 20th, 1971, after establishing the relationship between the terrible suffering that armed conflict continue to inflict upon combatants and civilians, through the use of cruel means and methods of warfare and through inadequate restraints in defining military objectives. It stressed that the UNGA:

> "...[C]alls upon all parties to any armed conflict to observe the rules laid down in The Hague regulations of 1899 and 1907 and the Geneva Protocol of 1925...etc."[241]

In the Resolution 3103 (XXVIII) of December 12th, 1973,[242] an important segment of internal conflicts that is the colonial wars and wars against racist regimes and alien domination, were elevated to the status of international wars in the sense of the 1949 Geneva Conventions. This means that a very significant portion of victims of internal wars would get a better protection than that provided for in Article 3.

In a series of resolutions, the UNGA tackled the question of the protection of different kinds of victims of war in all armed conflicts. Thus, in Resolution 2676 of December 9th, 1970, (paragraph 5), the UNGA:

> "...[U]rges that combatants in all armed conflicts not covered by Article 4 of the Geneva Conventions of 1949 be accorded the same humane treatment defined in the principles of international law applied to POW".[243]

Although, it is the right of combatants in colonial wars which are solicited here, a correct interpretation cannot preclude the application of the said resolution to all combatants who do not satisfy the conditions of Article 4 of the Geneva Convention of 1949.

Another noted resolution in the field was designed explicitly for the protection of civilians. Resolution 2675 (XXV) of December 9th, 1970 was adopted without any negative vote (109 in favour 0 against and 8 abstentions) which indicate that there is a general consensus among States that this group of victims of war need more protection. The Resolution contained the basic principles for the protection of the civilian population in armed conflicts. There is no insistence upon the kind of conflict which leads to the conclusion that the Resolution covers all internal wars.

The Resolution contains 8 principles[244] which are of great importance in any real

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[241] 25 UNY, 1971, p.428.

[242] Resolution 3103 (XVIII) was adopted by a majority of 83 in favour, 13 against (among them: the US, the UK and France). In paragraph 3, it is stipulated that:

> "The armed conflict involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international conflicts".

27 UNY, 1973, p.553.

[243] Op. cit., supra. n.239, p.540.

[244] The eight principles mentioned in the Resolution are:

> 1. Fundamental human rights, as accepted in international law and laid down in international instruments continue to apply fully in situations of armed conflicts.
> 2. In the conduct of military operations during armed conflicts, a distinction must be at all times between persons actively taking part in hostilities and civilian population.
> 3. The conduct of military operations every effort should be made to spare the civilian population from the ravages of war and all necessary precautions should be taken to avoid injury, loss or damage to civilian population.

protection of civilians. Among these principles, stress is laid down that fundamental human rights as found in international instruments continue to apply fully in situations of armed conflicts. Hence the close link between human rights and humanitarian law is established.

Moreover, the resolution maintained and stressed the customary distinction between combatants and non-combatants. The latter are not an object of attack, they are to be spared from all ravages of war. Furthermore, in Resolution 3318 (XXIX) of December 14th, 1974 which was adopted without any negative vote (110 in favour, 0 against and 14 abstentions) methods and means of war which inflict damage on civilians including women and children are prohibited. The following acts are banned:

A. Attacks and bombings, inflicting incalculable suffering against civilians.

B. The use of chemical and bacteriological weapons in the course of military operations. The reason being that they inflict heavy losses on civilian population including defenceless women and children.

C. All forms of repression and cruel treatment of women and children.[245]

The huge majorities for the adoption of these resolutions attest, in my opinion, to the growing concern and acceptance of States that protection of the victims of war, especially civilians, is vital whatever the character of the war. This has become an issue of international concern and has been taken away from the domestic jurisdiction of States. In other words, the defence of sovereignty and non-intervention can no longer be used to bar the demands of the international community that the civilians must be protected in any given situation of war either internal or international.

It seems to me, however, that the serious developments which took place in the UNGA did not seriously influence Protocol II. The reason is mainly political, since all developments in the UNGA were made under the influence of Third World countries, with their eye on colonial wars.

In the Diplomatic Conference those same States fought very hard for the inclusion of wars of national liberation under Protocol I; once a positive outcome was obtained, these States in general were not ready to continue the same efforts for civil wars because they were generally the threatre for such conflicts. Any far ranging extension of the laws of war to such conflict would only bring foreign intervention and would weaken their monopoly of sovereignty.

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4. Civilian population as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian population should not be the object of military operations.
6. Places or areas designed for the sole protection of civilians, such as hospitals, zones or similar refugees, should not be the object of military operations.
7. Civilian population or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
8. The provision of international relief to civilian population in conformity with the humanitarian principles of the Charter of the UN, the Universal Declaration of Human Rights. The Declaration of Principles for international relief to the civilian population in disaster situations, as laid down in Resolution XXVI adopted by the 21st International Conference of the Red Cross shall apply in situations of armed conflicts and all parties to a conflict should make every effort to facilitate this application.

Op. cit., supra. n.240, p.543.

[245] 28 UNY, 1974, p.646.

On the other hand, it is necessary to point out that the UN practice in the form of its different resolutions, has in effect introduced the vitally important linkage between human rights and armed conflicts in all their diversity. Thus, it was stressed, either directly or indirectly, that respect of the fundamental rules of the law of war, is a necessary condition for the enjoyment of human rights in times of conflict.

There are those, however, who view the UN approach with scepticism. They see in the UN endeavours an attempt to revise the laws of war through the bias of human rights. A typical opponent of such an approach is Meyrowitz, who maintains that:

> "Le confusionnisme n'est pas seulement un vice de la pensée; il est néfaste dans les conséquences pratiques auxquelles il conduit, l'hétérogéneité du droit de la guerre et des droit de l'homme condamne l'idée pronée de divers cotés, et qui a trouvé un écho aux Nations Unis, d'entrprendre par le bias des droit de l'homme la revision du droit de la guerre".[246]

Dinstein also goes in the same direction:

> "In any event international humanitarian law must not be confused with international human rights".[247]

To Dinstein many wartime human rights find their basis in The Hague law and not human rights (such as protection of private property). Humanitarian law also contains many provisions that apply directly to individuals. They are also human rights. It seems to me, however, that there is no doubt that the criticisms are valid in the context of international conflicts but not for internal conflicts.

Thus, the efforts of the UN must be welcomed since respect for fundamental human rights, leads logically and necessarily, in some instances, to the imposition of certain restraints on methods and means of war. These restraints do not exist wholly in Article 3, only the idea of human rights as developed by the UNGA can fill that gap.

The UN has done what the Inter-American Commission on Human Rights has done in Latin America where many excesses and cruelties of civil wars in Nicaragua, El Salvador etc., were condemned as violations of human rights.[248] Thus, the UN, in my opinion has contributed to the creation of the idea that human rights are the essential substance of the rules of war. Therefore, States are obliged to respect the life and freedom of their citizens in the conduct of war by choosing the means and methods of their armed struggle carefully.

This leads me to support what Meron who asserts that:

> "The idea of humanity has become the common denominator of human rights law and of humanitarian law".[249]

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[246] Op. cit., supra. n.126, p.1105.

[247] Y. Dinstein: Human Rights in Armed Conflicts in International Humanitarian Law, in T. Meron (ed.): Human Rights and International Law: Legal Policy Issues. Vol.2, Clarendon Press, Oxford, 1984, p.346.

[248] See N. Buergenthal: Human rights: The Inter-American System. Binder 3, Part 3, Cases and Decisions, Oceana Pub., Inc., Dobbs Ferry, New York 1987, p.67.

[249] Meron, op. cit., supra. chapter 3, n.24, p.14.

He concludes by stating:

> "The fact that these two systems of law [human rights and humanitarian law] have different historical and doctrinal origins and should not obscure the tremendous rapprochement between them which has already taken place".[250]

No doubt the UN was a real force behind such rapprochement, in the context of civil wars, since Article 3 does not specifically contain any restraints on the methods and means of warfare, the contribution of the UN is very important. It established beyond any doubt that the extension of the concept of human rights, if acted upon in good faith by the belligerents, will lead to the imposition of restraints on methods and means of war. This will afford a real protection of all individuals and above all to the victims of internal conflicts.

3. The ICJ and Article 3: the Nicaragua Case

In the Nicaragua Case, the ICJ had, for the first time, an occasion to deal with Article 3. However, it must be indicated that Nicaragua did not invoke that Article, presumably because it feared such a move would be construed that it regarded its war against the Contras as an 'Armed conflict not of an international character', such implication would force the Nicaraguan Government to abide by the rules contained in Common Article 3.

Nicaragua blamed the Americans for the illegal acts of the Contras, since in its opinion, they (the Contras) were financed and directed by the US. In short, they were the creation of the US and the latter must be considered as the responsible party for the Contras' violations of humanitarian rules in general.

However, the ICJ rejected the Nicaraguan logic. It held:

> "The Court does not consider that the assistance given by the United States to the Contras warrant the conclusion that these forces are subject to the US to such an extent that any acts they have committed are imputable to that State".[251]

It then added:

> "It [the Court] held the view that the Contras remain responsible for their acts and that the US is not responsible for the acts of the Contras but for its own conduct vis-à-vis Nicaragua, including conduct relating to the acts of the Contras".[252]

The Court then considered that the conflict as 'not of an international character' between the Contras and the Nicaraguan Government, 'the acts of the Contras toward the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character'.[253] In other words, it is Article 3 that governs the situation. However, the actions of the US in and against Nicaragua were considered to be of an international character.

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[250] Ibid.

[251] Case Concerning Military and Paramilitary Activities in Adjacent Nicaragua (Nicaragua v. United States of America), 25 ILM, 1986, para 110, p.1047.

[252] Ibid, para 110, p.1047.

[253] Ibid, para 219, p.1073.

The Court then made a very important pronouncement concerning the position of the rules contained in Article 3, in international law. It specifically stated:

> "Because the minimum rules applicable to international and non-international conflicts are identical, there is no need to address whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict".[254]

It then added:

> "The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of August 12, 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character".[255]

The Court considered the fundamental rules governing internal conflicts as substantially the same as those applying to international conflicts; in other words it considered that the rules contained in Article 3 as the minimum standard that must always be respected whatever the nature of the conflict.

The Court also stressed that:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defined 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, in the Court's opinion, which reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel Merits, ICJ Report, p.22)."[256]

Hence, the rules of Article 3 are characterized as 'elementary considerations of humanity'. The latter, it must be added, had been considered in the Corfu Channel case as obligatory in times of war and even in peace.[257]

The Court seems to imply, in my opinion, that the rules of Article 3 have become customary international law, or at least general principles of humanitarian law which must be adhered to independently of the Geneva Conventions. The view of the Court is therefore, in my opinion, of great importance since it also establishes beyond any doubt that the rules of Article 3 have become a real derogation from State sovereignty and it (the

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[254] Ibid.

[255] Ibid.

[256] Ibid.

[257] In the Corfu Channel Case, the ICJ stated in fact, that:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

The Corfu Channel Case (United Kingdom v. Alabania) (Merits), ICJ Reports 1949, p.22.

Court) contributed to make the protection of the victims of internal conflicts an international issue. The established Government can no longer claim a monopoly in this area.

However, it must be recognized that the Court's view concerning Article 3 has been the object of criticism by some judges and lawyers. Hence, Judge Jennings noted:

> "Even the Court's view that the common Article 3, laying down a 'minimum yardstick' (paragraph 218) for armed conflicts of a non-international character, are applicable as 'elementary considerations of humanity'; is not free from difficulty".[258]

The same view was expressed by Judge Ago in his Separate Opinion, he was:

> "...[M]ost reluctant to be persuaded that any broad identity exists between the Geneva Conventions and certain 'fundamental general principles of humanitarian law' which, according to the Court, were pre-existing in customary law to which the Conventions 'merely gave expression [paragraph 220] or of which they are at most' in some respects a development".[259]

Meron also was sceptical about the Court's view, he wrote:

> "It is not certain that the rules of Article 3 and of those other provisions match each other perfectly, or that all of those humanitarian principles have necessarily attained the character of customary rules of international law".[260]

In his view, elementary considerations of humanity have not attained the status of customary law and Article 3 was viewed in 1949 as making a 'new step' in the development of humanitarian law. It has no antecedents in earlier Geneva Conventions and the State practice is not very clear.[261]

It seems to me, that the Court can find the State practice not only in concrete situations, where violations are frequent, as we saw above, but also in the practice of international organizations, where representatives of States declare their readiness to respect humanitarian standards, also in different resolutions of the UNGA and since no State can voice its opposition to respect humanitarian principles contained in Article 3, this points to the existence of the element of **opinio juris** of States.

Thus, the Court may be said to have made the obligations contained in Article 3 **erga omnes**. This means that the plea of 'intervention in the internal affairs, has no relevance whatsoever, when humanitarian rules of Article 3 are violated by a given State'.

D. Conclusions

The conclusions concerning this section can be summarised as follows:

1. From the theoretical point of view, Article 3 is the first international attempt to

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[258] Op. cit., supra. n.251, p.1285.

[259] Ibid, p.1108.

[260] T. Meron: The Geneva Conventions as Customary Law. 81 AJIL, 1987, p.356. See also the same author, op. cit., supra. n.248, n.55 at p.48.

[261] Ibid, pp.356-358.

regulate internal wars, in the context of an international treaty. Whatever its shortcomings and low impact in practice, it is a fundamental derogation from the State sovereignty. The Nicaragua Case seems to imply, as we have seen above, that the rules of Article 3 have become a part of customary international law and thus confirmed as a real derogation on State sovereignty.

One may even venture to suggest that the humanitarian rules of Article 3, constitute rules of jus cogens, in the sense of Article 53 of the Vienna Convention on the Law of Treaties (1969). This assertion can be justified partly on the ground that there is no record of a State which adopted a policy of claiming publicly that it is not bound by the humanitarian rules contained in the Article.

States can always claim that the conflict does not fall in the ambit of Common Article 3, but not that the rules contained in it are non-applicable. That is to say, no State can claim that torture, killing, inhumane treatment and summary executions are justified, and are a component part of its policy in dealing with insurgents. I think this is a part of the answer of why the ICJ has not found it difficult to consider the rules of Article 3 as customary rules, or at least general principles of humanitarian law.

2. As to the content of the rules of Article 3, theoretically the influence of the emerging law of human rights is not wholly irrelevant. The law of New York has a very close relations with the law of Geneva, in the context of internal wars. Although, reading many of the rules of the law of war in Article 3, (such as the prohibition of bombardment of open towns and villages, selection of targets of attack and the prohibition of certain kinds of weapons), as some experts in humanitarian law did (even the ICRC),[262] can be implicitly opposed by a strict adherence to the rules of treaty interpretation (Articles 30 to 33 of the Vienna Convention). The UN was able to make that 'reading' by using the human rights approach, since respect for fundamental human rights of persons, resulted automatically in restricting the discretion of States in adopting methods and means of their war against their opponents.

3. It seems to me that the practice shows that the arguments of sovereignty and non-intervention were not used to justify violations of humanitarian rules contained in Article 3. Thus, torture, inhumane treatment and massacres, were never justified on those two pleas.

Therefore, when France was confronted with the publication of leaked ICRC reports (which revealed the brutal truth of the conduct of the French army in Algeria) in Le Monde (dated January 5th, 1960), the Government tried to prevent the spread of the revelations by stopping the distribution of the newspaper. However, when that failed, it tried to limit the damage by abolishing the Fifth Bureau which was responsible for carrying out the atrocities.[263]

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[262] ICRC, League of the Red Cross Societies in collaboration with the Henry Dunant Institute: International Red Cross Handbook. 12th ed., Geneva, July 1983, pp.641-646.

[263] D.P. Forsythe: Humanitarian Politics: The International Committee of the Red Cross. The John Hopkins Univ Press, Baltimore and London, 1977, pp.149-150.

The French Government never tried to justify its actions as necessary for the safeguarding of its sovereignty in Algeria. This leads to an important conclusion, namely that if Governments always use pleas of sovereignty and non-intervention, in the subject of characterisation of the conflict, as we saw in the third chapter, they are not willing to do the same when the matter concerns the substantive rules of Article 3. The reason seems to be that States morally and politically cannot justify either in international or internal conflicts, massacres, torture and inhumane treatment or their sovereign right to use every method at their disposal to win the war.

4. The practice which is not always consistent, however, reveals that the insurgents were almost always the first to declare their readiness to extend more humanitarian treatment, to at least one section of the victims of internal wars, namely, captured combatants. Whereas the established Governments are always reluctant to do the same or, when they do, only on a **de facto** basis.

In this area, I think the plea of sovereignty still wields strong influence, since any action of the established Government in this field may be interpreted as giving legal status to the insurgents.

5. The practice also establishes, that loopholes exist in the substantive rules of Article 3. The generality of those rules and their vagueness, leaves to the belligerents, especially the established Government, a wide room for discretion. The case of the wounded and sick is a point where the only obligations is to care for them. This merely led Governments in practice to prohibit the sale of certain medicines and punishment of those who assisted the wounded and sick insurgents.

Section III: The Protection of the Victims of Internal Wars Under Protocol II of 1977

Introduction

In its documentation submitted to the First CGEDHL (1971), the ICRC pointed out concerning the protection of the victims of internal wars:

> "Indeed, in the course of its practical activities, the ICRC had found that the number and scope of non-international conflicts made it immediately imperative to provide better protection to all victims of hostilities. However, Article 3 had proved, it had been shown to have numerous loopholes, and this made it no longer possible to ensure sufficient guarantees to the victims in question."[264]

This is the ICRC's rationale behind its efforts in providing more protection to the victims of internal wars.

However, in practice the ICRC had at least since 1953 signalled the need for more protection of the victims of internal wars.[265] Moreover, the Teheran Conference of 1968 signalled the beginning of the UN interest in the question of human rights in armed conflict. Thus, the UN added its voice to the need to update humanitarian law, in order to give better protection to all victims of all armed conflicts. The Teheran Conference in fact adopted the well known Resolution XXIII, in which it requested the UNGA to invite the

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[264] Op. cit., supra. n.100, p.7.

[265] Ibid.

UN Secretary-General to study:

> "(a) Steps which could be taken to ensure the better application of existing humanitarian international conventions and rules in all armed conflicts;
> (b) The need for additional humanitarian international conventions or for possible revision of existing conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."[266]

This led the UNGA at its 23rd session, to adopt Resolution 2444(XXIII) of December 19th, 1968, in which it invited the UN Secretary-General, in consultation with the ICRC, to study the possible measures to ensure the better protection of all victims of all armed conflicts without any distinction. This led in effect to the efforts which resulted in the adoption of the two protocols.

However, it must be stressed that many other factors have encouraged the movement for the better protection of the victims of war in general. The whole atmosphere of the 1960s (wars of national liberation, the adoption of the UN two covenants on human rights, and especially the atrocities and the sufferings of the Vietnamese war which were brought alive to the world through the media) have in different degrees led to the movement of development and reaffirmation of humanitarian law, which began in 1969, the date of the first Red Cross Expert Conference.

In this section I will concentrate on the protection of the victims of internal wars, in the context of Protocol II of 1977, in order to see whether new rules and new attitudes of States have changed from the rules and attitudes adopted in the conference of 1949. However, my main concern would be to bring out the influence of the concepts of sovereignty and non-intervention in speeding or retarding the rate of protection of the victims of internal wars.

To do this, my essential method would be the extensive use of the **travaux préparatoires** of the Diplomatic Conference (1974-1977) and sometimes even the use of the discussions which took place in the Red Cross Experts Conferences and the CGEDHL.

To me, this is the best area, where we can clearly see the working of the two concepts (sovereignty and non-intervention) in practice, because to my mind the Draft Protocol II submitted by the ICRC to the Diplomatic Conference has in essence, and in many important issues, placed the dictates of humanity before the demands of sovereignty and non-intervention. This led States to the use of these concepts, either to modify or simply suppress many important rules for the protection of the victims of internal wars.

However, recourse to the subsequent practice in cases of internal wars which are raging now would be undertaken to see whether what was adopted in Protocol II can find a place in practice. In other words, whether Protocol II was an exercise which was far from reality.

On the other hand, it must be stressed that it is only El Salvador which accepted the application of Protocol II to its internal conflict (at least in the opinion of the ICRC). Thus, recourse to other cases like Nicaragua, Sri-Lanka, Angola, Afghanistan, Mozambique and others would be on a de facto basis, since no one of them has accepted the application of the Protocol II to its conflict.

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[266] 25th Anniversary of the Universal Declaration of Human Rights, United Nations Action in the Field of Human Rights, UN, New York, 1974, UN Pub., Sales No.E74, XVI, 2, p.110.

However, before engaging in the study of the points included in this section, a general observation concerning the Drafting of Protocol II is in point, in order to show the important role played by the concepts of sovereignty and non-intervention in the shaping of many important rules of Protocol II.

Thus, two Red Cross Experts Conferences and two CGEDHL led to the adoption by the ICRC of the Draft Protocol II, which was submitted to the Diplomatic Conference in 1974. The Diplomatic Conference after four sessions adopted a Draft Protocol II at the committee level which did not differ substantially from what was proposed by the ICRC.

However, at the last session the leader of the Pakistani delegation, Judge Hussain, submitted another version of Protocol II, the so-called 'simplified version', which was eventually accepted by the conference as Protocol II. That simplified version contained many omissions and weaknesses, compared to what had been proposed by the ICRC, or even of what had been adopted at the committee level during four years of hard negotiations. This sudden change of mind was expressly justified on the grounds of sovereignty and non-intervention.[267]

Thus, the manoeuvring which led to the adoption of the simplified version or 'the Hussain Draft', gives us some illuminating insights into the operation of the two concepts of sovereignty and non-intervention, in the present development of humanitarian law.

A. The Concept of the Victims of Internal Wars in Protocol II

As we have seen in section II of the present chapter, Article 3 of the Geneva Conventions applies specifically to persons taking no part in the hostilities. However, there is no precise specification of the categories involved in that cited category. In other words, the personnel field of application of Article 3 is not explicitly stated.

Protocol II on the other hand seems to me to fill this lacuna by first indicating the different categories of persons who are to be protected, and secondly by stating the normative rules which would apply to those categories. Thus, it stipulates in its Article 2/1:

> "This protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. To all persons affected by an armed conflict as defined in Article 1."[268]

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[267] Thus, Judge Hussain, the Chairman of the Pakistani delegation, explained the rationale behind his initiative, in the following fashion:

> "Its provisions [of Protocol II] must be acceptable to all, and therefore, of obvious practical benefit. The provisions must be within the perceived capacity of those involved to apply them, and therefore, precise and simple. They should not appear to affect the sovereignty of any State party or the responsibility of its Government to maintain law and order and defend national unity, nor be able to be invoked to justify any outside intervention; nothing in the protocol should suggest that dissidents must be treated legally other than rebels; and lastly, there should be no automatic repetition of the more comprehensive provisions, such as those on civil defence, found in Protocol I. To include such provisions would risk changing the material field of application to such an extent that States would either fail to ratify Protocol II or tend to argue for its non-application in situations falling within its scope, thereby leaving the victims of those conflicts without adequate protection".

ORDCHL (1974-1977), VII. CDDH/SR.49, para.11, p.61.

[268] D. Schindler and J. Toman (eds.): The Laws of Armed Conflicts. Martinus Nijhoff, Dordrecht, & Henri Dunant Institute, Geneva, 1988, p.692.

In fact, the protocol applied to the whole territory where the internal conflict is taking place, and without any discrimination. Moreover, because in internal conflicts all elements of the population are affected in one way or another by the conflict, Article 2/1 is a welcome development, since every human being in a country torn by civil strife can be assumed to be an actual, or potential sufferer, whether he is in the area of the conflict **stricto sensu** or not.

Besides, the principle of non-discrimination protects all civilians even foreigners against any ill treatment. Thus, all persons, whether participating or not in the hostilities, are protected against any abuse of power, either by the established Government or the rebels.

It is interesting to note that the ICRC had submitted to the second conference of Government Experts a Draft Article 2, on the personnel field of application, which reads as follows:

> "The present protocol shall apply to all persons, whether military or civilian, combatant or non-combatant, who are in the territory of one of the high contracting parties, where an armed conflict within the meaning of Article 1 of this protocol is occurring".[269]

The ICRC Expert explained that the protocol:

> "...[A]pplied to all persons who were in the territory of one of the contracting parties".[270]

He then added that:

> "This provision seemed necessary since the future protocol had to contain provisions relating to combatants".[271]

This mention of the word 'combatants' led the British Experts to submit a new proposal for a new version of Draft Article 2, which would restrict the personnel field of the protocol to those persons who are taking no direct part in the hostilities.[272]

However, the ICRC submitted to the diplomatic conference a Draft Article 2, which did not differ much from its Draft Article 2 submitted to the CGEDHL in 1972. The Draft Article 2 reads as follows:

> "1. The present protocol shall apply, without any adverse distinction,to all persons,

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[269] CGEDHL, 2nd Session, (3 May-3 June 1972), I. Report on the Work of the Conference, Geneva, pp.121-122.

[270] Ibid, p.121.

[271] Ibid.

[272] The proposed Draft Article 2, submitted by the British Experts reads as follows:

> "1. The benefits and obligations of the present protocol shall apply, without any adverse distinction to all persons taking no active part in the hostilities, including members of armed forces who laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, who are in the territory of a high contracting party where an armed conflict within the meaning of the present protocol is occurring, etc."

2 CGEDHL 2nd Session, 3 May-3 June 1972, Report on the Work of the Conference (Annexes). Geneva, July 1972, p.46.

> whether military or civilian, combatant or non-combatant affected by an armed conflict within the meaning of Article 1.
> 2. Even after the end of the armed conflict, all persons whose liberty has been restricted for reasons in relation to the armed conflict and might not have been released, as well as persons arrested for these same reasons, shall enjoy the protection of Articles 8 and 10 until released."[273]

However, at the committee level many Drafting changes were made,[274] with the final result that the reference to 'combatants' was eliminated. This means in effect that States are still very sensitive to confer any status upon their enemies.[275]

At the committee level (the First Committee) Draft Article 2 was adopted by consensus. However, at least one delegation voiced its unhappiness with the new version of that Article. It was the Holy See which stressed that it:

> "...[I]t did not like the idea of distinguishing between various categories of victims of armed conflicts and regretted that the words 'all persons, whether military or civilian, combatant or non-combatant' had been dropped".[276]

Since in its view they made the scope of the Article wider than that which was adopted.

In the simplified version submitted by Pakistan, no changes were made in the Article (Article 2) adopted by the first committee, which meant that the protocol applies in the words of the ICRC representative:

> "...[T]o everyone, without distinction, affected by armed conflict whatever their nationality-including refugees and stateless persons: human treatment should be the same for all."[277]

However, it seems to me that the personnel field of application of Protocol II is wider than that of Article 3 of the Geneva Convention since it protects "all persons affected by armed conflict"[278] and not only those "hors de combat" . In this context, Rosemary Abi-Saab

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[273] 1 ORDCHL (1974-77), pp.33-34.

[274] See in this context, 10 ORDCHL, (1974-1977), CDDH/I/238/Rev./I, pp.95-96.

[275] In this context, Rosemary Abi-Saab has rightly stated:

> "Les delegations qui avaient émis des réserves à l'egard du champ d'application matériel de l'Article premier, ont émis les mêmes réserves basées sur la souveraineté et le principe du domaine réservé des Etats en matière de droit pénal, particulièrement à l'egard du second paragraphe de cet Article et de la précision attachée aux personnes concernées par le conflit armé, à savoir les personnes 'militaires ou civiles, combattantes ou non-combattantes', qui pouvait laiser entrevoir un statut de combattant".

Op. cit., supra. n.103, p.454.

[276] 8 ORDCHL (1974-1977), CDDH/I/SR, 22, para.44, p.210.

[277] Ibid, para.45, p.210.

[278] M. El Kouhene stressed in his interpretation of the expression of 'affected by the conflict' that:

> "Il semble qu'en égard aux transformations survenues dans 'l'art de la guerre' (guerre totale, participation des civils etc.) on ait voulu donner à l'expression 'affectée par le conflit un sens très large'".

Les guaranties fondamentales de la personne en droit humanitaire et droits de l'homme. Martinus Nijhoff, 1986, p.21.

rightly observes:

> "La suppression des termes 'combattants' est évidemment importante, dans la mesure ou c'était là la distinction essentielle, avec le champ d'application personnel de l'article 3 commun aux conventions, qui lui ne s'applique qu'aux personnes qui ne prennent pas part aux hostilités."[279]

She then adds:

> "On peut dire toutefois que les terms 'toutes les personnes affectées par un conflit armé' sont suffisamment larges pour pouvoir êtres interprétés dans ce même sens, plus large que celui de l'Article 3".[280]

In my opinion, the expression 'persons affected by the conflict' means that even combatants are entitled to at least be treated humanely. This restricts the liberty of the established Government and also the rebels. They have to respect the guarantees and obligations, especially those established in Article 4 of the Protocol II, which I will deal with later in greater detail.

Therefore, it would seem to me that Protocol II considered all the population living in a country torn by civil war as victims of war, to which certain fundamental human rights should apply. This restricts the sovereignty of the Government in dealing with its own nationals.

Thus, Protocol II establishes the first category of victims of war, namely 'all those affected by the conflict' which is indeed very wide as we explained. To this general category, the protocol establishes a general system of obligations and rights.

It also establishes a special regime of protection for other victims, which may be called the **stricto sensu** victims of internal wars. They are:

A. Persons whose liberty has been restricted in connection with the conflict.

B. The civilian population.

C. The wounded and sick, also religious and medical personnel involved in their assistance and care.

However, it must be noted that the Protocol continued the tradition established by Article 3 of the Geneva Conventions. In denying the status of POW's to captured insurgents, in this point the argument of sovereignty carried the day as we will see later.

After this general introduction to the concept of the victims of internal wars, I will deal with the actual norms of protection for each category as established by the Protocol, in order to see the influence and the working of the two concepts of sovereignty and non-intervention.

B. The Fundamental Guarantees of Article 4, the Contents and their Evaluation

Article 4 of the Protocol II stipulates:

> "1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for

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[279] Op. cit., supra. n.103, p.155.

[280] Ibid, p.155.

their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the person referred to in para.1 are and shall be prohibited at any time and in any place whatsoever:
(a) violence to life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any forms of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and slave trade;
(g) pillage;
(h) threats to commit any of the foregoing acts.
3. Children shall be provided with the care and air they require, and in particular:
(a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.
(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated.
(c) Children below the age of fifteen years shall neither be recruited in the armed forces nor allowed to take part in the hostilities.
(d) The special protection provided by this Article to children below fifteen years of age shall remain applicable to them if they take a direct part in hostilities despite the provisions of subpara.(c) and are captured.
(e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and wellbeing."[281]

In fact, Article 4 contains a very complicated set of rules, some of them belong to human rights, some to the Geneva law, and even some to The Hague law. Essentially it was Drafted as Article 6 by the ICRC, it kept the same number in the Draft drawn at the Committee level. However, during the last session, the simplified version eliminated many rules contained in other articles of the Protocol II, especially those which had any connection with means and methods of warfare. On the other hand, some other rules were included in the present Article 4.

The first question which may arise concerning Article 4 is who are the persons protected by it? and the second concerns the content of the rules involved in it.

1. Persons Protected by Article 4

Initially most of the rules contained in the present Article 4 were to be applied to all the population in the country torn by civil strife. Thus, the ICRC submitted to the second CGEDHL three Articles[282] which dealt in detail with the rules contained now in Article 4.

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[281] Bothe et al., op. cit., supra. chapter 3, n.186, p.638.

[282] They were Articles 4, 5 and 6. Article 4 (Torture and ill treatment) provides:

> "In order that the prohibition stipulated in Article 3(1) should obtain its fullest effect, the parties to the conflict shall take all necessary measures to ensure that their military or civilian agents should not commit, nor issue orders to commit, nor condone acts of torture or brutality."

When the ICRC delegate presented those Articles (4, 5 and 6) which were contained in Chapter II of the ICRC Draft, he expressly stated that:

> "Chapter II was devoted to the general protection of the population in the territory of a State where an armed conflict not of an international character was taking place".[283]

He then added that:

> "The subject of the chapter therefore, was not the protection of the civilian population as such...but the prohibition in relation to the general population, of certain cases of ill-treatment already forbidden by the four Geneva Conventions".[284]

This means that essentially the rules are to apply to the whole population without any distinction. It is in reality the extension of the principle of human treatment to cover the whole population, and not only the victims of internal war **stricto sensu.**

The majority of the Experts supported the view of the ICRC and stressed the need for the identity of the rules of protection in internal and international wars. This conception, in their opinion:

> "...[D]id not imply interference in the internal affairs of States, but that Governments should exercise their sovereignty in conformity with humanitarian law standards".[285]

Article 5 (Terrorism, reprisals, pillage), stipulates:

> "1. Acts of terrorism, as well as reprisals against persons and objects indispensable to their survival are prohibited.
> 2. Pillage is prohibited.
> 3.Women and children shall be protected, in particular against rape and any form of indecent assault."

Article 6 (Measures in favour of children) reads as follows:

> "1. Children shall be the object of special protection. The parties to the conflict shall provide them with the care and aid which their age and situations require.
> 2. To this end, the parties to the conflict undertake, at least:
> (a) to ensure the identification of children, particularly by making them wear identity discs;
> (b) to take care that children who are orphaned or separated from their families as a result of armed conflict are not left abandoned;
> (c) to endeavour to conclude local agreements for the removal of children from combat zones; such children shall be accompanied by persons responsible for ensuring their safety; all necessary steps shall be taken to permit the reunion of members of families temporarily separated;
> (d) to take care that children under fifteen years of age do not take any direct part in hostilities.
> 3. The death penalty shall not be pronounced on civilians below 18 years of age at the time when the offence was committed, nor on mothers of infants or on women responsible for their care. Pregnant women shall not be executed."

Op. cit., supra. n.272, pp.16-17.

[283]Op. cit., supra. n.269, para.2.107, p.72.

[284]Ibid, para.2.107, p.73,

[285]Ibid, para.2.110, p.73.

During the Diplomatic Conference, the ICRC submitted Draft Article 6 which contained the fundamental guarantees.[286] In introducing the Draft Article to discussion at the second session in 1975, the representative of the ICRC stressed that Part II of Protocol II, which contained Draft Article 6, was designated to protect 'all persons who took no direct part or who had ceased to take a part in hostilities'[287] and then added:

> "It [Part II] set out to protect all persons affected by the armed conflict without creating special categories of protected persons enjoying special status or treatment".[288]

This meant in his opinion that combatants who were **'hors de combat'** and had fallen into the hands of the adverse party are not to be transmuted into POW.

The conclusion is that the expression in Article 4/1 that 'all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted' has to be interpreted to include all persons in the country where civil war is taking place, and not only the civilian population **stricto sensu**, including combatants who either are **'hors de combat'** or those who still fight, because Article 4/1 in its last paragraph stipulates that 'it is prohibited to order that there shall be no quarter'. Thus, even combatants in the field of operation have some kind of protection.

The effect of this interpretation is once a State accepts the applicability of Protocol II, or rather once the Protocol is said to be applicable to the internal conflict, all persons living in the country are protected, from any actions that may violate their respect for their person, honour and their religious and moral convictions. This interpretation is valid, when it is taken together with Article 2, which stresses as we have seen that the Protocol applies to all those affected by the conflict.

Thus, it seems to me that it is safe to assume that States are under Protocol II more tied than Article 3. Their sovereignty is restricted since all the population is under the protection of an international instrument, and also no plea of intervention can be used against those who demand protection of the whole population.

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[286] Draft Article 6 submitted by the ICRC to the Diplomatic Conference stipulates:

> "1. All persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted are entitled to respect for their person, their honour and their religious convictions and practices. They shall in all circumstances be treated humanely without any adverse distinction.
> 2. The following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) acts of terrorism in the form of acts of violence committed against those persons;
> (d) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (e) slavery and the slave trade in all their forms;
> (f) pillage;
> (g) threats to commit any of the foregoing acts.
> 3. women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault."

Op. cit., supra., n.273, p.35.

[287] Op. cit., supra. n.276, CDDH/I/SR.32, para.3, p.323.

[288] Ibid, para.5, p.323.

2. The Content of the Guarantees of Article 4

The first observation concerning this point is that the rules contained in the Article do not bar the application of national law to persons who may have violated that law.[289] This is a fundamental concession to advocates of the sovereignty of the State, since the Government can always resort to the punishment of those who may try to topple it. Protocol II does not take away that right, it is there. The only obligation as we will see later is to treat them humanely, but there is no prohibition to the application of internal law, which always makes it a crime to take arms against the Government, or try to assist those insurgents who are fighting the Government.

Returning now to the rules included in this important Article (4). The latter essentially tries to fill a loophole in Article 3 of the Geneva Conventions, that is the definition of the notion of humane treatment.

Thus, the ICRC delegate at the Diplomatic Conference specifically stressed the intimate relationship between the provisions of Draft Article 6, and the United Nations Covenant on Civil and Political Rights,[290] and at least one representative expressed the view that the rules included in the Article came closer to the subject of human rights rather than that of humanitarian law.[291]

During the discussion two views concerning Draft Article 6 become clear. The first view was happy with what was proposed by the ICRC, however with some of its supporters advocating some minor Drafting changes.[292]

The second view stressed that some of the rules included in the Draft Article 6 constitute a violation of the principles of sovereignty and non-intervention. Thus, Nigeria, who was among the leaders of the second view maintained that Draft Article 6:

> "...[W]ould appear to be an attempt to destroy the careful balance between internal and international jurisdiction".[293]

To him, there was no obvious reason why the Draft Article should seek to lay down legal rules that are covered already in most domestic systems.

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[289] The ICRC representative made it very clear that:

> "Although it (Part II) laid down rules regarding human treatment of protected persons, it in no way shielded from the application of national law any person who might have violated that law in connection with the armed conflict".

Op. cit., supra. n.267, p.323.

[290] Op. cit., supra., n.276, CDDH/I/SR.32, para.6, p.324.

[291] Ibi, para.18, p.326.

[292] Thus, Poland stated that it:

> "...[E]xpressed satisfaction with the ICRC Draft Article 6".

Ibid, para.17, p.326. See also the statements of Belgium (ibid, para.27, p.328); Australia (ibid, para.26, p.328); Switzerland (ibid, para.299, p.328); Ukrainian Soviet Socialist Republic (ibid, para.33, p.329); UK (ibid, para.39, p.330); and New Zealand (ibid, para.42, p.331).

[293] Ibid, para.21, p.327.

Argentina stressed that it shared:

> "...[T]he concern of some representatives who considered that Article 6 entailed too much interference in national sovereignty".[294]

Thus, we see that to some at least, the inclusion of fundamental human rights and fundamental humanitarian rules can be considered as an intervention in their internal affairs.

However, Article 6 was adopted by consensus after some minor changes had been introduced by a working group and that by Committee I in 1975.

In the explanation of their votes on Article 6, some States continued to raise the question of the incompatibility of the rules of the article with demands of sovereignty and non-intervention. A typical example of this was voiced by Iraq, which strongly attacked Article 6 and other Articles of Protocol II. Its fundamental objection to those Articles is that 'they placed the State and a rebel party on an equal footing'.[295] However, Iraq noted that it was not against the principles included in the Article.

In the simplified version Article 6 became Article 4, it did not change much from what had been proposed by the ICRC and the first committee. However, the Draft Articles on quarter and protection of children (Articles 22 and 32 respectively) were included in the new Article 4.

Article 4 as adopted is very long, it is in effect a small convention in itself. Compared to common Article 3 of the Geneva Conventions, it is extensive in its interpretation of the concept of human treatment.

The concept of human treatment in the article contains many rules which belong to human rights law, Geneva law and even Hague law. The main human rights included are:

1. Respect for the person, his religious and moral convictions.
2. The right to life for those who do not take a direct part in the hostilities. Murder, and cruel treatment such as torture, mutilation or any form of corporal punishments are all prohibited.
3. Protection of women in their dignity, and the children and their right to protection and education.
4. Prohibition of slavery and slave trade.

It must be noted here that many of these rights are covered by international instruments of human rights. Moreover, all the rights mentioned in the article are concerned with the personal and moral integrity of individuals. This means that the article continues the tradition of the human rights instruments in providing that no derogation is possible in the application of these fundamental rights.

Thus, the article stipulates that all acts mentioned in paragraphs 2 and 3 'are and shall remain prohibited at any time and in any place whatsoever'. This is very important since

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[294] Ibid, para.30, p.328.

[295] Ibid, CDDH/I.SR.40, para.28, p.426. On the other hand, the Syrian representative noted that he supported Article 6, because of its humanitarian rules, but he was not happy with the wording of the Article since it implied a strict juridical equality between the Government and the rebels. Ibid, CDDH/I.SR.40, para.4, p.421.

torture, terrorism, collective punishments, and the taking of hostages can be resorted to frequently in internal conflicts, in order to extract information, or as a method of intimidating the population and the insurgents. Moreover, it must be noted that many of the rules of the article derive from the fourth Geneva Convention of 1949.[296]

The Article also contains in its paragraph 1, a rule which belongs to the law of The Hague, it relates to the question of quarter, and makes its withholding prohibited. The prohibition is based on Article 23/D of the regulations of The Hague respecting the laws and customs of war on land.

This is a protection for the soldiers in the field of combat and is a vitally important provision in the context of internal wars, where the hatred between the warring factions is intense. It is argued that this provision indirectly places some restraints upon the methods employed in the conduct of military operations, which may by their effects lead to the extermination of those who are involved in the fighting in specific operations.

It is to be observed that the article not only prohibits the commission of the acts listed in it, but it actually expressly forbids even 'threats to commit any of the foregoing acts' which means that the discretion of Governments in choosing the means of combating the insurgents and vice-versa has been greatly curtailed, in favour of more extension of humanitarian ideas to this inhuman experience (civil wars and their cruelty).[297] The general conclusions concerning Article 4 are as follows:

1. The Drafting history suggests that there is a general agreement between States that they are not against the extension of humanitarian protection to large segments of the population, if not to the whole population. Thus, the personnel field of application of the rules of Article 4 must be seen as wider than Common Article 3.

This conclusion carries with it that the sovereignty of the State has been, in this field at least, restricted since, nearly all the population has certain fundamental rights which derive directly from an international instrument. This in my view is a logical consequence of accepting human rights as a fundamental limitation on State sovereignty.

2. Furthermore, it is argued that the plea of sovereignty and non-intervention were raised not against the rules involved in the Article, which represent in fact some of the most generally accepted principles of civilisation, against which no civilised State can protest, at least publicly, but rather against the implication that the rebels stand as equals to the established Government. However, even that contention was not pushed further, since essentially what was proposed by the ICRC was accepted even in the simplified version of Protocol II.

3. The extension of some fundamental rules of the Geneva law, especially those of the fourth Geneva Convention of 1949, and even of some rules of Hague law, which were applied only between States in international wars, to internal wars is obvious in Article 4,

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[296] Thus, para.2/D is borrowed from Article 33 of the fourth Geneva Convention of 1949 (acts of terrorism); para.2/E from Article 27 (women); para 2/G from Article 33 (pillage). The Preamble of para.3 from Article 32/1; para 3/A from Article 24/1 (education for children); para.3/B from Article 26; para.3/C from Article 50; para.3/E from Articles 17, 24/2 and 50 of the fourth Geneva Convention.

[297] For a general discussion of Article 4, see Sandoz et al., op. cit., supra. chapter 3, n.23, pp.1368-1381.

which means that the sovereignty of the State has been curtailed in some important aspects. Thus acts of terrorism, pillage, taking of hostages and collective punishments are all prohibited.

B. Protection of Detained and Imprisoned Persons

Common Article 3 of the Geneva Conventions did not contain any special protection for persons whose liberty has been restricted for reasons connected with the internal conflict. However, as it has been said when dealing with Article 3 in Section II of the present chapter, the only provision that applies to captured combatants is that they are protected against summary execution. This means that the right of the established Government to punish its enemies in accordance with its own laws is by no means restricted whatever the barbarity of such law.

However, it must be stressed that the accordance of the status of POW to captured insurgents has very grave consequences for the established Government. It gives the rebel organisation respectability and legal status, which no Government dares to admit, because it undermines its authority, and its claim to the monopoly of representing the State.

The accordance of the POW status to rebels is thus seen by the established Government as constituting a big challenge to State sovereignty, and as opening of the doors of the State to foreign intervention. It seems to me, that the **travaux préparatoires** show in a very clear way how the invocation of the principles of sovereignty and non-intervention have in fact killed any attempt to extend POW status to rebels.

1. The Red Cross Experts' View

The Red Cross Experts were not against the extension of what they termed 'POW treatment' to captured insurgents. They stressed:

> "The fact of applying the humanitarian rules to rebels did not amount to a recognition of belligerency. In other words, the fact that they were treated as POW does not give them the status of POW according to the third Geneva Convention, and hence has no effect, in international law, on the status of the collectivity or the authority to which they belong."[298]

Thus, the Experts in fact did ask for the extension of 'POW treatment' to captured insurgents, and not the status of POW, in order to avoid the question of the legal status of the insurgent party, since according to the third Geneva Convention the status of POW is conferred only to captured combatants belonging to a State, as a general rule, or to a resistance movement.

On the other hand, the Red Cross Experts wanted to stress that the efforts to alleviate the sufferings of captured combatants must not prejudice the right of the established Government to withhold the granting of POW status, since it will be seen as a kind of recognition of the legitimacy of the struggle of the insurgents. This means that the Experts tried to pay strong attention to the demand of sovereignty.

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[298] Op. cit., supra. n.100, p.65.

2. The Government Experts' View

It seems that the ICRC has taken into account what has been proposed by its Experts, since it submitted to the second conference of Government Experts a Draft Article 25 which stipulates:

> "Article 25. Treatment of combatants who have fallen into the power of the adversary:
> Members of regular armed forces and members of those armed forces which have fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the treatment of POW of August 12, 1949, shall receive, after having fallen into the power of the adversary, a treatment similar to that provided for POW in the said convention."[299]

This Article in fact has been the subject of a heated discussion in the conference. Two trends can be detected. The first view, although it was not in principle against the idea of extending POW treatment to captured insurgents, was sceptical about the exact meaning of the notion of 'similar treatment' used by the ICRC. To this view it was a vague concept, since in practice it is very difficult to draw the line between those provisions of the third Geneva Convention to be applied under the heading of 'similar treatment' and those which would remain peculiar to the said convention.[300]

The second view was espoused by the defenders of the sovereignty of the State. They attacked the very idea of either placing the captured insurgents on equal footing with POWs captured in international conflicts, or indeed any regulation of their status in an international instrument. To them the insurgents had broken the laws of allegiance by committing the crime of rebellion, which was condemned by every penal code in the world.[301]

However, some Experts suggested that persons who had taken arms against the regular armed forces should be treated humanely 'in accordance with the law', that is the local law. In their opinion, this is the logical solution, since it is in accordance with the principle of respect for territorial sovereignty and in line with the desire to preserve this sovereignty from any outside intervention during an armed conflict.[302]

Thus, the general trend was against the inclusion of any article which may be interpreted as giving some kind of status to captured insurgents. The result was the deletion of Article 25 proposed by the ICRC, which means that demands of sovereignty and non-intervention have carried the day.

3. The Diplomatic Conference Attitude

In proposed Protocol II, submitted by the ICRC to the Diplomatic Conference, no mention was made of the granting of the treatment of POW to captured insurgents. The arguments of sovereignty and non-intervention had killed the ICRC attempt at the level of CGEDHL.

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[299] Op. cit., supra. n.269, p.78.

[300] Ibid, para.2.173, p.79.

[301] Ibid, para.2.172, p.79.

[302] Ibid, para.2.171, p.79.

In fact, the ICRC delegate stated clearly in the Diplomatic Conference in 1975 that:

> "...[C]ontrary to its earlier proposals and in accordance with the recommendations of the Experts it had consulted, the ICRC had given up the idea of assimilating combatants who were hors-de-combat and had fallen into the hands of the adverse party, to POW".[303]

He then added that:

> "A captured combatant would only enjoy the protection provided in Articles 8, 9 and 10 (Articles 5 and 6 of the actual Protocol II) and if he had committed an offence in connexion with the armed conflict might be prosecuted, tried and sentenced in accordance with national law".[304]

This means that no POW treatment is to be accorded to captured insurgents. The latter are still criminals under local law. However, the Government is under a duty to respect some humanitarian and penal rules concerning detention, judgment and sentencing of those rebels when captured, as I will show later when dealing with Articles 5 and 6 of the Protocol II.

It must be noted that the ICRC, although it ruled out the extension of POW treatment to captured insurgents in its Draft Protocol II submitted to the diplomatic conference, nevertheless tried to write down in Protocol II some rules which would mitigate the suffering of captured rebels, hence giving them some kind of needed protection. The example was Draft Article 7,[305] which was essentially based on Article 23/C of the Reglementation of The Hague of 1907,[306] which forbids the killing or wounding of an enemy who laid down his arms.

At the committee level it has been upheld and even strengthened, since the category of those who compose the 'hors-de-combat' has been clearly defined. It (Draft Article 7)

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[303] Op. cit., supra. n.276, CDDH/I/SR.32, para.5, pp.323-4.

[304] Ibid, CDDH/I/SR/32, para.5, p.324.

[305] Draft Article 7 of the Protocol II submitted by the ICRC to the Diplomatic Conference stipulates:
"Article 7. Safeguard of an enemy hors-de-combat:
1. In accordance with Article 6, it is forbidden to kill, injure, ill-treat or torture an adversary hors-de-combat. An adversary hors-de-combat is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:
(a) is unable to express himself, or
(b) has surrendered or has clearly expressed an intention to surrender,
(c) and abstains from any hostile act and does not attempt to escape.
2. If a party to the conflict decides to send back to the adverse party those combatants it has captured, it must ensure that they are in a fit State to make the journey without any danger to their safety." Op. cit., supra. n.273, p.35.

[306] Article 23/C of The Hague Convention on Land Warfare of 1907 provides:

> "23. In addition to the prohibitions provided by special conventions it is specifically forbidden: ...
> c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion."

Op. cit., supra. n.28, p.77.

became Article 22 bis;[307] it stressed that combatants who become hors de combat cannot be the object of an attack.

However, Article (22 bis) has been deleted in the simplified version submitted by Pakistan. But it must be noted that at least one delegation (Belgium) had made it clear when explaining its vote, that the deletion of Article 22 bis cannot mean that the principle underlying it cannot be respected. In its view, the principle still stands in Article 4/1 which prohibits the withholding of quarter.[308]

In my view, this is the correct interpretation, since it is in harmony with the object and purpose of Protocol II and especially Article 4/1.

Thus, the **travaux préparatoires** show in a very clear way that the arguments of sovereignty and non-intervention, either directly or indirectly, were responsible for the elimination of any attempt at giving captured insurgents the status of POW.

4. Articles 5 and 6 of the Protocol II and the Protection of Detained Persons

Articles 5 and 6 contain some fundamental human rights concerning the treatment of detained persons in connection with internal war. Article 5 concerns the rights of persons interned or detained for reasons related to the conflict and Article 6 contains the rules which must be respected in the prosecution and punishment of persons who committed criminal offences related to the armed conflict.

The two articles refer to civilian and military persons interned or detained, who are to be prosecuted for reasons related to the conflict. This means that the articles are not confined only to combatants captured by the Government, but also to all civilians who have committed offences relating to the conflict. Thus, their personnel field is wide and corresponds in my view to the real situations of civil wars, where the rate of interned and detained civilians is greater than insurgent combatants, because essentially of the guerrilla method, which is widely resorted to in internal conflicts.

These two articles, it must be emphasised, represent what States are ready to grant to their enemies. States made sure that nothing in the articles will imply that they recognise any legal status to insurgents.

In fact, the two article imply that persons covered by them have committed offences against the local law. Hence they are to be punished under that very law. On the other hand, established Governments under the two articles are under a duty to bring their national law in line with the rules included in them. However, it must be indicated that common Article

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[307] Draft Article 22 bis entitled "Safeguard of an Enemy Hors de Combat" adopted by the third committee at its 49th meeting (4 June 1976) and by consensus, reads:
"1. A person who is recognised or should, under the circumstances, be recognised to be hors de combat, shall not be made the object of attack.
2. A person is hors de combat if:
(a) he is in the power of an adverse party; or
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and he is therefore incapable of defending himself;
and in any case, provided that he abstains from any hostile act or does not attempt to escape."

15 ORDCHL (1974-77), Federal Political Dept, (1978), CDDH/236/Rev.1, p.420.

[308] Op. cit., supra. n.267, CDDH/SR/52, p.139.

3 of the Geneva Conventions contains no special safeguards concerning the protection of detained and interned persons and no rules on the prosecution of offenders.

In this respect, these two articles constitute a welcome and important innovation, since they limit the discretionary power of the legal Government in dealing with its enemies, even when the national law still considers them basically as common criminals.

In order to show the influence of the concepts of sovereignty and non-intervention on the Drafting of these two articles I will study the two articles separately.

4.1. Article 5

Article 5 of the Protocol II provides:

"5. Persons whose liberty has been restricted:

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:
(a) The wounded and the sick shall be treated in accordance with Article 7;
(b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of armed conflict.
(c) They shall be allowed to receive individual or collective relief;
(d) They shall be allowed to practise their religion, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious duties;
(e) They shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:
(a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
(b) They shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;
(c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
(d) They shall have the benefit of medical examinations;
(e) Their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this article to any medical procedure which is not indicated by the State of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 with paragraph 1(a),(c) and 2(d) of this article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding."[309]

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[309] H.S. Levie (ed.): The Law of Non-International Armed Conflict. Protocol II to the 1949 Geneva Conventions. Martinus Nijhoff, 1987, pp.240-41.

Originally this article was Drafted as Article 8 in the proposed version of Protocol II submitted by the ICRC to the Diplomatic Conference.[310] However, the first question which arises concerns the personnel field application of the article. In this context the ICRC delegate in presenting the Draft Article 8 interpreted the key expression 'persons whose liberty has been restricted' as comprising:

> "...[A]ll persons without distinction, both civilians and military, whose liberty has been restricted for reasons in relation to the armed conflict".[311]

Thus, it appears that the personnel field of application of the Article seems to be wide, and responds in a way to the needs of the internal conflicts. The commentary of the ICRC to Article 5 in fact, stressed that:

> "The expression 'persons whose liberty has been restricted' was chosen in preference to more specific words such as 'prisoners' or 'detainees' to take into account the full extent of the Article's scope of application, which covers all detainees and persons whose liberty has been restricted for reasons related to the conflict, without granting them a special status."[312]

In other words, all persons who were captured or arrested in relation to the conflict, although basically still considered as criminals who break the local law, would benefit from the humanitarian rules of the article, and there is no doubt that their number would be big,

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[310] Draft Article 8 submitted by the ICRC reads as follows:

"Article 8. Persons whose liberty has been restricted.
1. All persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict shall, whether they are interned or detained, be treated humanely, in accordance with Article 6.
2. In addition, the parties to the conflict shall respect at least the following provisions:
(a) The wounded and sick shall be treated in accordance with Article 12;
(b) The persons referred to in paragraph 1 shall be accommodated in buildings safeguarded as regards hygiene and health and provided efficient protection against the rigours of the climate and the dangers of the armed conflict.
(c) They shall be supplied with adequate supplies of drinking water and with food rations sufficient to keep them in good health. They shall be permitted to secure or to be provided with adequate clothing;
(d) Women shall be held in quarters separated from men's quarters. They shall be under immediate supervision of women. This does not apply to those cases where members of the same family are in the same place of internment.
3. The parties to the conflict shall also respect the following provisions within the limits of their capabilities:
(a) The persons referred to in paragraph 1 shall be allowed to receive individual or collective relief;
(b) They shall be allowed to practice their religion and receive spiritual assistance from chaplains and other persons performing similar functions;
(c) They shall be allowed to send and receive letters and cards. The parties to the conflict may limit the number of such letters if they deem it necessary;
(d) Places of internment and detention shall not be set up close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are detained or interned become particularly exposed to dangers arising out of the armed conflict, if their evacuation can be carried out in adequate conditions of safety.
4. Measures of reprisals against the persons referred to in paragraph 1 are prohibited.
5. Subject to temporary and exceptional measures, the parties to the conflict shall endeavour to facilitate visits to the persons referred to in paragraph 1 by an impartial humanitarian body such as the International Committee of the Red Cross."

Ibid, pp.205-206.

[311] Op. cit., supra. n.276, CDDH/I/SR.32, para.65, p.336.

[312] Op. cit., supra. n.297, p.1384.

especially among civilians.[313]

On the substantive level, the ICRC Draft Article 8 was very ambitious. It sets two kinds of obligations. The first are mandatory, which needed for their implementation, some positive measures. The second category included what may be called 'within the capacity and if conditions permit' obligations. The first category included strict standards which must be complied with, such as providing food, water, shelter, health, hygiene, adequate clothing and separate places of internment for men and women.

However, 'within the capacity and if conditions permit obligations' States are to respect the rights of detained and interned persons to practise their religion, to receive spiritual assistance from qualified persons, to correspond. Moreover, camps of detention and internment are not to be situated near combat zones.

Third World countries quickly challenged the idea of imposing any kind of mandatory obligations. In their opinion, they are not in a position to grant a more favourable treatment than that for the ordinary civilian living in the country. Thus, Mexico, as an example, considered that the obligations Stated in the Article (Article 8/2 (b) and (c) were 'unrealistic' and then added:

> "...[M]ost non-international armed conflicts occurred in developing countries in which living conditions described in paragraph 2 would be regarded as an ideal".[314]

Nigeria was more explicit. To it, the mandatory provisions of paragraph 2 appear to be "incongruous in such an instrument. They seem to be higher than those obtaining for law-abiding citizens".[315] Iraq and India in fact hinted that the article implied some kind of external supervision, which would inevitably lead to intervention in the internal affairs of States.[316]

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[313]This would be the implication of the ICRC representative's answer to a question from the UK delegate, on the exact scope of Article 8. The former (ICRC delegate) stressed that:

> "The formula retained (persons whose liberty has been restricted) has been intended to cover all persons whose liberty had been restricted: persons interned without judicial proceedings and persons awaiting trial during the whole period of their detention from the time of their arrest until their release."

Op. cit., supra. n.309, p.217.

[314]Op. cit., supra. n.276, CDDH/I/SR.32, para.65, p.336.

[315]Ibid, para.84, p.340.

[316]In this context, India stated that it:

> "...[C]onsidered that, though Article 8 was excellent from a humanitarian point of view, its provisions could not be implemented by all the forces concerned. In particular, paragraph 2 (b) and (c) and paragraph 3 (c) and (d) could not easily be implemented and therefore unrealistic. Any obligation to respect the provisions implied supervision. As his delegation had already stated, Protocol II should not become an instrument for interference in the internal affairs of States".

Ibid, para.87, p.340. See also Iraq, ibid, CDDH/I/SR.32, para.90, p.341.

These attacks led to the watering down of the tone of the ICRC Draft at the committee level.[317] Thus, the mandatory obligations of the parties in regard to detained persons were qualified by the phrase 'to the same extent as the local population'. In other words, the objections of Third World States were taken into account; hence standards of food, drinking water, health, hygiene and shelter were to take into account the conditions of life outside the camps as guidance.

Eide criticised this attitude since in his opinion:

> "...[W]hile this sounds plausible, it may nevertheless be somewhat misleading since the local population, whose liberty is not restricted, has some possibilities on their own initiative to improve their conditions when in severe difficulty, while the detained or imprisoned people entirely rely on the conditions provided for them by the detaining power".[318]

However, the ICRC commentary stresses in this respect that:

> "The obligation of the detaining power remains an absolute one, but its content varies depending on the living conditions prevailing in the area".[319]

Thus, food available for the guards of the detainees should also be a criterion; in other words, detainees should receive as much food as those guarding them, the commentary adds.

After the introduction of this fundamental change (the inclusion of the phrase 'to the same extent as the local population') it must be noted that Draft Article 8 was in fact strengthened by adding new obligations, both in the mandatory and 'within their possibility and if conditions permit' obligations.

Thus, in the former category of obligations, States are directed to respect the working conditions whenever they decide to make detainees and interned persons work. In other words, those persons should not work in dangerous or unhealthy conditions. They should always benefit from the legal working conditions similar to those which apply to normal workers. This is very important, since the authorities may use work as a real disguise for humiliating or even torturing their captured enemies.

In the latter category (within their possibility and if conditions permit) States are under a duty to seek to provide medical examinations for persons deprived of their liberty. The aim of this important provision is:

> "...[T]o ensure, generally, good medical attention in places of internment or detention; on the one hand, so that no one remains in a condition of distress without receiving care, and on the other hand, to ensure that contagious diseases are detected in time, in the interests of detainees and guards alike".[320]

This is very important, taking into account the mental and physical State of persons

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317 For the work done by the sub-working group and working group B of the Committee, see op. cit., supra. n.309, pp.220-223.

318 A. Eide: The New Humanitarian Law in Non-International Armed Conflicts, in A. Cassese (ed.): The New Humanitarian Law of Armed Conflict. Ed. Scientifica, S.r.L. Napoli, 1979, p.284.

319 Op. cit., supra. n.297, p.1387.

320 Ibid, p.1391.

deprived of their liberty, and the State of places of detention and internment with overcrowding and sometimes, the absence of elementary standards of hygiene.

Moreover, a new paragraph (3) was introduced. It concerns in fact, a special category of victim of internal conflicts. They are persons who are neither interned nor detained, but nevertheless, their liberty is restricted in connection with the conflict, such as individuals who are ordered to live under house arrest or under surveillance.

Those persons, in addition to the benefits of Article 4 (the fundamental guarantees) can enjoy the benefits set for detained and interned persons which do not concern the material conditions of internment or detention, such as their right to practise their religion, to receive relief, to correspond and receive mail.

However, after the introduction of these innovations, which did not appear in the ICRC Draft Article 8, the Article (8) was adopted by consensus by Committee I.[321]

In their explanation of votes, one delegation at least continued to view the content of the article as an intrusion in the sovereignty of State.[322]

In the simplified version of Protocol II submitted by Pakistan at the last session of the Diplomatic Conference, the same approach adopted by the first committee has been upheld. However, all references in the article to 'the parties to the conflict' or 'authority' had been omitted. The aim of course is very clear. It is to make it clear that the insurgents possess no legal status whatsoever, even if they are obliged also to carry out the obligations of the article.

Furthermore, it is to be noted that the simplified version added a new paragraph, which was not contained either in the ICRC Draft Article 8 or Draft Article 8 adopted by the first committee. The new paragraph (Article 5/2 (e)) in fact, reiterates Article 11(1) of the First Protocol.[323] The paragraph sets the general principle of the protection of the physical and mental health of persons interned or detained in connection with the conflict, and then specifies the governing medical procedures which must be complied with. Thus, acts or omissions which may endanger the physical or mental health of persons are prohibited, and then implicitly medical experiments are prohibited.

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[321] Op. cit., supra. n.309, pp.222-230.

[322] In this respect, Iraq made it clear that:

> "...[T]he fact that his delegation had not called for a vote on Articles 6, 6 bis and 8 did not mean that it agreed with the principles underlying those articles or the details contained in them; it thought that to take a vote in a conference on humanitarian law was incompatible with the humanitarian spirit, which should be one of unanimity and general goodwill".

Ibid, p.233.

[323] Article 11/1 stipulates that:

> "The physical or mental health and integrity of persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this article to any medical procedure which is not indicated by the State of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty".

Ibid, p.149.

The article then was adopted by consensus and became Article 5 in the final version of Protocol II.[324]

The main conclusions to be drawn from the history and actual wording of Article 5 are in my opinion as follows:

1. There is no doubt that it is a very important Article, because of the mere fact that it deals with the most hated category of the victims of the internal wars; captured insurgents and their allies among the civilian population. This is in itself an innovation, since common Article 3, as we have been, nearly totally ignores the plight of those victims.
However, it must be stressed that the article did not go as far as giving POW status to detained and interned persons. The reason is very clear. Sovereignty, as the **travaux préparatoires** show, was used systematically to eliminate any such prospect, but the article which in fact supplements Article 4 (fundamental guarantees) (the latter as we have seen contains general prohibitions) contains concrete measures, which would if complied with make the life of those interned or detained less harsh and more humane.

2. To me, the basic idea behind the article is the protection of the fundamental human right, namely the right to life. This right cannot be sustained in reality, in detention and internment places, if concrete measures are not taken concerning food, water, medical care, hygiene and shelter. They are in fact, the ingredients of the right to life, especially in the Third World, where all of the civil wars are taking place.

3. Article 5 is an attempt, in my view, (from the moral and legal point of view), to prove that the claim that in civil wars all methods and means are permissible to finish off the enemy, is not accepted, at least on the normative level, in the age of human rights. Article 5 in fact limits the conduct of the warring factions **vis-à-vis** this important category of victims of war, which means implicitly that the discretion of Governments has been curtailed to a significant degree in this sphere.

4. It is also interesting to n. that in the **travaux préparatoires** no State has claimed, at least publicly, that insurgents and their allies among the civilian population who are detained or interned need no protection, because of the sole fact of disobeying their State's laws. In fact, even sovereignty-oriented delegations conceded that humanitarian rules were needed. However, they were only against giving the insurgents any legal status or higher protection than that given to civilian population. In this sphere then the concept of human rights, as a limitation of State sovereignty, was upheld and confirmed.

4.2. Article 6 of Protocol II (Penal Prosecutions)

Article 6 of Protocol II provides:

> "1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
>
> 2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality In particular:
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and

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[324] Ibid, pp.240-241.

during his trial all necessary rights and means of defence;
(b) no-one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with the offence is presumed innocent until proven guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no-one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limit within which they may be exercised.

4. The death penalty shall not be pronounced on persons who are under the age of eighteen at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the conflict whether they are interned or not."[325]

In fact, this Article embodies the essentials of the penal policy which the parties to the conflict must respect and apply to criminal offences committed in relation to the armed conflict. It contains both procedural and substantive rules which the parties must comply with. The influence of human rights is by no means absent, especially of the Covenant on Civil and Political Rights of 1966.

However, it must be emphasised that the Article is based on the assumption that the right of the established Government to prosecute, try and convict persons who committed crimes in connection with the armed conflict was upheld and left intact. In this particular and important sphere, it is not different from Article 3. It continued in fact the same tradition, hence sovereignty still holds the day.

On the other hand, Article 6 must be seen as going further in its protection of persons who committed criminal offences in connection with the conflict than Article 3. In fact Article 6 supplements and develops Article 3, paragraph 2, sub-pararagraph 1 (d), which prohibits:

"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 recognised as indispensable by civilized peoples."

Ratione personae, the Article is "quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecution."[326] The importance of the Article, it must be indicated, springs from the fact that in most cases national laws in emergency cases are very harsh, if not totally inhuman

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[325] Op. cit., supra. n.297, p.1395.

[326] Ibid, p.1397.

towards those who struggle against the established Governments, be they military or civilian.

The most common sentence imposed on them is the death penalty. Also the tribunals which deliver such sentences (if they exist) are military tribunals which are composed generally in a way which does not guarantee any chance of fair trial, and contains no element of independence and impartiality.

4.2.1. The Red Cross Experts' Opinion

It must be noted from the start that the ideas contained in this important Article had been the subject of heated discussions from the beginning of the ICRC's attempt to codify rules for non-international conflicts.

In this context, and at the very beginning, the ICRC suggested to the Red Cross Experts that it intended to extend three main substantive rules on the question of penal prosecution of offences related to the internal conflicts, namely:

1. Immunity to be granted for the sole fact of having taken part in hostilities.
2. Deferment, during hostilities, of the execution of any death penalty.
3. General amnesty at the end of hostilities.[327]

These general rules were to be applied to combatants who did not commit grave breaches of the laws of war, that is combatants who conduct their operations in accordance with the governing rules of humanitarian law, criminals who breached those rules have to be provided with necessary judicial guarantees.

The Red Cross Experts in general seem to be reluctant to endorse the ICRC suggestions. They pointed out the difficulties inherent in their application, especially in the first period of the conflict, where the established Government would be inclined to take energetic steps to stop attacks upon its authority and existence. They stressed that the most that can be done in those circumstances is to try to get the consent of the established Government to introduce in their penal laws provisions which stipulate that the mere fact of participation in the conflict would not be punished by death.

However, concerning the question of granting amnesty at the end of the hostilities, they pointed out that this prerogative belongs to the established Government, which can accord it as it sees fit.[328]

Thus, the Red Cross Experts seem to pay strong attention to the attitude of the established Governments in regard to the introduction of new rules which are to be applied essentially to those who carry arms against it, and those who support them. Implicit in their argument is that Governments are not likely to accept easily such far-reaching limitations upon their discretionary power, hence their sovereignty to punish their enemies according to their laws.

4.2.2. The Governments' Experts' View

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[327] Op. cit., supra. n.100, pp.56-59.

[328] Ibid.

At the CGEDHL in 1972, the ICRC submitted in fact two Articles (27 and 28).[329] The first one contains of the generally accepted principles of penal law, namely, individual responsibility, and thus prohibits collective penalties. The second Article, however, deals specifically with the prosecution of combatants. Its essential aim was the prohibition of the death penalty for the sole fact of taking arms against the Government, by combatants who generally satisfy the conditions of Article 4/A (2) of the third Geneva Convention.

Draft Article 28 thus, touches a very sensitive point, namely the right of legal Governments to impose the death penalty on those who defy its laws and resort to force in order to topple it. Hence, the Article was the subject of a heated discussion, which in fact, reveals that the concept of sovereignty has been used extensively by some Experts to retain the right of the Government to use the death penalty against captured insurgents.

In this context, some Experts simply proposed the deletion of the Article, the reason being that it 'concerns a matter falling within the domestic jurisdiction of the State'.[330] Another Expert doubted:

> "...[W]hether a State would agree, in accordance with the terms of the protocol to be drawn up, to grant such immunity to its nationals in the event of an armed conflict."[331]

Moreover, it was pointed out that no Government would decide to comply with the protocol by introducing changes in its own legislation when it was caught up in a civil war. The death penalty would be used as a means of repression.[332]

However, the majority of Experts seem to favour some form of restricting the power of established Governments, to use the death penalty against persons for the sole fact of taking up arms against it. Thus, the Experts proposed the addition of many important rules concerning penal prosecution. They suggested in fact, that the following rules must be respected by authorities:

> "1. No sentence shall be passed or execution carried out against a person who has committed an offence related to the conflict without previous judgment pronounced by a regularly constituted court affording [all] the judicial guarantees which are

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[329]Article 27 reads as follows:

> "No person may be punished for an offence he or she has not personally committed. Collective penalties are prohibited."

On the other hand, Article 28, which is entitled "Penal prosecution against combatants", stipulates:

> "After having fallen into the power of the adversary, combatants who will have fulfilled the conditions stipulated in Article 25 of the present protocol, as well as those combatants who, without having fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the treatment of POW of August 12, 1949, will have, at least in the course of their operations, distinguished themselves from the civilian population by some distinctive sign or by any other means and who have complied with the provisions of the present protocol, shall not be punished by death if they become the object of penal prosecutions only by reason of having taken part in hostilities or having been members of armed forces."

Op. cit., supra. n.269, pp.83-84.

[330]Ibid, para.2.210, p.84. (This was the view of the Experts of Romania).

[331]Ibid, para.2.111, p.84.

[332]Ibid, para.2.223, p.86.

generally recognised [as indispensable] by the principal legal systems of the world.
2. A person convicted of such an offence shall be entitled, in accordance with the laws in force, to avail himself of the right of appeal or petition from any sentence pronounced upon him. He shall be fully informed of his right of appeal or petition.
3. At the conclusion of the hostilities, the parties to the conflict should endeavour to grant amnesty to as many as possible of those who have participated in the conflict or have been convicted of offences or deprived of liberty in connection with the conflict.
4. War crimes are prohibited. Penalties for war crimes shall be imposed and carried out in accordance with the conflict.
5. No execution shall take place in public."[333]

These rules, although they did not rule out the right of the legal Government to resort to the use of the death penalty, establish general standards of fair trial. Hence, they restrict the discretionary power of established Governments in suspending or abolishing those fundamental standards. Thus, the Experts in fact, tried to find a balance between the demands of sovereignty and those of humanity.

4.2.3. The Diplomatic Conference Attitude

At the Diplomatic Conference, the ICRC submitted two Draft Articles (9 and 10)[334] which were largely based upon the Governments' Experts suggestions. The former dealt with the general principles of penal law, and the latter dealt with some procedural penal points. No mention of the word 'combatant' was used. These Articles were to be applied to persons who have committed offences related to the armed conflict. They were designed in fact, to

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[333] Ibid, p.87.

[334] Article 9, entitled "Principles of Penal Law" stipulates:

"1. No one may be punished for an offence which he or she has not personally committed; collective penalties are prohibited.
2. No-one may be punished on account of any act or omission contrary to a duty to act which was not an offence at the time when it was committed.
3. No-one shall be liable to be prosecuted or punished for an offence for which he has already finally been acquitted or convicted.
4. No-one shall be held guilty of an offence except under those provisions of law which were in force at the time when the offence was committed.
5. Everyone charged with an offence is presumed innocent until proved guilty according to law".

On the other hand, Article 10 entitled "Penal prosecution" reads as follows:

"1. No sentence shall be passed or penalty inflicted upon a person found guilty of an offence in relation to the armed conflict without previous judgment pronounced by a court offering the guarantees of independence and impartiality which are generally recognised as essential, in accordance with a procedure affording the accused the necessary rights and means of defence.
2. Everyone shall have the right of appeal against any sentence pronounced upon him. He shall be fully informed of his right to appeal and of the time limit within which he may do so.
3. The death penalty pronounced on any person found guilty of an offence in relation to the armed conflict shall not be carried out until the hostilities have ceased.
4. The death penalty shall not be pronounced for an offence in relation to the armed conflict committed by persons below eighteen years of age and shall not be carried out on pregnant women.
5. In case of prosecutions carried out against a person only by reason of his having taken part in hostilities, the court, when deciding upon the sentence, shall take into account, to the greatest possible extent, the fact that the accused respected the provision of the present protocol.
6. At the end of hostilities, the authorities in power shall endeavour to grant amnesty to as many as possible of those who have participated in the armed conflict, in particular those whose liberty has been restricted for reasons in relation to the armed conflict, whether they are interned or detained."

Op. cit., supra. n.309, pp.245-46.

limit excess in the trial prosecution and conviction of captured insurgents and civilians who support them.

In the discussions which followed, many States especially from the Third World, attacked the Articles by using the arguments of sovereignty and non-intervention. It was argued that the penal rules contained in Article 9 of the ICRC Draft Protocol II have no place in that protocol, since they exist in all legal systems of the world, hence their inclusion in Protocol II is superfluous.[335]

Concerning the question of the death penalty, which in fact was prohibited in two cases only according to Draft Article 10, namely, offenders under the age of 18 and pregnant women, and despite the ICRC delegate assurance that "with those two exceptions, Article 10 left intact the right of the authorities to pronounce the death penalty in accordance with national law",[336] some Third World countries were not content. Thus, the Indian delegate stressed that Draft Article 10:

> "...[W]ould be in conflict with his country's national law, and that its provisions constitute interference in the sovereign right of States."[337]

Thus, the precedence of national law over international law is advocated in order to protect the sovereignty of the State.

Similarly, Pakistan after noting that each country had its own criminal laws, stressed that any attempt to impose principles which differed from those followed by national laws would be pointless in his country. He emphasised that:

> "...[I]nsurgents would be executed, and any attempt to impose international legislation...would in his opinion constitute interference with the sovereign right of States."[338]

Thus, some States resist any attempt to codify, in an international instrument, even some general principles of penal law accepted by all States in their national laws. The reason is clear, they wish to be free to deal with their enemy.

However, at the committee level, the two Articles (9 and 10) were merged into one Article (Article 10). It was adopted by the First Committee after lengthy Drafting

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[335] In this context, Iraq argued that:

> "Article 9 was of such a general nature that it was out of place in Draft Protocol II; no mention was made in it either of armed conflicts or of victims. The rules of penal law enunciated therein could be found in the general practice of penal law as well as in certain international conventions relating to human rights; which could be applied to everyone and in all circumstances".

Op. cit., supra. n.276, CDDH/I/SR.33, para.51, p.351. Indonesia also stressed that Article 9 had a very general scope and contained provisions already existing in the penal legislation throughout the world. For that reason he considered it inopportune for the Article to appear in protocol II, which had a well-defined objective. Ibid, para.68, p.354.

[336] Ibid, para.4, p.357.

[337] Ibid, para.13, p.359.

[338] Ibid, para.17, p.360.

changes.[339] The new Article[340] can be seen in fact as more elaborate than that of the ICRC. Thus, in addition to what the ICRC submitted, other rights were included, and which all go in the direction of strengthening the right to fair trial. Among the rights are the following:

1. The accused must be informed without delay of the particulars of the offence against him.
2. The accused must have the right to defence before and during his trial.
3. No heavier penalty should be imposed on the accused, other than the one that was applicable at the time the criminal offence was committed. However, when lighter penalties are subsequently imposed on the same offence, the accused should benefit from it.
4. The accused has the right to be tried in his presence.
5. No-one can be obliged to testify against himself or to confess guilt.
6. Persons charged and sentenced for criminal offences in relation to the armed conflict shall have the right to seek pardon or commutation of the death sentence.

Thus, it seems that at the committee level, despite the misgivings of a handful of Third World States, the majority supported the strengthening of the Article. Part of the answer lies in the fact that most of these rights were already included in other international agreements, especially human rights instruments.

But, at the final session of the Diplomatic Conference, Pakistan proposed in its simplified

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[339] For a detailed version, see op. cit., supra. n.309, pp.246-292.

[340] New Article 10, adopted at the committee level (First Committee), stipulates:

"1. This Article applies to the prosecution and punishment of criminal offences relating to the armed conflicts.
2. No sentence shall be passed or penalty executed on a person found guilty of an offence except pursuant to a conviction pronounced by a tribunal offering the essential guarantees of independence and impartiality. In particular:
(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and should afford the accused before and during his trial all necessary rights and means of defence;
(b) no-one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no-one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of time limits within which they may be exercised.
4. The death penalty shall not be pronounced on persons below 18 years of age at the time of the offence and shall not be carried out on pregnant women and mothers of young children.
5. In case of prosecutions carried out against a person only by his having taken part in hostilities, the court, when deciding upon the sentence, shall take into consideration, to the greatest possible extent, the fact that the accused respected the provisions of the present protocol. In such a case the death penalty shall not be carried out until the armed conflict.
6. Anyone sentenced shall have the right to seek pardon or commutation of the sentence of death in all cases.
7. At the end of hostilities the authorities in power shall endeavour to grant amnesty to as many as possible of those who have participated in the armed conflict, or those whose liberty has been restricted for reasons in relation to the armed conflict, whether they are interned or detained."

Op. cit., supra. n.274, CDDH/234/Rev.1, para.95, pp.131-33.

version of Protocol II the deletion of paragraphs 5, 6 and 7 of Draft Article 10 as adopted at the committee level. All these three paragraphs, it must be noted, deal in one way or another with the question of the death penalty and therefore directly relate to the fate of captured insurgents.

Nevertheless, only paragraph 7 has been retained, which means that in practice Governments can sentence to death their enemies and swiftly carry out the execution, without having to wait until the end of hostilities. The aim here is very clear. Governments want to give an example to all those who may wish to disobey its laws. It is a way of breaking the will of an adversary by resorting to the harshest sentence - death. Also the implication of paragraph 6 (the right to seek, after the sentence of the death penalty, commutation or pardon) means that the Government wants to signal to its enemies that they have no hope of pardon or mercy.

It must be stressed that even after the deletion of paragraphs 5 and 6, some States especially from the Third World, continued their attacks upon the Article. Thus, on one hand, Kenya thought that the Article is 'superfluous'.[341] On the other hand, Nigeria emphasised that 'this kind of provision constitutes interference with the internal systems obtaining in States,'[342] and then added that the Article as adopted:

> "...[V]eers dangerously towards imposing a kind of new criminal procedure for States parties thereto, which to us represents a dangerous trend in international law".[343]

It then warned:

> "This trend, if not arrested in time, will escalate and pad this protocol to such an extent that many States would find it difficult to ratify it."[344]

Zaire went even further. In explaining its vote against the retention of paragraph 7 of Draft Article 10 (which became paragraph 5 of Article 6 of the final version of Protocol II, the paragraph concerns clemency and amnesty), it considered the obligation contained in the paragraph as a mere recommendation devoid of any mandatory force. It expressly stated:

> "...[I]t is in no way a binding obligation, nor even a simple obligation in the technical sense; that is, a legal bound requiring any sovereign State to amnesty, no matter how under pressure certain forces involved, persons who have done their country serious harm by serving foreign interests."[345]

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[341] Op. cit., supra. n.267, CHHD/SR.50, p.101.

[342] Ibid, p.102.

[343] Ibid.

[344] Ibid.

[345] Ibid. Similarly, Spain, in explaining its vote against the retention of paragraph 7 of Article 10 stated:

> "Such measures [of clemency and amnesty] fall within the exclusive competence of States, which bearing always in mind the common good of the community they govern, can alone decide whether or not an amnesty or conducive to the restoration of public peace."

Ibid, p.103.

However, despite these misgivings, which it must be confessed may explain the non-ratification of Protocol II (in October 1989, the number of States which ratified Protocol II stands at 78[346]) by a significant number of States. It seems that the majority were in favour of what has been accepted in Draft Article 10, which became in the final version of Protocol II Article 6 (cited above).

I believe that the adoption of Article 6 is a very important step towards the protection of one important category of the victims of internal wars. Their number is very high, since it does not only include captured insurgents but also large numbers of civilians who may assist them in different contexts and situations.

The importance of the Article also springs from the fact that as a first step in combatting insurgents and their allies among the civilian population, States resort to the suspension of the constitution and the declaration of emergency or State of seige, hence suspending all standards and rules of fair trial.

The Article makes it clear at least implicitly, that no suspension of the general penal rules are possible in the event of civil wars governed by Protocol II. This is the effect of Article 6/2. Then, no derogation from the components of a fair trial is possible.

The influence of human rights is by no means absent in this context. The ICRC commentary of the two protocols stresses:

> "Article 6 reiterates the principles contained in the third and fourth conventions [Articles 86, 89-108 of the former and Articles 64-78 of the latter] and for the rest it is largely based on the international covenant on political and civil rights, particularly Article 15, from which no derogation is permitted, even in the case of public emergency threatening the life of the nation."[347]

The list of rights which the Government cannot suspend, or derogate from, in Article 6 is very wide indeed, and compared to Article 3 is a real development of humanitarian law in cases of internal conflicts, the list of these rights include:

1. Right to fair trial in general (Article 6/2).
2. Right to information (Article 6/2 (a)) (about the particulars of the offence, of which the accused is to be tried).
3. The right to defence (Article 6/2 (a)).
4. The principle of individual responsibility (Article 6/2 (b)).
5. The principle of non-retroactivity (Article 6/2 (c)).
6. The principle of presumption of innocence (Article 6/2 (d)).
7. The right of the accused to be present at his own trial (Article 6/2 (e)).
8. The right not to be compelled to testify against oneself or to confess guilt (Article 6/2 (f)).
9. The right to be informed of judicial remedies and of the time limits in which they must be exercised (Article 6/3).
10. The right of persons aged under 18, and pregnant women, not to be sentenced to the death penalty (in fact, it is prohibited to do so) (Article 6/4).

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[346] IRRC, 1989, 29th year, No.272, p.490.

[347] Op. cit., supra. n.297, p.1397.

These are the essential guarantees for the protection of the right to fair trial, and there is no doubt that if adhered to much suffering and cruelties, which are very common in internal conflicts, would disappear.

However, some authors argue that despite the importance of the provisions of Article 6 they are not wholly satisfactory. Eide stressed that Article 6 contained 'no further provisions as to the way in which the impartiality is to be safeguarded'.[348] He maintained that during internal armed conflicts, military tribunals take the place of civilian tribunals. This state of affairs, coupled with the control of political power by usually a military regime, makes 'these tribunals easily degenerate into a mechanism for the arbitrary maintenance of political control'.[349]

Despite these criticisms, which seem to be too general, Article 6 in my opinion, when coupled with similar provisions of non-derogable rights in Articles 14 and 15 of the Covenant on Civil and Political Rights, establishes a desirable system of the protection of due process and human rights in general in internal conflicts. Consequently, it contributes to the safeguard of the fundamental rule of right to life, which is not only threatened by killings and massacres in the field of combat, but especially through lack of respect for the due process of law and fair trial.

For all this, it seems to me, to be correct to indicate that Article 6 constitutes a real derogation from State sovereignty. In the last analysis, it curtails to a great extent the discretionary power of established Governments, which is greatly used in cases of state of emergency to suspend and even abolish any prospect of fair trial.

4.2.4. Conclusions concerning the Evaluation of Article 6

1. It is postulated that the influence of the idea of human rights is clearly present, especially in Article 6. Some of its provisions were taken nearly verbally from Articles 14 and 15 of the Covenant on Civil and Political Rights.[350] In fact, even at the Diplomatic Conference some States linked the contents of the present Article 6 to the law of human rights.[351]

This, in my view, seems to explain in part at least, the acceptance of States of the important rules of Article 6, since if they were adhered to in one international instrument, there is basically no reason why they should not accept them in another such instrument.

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[348] Op. cit., supra. 318, p.285.

[349] Ibid.

[350] In this respect, it is indicated that: Article 6/2 (a) corresponds to Article 14/3 (a) and 14/3 (b)(d); Article 6/2 (b) corresponds to Article 14/3 and 14/3 (b)(d); Article 6/2 (c) corresponds to Article 15/1; Article 6/2 (d) corresponds to Article 14/2; Article 6/2 (e) corresponds to Article 14/3 (d); Article 6/2 (f) corresponds to Article 14/3 (g). Cited by Bothe et al., op. cit., supra. n.281, p.651.

[351] In this context, Belgium indicated during the discussion of Draft Articles 9 and 10 that the principles contained in them 'fall in the realm of international law and human rights', op. cit., supra. n.276, CDDH/I/SR.33, para.41, p.350. Similarly, some delegations referred to the Covenant in order to take from it the correct wording. Thus, East Germany for instance explained the aim of its amendment (CDDH/I/89) to Draft Article 9 as:

> "...[T]o harmonise that text [Article 9/2 of the ICRC Draft Protocol II] with Article 15 of the International Covenant on Civil and Political Rights".

Ibid, para.38, p.349.

2. Moreover, it seems fair to state that humanitarian law has been extended and strengthened to an area which was barely regulated, since Article 3 of the Geneva Convention purports only the general principle that it is prohibited to pass sentences and carry out execution without a previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples. The generality of the provision constituted the main weakness in Article 3. Furthermore, in Article 6 the details of fair trial are well put and clear. Meron rightly noted that:

> "These provisions of common Article 3 have been greatly strengthened by those of Article 6 of Protocol II."[352]

3. However, it must be conceded that the argument of sovereignty and non-intervention still holds the balance, since captured combatants and civilians tried for offences related to the armed conflict have no POW status. They are still considered as common criminals, tried for the simple fact of taking up arms against the established Government.

Besides, the **travaux préparatoires** establish that the limitation of State sovereignty in the context of Article 6 is that these 'criminals' are not to be tried and sentenced according to what the Government want, but in accordance with some general rules and some specific rules and measures from which no derogation is possible.

The mere codification of these general principles, and these specific rules in an international instrument is by itself an important intrusion into State sovereignty.

D. The Protection of the Civilian Population in Protocol II

The protection of the civilian population from the sufferings and cruelties of internal wars has become a matter of urgence, since they are the main victims of internal wars. Their protection was, it must be emphasised, an essential aim of the Protocol II from the start.

Common Article 3 of the Geneva Conventions as it has been shown in section II of this chapter, was not enough. It left many loopholes in the protection of the civilian population from the cruelties of internal conflicts.

The fourth Geneva Convention which deals specifically with the protection of civilians, was based on concepts which are not present by any means in internal conflicts.

Thus, at the Conference of Red Cross Experts, the majority expressed their doubts as to the feasibility of the application of the fourth Geneva Convention. Their argument was that:

> "The Fourth Convention is based on concepts of sovereignty, nationality and occupation, and these concepts are not consistent with the nature of non-international armed conflicts."[353]

Despite this fundamental reservation, the Experts felt that they:

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[352] Op. cit., supra. n.249, p.22.

[353] Op. cit., supra. n.100, p.69.

"...[D]esired to find restated in an additional protocol all the provisions which could logically be applied in non-international conflicts."[354]

Thus, implicitly the Experts argued for the extension of humanitarian rules concerning the protection of civilians, which do not conflict with the concept of sovereignty of the State.

At the second CGEDHL, the ICRC submitted four Draft Articles dealing with the civilian population (Articles 14-17).[355]

In general, it tried to establish in the sphere of civil war the fundamental distinction between combatants and non-combatants. It gave a very broad definition which in fact perfectly responds to the needs of internal conflicts. It proposed that the presence of

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[354] Ibid.

[355] Thus, Draft Article 14: "Definition of the Civilian Population" reads as follows:

"1. Any person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities is considered to be a civilian.
2. The civilian population is composed of all civilians fulfilling the conditions in paragraph 1.
3. Proposal I: The presence, within the civilian population, of individuals who do not conform to the definition given in paragraph 1, does not prevent the civilian population from being considered as such.
Proposal II; The presence, within the civilian population of individual combatants does not prevent the civilian population from being considered as such."

Op. cit., supra. 269, p.113. Draft Article 15 entitled "Respect for and Safeguarding of the Civilian Population" stipulates:

"1. The civilian population as such, as well as individual civilians, shall never be made the object of attack.
2. In particular, terrorisation attacks shall be prohibited.
3. Attacks which by their nature are launched against civilians and military objectives indiscriminately, shall be prohibited. Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.
4. The civilian population or individual civilians shall never be used in an attempt to shield, by their presence, military objectives from attack."

Ibid, p.114. Draft Article 16 entitled "Respect for and Safeguarding of Objects Indispensable to the Survival of the Civilian Population" reads as follows:

"Proposal I:
1. Objects indispensable to the survival of the civilian population shall not be the object of attack.
2. The parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed, shall refrain from:
(a) using them in an attempt to shield military objectives from attack;
(b) destroying them, except in cases of unavoidable military necessity and only for such time as that necessity remains.
Proposal II:
1. Objects indispensable to the survival of the civilian population shall not be the object of attack.
2. The parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed shall refrain from destroying them or using them in an attempt to shield military objectives from attack."

Ibid, p.115. Lastly, Draft Article 17 entitled "Precautions when Attacking" stipulates:

"So that the civilian population, as well as objects indispensable to its survival who might be in proximity to a military objective be spared, those who order or launch an attack shall, when planning and carrying out the attack, take the following precautions:
(a) They shall ensure that the objectives to be attacked are not civilians, nor objects of a civilian character, but are identified as military objectives; if this precaution cannot be taken, they shall refrain from launching the attack.
(b) They shall warn, whenever circumstances permit, and sufficiently in advance, the civilians threatened, so that the latter may take shelter".

Ibid, p.117.

individual combatants within the civilian population, does not prevent the latter from being considered as civilian. Articles 15, 16 and 17 introduced, for the first time, some fundamental rules of **jus in bello** to the arena of internal conflicts.

The discussions which took place at the CGEDHL revealed that there was some difference of opinion as to the feasibility of defining the civilian population. Some Experts felt the necessity and importance of such definitions, and stressed that the distinction between civilians and combatants must be kept, whatever the nature of the conflict internal or international.

Others felt that because of the nature of internal conflict, combatants and non-combatants are involved, either as full or part-time combatants. Hence, any attempt to uphold the distinction is unrealistic. The practice in their view is very vague.[356]

On other issues concerning the protection of civilians, the general picture of the debates of the Governments' Experts shows that the latter did not challenge the position of the ICRC, in the introduction of the main principles of The Hague law to internal conflicts, since the rules suggested would in practice tend to make internal conflicts more humane.

At the Diplomatic Conference, the ICRC submitted a complete 6 Articles[357] which

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[356] See op. cit., ibid, p.113 for the details of the discussions.

[357] Draft Article 24 submitted by the ICRC to the Diplomatic Conference which is entitled "Basic Rules", stipulates:

> "1. In order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.
> 2. Constant care shall be taken, when conducting military operations, to spare the civilian population and civilian objects. These rules shall, in particular, apply to the planning, deciding or launching of an attack".

Draft Article 25 entitled "Definition", reads:

> "1. Any person who is not a member of armed forces is considered to be a civilian.
> 2. The civilian population comprises all persons who are civilians.
> 3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character."

Draft Article 26 entitled "Protection of the Civilian Population", reads as follows:

> "1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. In particular, methods intended to spread terror among the civilian population are prohibited.
> 2. Civilians shall enjoy the protection afforded by this Article unless and for such time as they take a direct part in hostilities.
> 3. The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited. In particular, it is forbidden:
> (a) to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other;
> (b) to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.
> 4. Attacks against the civilian population or civilians by way of reprisals are prohibited.
> 5. The parties to the conflict shall not use the civilian population or civilians in attempts to shield military objectives from attacks."

Draft Article 27 entitled "Protection of Objects Indispensable to the Survival of the Civilian Population", reads as follows:

> "It is forbidden to attack, destroy or render useless objects indispensable to the survival of the civilian population, namely foodstuffs and food-producing areas, crops, livestock,

regulate the protection of the civilian population. The ICRC tackled the question of the protection of the civilian population by introducing detailed rules which would restrict the right of the belligerents to choose the means and methods of combat.

However, it seems that this approach was not favoured by the majority of States, for different reasons. For some States, the detailed regulation would limit the freedom of the Government in dealing with its enemies. To other States, the ICRC approach brings a detailed regulation to a domaine where it seems only simple rules would suffice.

In general, it appears, as Rosemary Abi-Saab rightly observes:

> "Les discussions en commissions des Articles du projet du CIRC concernant la protection de la populaton civile, ont mis à nouveau en évidence, et cela de façon particulièrement nette, le clivage entre les défensseurs des principes d'une protection humanitaire essentielle, et les ardents défenseurs du principe de la souveraineté étatique."[358]

It must also be pointed out that before the official opening of the Diplomatic Conference, the US Deputy Legal Adviser of the State Department, Mr. G.H. Aldrich, attacked the philosophy behind the ICRC proposals on the protection of the civilian population in general. He stated:

> "...[These] proposals for revolutionary change which would require a fundamental reordering of national security. However desirable they may be, I submit that they demand more than lawyers and diplomats who attend the conference to supplement the Geneva Conventions can be expected to produce, and we must see them as longer range objectives."[359]

He thought that improvement in civilian protection can be achieved by concentrating on 'proposals that are more limited.'[360] He gave, as example, the devising of rules that would

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drinking water supplies and irrigation works, whether it is to starve out civilians, to cause them to move away or for any other reason."

Draft Article 28, entitled "Protection of Works and Installations Containing Dangerous Forces", reads as follows:

> "1. It is forbidden to attack or destroy works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations, whenever their destruction or damage would cause grave losses among the civilian population.
> 2. The parties to the conflict shall endeavour to avoid locating any military objectives in the immediate vicinity of the objects mentioned in paragraph 1."

Draft Article 29, entitled "Prohibition of Forced Movement of Civilians" reads as follows:

> "1. The displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should the parties to the conflict undertake such displacements, they shall take all possible measures in order that the civilian population be received under satisfactory conditions of hygiene, health, safety and nutrition.
> 2. Civilians shall not be compelled to leave their own national territory."

Op. cit., supra. n.273, pp.40-41.

[358] Op. cit., supra. n.103, p.177.

[359] A.W. Rovine: Digest of United States Practice in International Law. (1973), Dept. of State, Washington, D.C., p.504.

[360] Ibid.

promote care by the armed forces in avoiding unnecessary injury to civilians, protect their property and to make safety zones a workable concept in the real world.

He believed that prohibiting attacks on hydroelectric dams and power stations was 'unrealistic'. He also specified the prohibition of starvation as a method of warfare as desirable. Nevertheless, he defended the crop destruction practised by the US in Vietnam. It was justified and legal, since 'the evidence was strong that the crops were intended for enemy troops.'[361]

It must be noted here that the American position was not confined to the protection of civilians in internal wars. It was in fact, a general statement which covered the protection of civilians whatever the character of the conflict.

What is clear from the statement, however, is that the US wanted in advance to declare that it was not ready to accept any substantial limitation on the use of some weapons whose legality is doubtful, and that this question was not part of the business of the Diplomatic Conference on humanitarian law.

It seems that the Soviet Union held virtually the same position, at least concerning internal wars. In this context, it stressed that:

> "There were differences between international and internal conflicts. With regard to the latter it was essential to make rules that everyone could accept."[362]

Canada in a way explained what the Soviet Union and the majority of States would accept. It stated that:

> "It was important that Draft Protocol II should embody rules that were practical. It could already be foreseen that some of the rules in the present Draft based on moral principles would be unworkable. They must be omitted, to avoid the danger of adopting a code which could not be respected."[363]

Thus, the approach favoured by the big powers, and many other States, was against the similarity of rules concerning the protection of civilians in internal and international wars. To them, the articles on the protection of civilian population in internal conflicts should be short, cogent and direct in order that the parties might clearly see their obligations.

However, the minority favoured the ICRC approach. Norway, supported by Italy, the Holy See and others, advocated forcefully that the civilian population must be given the same protection irrespective of the nature of the conflict. They defended the need for the codification of detailed rules on the protection of civilians on the following basis:

> "The concept of military necessity has lost much of its meaning in many modern conflicts, where one side is often technologically superior to the other and where at least one of the sides is often fighting not for survival but for other reasons. It would therefore be neither unrealistic nor impossible to lay down very strict criteria providing the greatest possible protection for the civilian population."[364]

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[361] Ibid.

[362] 14 ORDCHL (1974-1977), Federal Political Dept, Bern (1978), CDDH/III/SR.9, para.14, p.73.

[363] Ibid, para.11, p.72.

[364] Ibid, CDDH/III/SR.8, para.3, p.59.

It seems to me, that the two views, both favoured the regulation of the protection of the civilian population in internal wars. However, they differed as to degree of such protection and as to the best method of achieving that protection.

In my view, some favoured an approach which emphasised the element of human rights in that protection, whereas others preferred an approach which would place rigorous limits on the methods and means of conducting war as the only way of providing real protection to the civilian population against the rigours of war.

It seems that the former approach won the day, as we will see later when analysing different rules relating to the protection of the civilian population.

To me, this state of affairs reflects that States can accept the validity of the concept of human rights as a limitation upon their sovereignty, since to them that concept can be used safely as a real means of the protection of civilians in time of internal wars.

However, I will tackle the question of the protection of civilians by studying different rules proposed by the ICRC, and how in every case States reacted, especially when using the concepts of sovereignty and non-intervention, to stop sometimes some fundamental rules proposed by the ICRC.

1. The Distinction Between Combatants and Non-Combatants

Draft Article 24 submitted by the ICRC restates the customary rules of the obligation to distinguish between combatants and non-combatants, and the duty to confine military operations to the weakening of the military might of the enemy, also the duty that when planning, deciding or launching attacks, civilians and civilian possessions must be avoided.

The ICRC delegate, when presenting draft Article 24, specifically and explicitly referred to some UNGA resolutions such as Resolutions 2444 (XXIII) and 2675 (XXV) which stressed, among other things, the duty of all belligerents to make distinctions between the civilian population and combatants, and between civilian and military objectives.[365]

These resolutions in fact, referred to the application of such distinctions to 'all armed conflicts' which was presumably interpreted by the ICRC to apply also to internal conflicts. Moreover, it must be recalled that those resolutions had been adopted unanimously or almost unanimously, which would indicate that there is a general consensus that the customary concepts contained in them must be extended to internal wars.

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[365] Ibid, CDDH/III/SR.2, para.14, p.15.

At the committee level (the Third Committee) Article 24 was adopted easily, and without any fundamental change of the ICRC proposal.[366] However, the Article was deleted in the simplified version submitted by Pakistan.

It would seem to me, that the essentials of Article 24 are to be found especially in Article 4/1 of the final version of Protocol II, which provides that:

> "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction, etc."

The **travaux préparatoires** support this view. The latter in fact show that there are two versions concerning the effect of the deletion of draft Article 24. The minority contended that it had no counterpart in other Articles of Protocol II. Norway stated explicitly that:

> "Article 24 made a fundamental distinction between the civilian population and combatants and between civilian objects and military objectives. Those distinctions, which were essential for the proper protection of the civilian population and civilian objects, were not made in Article 7 [which became Article 4 in Protocol II]."[367]

Norway was strongly supported by Italy,[368] and the Holy See.[369]

However, the majority, it seems stressed that the essentials of Article 24 were included in draft Article 7 (Article 4/1). Thus, Pakistan argued that:

> "...[I]t was not in favour of retaining Article 24 as a whole. Article 7 of the simplified draft submitted by his delegation was intended to replace Article 24."[370]

Pakistan was supported by France,[371] Canada,[372] USA,[373] Iraq,[374] Iran,[375] Ghana[376] and

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[366]Draft Article 24 (Basic Rules) as adopted by consensus by the Third Committee on April 24th, 1975 reads as follows:

> "1. In order to ensure respect and protection for the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and shall direct their operations only against military objectives.
> 2. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall in particular apply to the planning, deciding or launching of an attack."

Op. cit., supra. n.307, CDDH/215/Rev.1, p.319.

[367]Op. cit., supra n.267, CDDH/SR.52, para.68, p.133.

[368]Ibid, paras.30-32, p.129.

[369]Ibid, para.33, p.129.

[370]Ibid, para.53, p.131.

[371]Ibid, paras.65-66, p.133.

[372]Ibid, para.38, p.130.

[373]Ibid, para.63, p.132.

[374]Ibid, para.72, p.133.

[375]Ibid, para.69, p.133.

Cameroon. The latter in fact, stated that Article 24 would be superfluous when Article 7 was accepted.[377]

It is my opinion, that the fundamental distinction between civilians and combatants, and civilian objects and military objectives, survives in Protocol II. Indeed any contention to the contrary would be against the object and purpose of the whole Protocol II, which is essentially the protection of the victims of internal wars. Such protection will never be fulfilled in the absence of those distinctions.

2. The Definition of Civilians

The definition of civilian, as is well known, is a vitally important question in the context of internal wars, where the use of the guerrilla method of warfare often obscures the criteria of distinguishing between a civilian and a combatant. In the discussions of draft Article 25 of the ICRC, no State suggested the restriction of the definition of civilian. On the contrary, nearly all States who either submitted amendments or intervened in the discussions, favoured the broadening of the definition.[378]

This situation led to the adoption at the committee level of Draft Article 25, entitled 'Definition', which provides that:

> "1. A civilian is anyone who is not a member of the armed forces or of an organised armed group.
>
> 2. The civilian population comprises all persons who are civilians.
>
> 3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.
>
> 4. In case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian."[379]

In fact, this article is broader in its definition of the civilian population than the Draft Article 25 submitted by the ICRC. The example is the addition of the important paragraph 4, which was proposed by Egypt.

This means that at that stage humanitarianism won the day. The discretion of Government has been greatly curtailed. Its freedom to indicate who is and who is not a civilian is not without limitation. But, it seems that the tide has been reversed at the final session of the Diplomatic Conference, since the simplified version submitted by Pakistan deleted Draft Article 25.

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[376] Ibid, para.36, p.130.

[377] Ibid, para.59, p.132.

[378] Thus, Egypt in its amendment (CDDH/III/33 of 15/3/74) to Article 25 proposed a new paragraph, which reads:

> "4. In case of doubt as to whether any person is a civilian he or she shall be presumed to be so."

4 ORDCHL (1974-1978), Federal Political Dept, Bern, 1978, pp.73-74.

[379] Op. cit., supra. n.307, CDDH/215/Rev.1, p.320.

It seems to me, that in this respect defenders of the sovereignty of State and non-intervention in its internal affairs triumphed, since at least implicitly it is up to the established Government to define the scope of civilians. Nevertheless, it is argued that this determination must take into account the object and purpose of the protocol and especially Article 4. This will in effect, restrict any dictatorial attempt from the established Government to determine arbitrarily who is a civilian.

3. The Protection of the Civilian Population

Article 13 of Protocol II covers the subject of the protection of the civilian population. It stipulates:

> "1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this part unless and for such time as they take a direct part in hostilities."[380]

In fact, the ICRC Draft Article 26 was more ambitious in its drive to protect the civilian population. It introduced some fundamental rules on methods and means of warfare, such as the rule that civilians shall not be the object of an attack, and especially paragraph 3, which literally prohibits the use of methods and means of combat which do not discriminate and distinguish in their effects between civilians and combatants, and between civilian and military objects.

Thus, bombardment of military objectives, which are in a zone which is populated is prohibited. Similarly, attacks which may incidentally cause damage to civilians and their objects, which are not proportionate to the military advantages gained are prohibited.

During the discussions a minority of States considered that especially paragraph 3 of Draft Article 26 should be deleted. Their reason was:

> "No paragraph 3 was needed at all, on the ground that the intermingling of civilians and combatants in non-international conflicts makes a rule against methods or means of combat which affect civilians indiscriminately or a rule against indiscriminate attacks unsuitable for application in international conflicts.[381]

However, other delegations stressed that the provisions concerning the protection of civilians should be the same whatever the nature and character of the conflict.[382]

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[380] Op. cit., supra. n.309, pp.469-470.

[381] Op. cit., supra. n.307, CDDH/III/275, pp.363-364.

[382] In this respect, Norway was represented by Professor Eide, who noted that:

> "...[T]hat the civilian population must be given the same protection irrespective of the nature of the conflict".

He then added:

At the end the Third Committee adopted Article 26, [383] which did not differ much from the ICRC proposal. The Committee even went further by adopting a completely new Article[384] (Article 26 bis) which contained a general prohibition against attacks on objects of a civilian character. Thus, attacks were only to be directed against objects which by their own nature, location, purpose or use make an effective contribution to armed action by the parties to the conflict.

Moreover, at the committee level, it seems that humanitarianism was very present, and eventually opened the way for the regulation of one of the most difficult problems of internal conflict, namely the effective protection of the civilian population.

However, the triumph was not long, Pakistan in its simplified version simply deleted the two Articles (26 and 26 bis). It seems, that considerations of sovereignty, military planning and security, and the obsession of many States to delete any detailed regulation in matters touching internal conflicts have all in different degrees contributed to that deletion. The statement of the US Deputy Legal Adviser to the State Department, and the Pakistani delegate when introducing his simplified version of Protocol II, cited above, confirm the correctness of this assessment.

The deletion of Articles 26 and 26 bis have in fact, led Bothe and others to contend that Protocol II, and especially its Article 13:

> "...[D]oes not, however, explicitly provide protection against indiscriminate or disproportionate attacks, nor does it prohibit explicitly the use of civilians to shield military operations. Moreover, it omits any direct reference to the prohibition against

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"...[O]bligations undertaken under a Protocol II which gave full protection to the civilian population would hardly go further than those already undertaken by Governments with respect to the civilian population under general principles of humanitarian law, which had now become customary law. Governments would simply have the benefit of more precise rules that would make it possible for them to defend themselves against unfounded criticism".

Op. cit., supra n.309, pp.456-57. The same argument also has been used by Italy, ibid, p.459.

[383]Article 26 as adopted by Committee III on May 5th, 1977 stipulates:

> "1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection the following rules shall be observed in all circumstances.
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.
> 3. Civilians shall enjoy the protection afforded by this chapter, unless and for such time as they take a direct part in hostilities.
> 4. The employment of methods or means of combat which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, is prohibited.
> 5. An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects is to be considered as indiscriminate.
> 6. The parties to the conflict shall not use the civilian population or civilians in order to attempt to shield military objectives from attacks."

Op. cit., supra. n.307, CDDH/407/Rev.1, p.503.

[384]The Article (26 bis) (General Protection of Civilian Objects), stipulates:

> "Civilian objects shall not be the object of attack. Attacks shall be limited strictly to those objects which by their nature, location, purpose or use make an effective contribution to the armed action of the parties to the conflict".

Ibid, p.504.

direct attacks of disproportionate collateral damage with respect to civilians."[385]

In my opinion, this negative picture is not wholly correct. Firstly, the distinction between combatants and non-combatants is implicitly included in the protocol, and clearly one fundamental effect of such distinction is prohibition of the acts listed by Bothe. Secondly, the **travaux préparatoires**, of either the discussions in the committees or working groups, do not support the contention advanced by Bothe, no State has clearly and publicly stated that it considered that the acts listed by the above writer were legal. Thirdly, even Bothe speaks about Article 13 as not providing 'explicitly' for the acts he listed, which means in effect, he does rule out the possibility that those acts are implicitly prohibited.

Finally, the commentary on the two protocols produced by the ICRC stresses that:

> "Article 13 sets out first of all the general principle of protection, i.e. the immunity to which the population is entitled under the law. This in particular, implies an absolute prohibition of certain methods of combat: direct attacks against the civilian population and intimidation."[386]

Further, the commentary stated that:

> "...[R]adical simplification does not reduce the degree of protection which was initially envisaged, for despite its brevity, Article 13 reflects the most fundamental rules. How to implement them is the responsibility of the parties, and this means that the safety measures they are obliged to take under the rule on protection will have to be developed so as to best suit each situation, the infrastructure available and the means at their disposal."[387]

In my view, an interpretation in good faith, and which takes into account the object and purpose of the protocol as a whole of Article 13, would instantly reveal that many important rules on the protection of civilians can be said to exist.

In this context, paragraph 2 of Article 13 speaks about the enjoyment of the civilian population of 'general protection against the dangers arising from military operations'. This means that the obligation 'does not consist only in abstaining from attacks, but also in avoiding, or in any case reducing to a minimum, incidental losses and in taking safety measures.'[388]

Moreover, to ensure such general protection of the civilian population many measures should be taken by the parties when planning or deciding to attack. Among them, the parties to the conflict should not intentionally place military installations within the vicinity of populated places, in order to avoid the use of civilians as a shield against attacks of the enemy.

In fact, to bring real protection to the civilian population many customary rules may be said to apply, such as:

1. Minimum force is required to harm the enemy, otherwise any contrary action would be

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[385] Op. cit., supra. n.281, p.676.

[386] Op. cit., supra. n.297, p.1446.

[387] Ibid, p.1448.

[388] Ibid, p.1449.

considered terror, which is explicitly prohibited by Article 13/2.
2. The principle of distinction and proportionality would make it forbidden to attack where such an action would result in harming the civilians and their objects, without resulting in clear military advantages.

Thus, despite its brevity Article 13 can be said to contain a good many rules for the protection of the civilian population, and thus places many restrictions on the liberty of the parties to the conflict to choose the means of combat. Hence, the Article, indirectly at least places, some fundamental limits on the sovereignty of the State in this field.

4. Protection of Objects Indispensable to the Survival of the Civilian Population

Starvation is an old method, which was used in times of war in order to defeat the enemy. It played a very important role in influencing the outcome of civil wars. The American Civil War, the Boer War and the Biafran War are good examples.

Starvation as a method of war may take three ways, as Rosenblad affirms. The first involves the destruction of objects indispensable to the survival of the civilian population, e.g. foodstuffs and food-producing areas, crops, livestock, drinking water resources within an area, e.g. by means of devastation or destruction of food supplies. The second way aims at cutting the adversary off from supplies of food or water from outside, e.g. by means of siege, contraband measures or blockade. The third way envisages scorched earth tactics.[389]

On the legal level there is no indication that starvation is prohibited. In fact, the Lieber Code specifically stresses its legality. Thus, Article 17 stipulates:

> "War is not carried on by arms only. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy."[390]

Article 3 is silent, although the concept of humane treatment may be said to prohibit such practice because it is essentially an extreme form of inhumane treatment.

However, Article 14 of the second protocol provides:

> "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works."[391]

The ICRC submitted to the conference Draft Article 27, which dealt with the subject of starvation. The aim of the Article was to prohibit a particular cruel method of war, namely the destruction of essential means of survival of the population and the destruction of the environment.

From the discussions and many amendments submitted by State representatives, two positions can be clearly distinguished. The majority stressed the importance of the Article,

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[389] E. Rosenblad: International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Destruction and Related Problems. Geneva, Institut Henry Durant, 1979, p.103.

[390] Op. cit., supra. n.28, p.6.

[391] Op. cit., supra. n.309, p.485.

and even demanded the extension of the means covered by the prohibition, such as food producing areas, crops, objects of national economic value, houses, installations and means of transport.[392] Others demanded that civilian objects should not be the object of reprisals and any form of attack.[393]

However, the minority view which was advocated by Canada and supported only by the US, simply demanded the deletion of Draft Article 27. Canada invoked the ground of sovereignty specifically to suggest such deletion.[394] The US delegate supported Canada's attitude, and further stressed that the Article constituted an intervention in the internal affairs of States.[395] Ireland and the Soviet Union, among others, specifically argued against the Canadian approach, and stressed the importance of the Article in Protocol II.[396]

This atmosphere led to the adoption of Article 27 at committee II without any major modification as to the ICRC proposal.[397] This means that at that stage there was a widely

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[392]For an example of this trend, see the Romanian amendment (CDDH/III/12 of 12/3/1974), ibid, p.473. See also Australia (CDDH/III/47 of 15/3/74), ibid, p.474.

[393]See the amendments submitted by Egypt, Iraq, Mali and Syria (CDDH/III/62/Rev/1/add.1 of 19/3/1974), ibid, p.474.

[394]Thus, Canada's delegate argued that:

> "...[H]is delegation proposed that Article 27 should be deleted [CDDH/III/36 of 15/3/74] arose from its conviction that, if Draft protocol II was to represent an important evolution of humanitarian law, the effect its provisions would have on the sovereignty of States must be carefully weighed. In view of the fact that both parties to non-international armed conflict were generally fighting on their own territory, it would perhaps be inappropriate to suggest to them that they could not deal with certain objects as they saw fit."

He then added:

> "...[A]s the Canadian proposal might appear to run counter to the aims of the conference, he wished to make it clear that his delegation was not in favour of attacks on the types of objects in question. However, the situation in non-international armed conflicts was often very different from that obtaining in international conflicts and would be inappropriate to overburden Draft Protocol II with provisions that were merely copies of those in Protocol I".

Op. cit., supra n.362, CDDH/III/SR.17, para.41, pp.149-150.

[395]The US delegate pointed out that:

> "In his delegation's opinion, Draft Protocol II should be based entirely on the principle of the sovereignty of States within their borders and should be limited to humanitarian considerations. He agreed with the Canadian representative that the wording of Article 27 amounted to interference in internal affairs of States. Those provisions should be modified for they were too broad. Their scope should be limited to a simple ban on starving out the civilian population".

Ibid, CDDH/III/SR.18, para.7, p.152.

[396]Ireland indicated that:

> "It did not share the opinion expressed by Canada...that such prohibition would affect the sovereignty of States, and the USSR emphasised that there could be no question of deleting Article 27 for that would endanger the civilian population and the objects indispensable to their survival".

Op. cit., supra n.309, p.478.

[397]Draft Article 27 was adopted by Committee II by consensus on June 4th, 1976 (CDDH/III/359). It stipulates that:

> "Starvation of civilians as a method of combat is prohibited and therefore it is forbidden to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs and food producing areas, crops, livestock, drinking water

shared consensus that the essential means of survival of the civilian population must be spared, and that there is no real military advantage can be said to come from their destruction. Despite this, the Pakistani simplified version listed Article 27 among the list of Articles which were proposed to be deleted.

At that point the delegate of the Holy See intervened, and made a very emotional statement in order to spare the Article. After observing that he was watching with increasing concern the dismantling Article by Article of Draft Protocol II. He declared:

> "Now that the conference was being called on to decide whether or not to delete Article 27, which was essentially concerned with food and water supplies for the civilian population, the delegation of the Holy See, as well as others, had to face a problem of conscience, for the protection of civilians was one of the aims, possibly even the main aim, of the two protocols."[398]

Many delegations supported the Holy See, among them: Sweden, the USSR, Ecuador, Algeria, Libya and Italy.[399] France, in order to dispel the fears of sovereignty-oriented these States pointed out:

> "All Article 27 contained was a purely humanitarian provision, which no-one should oppose. The text did not authorise any interference in the internal affairs of a State and in no way ran counter to the requirement of national defence."[400]

These efforts led finally to the sparing of Article 27, which was adopted by consensus. It became Article 14 in the final version of Protocol II. Thus, starvation as a cruel and inhuman method of warfare against civilians is finally prohibited. Article 14 in fact prohibits the different ways through which starvation can be brought about, such as the destruction of foodstuffs and areas which produce foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

The list is not exhaustive, since as the commentary of the two protocols of the ICRC stated, starvation can also result from omission. It stressed:

> "To deliberately decide not to take measures to supply the population with objects indispensable for its survival in a way would become a method of combat by default, and would be prohibited under this Article."[401]

Moreover, the use in Article 14 of the verbs 'attack', 'destroy', 'remove' and 'render useless' was aimed at covering all eventualities. This indicates that it is prohibited to pollute the water supplies by whatever means, and to destroy the harvest by using any kind of chemicals.

The Article in my view is another positive step in the direction of real protection of

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installations and supplies, and irrigation works, for that purpose".

Ibid, p.482.

[398] Op. cit., supra. n.267, CDDH/SR.52, para.82, p.136.

[399] Ibid, paras.84, 87, 91, 93 and 94, pp.136-137.

[400] Ibid, CDDH/SR.52, para.86, p.137.

[401] Op. cit., supra. n.297, p.458.

fundamental human rights, the right to life. MacAlister-Smith stressed in this respect:

> "Article 14 establishes without reservation the prohibition of starvation as a method of warfare and its terms assume particular importance in the light of weaknesses in the remaining provisions concerning relief."[402]

He then indicated that:

> "...[F]ailure to provide relief may constitute a violation of the prohibition of starvation of civilians laid down in Article 14."[403]

In conclusion, Article 14 constitutes a welcome development in an area where it is most wanted, internal conflict, placing as it does a real restriction on the discretion of the warring factions.

5. The Protection of Works and Installations Containing Dangerous Forces

Article 15 of the Protocol II provides:

> "Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequently severe losses among the civilian population."[404]

Resort to the use of natural and artificial forces to combat the enemy, and achieving victory, is an inhuman act, since its main victims are always civilians. The representative of Vietnam in the Diplomatic Conference said that during the war in Vietnam 661 sections of dyke had been either damaged or destroyed, and it had been calculated that the bombing of the dykes in North Vietnam carried out systematically with explosives and penetration bombs, could have effects comparable to those of a hydrogen bomb. The flooding of the delta and other acts led to the death of two or three million inhabitants by drowning or starvation.[405] However, the substance of Article 15 cited above, was included in Article 28 of the ICRC Draft Protocol II.

During the discussions at the committee level, and from the amendments submitted to the Article, we can deduce three positions. The first supported the ICRC's position, like the latter, it was in favour of the prohibition of attacks against objects which contain dangerous forces, but only when such attack may cause the release of dangerous forces and consequently cause severe losses among the civilian population. This means at the end, that the prohibition is not wholly absolute, since the possibility of attacks remains.[406]

The second view stressed that the prohibition must be absolute. It suggested the deletion

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[402] P. MacAlister-Smith: International Humanitarian Assistance: Disaster Relief Actions in International Law and Organisation. Martinus Nijhoff, Dordrecht/Boston, Lancaster, 1985, p.31.

[403] Ibid, p.31.

[404] Op. cit., supra., n.307, p.505.

[405] Op. cit., supra. n.362, CDDH/III/SR.19, para.2, p.161.

[406] This was the position of Australia's amendment (CDDH/III/46 of March 19th, 1974), op. cit., supra n.309, p.490.

of any qualification in the Article which may be interpreted that attacks are sometimes permitted, and further suggested that those objects which contain dangerous forces shall not be the object of reprisals.[407]

The third view simply proposed the deletion of Article 28 on the ground that it had no place in Protocol II, because it constitutes an intervention in the internal affairs of States.[408]

However, at the committee level it was the first position which won the day, and the Draft Article 28 adopted seems to afford a better protection than that which was envisaged in the ICRC Draft Article 28. In this context, paragraphs 2 and 3 were added. The first made an obligation for the parties to endeavour to avoid locating military installations and objectives in the vicinity of works or installations containing dangerous forces. And the latter (third paragraph) induces the parties to mark such works and installations with special marks.[409] However, Article 28 was adopted after the imputation of paragraphs 2 and 3. In other words, a return to what had been proposed in the ICRC Draft Protocol II.

On balance, it seems that Article 15 is an innovation in the context of Protocol II, no such provision can be found in Article 3. It obliges the parties to the conflict not to attack objects which contain dangerous forces, whenever severe losses of civilians would result from such attacks. In that respect, the Government cannot claim that these works and installations are in the national territory, and it is only the legal authority which can decide what to do with them in the event of internal conflict. Its sovereignty in that respect is curtailed at least to a certain degree.

On the other hand, it must be conceded that the Article contains many loopholes. Thus, the list of installations and works which cannot be the object of attack is exhaustive, since the Article uses the term 'namely', which means that many installations and works which contain in effect, dangerous forces are not immune from attack, such as facilities and works used for the storage of crude oil products, and chemical agents. Moreover, the protection of civilians in the Article is not absolute since the prohibition is qualified by 'severe loss' which means when there is no severe loss then civilians must bear the horrors of attacks on those installations.

5. Protection of Cultural Objects and Places of Worship

Article 16 of the Protocol II provides:

> "It is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of military effort."[410]

The ICRC, it must be indicated, submitted nothing concerning this important question. The

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[407]This was the effect of the Romanian amendment to Article 28 (CDDH/III/327 of April 30th, 1970), ibid, p.489.

[408]This was the opinion of Canada. It demanded the deletion of Article 28 for the same reasons which it had advanced for the deletion of Article 27. In fact it advanced grounds of sovereignty and non-intervention. Op. cit., supra n.362, CDDH/III/SR 20, para.20, p.176.

[409]See op. cit., supra n.309, pp.501-502.

[410]Ibid, p.526.

Article originated in an amendment tabled by 11 States, which proposed the addition of new Article 20 bis[411] dealing with the subject of the protection of cultural objects and places of worship.

During the discussions at the committee level, the majority did not see any problem in adding a new Article dealing with that subject. However, at least the US and Japan pointed out that:

> "...[T]he incorporation in Draft Protocol II of such executive international regulations of internal conflicts did not enhance the protocol's chances of acceptance."[412]

However, Article 20 bis was adopted by consensus at the level of the Third Committee.[413]

In its simplified version, Pakistan proposed the deletion of Draft Article 20 bis. But, the majority of States led by Greece appealed to the Pakistani delegate not to insist on that deletion, since many of the world's treasures were in danger of being destroyed in the course of internal armed conflict.[414] Iraq was against the majority, its delegate stated that:

> "its Government and people need not an Article in Draft protocol II to tell them that such acts as those mentioned in Article 20 bis were prohibited."[415]

The US also stressed that, if adopted, the Article would be bound to prevent some States from becoming parties to Protocol II, and signalled its willingness to vote against the inclusion of the Article in Protocol II.[416] However, at the plenary meeting of 6 June 1977, the Article (20bis) was adopted by 35 votes to 15, with 32 abstentions.[417] Even after the vote, India explained its negative vote for Article 20 bis on terms of its contradiction with State sovereignty.[418]

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[411] Amendment (CDDH/III/GT/95 of May 25th, 1976) formulated by Afghanistan, Egypt, Ghana, Greece, Holy See, Italy, Japan, Jordan, Spain and Yugoslavia. Ibid, p.509.

[412] Ibid, p.512.

[413] The Article adopted reads:

> "Without prejudice to the provisions of The Hague Convention on the protection of cultural property in the event of armed conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against those historic monuments or works of art which constitute the cultural heritage of peoples, and to use them in support of the military effort".

Ibid, p.514.

[414] Greece was supported by Ireland, the Holy See, France, Italy, Austria, Spain, Colombia and Turkey. See ibid, pp.515-516.

[415] Ibid, p.515.

[416] Ibid, p.515.

[417] Ibid, p.523.

[418] It stressed that:

> "The Indian delegation objects strongly to the reference to any international convention to which only sovereign States can be parties, in Protocol II, which will apply to internal conflicts".

Ibid, p.524.

The adoption of Article 16 is a very welcome development. In a way, if compared with Article 19[419] of The Hague Convention for the protection of cultural property, it grants more comprehensive protection, thus, it covers also places of worship. Also Article 16 contains no possibility of derogation from the prohibitions listed there, even where the imperatives of military necessity so require, whereas Article 19 contains such possibility. To that extent, I think that Article 16 brings a further limitation on the sovereignty of the State, as such, it is indeed an innovation.

7. Prohibition of Force Movements of Civilians

Article 17 of Protocol II provides:

> "1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."[420]

It is to be observed that the forced displacement of the civilian population during civil wars still causes untold sufferings. The examples of Algeria, Vietnam, and recently of Cyprus, Nicaragua and El Salvador among others reveal clearly the correctness of such assertion.

On the normative level, there was no international regulation of the question. Article 3 is silent on the point, which meant in practice States were free to order such relocation for whatever reason they see fit. This important loophole had to be filled. The ICRC had just done that by submitting Draft Article 29, which deals with the subject.

The Article in fact, poses the general principle that the relocation of the civilian population for reasons related to the conflict is prohibited. However, such relocations can take place exceptionally in two cases. The first, is when the safety of the population itself is in danger. Secondly, when imperative military necessity so demands in that these cases are necessary actions and measures must be taken to make such displacements smooth and humane. Paragraph 2 indicates that civilians must not be forced to leave their national territory.

The **travaux préparatoires** show that the Article was seen as touching a very sensitive point,

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[419] Article 19 (Conflicts not of an International Character) stipulates:

> "1. In the event of an armed conflict not of an international character occurring within the territory of one of the high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present convention which relates to respect for cultural property.
> 2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present convention.
> 3. The UN Educational, Scientific and Cultural Organisation may offer its services to the parties to the conflict.
> 4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict."

Op. cit., supra., n.28, pp.679-70.

[420] Op. cit., supra. n.309, p.543.

namely the right of the established Government to take all necessary measures to maintain public order. Two views concerning the Article can be said to emerge from reading those **travaux préparatoires.**

1. The first view, which is the majority view, welcomed the idea of covering the subject of deportations and displacements in Protocol II, then supported the ICRC Article. Some delegations went even further. Thus, it was proposed that the prohibition of displacements must not only cover the civilian population, it must be extended to cover any transfer of civilian objects or installations.[421] Cyprus, which according to its delegation had the greatest proportion of displaced persons, since 2 out of 5 had been uprooted in inhuman conditions, supported strongly the strengthening of the Article and its preservation in the context of Protocol II. In its eyes displacement constitutes 'an inhuman and unacceptable practice'[422] and it stressed also that:

> "...[O]f all inhumanities of an armed conflict the Government of Cyprus considers the displacement of the civilian population to be among the most deplorable".[423]

The second view explicitly invokes the concepts of sovereignty and non-intervention, to state the dissatisfaction with the inclusion of anything concerning the question of displacement in Protocol II. Canada led this group. It proposed the deletion of the Article. The rationale behind this is that:

> "In case of insurrection or non-international conflict, Governments had the right to transfer part of the civilian population from one region to another if they considered it necessary. The prohibition of forced movement of civilians was justified in Draft Protocol II I, which applied to international conflicts, but in the case of an internal conflict it becomes interference in the domestic affairs of a country."[424]

The US supported Canada[425] Indonesia also indicated that:

> "...Article 29 could be interpreted as leading to interference in the internal affairs of sovereign States, which had the right to decide on the measures required for their safety and that of the population even where the displacement of the civilian population was concerned."[426]

During the discussion at the committee level, Norway answered indirectly those who raised

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[421] this is the effect of the Romanian amendment (CDDH/III/12 of March 12th, 1974). The Soviet Union, Switzerland, Norway and Cyprus. See ibid, pp.529-35.

[422] Op. cit., supra. n.307, CDDH/III/327, p.95.

[423] Op. cit., supra. n.267, CDDH/SR.53, p.156.

[424] Op. cit., supra. n.309, p.531.

[425] The US argued that:

> "...Article 29, as Drafted, would undoubtedly lead to the non-application of Protocol II. No State was likely to admit that existing authority within its territory was challenged to the point at which the provisions of Protocol II would apply".

Ibid, p.534.

[426] Ibid, p.534.

the issue of sovereignty in these terms:

> "Of course, sovereignty was important in that it afforded protection against outside interference, but it had ceased to be a screen behind which Governments had unrestricted freedom to act in their relations with the nationals of the country. The development of international humanitarian law had shown that Governments were ready to accept restrictions on their freedom of action."[427]

At the committee level, Article 29 was adopted.[428] Basically, it did not depart from what has been proposed by the ICRC. The only change was in paragraph 2, which although it had upheld the principle that civilians shall not be compelled to leave their own territory for reasons related to the conflict. It opened an exception, and that is in the case in which individuals convicted by final judgment of crimes are required to leave the territory, or when they elected to do so when offered that opportunity; and finally in cases of extradition which must, however, be in conformity with the law.

In the simplified version in which the Article was kept, it was not suggested for deletion. The only change is the deletion of the expression 'the parties to the conflict' which aims at not giving any chance of legal status to the insurgents.

The main conclusions to be drawn concerning this important Article are:

1. There is no doubt that Article 17 fills an important gap, namely the question of displacements, which are becoming a normal means of conducting the war in internal conflicts, as the practice in Nicaragua, El Salvador, Mozambique and Afghanistan among others will show later. Article 17 is an innovation, since Article 3 is silent on the point. In fact, the article was specifically inspired by Article 49 of the Fourth Geneva Convention,[429]

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[427] Ibid, p.533.

[428] Article 29 as adopted by the Third Committee on May 10th, 1977 stipulates that:

> "1. The displacement of the civilian population shall not be ordered by a party to the conflict for reasons relating to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should a party to the conflict undertake such displacements, it shall take all possible measures in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict except in the case in which individuals convicted by final judgment of crimes are required to leave that territory or, having been offered the opportunity of leaving the country, elect to do so, or in the case of individuals extradited in conformity with law".

Ibid, pp.541-542.

[429] See the comment of the ICRC representative, when he presented Article 29, ibid, p.530. Article 49 stipulates:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
Nevertheless, the occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory, except when for material reasons it is impossible to avoid such displacements. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
The occupying power undertaking such transfers or evacuations shall ensure, to the greatest practical extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
The protecting power shall be informed of any transfers and evacuations as soon as they have taken place.

and in that respect the protection of civilians from displacement is similar in internal and international wars, which is in itself a fundamental change from the thinking of the 1949 Conference.

This leads one to conclude that the assertion that the established Government enjoys a complete freedom of action vis-à-vis its population, especially in times of emergencies, has been restricted and even curtailed to a great degree. The majority of States felt that the inhuman tragedies of displacement must be prohibited as a general principle. The discretion of the Government in this domain is limited.

2. Moreover, it can be safely advanced that on the subject of displacements, it seems that humanitarian ideals have overcome demands of sovereignty and non-intervention. The non-inclusion of Draft Article 29 in the list of the Articles demanded for deletion by Pakistan in its simplified version of Protocol II is a case in point.

3. Furthermore, we must not be over-optimistic, since Article 17 contains some important loopholes. Thus, the prohibition of displacements, according to the Article, ceases to be operative when 'the security of the civilians' is involved, and when 'imperative military reasons' so demand. These grounds may be used and interpreted to justify massive displacements.

However, it seems that an interpretation in good faith, and in accordance with the object and purpose of the protocol would limit excesses to a significant degree. In this context, the commentary of the ICRC stresses in connection with the expression 'imperative military reasons' that "the situation should be scrutinised most carefully as the adjective 'imperative' reduces to a minimum cases in which displacements may be ordered".[430] The commentary also indicates that:

> "...[C]learly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group."[431]

However, as concerns the notion of 'the security of civilians', it seems that a good faith interpretation requires, as the Norwegian delegate rightly pointed out during the conference, that 'the security of civilians should not require their forced displacement, because if their security was genuinely threatened civilians would be prepared to move off of their own accord'.[432]

> The occupying power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies".

Op. cit., supra. n.28, p.448.

[430] Op. cit., supra. n.297, p.1473.

[431] Ibid.

[432] Op. cit., supra. n.362, CDDH/III/SR.25, para.4, p.229.

8. General Conclusions Concerning the Articles on the Protection of Civilians

1. The general impression is that Articles 13-17 constitute the biggest contribution of Protocol II to humanitarian law applicable in non-international conflicts. Compared with Article 3, Protocol II has indeed filled many normative gaps, which were not regulated by any international instruments. Thus, civilians cannot be the object of attack. Objects necessary for the survival of those civilians are also protected from attack or manipulation, and civilians are protected from starvation etc.

2. Moreover, it is asserted that the deletion of many important rules, such as Draft Articles 24 and 25 of the ICRC Draft, which established the distinction between combatants and non-combatants, and established a general presumption in favour of the civilian population in cases of doubt, has to some extent limited the importance of the rules contained in Articles 13-17. Although, an interpretation in good faith and in accordance with the object and purpose of Protocol II would reveal that those rules, and even some rules on methods and means of warfare, can be found in Article 4 and Articles 13-17.

3. It is asserted here that the arguments of sovereignty and non-intervention have played a major role in the imputation of many important rules for the protection of civilians. Indeed Pakistan, the author of the simplified version of Protocol II, had advanced them as the main reason for making the protocol 'simple' and capable of being accepted by States and also being practical.

However, it is clear also that considerations of humanity have played a major role in persuading States to accept many rules for the protection of civilians. Indeed, the mere fact of the acceptance of those rules is a challenge to the sovereignty of States.

Furthermore, it must be noted the group of States which favoured an extension of rules of humanitarian law concerning civilians to internal wars (which was led by Norway, Italy and the Holy See, and was supported by many other States), had the upper hand at the committee level. Their strategy was to stress the humanitarian nature of the provisions and emphasise that they did not in any way amount to intervention or breach of sovereignty. However, at the last session it seems that defenders of State sovereignty made it clear there must be either simplification (which means that many rules had to go) or abandonment of Protocol II. This blackmail left no alternative but 'something is better than nothing'.

4. Further, I think that the philosophy of human rights has facilitated the effort to produce more rules for the protection of civilians. Since after all, Articles 13-17 are all designed in a way to protect the fundamental human rights of right to life and the right to be treated humanely in all circumstances. No State has challenged at least explicitly the use of human rights in that direction. Indeed no State has argued against the relevance of the concept of human rights to the question of the protection of civilians in times of war.

E. The Protection of the Wounded and Sick in Protocol II

As has been indicated in Section II, Article 3, apart from posing the general principle that the sick and wounded shall be collected and cared for, did not give any details on how it was to be implemented.

Thus, no protection is given to the medical personnel or civilians who try to assist and care for the wounded and sick, nor is there protection for medical establishments and

vehicles. These omissions do not facilitate the protection of victims of internal wars.

In fact, the ICRC has signalled the need for a thorough protection for the wounded and sick, as far back as 1957, when it adopted in the XIX International Red Cross Conference in New Delhi, Resolution XVII, in which the wish was expressed that:

> "That a new provision be added to the existing Geneva Conventions of 1949 extending the provisions of Article 3 thereof so that:
> (a) The wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances.
> (b) The inviolable principle of medical professional secrecy may be respected.
> (c) There may be no restrictions, other than those provided by international legislation, on the scale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes".

The Resolution then made 'an urgent appeal to all Governments to repeal any measures which might be contrary to the present resolution.'[433] Moreover, the UN Secretary-General, in his second report on human rights in armed conflicts, advocated the same course of action.[434]

1. The Red Cross Experts' View

When the Red Cross experts were consulted on the question of the protection of the wounded and the sick in their conference in 1971, they unanimously recognised the need for more effective protection of this helpless category of the victims of internal conflicts. They were for:

> "...[I]ncreasing the respect shown to the emblem of the Red Cross, for strengthening the protection of medical personnel, whether military or civilian, as well as for the immunity of hospitals. Furthermore, they expressed the wish that the civilian population would not be punished simply for having aided or assisted the wounded and sick, as well as refugees."[435]

Thus, no question of sovereignty or non-intervention was raised either implicitly or explicitly.

2. The Governments' Experts' View

The ICRC, encouraged by the view of its experts, and by its experience in the field, submitted a whole seven Articles dealing with all aspects of the question of the protection

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[433] ICRC-and League of Red Cross Societies, op. cit., supra. n.266, pp.642-643.

[434] The UN Secretary-General stated in fact that:

> "It may therefore be suggested that an additional provision be adopted, under which personnel such as that of the Red Cross carrying out medical and relief activities and displaying the appropriate emblem should be protected from killing, ill treatment in all circumstances, and given the necessary facilities, whenever available, to perform their mission. Such a provision should also cover persons acting in an individual capacity solely for the purpose of giving medical aid and relief, provided their identity and whereabouts are made known to all participants to the conflict".

Report of the Secretary-General, UN Doc A/8052, para.150.

[435] Op. cit., supra. n.100, p.54.

of the sick and wounded.[436] The ICRC in fact, made it clear that it was important to use the same wording in these provisions as in the first protocol, since those provisions only refer to purely humanitarian aspects, and hence implicitly, they do not touch the sovereignty of States, and open no way to foreign intervention.

However, two experts at least were not happy with the ICRC approach. In their view, 'situations in non-international armed conflicts differed widely from those in international armed conflicts to the State and the role of the civilian population.'[437] Thus, they were not opposed to the widening of the protection of the wounded and the sick, but the use of the same wording in the two protocols. However, the majority were of the opinion that the same wording should be adopted in the two protocols.

It is interesting that no-one questioned the validity of extensive protection for the wounded and sick, which means that humanitarianism was the master of the situation in this important field.

3. The Diplomatic Conference Attitude

At the Diplomatic Conference, the ICRC submitted 8 Articles (11-18) which cover, essentially, the whole problems raised by the need for effective protection of the wounded and the sick and the shipwrecked.[438]

At the beginning of the discussions of the ICRC Articles, Bothe, the West German delegate, doubted "whether the issue of sovereignty really arose with regard to Articles dealing with the wounded and sick."[439] To him, the ICRC was only fulfilling a basic humanitarian need by providing better protection for the most unfortunate and weakest of victims of armed conflicts. Hence he failed to see how the requirements of State sovereignty could be construed to prevent that. Sweden also pointed out that it:

> "...[A]ppreciated the importance of State sovereignty, non-interference and so forth, but believed that these considerations should not prevail over the application of humanitarian law, especially in cases involving the protection of the wounded and sick."[440]

These comments were true to a large extent, no State has, in fact, made a statement to the effect that the extension of the rules on the protection of the wounded and sick can be seen as an infringement of State, or an intervention in its internal affairs. In this context, Solf summarised correctly the situation vis-à-vis protection of the wounded and the sick, at the

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[436]Thus, Articles 7-13 deal respectively with Protection and Care; Search; the Role of the Population; Medical and Religious Personnel; Medical Establishments and Transport; Evacuation; and the Distinctive Emblem. For their content, see op. cit., supra n.269, pp.100-104.

[437]Op. cit., supra. n.100, para.2.359, p.100.

[438]Articles 11-18 deal respectively with Definitions; Protection and Care; Search and Evacuation; Role of the Civilian Population; Protection of Medical and Religious Personnel; General Protection of Medical Duties; Medical Units and Transports; and the Distinctive Emblem. Op. cit., supra. n.273, pp.37-38.

[439]11 ORDCHL (1974-1977), Bern (1978), CDDH/II/SR.21, para.38, p.207.

[440]ibid, para.44, p.210.

committee level, he noted:

> "Insofar as its [Part II of Protocol II dealing with the wounded and sick] scope deals only with the humanitarian obligations to provide protection to the wounded, sick and shipwrecked, the committee believed that this part does not involve the political problems of status and sovereignty which may have been involved in other parts."[441]

However, at least one Article (Article 16: General Protection of the Medical Duties),[442] roused a great deal of discussion at the committee level, and the arguments of sovereignty and non-intervention were used extensively.

Article 16/3 especially, was the focus of attack, since it envisages a complete protection of the medical personnel involved in the assistance to the wounded and sick. They were not obliged to report to the parties to the conflict any information that would endanger the lives of their patients or their families.

Canada, and the US to a lesser extent, argued for the deletion of the Article, or at least its paragraph 3. The former stressed that paragraph 3 'could be regarded as an infringement of sovereignty and should be deleted.'[443] Indonesia endorsed Canada's view, because it 'would have difficulty in accepting paragraph 3 of Article 16, whose provisions were contrary to existing law in Indonesia.'[444]

However, another view was advocated by the Ukrainian Soviet Republic and was supported by Sweden, Cuba and the USSR. It stated that:

> "...[Paragraph 3] had nothing to do with sovereignty; it was a question of providing protection to medical personnel in the case of an internal conflict. To delete the paragraph would seriously weaken the impact of the whole protocol."[445]

This divergence of views led to the creation of a working group to deal with paragraph 3, which produced two texts of the paragraph.

The first text stressed that medical personnel have full discretion concerning giving information on the sick and wounded under their care 'except as provided form in the law

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[441] W. A. Solf: Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocol IIs Additional to the 1949 Geneva Conventions, in Swinnarski (ed.), op. cit., supra. chapter 1,n.1, p.239.

[442] Draft Article 16 as submitted by the ICRC provides:

> "1. In no circumstances shall any person be punished for carrying out medical activities compatible with professional ethics, regardless of the person benefiting therefrom.
> 2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to rules of professional ethics or to abstain from acts required by such rules.
> 3. No persons engaged in medical activities may be compelled to give to any authority information concerning the sick and wounded under his care should such information be likely to prove harmful to the persons concerned or to their families. Compulsory medical regulations for the notification of communicable diseases shall however be respected."

Op. cit., supra. n.309, p.363.

[443] Op. cit., supra. n.439, CDDH/II/SR.28, para.14, p.283.

[444] Ibid.

[445] This was the statement made by the Ukrainian Soviet Socialist Republic. Ibid, para.22, p.284. See also ibid, para.25, p.284 (USSR), para.27, p.285 (Sweden) and para.30, p.285-86 (Cuba).

in force prior to the beginning of the conflict'. This version which attempted to be a compromise between the advocates of sovereignty and humanitarianism was not acceptable to sovereignty oriented delegations. Indonesia seems in fact, to state the majority view, when it stated:

> "It considered the text a great improvement on the ICRC text, particularly since it provided an exception with respect to the 'law in force'. It feared, however, that the phrase 'prior to the beginning of the conflict' might constitute an interference with the right of a Government to enact legislation at any time, even after the outbreak of an internal conflict."[446]

Then the working group produced another version of Article 16/3 which paid great attention to the considerations of sovereignty, since the obligation not to give information on the sick and the wounded was respected 'subject to national law', which means among other things, that the door is open for Governments to enact laws, even after the outbreak of internal conflicts, to reduce that obligation.

The Draft Article, as adopted at the committee level, takes into account the second version of the working group texts. No deletion or modification was proposed for that Article in the simplified version. In the final Protocol II, it became Article 10, and it provides that:

> "1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
>
> 2. Persons engaged in medical activities shall neither be compelled to refrain from acts required by the rules of medical ethics or other rules designed for the benefit of the wounded and sick, in this protocol.
>
> 3. The provisional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
>
> 4. Subject to national law, no person engaged in medical activities may be penalised in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care."[447]

However, it must be noted that two important Articles, 12 bis and 14, have been deleted in the simplified version of Protocol II submitted by Pakistan. The first concerns the protection of persons in their mental and health integrity. Thus, it prohibits physical mutilation, medical experiments or removal of organs for transplantation (this Article was not proposed by the ICRC; it had been Drafted at the committee level).[448] The second,

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[446] Ibid, CDDH/II/SR.39, para.33, pp.424-425.

[447] Op. cit., supra. n.309, p.402.

[448] Article 12 bis as Drafted and adopted by Committee II which stipulates:

> "1. The physical or mental health and integrity of persons who are interned, detained or otherwise deprived of liberty, by any of the parties to an armed conflict for reasons relating to that conflict, shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the State of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical

which deals with the role of the civilian population, concerns their assistance to the sick and wounded.

But, it seems that their essentials and spirit can be found in other Articles of Protocol II. Thus, on one hand, it is argued that the spirit of Article 12 bis is found in Article 5/1 (e). Indeed, such was the intention of the Pakistani delegate.[449] On the other hand, civilians are protected by virtue of Article 18/2 which provides that:

> "The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked."[450]

Moreover, it is important to note that the ICRC has proposed a very important Article (Draft Article 11) concerning definitions of the terms 'sick' 'wounded' and 'shipwrecked'. At the committee level, some delegations voiced their opposition to the inclusion of such definitions, because they feared that the complex sets of such definitions might make Protocol II difficult to read and understand.[451] The UK representative even suggested that:

> "There was also a psychological consideration: rebel leaders might be discouraged from observing the protocol if their first glimpse of it was a lengthy list of technical definitions of apparently commonplace terms."[452]

However, the majority of States at the committee level were of different opinion. They supported the inclusion of such definitions, which led the committee to adopt Draft Article 11.[453]

But, in the simplified version of Protocol II, Article 11 was deleted, the reason being the simplification of Protocol II in order to make it effective. The ICRC commentary on the two protocols, suggests that the definitions used in Protocol I (Article 8), although not binding in Protocol II, 'nevertheless constitute a guide for the interpretation of the terms.'[454]

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circumstances.
2. Subject to the provisions of paragraph 1, it is, in particular, prohibited to carry out on such persons, even with their consent:
(a) physical mutilations;
(b) medical or scientific experiments;
(c) removal of tissue or organs for transplantation."

Ibid, p.320.

[449] See his comment on introducing his proposal for the deletion of Article 12 bis. Ibid, p.320.

[450] Ibid, p.601.

[451] 12 ORDCHL (1974-1977), Federal Political Dept, Bern 1978, CDDH/II/SR.79, para.18, p.260.

[452] Ibid, para.32, p.262.

[453] For the text of this very long Article see: 13 ORDCHL (1974-1977), Federal Political Dept, Bern, 1978, CDDH/406/Rev.1, pp.421-422.

[454] Op. cit., supra. n.297, p.1405. At least the US seems to support such a course of action, since it expressed its understanding was that:

> "It is the understanding of the United States of America that the terms used in Part III of this protocol [II] which are the same as the terms defined in Article 8 of Protocol II I shall so far as relevant be construed in the same sense as those definitions".

The general impression, however, is that many important rules have been adopted concerning the protection of the wounded and the sick. They indeed fill the loopholes and gaps which practice has shown. The rules adopted afford protection to the sick, wounded and shipwrecked, and also protection for those who assist them, either medical, religious or civilian personnel; and lastly protection for the material means necessary for the real protection of this category of victims of internal conflicts. These rules may be summarised as follows:

1. The wounded, sick and shipwrecked are to be collected, searched for and cared for, whatever they may be, insurgents, soldiers of the Government, civilians or military. No discrimination on whatever ground can be resorted to.

2. Medical and religious personnel have full protection, when engaging in their assistance and caring of the wounded, sick and shipwrecked. It is no longer a crime to do so. The parties are under strict obligation to grant all the means available for those personnel in order that their task is fulfilled properly.

3. Medical units such as hospitals, and means of transport whatever their nature, cannot be the object of attack, unless they have deviated from their humanitarian mission.

4. The distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun has to be displayed by medical and religious personnel and medical units and transport. It must be respected.

These are essential rules for any effective protection of the sick, wounded and shipwrecked. They constitute in fact a real development of Article 3 of the Geneva Conventions. In general, there was a wide consensus that they must be respected, since they are far from touching any questions of sovereignty or intervention. They are purely humanitarian rules, which all cultures and religions of the world accept. This explains in part why Pakistan, in its simplified version, did not basically operate fundamental changes of what was accepted at the committee level.

F. The Practice after the Adoption of the Two Protocol IIs vis-à-vis the Protection of the Victims of Internal Wars

Although no State experiencing an internal conflict has yet recognised the application of Protocol II, except may be El Salvador,[455] it seems to me very interesting to review the State practice after the adoption of Protocol II, in order to see whether its innovations concerning the protection of the victims of internal wars has, at least indirectly, influenced the conduct of such conflicts. By the same token, we intend to show whether the rules adopted in Protocol II can stand a good chance of application or not.

1. The Practice in Relation to the Protection of Civilians

It seems that the civilian population is still by and large the main victim of internal conflicts. All its horrors still fall on them. The practice supports such a contention in a very clear way.

Op. cit., supra n.439, p.240.

[455] At least the ICRC seems to support this view. See The ICRC Worldwide, 1988, p.11.

1.1. El Salvador

In El Salvador it seems that the civilians had in many instances become a military target themselves. Ground and air forces are involved in such practices, especially in the areas suspected to harbour insurgents. Thus, the Commission of the Church on International Affairs stated that:

> "...[W]e can no longer speak of the mere violation of human rights in El Salvador. The statistics prove that in quantitative and qualitative terms a policy of systematic extermination has been designed and is constantly updated."[456]

In a report of a fact-finding mission to El Salvador led by two members of the US Congress, it is alleged that 'El Salvador is engaged in a civil war but more people die by murder than in combat.'[457]

Besides, the New York Tribunal on Central America and the Caribbean emphasized that 'attacks against civilian targets are an almost inevitable component of a military campaign,'[458] and then it adds:

> "That is a large part of what military counterinsurgency strategy in El Salvador is about: air attacks and ground troop sweeps through 'contested areas', areas where Government control is not secure; attacking villages, destroying homes, burning crops, massacring civilians, and tearing apart the social fabric, causing people to leave their villages and run for their lives, fleeing through the mountains and the jungle for months without food or medicine until they are prostrate, until they give up running and turn themselves in to the authorities and live as refugees in the relocation centers run by the Government."[459]

Similarly, it was reported that:

> "It is now plain that the Salvadoran armed forces are attempting to win the war by forcing out of zones controlled by the guerrillas. Apparently the purpose is to deprive the guerrillas of access to the civilian population from which they may obtain food and other necessities."[460]

Moreover, The American Watch and the Lawyers Committee for International Human Rights in El Salvador arrived at the same conclusion. It revealed that:

> "The evidence we have gathered makes it clear to us that the armed forces of El Salvador, ground and air, are engaged in indiscriminate attacks upon the civilian population on conflict zones, particularly in guerrilla controlled conflict zones of El

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[456] Commission of the Church on International Affairs, Jan. 1981, Background Information, El Salvador: One Year of Repression, p.28.

[457] J. Jeffords, B. Richardson, J. Oberstar (US Representatives): Report of a Fact-Finding Mission Sponsored by the Unitarian Universalist Service Committee, p.3.

[458] P. Ramshaw and T. Steers (eds.): Intervention on Trial: The New York Crimes Tribunal on Latin America and the Caribbean. Praeger, New York, Westport, Connecticut, London, 1984, p.17.

[459] Ibid, p.18.

[460] An American Watch Report: Draining the Sea, 6th Supplement to the Report on Human Rights in El Salvador, March 1985, p.1.

Salvador."[461]

It seems that the military view the civilians living in zones under guerrilla control as fair game. Thus, according to Col. J. Adalberto Cruz Reyes, Commander of the Garrison in San Francisco Gotera, Morazan, when the FLMN (the insurgents) is present, civilians 'who don't want to cooperate leave the area, and those who remain are collaborating'[462] which means that bombings of civilians[463] and the use of prohibited weapons were used extensively against civilians. In the latter case, the air force commander stated expressly that 'before the US started helping us, we had to use napalm, because we did not have any other equipment'.[464]

Resort to aerial bombardments of civilians in particular has been, it must be stressed, criticised even by the Americans who by their assistance have made the Salvadoran air force the most powerful air force in Central America. Thus, a classified report by the US Defence Advisory Panel reportedly criticised those air forces. Retired Major General John Singlamb, the panel's head, emphasised in an interview that 'dropping 500 pound bombs on insurgents is not the way to go,'[465] and added 'there is a tendency to escalate to a higher level of violence than is appropriate.'[466]

However, the bombing tactics have placed the Government in a very uncomfortable position, which led the President (Duarte) to issue a set of guidelines for air force pilots. The Directive C.111.03.1984, permits aerial attacks only on mobile guerrilla forces, which are: (1) actually engaged in fighting with Government troops; (2) attacking a Government installation; or (3) moving supplies or personnel.[467]

In practice, the military, in order to give lip service to the presidential directive, have resorted to what they call 'softening up bombardments' (bombardo de ablan damiento)[468] which are aimed at moving the guerrillas from areas where it is supposed that they have contact.

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[461] J.W. Hopkins (ed.): Latin America and the Caribbean Contemporary Record. Vol.3, 1983-84, Holms & Meir, New York and London, 1985, p.526.

[462] Ibid.

[463] In this regard, see Christian Science Monitor of March 26th, 1984, p.1 and 32.

[464] Op. cit., supra. n.457, p.4.

[465] Op. cit., supra. n.461, p.526.

[466] Ibid.

[467] For the actual text of the Directive, see op. cit., supra n.460, pp.29-30.

[468] As an example of such exercise, the Press Office of the Salvadoran Armed Forces (COPREFA) made some statements which were reported by the Salvadoran press. It is asserted that:

> "The armed forces reported that artillery units are participants in efforts to soften the position of the FMLN in the hills of San Pedro and La Camparra in the Canton La Joya (San Vicente), while planes and helicopters of the air force are providing reconnaissance, observation and sometimes bombing services... The armed forces count on the support of the artillery and whenever they deem it convenient, that of aviation, in order to soften the positions of the guerrilleros".

Ibid, pp.27-28.

However, even the Americans claim that such groupings and fixed rebel installations are 'practically non-existent',[469] which means that the civilians are the main victims in the end of such tactics.

The terror tactics of the military have resulted, according to a US Senate staff report, in there being currently about half a million internally displaced persons in El Salvador. In addition, there are estimated to be another quarter million either in refugee camps in Honduras, Nicaragua or Costa Rica, or in Mexico. Approximately half a million more are believed to have fled to the US. These figures represent 25% of El Salvador's total population.[470]

Moreover, the International Commission of Jurists estimated in December 1986 that 700,000 Salvadorans had fled the countryside to the cities, another 700,000 have taken refuge in other States. It also stated that human rights violations which spring from the conflict itself, including massacres in rural areas to indiscriminate bombings and death squad killings, have resulted in the killing of more than 40,000 persons. All this in a population of not more than 5 million.[471]

Furthermore, the guerrillas also are accused of some serious human rights violations. Thus, during 1985 the Justice and Peace Commission of the Archbishop reported 173 cases of persons killed, disappeared or kidnapped by the guerrillas. It was the highest number ever recorded since the start of the civil war.[472] However, many of the deaths attributed to the insurgents are due to land mines laid without proper precautions to protect guerrilla controlled territories.[473]

The overall impression is that the provisions concerning the protection of civilians are not respected, especially by Government forces. Attacks, displacements, harassments and killings are widely reported.

The Government has tried in vain to mitigate the sufferings of the civilian population by introducing guidelines to action, especially of the air force. However, the military in the field do not seem to be disposed to apply them. In their view, anyone living in an area suspected of harbouring the guerrillas must bear the responsibility for the actions of the insurgents. Legal restraint seems to play no significant role in their decisions and acts.

1.2. Nicaragua

In the context of the Nicaraguan civil war, two important issues of humanitarian law arise. First, the attacks of the insurgents of essential objects of living of the civilians. Secondly the question of forced relocation of the Miskito Indians.

As to the first issue, there is enough evidence to the effect that the insurgents seem to see

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[469]Cited by R. Weiner: The Agony and the Exodus: Reporting Salvadorians in Violation of the Fourth Geneva Convention", 18 NYUJILP, 1986, p.721.

[470]Op. cit., supra. n.461, p.526.

[471]The Review (ICJ), No.37, Dec 1986, pp.9-10.

[472]Ibid, p.11.

[473]Ibid, p.12.

civilians and civilian objects as a legitimate object of attack. In this context, the New York Tribunal on Central America and the Caribbean revealed that:

> "The Contras have conducted a campaign of terror against the civilian population of Nicaragua. The Contras pick out teachers, health workers and religious leaders as special targets of their terrorist attacks. Some they kidnap, torture and rape, some they murder and mutilate."[474]

It added:

> "Over seventy-five hundred Nicaraguans have been killed, wounded or disappeared."[475]

The Contras also concentrated their attacks:

> "...[O]n schools, clinics, grain storage facilities, and agricultural cooperatives. In addition they attack targets important to the country's economy, such as major bridges and the fuel storage facilities. These attacks have disrupted agricultural production and exacerbated hardship and hunger."[476]

As an example of the Contras' behaviour, it was reported that in the village of Abisinia residents watched the burning of 40 houses, the cooperative store, the community kitchen, the educational ministry building etc. After that, the Contras gathered people and their Leader said:

> "They [the civilians] should leave here or they could come back and do worse things, he said even if they rebuilt Abisinia 100 times they could destroy it 100 times."[477]

Similarly, it was reported that in the northwestern mountain areas in Nicaragua, the FDN (Frente Democratico Nicaraguense) has engaged repeatedly in kidnappings, torture and murder of unarmed civilians, mostly in villages or farm cooperatives. Peasants have also complained of mortar shelling by FDN forces against villages and on cooperatives that have resulted in the destruction of property and the death of civilians.[478] Likewise, it was stated that:

> "In combination, the Contra forces have systematically violated the applicable laws of war throughout the conflict. They have attacked the civilians indiscriminately. They have tortured and mutilated prisoners. They have murdered those placed hors de combat by their wounds. They have taken hostages; and they have committed

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[474] Op. cit., supra. n.458, p.75.

[475] Ibid.

[476] Ibid. See also the testimony of Father Bob Stark: The effect of War: Economic Destruction and Human Suffering. He stated:

> "As from May 15, 1984 there have been some 7391 direct victims of the war that includes 2,311 people killed, 1,900 wounded and 3,720 disappeared or kidnapped. That death toll, considered as a proportion of the country's total population, is three times greater than the death toll the US experienced in Vietnam".

Ibid, p.95.

[477] Christian Science Monitor, Augt. 20th, 1987, p.12.

[478] An American Watch Report: Human Rights in Nicaragua, 1984, New York, pp.44-45.

outrages against personal dignity."[479]

A clear conclusion could be deduced from the above: 'Violations of non-combatants' protection under the laws of war have been committed by all Contra groups, evidently as a matter of policy since 1980 and continue to the present.'[480]

On the second question of the relocation of the Miskito Indians, the matter seems interesting, since the case of such relocations was taken to the Inter-American Commission of Human Rights. It illustrates clearly how in the context of a civil war the instruments of human rights may play a useful role in diminishing the sufferings of the civilian population.

The Miskito population as a whole is roughly 70,000. When the counter-revolutionary activity began the Government decided to relocate some 8,000 civilians who lived in the Rio Coco. The evacuation began in 1982. It is alleged that the Government resorted to burning houses and livestock in order to move the population quickly. The rationale behind the Government decision was that:

> "...[T]he resettlement will safeguard the Miskito population from attacks of counter-revolutionary bands, and ensures protection of their principal human right: the right to life and the right to work in peace."[481]

However, the plan was envisaged to be voluntary, but circumstances changed, mainly because of the military situation, which led the Junta, in the words of Commander Campbell, to:

> "...[D]eclare this strip [of Rio Coco] territory of a high security military zone, and proceed to reinforce detachment. This situation meant that the civilian population was trapped between military forces."[482]

In other words, it was imperative military reasons and the safety of the population itself which was the reason behind the Government decision to relocate the Miskito Indians. Nevertheless, it seems that the Government assessment of the situation was right. Thus, an American Watch Report considered that:

> "...[U]nder these circumstances, we cannot conclude that the decision to evacuate these villages was not justified by the military need to defend borders and facilities against attack".[483]

Then it concluded that:

> "Our opinion on this matter [of relocation] is consistent with what we stated about the first evacuation in our report of May 1982. We believe it is also consistent with the

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[479] An American Watch Report: Violations of the Laws of War by both Sides in Nicaragua, 1981-1985, R.K. Goldman, J.E. Mendes, Aryehmeir and Jamera Rone, C. Brown (ed.). March 1985, p.6.

[480] Ibid, p.40.

[481] N. Buergenthal: Human Rights: The Inter-American System, Vol.4, (Part 3. Cases and Decisions), Oceana Pub., 1986, p.45.

[482] Ibid, p.44.

[483] Op. cit., supra. n.479, p.11.

standards of the international convention on the law of war."[484]

The Inter-American Commission on Human Rights also approved the contention of the Government that there was indeed a genuine case of emergency, since the security of the State was threatened. However, it found that many violations of human rights had been committed, many Miskitos being illegally detained under vague accusations of counter-revolutionary activities, and that many persons had been illegally killed.[485]

The Commission in fact stressed that even if the Government had a right to relocate the Miskitos due to the military situation, it emphasised that in accordance with Article 27/1 of the American Convention on Human Rights, the measures should be adopted for 'a period of time strictly required by the exigencies of the situation'.[486]

The Commission then indicated that:

> "The Government should expressly declare that the Tsba Pri project [which envisaged the relocation of the Miskitos] may only be carried out with the Miskitos who voluntarily choose to remain there, and in addition, should declare that it will assist in resettling other Miskitos who wish to return to the Coco region, which entails granting them adequate compensation for the loss of their property."[487]

On the question whether the relocation process was discriminatory because it was aimed at a specific ethnic minority, the Commission observed:

> "In this case, the commission is of the opinion that the relocation for military reasons was not carried out in discriminatory fashion, but if the Miskitos are not helped to return to the Coco river region once the military emergency is over, their prolonged stay in Tasba Pri will become a form of discriminatory punishment."[488]

However, it is to be noted that in a note dated 15th June, 1982, addressed by the Nicaraguan Government to the Commission, the former stated that:

> "When the danger on the border is over those who wish to return to their places of origin may do so, and the Government of Nicaragua has surpassed the adequate compensation suggested by giving these Nicaraguan citizens land, homes, seeds, fertilizers and farm tools, and medical attention without charge."[489]

Moreover, the ICRC Worldwide 1986 observes that:

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[484] Ibid.

[485] The American Watch Report of March 1985 in fact, found that:

> "In the case of the Nicaraguan Government, major abuses were committed in December 1981, when its forces massacred 14 to 17 Miskitos and Lermus, and in 1982 when its forces massacred 7 Miskitos at Walpasksa and when they caused some 70 Miskitos to disappear".

Ibid, p.4.

[486] Op. cit., supra. n.481, p.46.

[487] Ibid.

[488] Ibid, p.48.

[489] Ibid, p.46.

> "These people [Miskitos] who had been displaced in 1981 because of the conflict had returned to their homes near the Honduran border, but were completely destitute".[490]

This means that many promises were not kept. Nevertheless, there is tangible evidence that the Government has done its best to improve its relations with the Miskito population. Thus, certain officials who were involved in the violations of human rights were dismissed and replaced. Also on 1 December 1983 the Government issued Decree No.1352, granting amnesty to all Miskitos who had been accused of violent activities taking place after December 1st, 1981; and in its Decree No.1353 of December 4th, 1983, all Nicaraguans (not limited therefore to Miskitos) who had left the country were offered the opportunity to return without fear of prosecution, whether they had actively participated in 'counter-revolutionary' activities or not.[491]

This case shows clearly how an approach based on human rights law may very well, and indeed can, solve real problems of humanitarian law, in this case the question of relocation and displacements which are dealt with in Article 17 of Protocol II.

The Commission argued the problem on the basis of the right of residence and movement, and the suspension of guarantees during the State of emergency. The Commission did not refer at all to Protocol II, which is understandable since Nicaragua has not indicated its acceptance. The Government in fact chose an approach based on human rights, which means that it accepts wholeheartedly human rights as a limitation on its sovereignty.

An approach based on human rights is preferred in this case by the Government because it does not involve either directly or indirectly, the implication of recognising the insurgents or giving them any legal status. In fact its claim to be the sole legitimate and legal authority within the State is preserved.

1.3. Other Cases

The practice after the adoption of Protocol II offers many instances in ongoing civil wars that civilians were simply considered as a lawful object of attack. This is due in my opinion, mainly to two reasons. Either because the weapons or the methods of war are indiscriminate in their effects, or it is a deliberate attempt to break the will and morale of the civilians in order to force the Government to negotiate.

In Angola and Mozambique, the insurgents, respectively UNITA and RENAMO especially, lead a terrible war against civilians. The latter become the first target of attack and military objectives are in second place.

Thus, as concerns Angola it is reported that:

> "The most disturbing aspect of UNITA's campaign...is the degree to which it increasingly resembles the brutal strategy employed by RENAMO in Mozambique, with similarly devastating effects."[492]

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[490] The ICRC Worldwide 1986, ICRC Publications, Switzerland, p.15.

[491] Op. cit., supra. n.478, p.14.

[492] Africa Report: Angola: War, Politics and Famine. March-April 1988, p.42.

Angola in fact, has become the home of the largest number of amputees in the world. It is estimated that 20,000 civilians have lost arms, legs or both.[493] Moreover, clinics, schools, grain storage facilities and other infrastructure essential to a functioning rural life have been systematically destroyed by the insurgents. Land mines laid along fields and roads have made cultivation impossible in very large areas of the country, which led to a massive displacement of civilians. Their number is estimated to be, as a minimum, between 600,000 and 700,000 persons.[494]

Furthermore, the insurgents in Angola are using terror tactics against the civilians, in contravention of the spirit and the letter either of Protocol II or Article 3, or indeed any legal or humanitarian standard.

In Mozambique the situation is worse. Renamo, the insurgents organisation, has been said by Chester Crocker, the top US State Department specialist on Africa, to be 'the creation of alien forces' and a 'largely destructive army with little homegrown legitimacy'.[495]

Thus, in a Government assessment of the situation in early 1988 it is revealed that in addition to the destruction of roads, railways and bridges, the insurgents destroyed 1800 health centres, 720 schools, 900 rural shops, 1300 lorries and 44 agricultural enterprises, including major tea and sugar factories.[496]

In addition, there is strong evidence that rebels operate slave labour camps. In this context, it was reported that rebels hold tens of thousands of peasants in slave labour camps, which operate as supply bases for the rebels. It was stated that:

> "The existence of the camps, each containing as many as 3000 prisoners, has been reported by escaping inmates".[497]

It is estimated that by the beginning of 1988 a total of 5,000,000 subsistence farmers had been forced from their lands; rebels slaughtered livestock, burned grain stocks and even blocked springs and wells, sometimes with corpses.[498]

Moreover, Bob Geldof, who visited Mozambique, was reported as saying that 'the right-wing Renamo forces have terrorised the economy, attacking mainly civilian targets.'[499] He revealed that:

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[493] Ibid. See also Christian Science Monitor, July 20th, 1987, p.13. Moreover, the ICRC Worldwide 1988 reports as an example that "the orthopaedic workshop run by the ICRC in Bomba Alta...operated at full capacity throughout the year. In 1988 the two workshops produced 1,250 and 310 prostheses respectively". ICRC Worldwide 1988, p.8.

[494] Op. cit., supra. n.492, pp.42-43.

[495] Christian Science Monitor, Augt. 3rd, 1987, p.9

[496] 36 Keesing's, 1988, p.35685.

[497] 24 Africa Research Bulletin (Political Issues), 1987, p.8406.

[498] Op. cit., supra. n.495, p.35686.

[499] The Guardian, Dec 14th, 1987, p.4.

> "...[I]f a town is dependent on a sugar refinery they will blow that up. They specifically go in and kill huge numbers of people in the most brutal way."[500]

He concluded by stating that the rebels 'think it out in a very clear-cut way how to brutalise and terrorise a people and render the economy a shambles.'[501]

However, the tragedy of Homoine village, which occurred in July 1987, in fact, revealed beyond any doubt the tactics of Renamo. According to official figures 386 people were killed within 5 hours. The majority were civilians. The attackers, according to eye witnesses, went from 'straw hut to straw hut, kicking and killing people inside.'[502] They also opened fire on patients of the local hospital and on women and children who had sought refuge there when the shooting started. Following the massacre 3,000 people fled from the town in fear.[503]

It seems that in Angola, and especially in Mozambique, the insurgents respect no restraints whatsoever. They conduct a viciously bloody war against the entire population with no respect for basic humanitarian norms. This makes any attempt to apply humanitarian law unlikely, since Governments in power view these organisations as bands of criminals financed and directed by outsiders, specifically South Africa.

In Afghanistan, it seems that the massacre of civilians has attained record levels. According to the Bibliotheca Afghanica (a research institute in Switzerland) one million Afghan civilians are believed to have died in the war so far. Moreover, some 80,000 guerrilla and 15,000 to 20,000 Soviet troops are believed to have been killed.[504] Thus, the proportion of civilian deaths is immensely higher. According to one source, the cause of such huge numbers of victims is mainly due to the fact that:

> "Moscow and Kabul's policy of so-called 'migratory genocide'-massacres, bombing of villages and destruction of crops has created the world's largest refugee population. Some 5 million Afghans, from a pre-war population of 15 to 17 million have fled the country."[505]

Similarly, in a report for presentation to the UNCHR, it is alleged that the Afghan Government forces and 'foreign forces' were waging a campaign of 'systematic brutality against the rural civilian population as a scorched earth policy was radically altering the country's demographic structure.'[506]

Moreover, in another report, it was revealed with concrete examples the tactics used by the Government and its Soviet allies in conducting the war. It is alleged that they have

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[500] Ibid.

[501] Ibid.

[502] Op. cit., supra. n.495, p.9.

[503] Op. cit., supra. n.496, p.35686.

[504] Christian Science Monitor, Augt. 11th, 1986, p.11.

[505] Ibid, p.11.

[506] 33 Keesing's, 1987, p.34869.

resorted to indiscriminate bombings, reprisal killings and massacres, summary executions and random killings, killing of farmers, destruction of food supplies, destruction of irrigation works, arrest, forced conscription, torture and the use of anti-personel mines.[507]

It must be indicated that the Government forces are not alone in committing horrible acts against the civilians. The insurgents frequently attack civilian targets, especially in the cities.[508] Finally, a report prepared to the UNCHR in 1988 seems to suggest that there is 'some improvement in the human rights situation'[509]; and then added that 'serious contraventions of humanitarian law and human rights had taken place in combat areas'.

In Lebanon, a report published by the Government on 1st October, 1987 estimated the total number of people killed as a result of 12 years of civil war as 130,000 with 14,000 kidnaps being reported. The situation in Lebanon is unique. The Government is helpless in the face of warring factions occupying different parts of the country, together with Syria and Israel. Fighting is endless; civilians are caught in the middle and they are the greatest victims.

Thus, in the war of camps between Amal organisation and the Palestinians, the former held the occupants of the camps responsible until those who carried arms gave up their weapons. They were in fact held as hostages. This policy, combined with preventing all relief to the camps and preventing even women, children and the elderly from leaving the camps, seems to indicate that a policy of genocide and total war was going on. Only the entry of the Syrian troops seems to have brought this unhappy situation to an end.

To conclude, it seems fair to me, to say that the situation of civilians in internal conflicts is worsening all the time, due especially to the increased availability of highly sophisticated and destructive weapons. This state of affairs is compounded by the total absence of adherence of the warring parties to any humanitarian standard. There is an all too frequent assumption that in internal conflicts all means of crushing the enemy are legitimate.

Moreover, it is evident that foreign assistance to some insurgent movements, such as the Contras, RENAMO and UNITA, which observe few limits on their military actions, has given them all the means to pursue a policy of real terror against civilians.

These cases indicate that if the parties to the conflict adhered to the basic rules laid down in Protocol II concerning civilians, many cases of human suffering would be prevented, and human lives would be spared. However, the case of the Nicaraguan civil war seems to suggest that the Government has tried to adhere to certain humanitarian rules, not through the recognition of the application either of Article 3 or Protocol II, but through a human rights approach. The reason is in order to escape the implication that the Government regards the insurgents as having a legal status.

2. The Practice vis-à-vis the Protection of Captured, Interned and Detained Persons in connection with Internal Conflicts after the Adoption of Protocol II

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[507] A Report from Helsinki Watch: Tears, Blood and Cries. Human Rights in Afghanistan Since the Invasion 1979-1984, Dec 1984, New York, pp.23-80.

[508] See, for example, 34 Keesing's, 1988, pp.35972-35972.

[509] Ibid, p.35785.

The situation of detained and interned persons in connection with internal conflicts is mixed. The emergency legislation of many States which was adopted after Protocol II, at least on paper, affords the necessary standards of due process and fair trial. On the other hand, the practice in the field of combat and in detention centres and courts is a little different.

2.1. Emergency Legislation and Detained and Interned Persons in Connection with the Conflict

In Nicaragua the Junta of National Reconstruction promulgated the Fundamental Statute on 20 July 1979, that is before the outbreak of the civil war. This statute protects the right to life, liberty and security of person, also the right not to be subjected to arbitrary arrest or detention and the right of everyone charged with a penal offence to all the guarantees necessary for his defence. Article 5 in fact provides that:

> "The right to life is inviolable and inherent in the human person. There shall be no death penalty in Nicaragua."[510]

The abolition of the death penalty was established even in the Law on Military Offences, (Decree No.600). Thus, the death penalty does not exist, even in the case of internal war. Moreover, Article 6 of the Fundamental Statute deals with the rights of defendants. It stipulates that:

> "All persons shall be entitled to respect for their physical, mental and moral integrity. Punishment shall not extend beyond the offender himself. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It shall not be permitted to impose a penalty which, either severally or collectively, lasts for over 30 years."[511]

These rights, according to Article 49 of the Statute, are protected even in cases of emergencies which threaten the life of the nation.

The Prevention of Terrorism Act (Decree No.5 of 28 August 1979) established special courts to deal with questions of order and security. However, these courts have never been created, which means that even offences related to the conflict are dealt with by the ordinary courts, which affords all the guarantees necessary for fair trial.

This means that the situation in Nicaragua; at least according to its laws, guarantees all the rights of those who committed offences in relation to the conflict. Its laws are in total accordance with human rights instruments, and even better than Protocol II, since the death penalty is not prohibited in the latter.

In Sri-Lanka the Prevention of Terrorism Act, which came into operation on 20 July 1979, was enacted to deal with the situation of civil war. It contains some safeguards for persons arrested or detained for offences related to the conflict.

Thus, according to the Act's section 6 the power of arrest is given only to a specific person (the superintendent), provided that he is authorised in writing to do so. The arrested

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[510] Yearbook of Human Rights for 1979, UN, New York, 1986, p.132.

[511] Ibid, p.133.

person must be informed duly for the reason of his arrest, and when he is taken to custody, he is served with a copy of the detention order. The latter must contain the reason for his detention and the place of such detention.[512]

However, the act was criticised by Leary, in her view, certain of its provisions were unduly vague, created offences retroactively and provided for detention incommunicado contrary to internationally accepted standards.[513]

In El Salvador cases of treason, espionage, rebellion, sedition and other offences against the peace or independence of the State, according to the emergency legislation, are dealt with by military courts,[514] which are generally severe, and afford no guarantees of due process and fair trial.

In December 1980, under another Decree No. 507, even the Military Code procedures were seen as not meeting the needs of the situation. A special regime was brought into operation. Thus, even persons under the age of 16 years may be tried for the crimes cited above.

Moreover, under the above decree, those suspected of crimes against the State could be held incommunicado for up to 180 days. If no proof of guilt had been established by the end of this period a sentence of four months corrective detention could nevertheless be imposed.[515] This means that even in the legislation itself, the elementary rules of penal law were not respected, in contravention of all international instruments on human rights.

It is to be noted that many States facing civil wars have in recent times resorted frequently to the use of amnesty, by releasing those who were charged with crimes and offences in relation to the conflict. However, the motivation is always political, e.g. to encourage national conciliation.[516]

2.2. The Practice in the Field

The practice shows that in many instances persons captured and detained for offences in connection with the conflict are harshly treated. In Angola, the death penalty awaits all those who commit crimes against State security and endangering the revolution. The penalty applies to civilians as well as foreigners. The crimes involve: treason, spying, the exposure of the country to armed aggression or the spreading of false information damaging to the good name of Angola.[517] The Government had resorted to the execution of UNITA members frequently, and UNITA resorted to reprisals and executed captured Angolan soldiers.[518]

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[512] Ibid, p.193.

[513] The Review (ICJ) No.29, Dec 1982, p.13.

[514] Yearbook on Human Rights for 1980, UN, New York (1988), p.62.

[515] 27 Keesing's, 1981, p.31175.

[516] In this regard, see Amnesty Laws in The Review (ICJ) No.35, Dec 1985, pp.27-30.

[517] 26 Keesing's, 1980, p.30551.

[518] Ibid.

In El Salvador, it seems that the situation of captured combatants, either of the Government or the insurgents, is slightly better. Thus, it was stated that:

> "...[In respect of treatment of captured soldiers] the practice of the FMLN compares very favourably with the practice of the Salvadoran armed forces. As best as we can determine, the Salvadoran armed forces rarely take POW from among guerrilla combatants."[519]

Then it was added that:

> "There are apparently no prisoner of war camps in El Salvador nor are there captured guerrilla combatants in Marrona prison."[520]

Moreover, it was revealed that the FMLN continued to release captured soldiers through the ICRC, and that a handful of guerrilla combatants are known to have been taken alive and exchanged for high ranking prisoners captured by the FMLN.[521]

Thus, in El Salvador, it is the civilians who are accused of collaborating with the insurgents who are the victims of the violations of the most elementary principles of fair trial and justice.

In Nicaragua, the insurgents especially are accused of resorting simply to the killing of any Government soldiers who fall into their hands, especially the FDN and the Misura-Misurasata have summarily executed prisoners.[522]

As to the Government, according to American Watch reports, the most serious complaints about the treatment of detainees refer to detention centres that are not under the jurisdiction of the penitentiary system, but of the security police centres. The abuses are mainly present in the interrogation period.

However, the reports confirm that the procedures before the courts which deal with detainees for offences in relation to the conflict, conform to the due process requirements. Thus, defendants are given an opportunity to be confronted with evidence against them, to make personal appearances before the court, to present evidence on their own behalf, and to be assisted by counsel. Sentences seem to be based on evidence. The courts must explain their findings.[523]

In Afghanistan, the situation is very bad for detained persons, either civilian or military. It is revealed that 'widespread and systematic' abuses of human rights exist. Civilian detainees in the country's prisons were regularly subjected to electric shocks, beatings and other forms of torture. Moreover, the general conditions in prisons were severely criticised. It was reported that extra-judicial executions and detention without trial of people

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[519] Op. cit., supra. n.460, p.58.

[520] Op. cit., supra. n.460, p.58.

[521] Ibid.

[522] Op. cit., supra. n.478, pp.40-43.

[523] Op. cit., supra. n.479, pp.4-48.

suspected of sympathising with the rebels had occurred.[524]

There is also evidence that the Government forces and the Soviet Union do not take prisoners. They just kill them. In this context, a Soviet soldier was asked how the Soviets treated Afghan prisoners and he replied 'they destroy them.'[525]

It is reported that prisoners accused of offences relating to the conflict wait some months without charge or trial. They cannot meet family or lawyers, confront witnesses or prepare a defence. In many cases, the main evidence is a confession obtained under torture. The accused are judged by 'a revolutionary court'. The latter, in fact, always confirms the Khad (the secret police) verdict. Moreover, no appeals from the decision of the revolutionary court are allowed. The death penalty may be imposed and carried out.[526]

The conclusion in regard to prisoners, detained and interned persons in connection with offences in relation to internal conflicts is mixed. In a few cases, like in Nicaragua there is enough evidence that the Government has tried its best to conform to the general standards concerning the treatment of detained and interned persons. The main reason seems to be political. The Government seeks to prove to the world that it is respectful of human rights, even in extreme circumstances of internal conflict. However, in the other cases, it seems that detained persons, who are in the majority civilians, suffer greatly from the conditions of detention which are very bad, and especially from outright violations of the most fundamental rules of due process and fair trial.

It seems that Governments in these instances use the non-respect of the basic standards of penal law and the suspension of rights and freedoms of individuals as a real tactic of terror in order to make the population abandon its collaboration with its enemies. However, these tactics, as experiences show in Algeria, Vietnam and other cases, are counter-productive, since many innocent people become victims. Hence, it is the Government which makes them new recruits of the insurgents.

Besides, it seems that the patient policies of the ICRC have led many Governments in recent times to allow the representatives of the Red Cross to visit the detainees and detention centres. Those visits generally end with promises from Governments, and even insurgent movements, to make their situation better. During those visits, the ICRC endeavour to distribute relief, and facilitates the problem of correspondence between the detainees and their families. This happened in Afghanistan, El Salvador, Lebanon and Mozambique.[527]

It seems that the new international climate, in which the super-powers seem to be willing to resolve many outstanding conflicts by encouraging negotiation between the warring factions in countries faced by civil wars, goes towards explaining why the established Governments in those countries are trying to amend their positions. This state of affairs

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[524] Op. cit., supra. n.506, p.34869.

[525] Op. cit., supra. n.507, p.171.

[526] Ibid, pp.156-162.

[527] See The ICRC Worldwide 1988; Mozambique p.6; El Salvador p.10; Afghanistan p.13; and Lebanon pp.18-19. See also IRRC, 1989, 29th year, No.269, pp.147-152.

may help pave the way towards an ultimate solution; tragedy and suffering will never aid such that course of action.

Again it is very clear that the rules of the protection of detained and interned persons for offences relating to the conflict, contained in Protocol II, seem to offer (if adhered to by the parties to the conflict) a solid humanitarian ground for solving many problems and plights of that category of victims of internal conflicts.

3. The Practice and the Protection of the Sick and Wounded

The practice concerning the protection of the wounded and sick is in general favourable. There are no systematic violations of the basic rules relating to the protection of that category. However, there are some examples, especially of violation of some basic obligations in relation to the protection of medical personnel, medical units and transportation; the non-respect of the Red Cross emblem, and even of killing the wounded and sick and preventing their assistance.

Thus, in Lebanon the ICRC delegate was kidnapped in December 1988. Death threats were made against those who work with the ICRC, which led to the suspension of its valuable activities for seven weeks in 1989. However, in March 1989, and after intensive contacts, it was able to resume its activities.[528] Moreover, the ICRC in its Worldwide Report of 1986 indicated that some workers of the Red Cross were killed and some injured because the Red Cross emblem, which was supposed to protect them, was not respected.[529] Furthermore, vehicles and relief supplies were stolen, and on several occasions the ICRC delegates were prevented from assisting the wounded.[530]

Further, in its Worldwide Report of 1988 the ICRC noted that "ICRC delegates together with volunteers from the Lebanese Red Cross, evacuated and cared for the wounded, distributed food and relief and returned the dead to their families."[531] In its Bulletin of June 1989, the ICRC indicated that its delegates continued to provide medicines and medical material for hospitals treating victims of the conflict. A medical programme for over 140 dispensaries was set up in the south to deal with the influx of refugees coming from Beirut.[532]

In Nicaragua, there are some indications that especially the Contras resorted in some instances resorted to the killing of wounded opponents. In fact the American Watch attested to that.[533] However, the same report made clear that the ICRC vehicles that were clearly marked did not experience any difficulties in their mission of assisting the wounded and

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[528] ICRC Bulletin, March 1989, No.158, p.1.

[529] Op. cit., supra. n.490, p.22.

[530] Ibid.

[531] ICRC Worldwide 1988, p.19.

[532] ICRC Bulletin, 1989, No.161, p.3. See also IRRC, 1988, 28th Year, No.267, p.550.

[533] Op. cit., supra. n.479, pp.41-43.

displaced persons.[534]

In El Salvador its seems that the situation is in general very positive. The ICRC and the local Red Cross organisation work in the conflict area, evacuating the wounded from the combat zones to hospitals. Moreover, they constituted medical mobile teams. Their work consisted in giving medical aid and dental consultation and vaccinations.[535]

Furthermore, it is reported by the ICRC that at the end of June 1987 an agreement was signed by both parties to the conflict authorising the ICRC to organise the transfer abroad for medical treatment of 98 war invalids opposed to the Government.[536]

The ICRC Worldwide of 1988 indicates that the ICRC is working without any major difficulties in assisting medically those in need, especially in areas where violence is taking place.[537]

In Afghanistan during the first years of the conflict, the situation for the sick and wounded was bad. There is in fact, evidence that the Soviet-Afghan military units have searched for and arrested civilian medical personnel, who assisted and cared for the wounded insurgents. Further, Soviet aircraft bombed hospitals. Nor was ICRC allowed to provide medical care for victims of the conflict.[538]

According to the ICRC, the situation is becoming more promising for the wounded and sick. The ICRC works without difficulty. Many hospitals were opened, through the invaluable help of the ICRC, to care for the wounded. Thus, it was reported:

> "Despite extremely precarious security conditions, ICRC delegates and doctors made several trips to the provinces of Balkh in the north of the country, and Herat in the north west, where they provided emergency medical assistance to the regional hospitals caring for war casualties."[539]

In 1989, the ICRC embarked on large-scale operation, in setting up bases, first aid posts and surgical hospitals to deal with the increased number of wounded and sick.[540]

In Angola, despite the crash of one of its aircraft in October 1987, and the eventual killing of 8 of its delegates, which led to the suspension of all its activities in the country, the ICRC in February 1988 has resumed its activities to deal especially with the wounded, where there is an increased influx of people wounded by the fighting.

The conclusion is that, in relation to the protection of the wounded and sick, Governments and insurgents alike are in general ready to cooperate, at least on an **ad hoc** basis, or through the ICRC, to deal with the problems of that category of victims of war, these being the most helpless victims of war. Governments in fact, do not resort to the use

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[534] Ibid, p.82.

[535] Op. cit., supra. n.490, p.14.

[536] IRRC, 1987, 27th year, No.259, p.391.

[537] Op. cit., supra. n.527, p.11.

[538] See op. cit., supra. n.507, pp.174-180.

[539] Op. cit., supra. n.527,p.13.

[540] ICRC Bulletin, 1989, No.157, p.3.

of the argument of sovereignty and in that respect humanitarianism seems to win the day in this important aspect of internal war.

CHAPTER FIVE

COMPLIANCE WITH AND IMPLEMENTATION

OF HUMANITARIAN LAW IN INTERNAL CONFLICTS

Introduction

One of the most difficult problems of international law is the question of its enforcement and implementation. Unlike domestic law, where there is an authority which monitors its application and has the material and legal capabilities which makes it capable of punishing those who may breach its provisions. In international law, there is no such authority above the States obliging them to conform to the law, which means that violations may go unpunished.

This state of affairs, led in legal theory to a lively discussion on the nature of international law. Some writers had simply claimed that international law, is not a law at all, to them it is a mere moral, devoid of any obligatory force.[1]

However, the majority opinion acknowledges that international law is law; but its elaboration and application methods differ from domestic law, since it is a law between States and not above them. Thus, in an arbitration between the O.S.K. and the owners of the S.S. Prometheus. The acting Chief Justice stated in a case involving a charter-party stipulation that the vessel was not to carry contraband of war (during the Russo-Japanese war):

> "It was contended on behalf of the owner of the Prometheus that the term law as applied to this recognised system of principles and rules known as international law is an inexact expression, that there is, in other words no such thing as international law; that there can be no such law binding upon all nations inasmuch as there is no sanction of the law, that is to say that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto."[2]

However, the acting Chief Justice did not support this assertion, he stressed:

> "I do not concur in that contention. In my opinion a law may be established and become international law, that is binding upon all nations by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement."[3]

He then added:

> "...[T]he resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot perhaps, be overcome. Such resistance merely makes the resisting nation a breacher of the law to which it has given its adherence but leaves the law, to the establishment of which, the resisting

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[1] See J. Austin: Lectures on Jurisprudence. 4th ed. Rev. & ed. by R. Campbell. John Murray, London, 1873, pp.81-106; and for a thorough discussion of the question whether international law is law, see: A. D'Amato: International Law: Process and Prospect. Transnational Pub., Inc. Dobbs Ferry, New York 1987, pp.1-26.

[2] W. Bishop: International Law: Cases and Materials. 3rd ed. Brown, Boston Little, 1971, p.10.

[3] Ibid.

nation was a party subsisting."[4]

In other words, the absence of means of redress in case of the breach of rules of international law, does not affect its claim that it is law.

However, such assertion does not solve the question of how then international law is to be made effective. Hackworth notes in this respect, that it is the will of the State which can make law effective and also:

> "...[I]n the State's ultimate responsibility for its own action or failure to act, in its fear of war or reprisals, in the effect of world opinion, or in the combination of any two or more of these."[5]

Thus, it is essentially such means as reprisals and wars which are mutual in character (in other words which depend directly on the will of the States) which serve to enforce the law. To me, this is due to the important influence of ideas of sovereignty and non-intervention, which exclude third party or centralised machinery, which can supervise the application of international law. This opinion has been clearly stated by Lauterpacht, who writes:

> "...[T]he function of law is to regulate the conduct of men by reference to rules whose formal-as distinguished from their historical-source of validity lies, in the last resort, in a precept imposed from outside. Within the community of nations this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which reduces the binding force of international law from the will of each individual member of the international community."[6]

In practice, this meant that the conception of sovereignty, has blocked any significant development, in the area of providing adequate means for supervising the implementation of international law.

Returning now to humanitarian law, which is a part of international law, it is asserted that the question of enforcement, supervision, control and implementation of its rules, is of fundamental value, since lives of human beings are at stake in the event of its breach. Thus, if the belligerents do not respect the principle of distinction between combatants and non-combatants, then it is clear that the right to life would be fair game, since innocents can be attacked, women and chilren would be murdered.

However, despite the urgency and great need for suitable machinery which can be used to supervise the application of law in times of war hence, reducing the risk of gross violations of the law. Forsythe has observed that:

> "The practice of supervising the law of armed conflict has been little known, little understood, and little studied."[7]

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[4]Ibid. p.10.

[5]Hackworth: Digest of International Law. Vol.1, Government Printing Office, Washington, D.C., 1940, p.12.

[6]H. Lauterpacht: The Function of Law in the International Community. Clarendon Press. Oxford, 1933, p.3.

[7]D. Forsythe: Who Guards the Guardians. 76 AJIL, 1976, p.41.

A very similar point has been stressed by Aldrich the US Deputy Legal Advisor to the State Department, who maintained in April 13th, 1973 that:

> "...[D]eficiencies are found in both substance of existing law [humanitary law] in its application and enforcement. Of the two the latter is, in our view, the more important and probably correct."[8]

Then, the question of compliance has been considered as one of the most difficult questions of humanitarian law. This applies to both international and non-international conflict. However, to me, the question must be seen as acute in non-international conflicts. Since if even in international wars compliance poses great and complicated problems between subjects of international law, then in civil wars, the question is even worse. The reason for this being that one of the parties is considered by the other as no more than a band of criminals, which results, in many cases, that no standards are to be respected when dealing them.

Moreover, compliance in practice may involve first, some kind of third party control over the actions of the parties, for the established Government, this would restrict its freedom of action in dealing with its enemies, since its acts would be under international scrutiny. Secondly the mere fact of accepting such machinery, is bound to give certain legal status to its enemies, and in any event it would be seen as intervention in its internal affairs.

My aim in this chapter, is to reveal the role of the principles of sovereignty and non-intervention in blocking any attempt at the normative level for bringing any obligations on the field of ensuring respect for humanitarian law. That is the stopping of any machinery for the control of the application of humanitarian law in internal conflicts. It must be stressed at the outset that the term compliance as used in this chapter, includes the ideas of implementation, enforcement and supervision.[9] In general all means of ensuring respect for the law.

SECTION I: Customary International Law, and the Question of Compliance with the Laws of War in General

A. Introduction

Thr rule is that customs and usages of war are applicable only between States. Their respect was not based on any system of third party machinery, it was exclusively based on the idea of self-help.

By reason of its sovereignty, each actor on the international stage was authorised to respond in its own way to any alleged violations of the laws of war. Pictet summed up the practice in the antiquity concerning the sanctioning of those who commit crimes during the war. He observed:

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[8] A.W. Rovine: Digest of United States Practice in International Law. (1973), State Dept Pub., Washington, D.C., 1976. pp.492-493.

[9] Draper defines implementation as 'those devices, institutions and rules designed to monitor and ensure its observance' and defines enforcement as 'the collection of mechanisms and rules available to the law of war to secure the restoration of observance when that law has been violated.' G.I.A.D. Draper: The Implementation and Enforcement of the Geneva Convention and the Additional Protocols of 1978. RCADI, 1979/III, p.9.

> "Dans l'antiquité, on chatiait parfois des capitaines pour avoir trahi au failli, mais on ne songait guère à leur reprocher leur cruauté".[10]

Thus, sanctions of soldiers occured only when they violate their allegiance to their sovereign, whereas committing horrible crimes against enemy soldiers or civilians were not considered worthy of punishment. This appears to me the logic of absolute sovereignty.

However, it must be noted that the mere development of a body of rules concerning the conduct of war **jus in bello** must be considered in itself as a means of restricting the horrors of war, and implicitly a primitive way of ensuring respect for lives of human beings and their property.

History also gives us some examples of primitive methods of controlling the application of what is called 'the laws of arms.' The latter has been defined by Keen as:

> "...[T]he law of arms was an international law, but the middle ages knew of no permanent international court in which international cases could be tried."[11]

He cited many cases which had been brought before courts especially in France and Britain, concerning the question of ransom.

The 'law of arms' in the Middle Ages allowed the freeing of captured soldiers on the condition of paying ransom. However, some captives upon their return just forgot about their deals. Permanent courts were established to deal with the problem and many cases were brought before them.[12]

In England, it was the Court of Chancery which dealt with such matters, and was presided by the Earl Marshall and the High Constable, and sat at the White Chamber at Westminster, and heard cases at least from the reign of Edward III.[13] The courts of these Constables and Marshals were permanent courts because they were permanent tribunals with settled jurisdiction. They were open to suitors who wished to bring cases at any time.[14]

The main weakness of such system was, in my opinion, that the courts were essentially only open to disputes between knights. They involved high costs, delays and travel. The questions raised in front of them were mainly concerned financial dealings and undertakings, humanitarian motives toward the wider population were not involved.

The military law which developed thereafter, in the 16th, 17th and 18th centuries responded essentially to the changes which took place in the organisation of armies. Armies based largely on feudal levies were replaced by more professional armies, many being composed largely of mercenaries and commanded by nobles and **condottiere**. The latter subjected their mercenary armies to harsh discipline.

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[10] J. Pictet: Evolution du droit international pénal, in Hangartner et al., (eds.), op. cit., supra. chapter 3, n.167, p.206.

[11] M.H. Keen: The Laws of War in the Middle Ages. Routledge & Paul, London. Univ. of Toronto Press, Toronto. 1965, p.23.

[12] Examples of such cases can be found in see Keen, ibid, p.24-44.

[13] Ibid, p.27.

[14] Ibid, p.28.

Many States resorted to enactment of military laws, in order to keep discipline and thus, effectiveness in the field. The Swedish Kings Gustavus Adolphus, Charles X and Charles XI as well as Czar Peter the Great issued 'War Articles' which contained severe punishments for certain crimes committed during war.

Under the Czar Peter the Great War Articles of 1716 mutiny, killing of prisoners of war, women, children, clergymen and the aged, and the burning of churches, Schools and hospitals, were heavily punished.

However, Rosenblad rightly observed:

> "...[T]he military law thus implemented was as a rule not enacted for humanitarian considerations. Rather it was proclaimed for military reasons, inasmuch as maintaining strict discipline was rightly held to be an indispensable key to success in warfare".[15]

This system basically serves the practical interests of the State concerned in maintaining a disciplined and strong army. The State was the judge in its own case, there was no room for third party control. The main conclusion is that there is no system of control beyond the will of the State, which reflects accurately the weight of the concept of sovereignty at that time.

Moreover, it is maintained that military law was enacted essentially to rule the army in times of war against other States, that is in international wars and not in internal wars, which means there were no normative or procedural rules concerning such wars. The absolute concept of sovereignty was totally ascendent in such situations with all its grave practical consequences **vis-à-vis** rebels and those who assist them.

B. Classical Writers and the Question of Compliance with the Laws of War

The importance of classical writers views and writings lies in the fact that they influenced the theoretical foundations and the subsequent development of the laws of war. Thus, it is necessary to return to them to trace the beginning of ideas, rules and procedures of the laws of war.

It can be safely stated at the outset that no writer dealt directly with the questions of implementation and enforcement of the laws of war. This, in my opinion, was a logical situation, since at that time the most important issue was to provide substantive rules which mitigate the sufferings of the victims of war. They concentrated on proving the usefulness of accepting a body of rules of **jus in bello**, in conducting wars, rather than providing means of ensuring respect for such rules.

However, to this general observation, it is necessary to make some exceptions, since indirect references to the quest of compliance can be found from time to time.

1. Franciscus De Victoria

He developed certain limits to the idea of just war and made recourse to war restricted. Thus, diversity of religion, extension of an Empire and personal glory or advantage were not just causes of war. According to him 'seule, une injustice peut constituter une juste

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[15] Rosenblad, op. cit., supra. chapter 4, n.389, p.9.

cause de la guerre'.[16] Once the justice of war is clear, he argued:

> "Il est permis de faire tout ce qui est nécessaire pour défendre le bien public. C'est évident, car le but de la guerre est de défendre et de protéger l'Etat".[17]

Accordingly, he adds that:

> "Il est permis de recouvrir tous les biens perdus ou leur équivalent. Cela est trop évident pour avoir besoin de preuves, car c'est dans ce but que l'on entreprent ou que l'on fait la guerre."[18]

Moreover, the Prince may in his view:

> "...[M]ême aller plus loin, dans la mésure où c'est nécessaire pour obtenir des enemis la paix et la sécurité".[19]

These sweeping pronouncements would imply that once the just cause of a war is established, then every means of conducting the war is justified which, in fact, negates the essence of the jus in bello, and hence there is no rule to observe in just war. This means in other words since there are no rules to be respected, logically there is no system of enforcing them.

However, Victoria made several references to unlawful actions even in just wars.[20] He envisaged even in just wars, a possible punishment for those soldiers who may loot or burn without authority. In this case, they are bound to make restitution.[21]

Victoria also admitted the possibility of the claim that the war may be just on both sides, which in his view may be attributed to ignorance. In these circumstances, only god knows which side is fighting a just war. In such a situation, Johnson stressed that Victoria was of the opinion that:

> "...[T]he belligerent should be chastened in the realisation that both sides might seem to be equally in the right, and so be especially scrupulous in observing the jus in bello, the rules of war."[22]

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[16] D. de Victoria: Leçons sur les indiens et sur le droit de guerre. Introduction, traduction et notes par M. Barbier, Librairie Droz, Genève, 1966, p.122.

[17] Ibid, p.123.

[18] Ibid.

[19] Ibid, p.124.

[20] He stressed:

> "De soi, il n'est jamais permis de tuer volontairement un innocent".

He then added that:

> "Il n'est pas permis de punir des innocents pour les fautes des méchants".

Ibid, p.139.

[21] Ibid, p.151.

[22] J.J. Turner: Ideology, Reason and the Limitation of War: Religious and Secular Concepts 1200-1740. PUP, Princeton, 1975, p.20.

Thus, the doctrine of 'simultaneous ostensible justice', plays a fundamental role in making the parties observe and comply with the rules of war. Ferencz observed concerning Victoria's contributions to the laws of war and its enforcement:

> "Many of Victoria's ideas, articulated in the first half of the 16th century, such as elements of a definition of aggression, the limits of permissible self-defence, proportionality, restraints on wanton destruction, the notion of military necessity, responsibility of heads of State and the unavailability of superior orders as a defense, were early forerunners of doctrines that were to become accepted principles of international criminal law four centuries later."[23]

Thus, some ideas relating to enforcement of the laws of war can be found in Victoria's writings, especially in relation to actions and declaration of unjust wars, were the criminality of leaders for waging the war, and ordering violations of the laws of war, were seen as crimes.

2. Balthazar Ayala

He noted:

> "Cicero lays it down that in a well-ordered State the laws of war should be scrupulously observed. Alike in beginning a war and in carrying it on and in ending it, law has a most important position and so has good faith."[24]

He then adds:

> "War, therefore, is justifiable when its object is to procure peaceful existence and freedom from outrage, and when begun in such a way as that peace may appear to be its sole object."[25]

The implication of these two important statements is that the belligerent must make it their duty to respect the law in their wars in good faith, that is to abstain from intentional violations of the laws of war, since that would undermine any subsequent gains. Because the situation of peace, which has been established after violations of the law of war cannot be permanent, the sense of vengeance and injustice will lead the vanquished to seek recourse to war.

Ayala relies on the advantages which the belligerent can gain from observing the laws of war, as an effective means of inducing them to respect them.

3. Alberico Gentili

He observed:

> "I said 'a just strife' for I maintain that the war must be just and that all the acts of war must be just. In this sense one speaks of a just and righteous war and of just and

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[23] B.B. Ferencz: Enforcing International Law. Vol.1, Oceana Pub., Dobbs Ferry, New York, 1983, p.8.

[24] Ayala Balthazar: Three Boooks on the Law of War and Duties Connected with War and on Military Discipline. Vol.2, translated by J.P. Bate, The Carnegie Institution of Washington, Washington, D.C., 1912, p.7.

[25] Ibid, p.8.

righteous arms."[26]

In fact, Gentili introduces an important idea, that the just war must be just in its resort and its conduct, in other words justice must be adhered to in **jus ad bellum** and **jus in bello**. This idea would have important effect for the observance of the law, since violations of the rules of war is seen as violations of the just war as a whole.

Gentili like the majority of writers of that period stressed that peace is the real aim of the war, justice in conducting the war, that is the observance of the law of war, is the essential condition for a real condition of peace. In this regard he observes:

> "Therefore there is but one enduring principle, namely justice which has been observed in punishment and should be preserved also in taking vengeance and making conditions for the future. For one who has been injured beyond his deserts will not be tranquil, but will continually deserve revenge; and one who is forced to accept pitiless conditions will carry the burden only so long as he is under the necessity of obedience."[27]

Thus, Gentili introduces the idea of justice as an element which encourages respect for the laws of arms. Since, when there is no justice, that is when there are violations of the law, there is consequently no real basis of a future permanent peace. This would not be implicitly in the interest of the belligerent.

4. Grotius

According to him, it is false to assume that in wars all laws are in obeyance, on the contray:

> "War ought not to be undertaken except for the enforcement of rights; when once undertaken it should be carried on only within the bounds of law and good faith."[28]

In his view, compliance with and observance of the laws of war must be seen as an integral part of the doctrine of just war. In effect, he advocated that just cause must be served by just means. Thus, respect for the laws of war in good faith is, according to Grotius, a necessary ingredient of the just war doctrine.

However, it is in the event of unjust wars that Grotius has made a very important contribution to the subject of enforcement of the laws of war. He introduced the element of responsibility of those who brought the unjust war 'either by the exercise of their power, or through their advice.'[29] He then makes clear the extent of their responsibility:

> "Their accountability concerns all those things, of course, which ordinarily follow in the train of war; and even unusual things, if they have ordered or advised any such

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[26]A. Gentili: De Jure Belli Libri Tres. Vol.2, translation of the 1612 by J.C. Rolf, Clarendon Press, Oxford, Humprey Milford, London, 1933, p.13.

[27]Ibid, p.354.

[28]Grotius, op. cit., supra. chapter 3, n.50, p.18.

[29]Ibid, p.719.

thing, or failed to prevent it when they might have done so."[30]

What Grotius in fact, advocates does not differ much from what the tribunals at Nuremburg and Tokyo have said, when in establishing the responsibility of political leaders for waging an aggressive war; that is crimes against peace and also for war crimes they have ordered or failed to stop from being committed.

Grotius, stressed that:

> "Generals are responsible for the things which have been done while they are in command; and all soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage. In the case of separate acts each is responsible for the loss of which he was the sole cause, or at any rate was one of the causes."[31]

Here Grotius introduces the concept of criminal responsibility of commander and soldiers who violate the laws of war, implicitly the idea of superior orders may not be used as a valid defence.

As to the punishment of those crimes, Grotius advocates two kinds of punishment. The first finds it roots in the concept of 'moral justice' which is in fact a religious punishment. Thus, the punishment of those who 'knowingly perform such acts, or co-operate in them, are to be considered of the number of those who cannot reach the kingdom of heaven without repentance.'[32]

Moreover, the second form of punishment which it seems is preferred by Grotius, is that "true repentance again, if time and means are adequate, absolutely requires that he who inflicted the wrong, whether by killing, by destroying property or by taking booty, should make good the wrong done."[33] In other words, Grotius considers that religious and moral punishment is not enough, legal punishment (by implication courts and tribunals) is preferable, since the guilty would be obliged to repair the wrong he has done.

Grotius' ideas in the field of enforcing the laws of war are more clear. His contribution can be seen as a forerunner to what has been established, especially after the Second World War, in the form of trial of leading officials for their role in committing crimes against peace and war crimes. However, it is clear that his ideas were to apply between States, since in his opinion just and unjust wars are public wars between sovereign princes, which means internal wars are without any regulation.

5. Vattel

He was the first jurist who tried to discuss the question of the application and observance of the laws of war in civil wars. In this respect, Siotis writes:

> "Les idées avancées de Vattel tranchant nettement avec la practique aussi bien que

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[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

la doctrine de son époque."[34]

Vattel in fact, likened civil wars to international wars, and argued for the application of all rules of war to such events.[35] Consequently, he holds the two parties to be bound by those rules which are applicable between States.

Nevertheless, Vattel who champions the application of laws of war to civil wars (a very advanced stand in his own time), did not attempt to elaborate on ways of ensuring respect for the law of war, apart from the goodwill and free acceptance of the parties themselves to do so.

He did, however, write extensively on means of enforcing international law, but his all references, it seems were made to the law of peace rather than the laws of war. He in fact, concontrated on means of ensuring respect for obligations laid down in treaties. He was sceptical about reliance on good faith of the parties as a sufficient guarantee against the breach of obligations.

He stressed the importance of introducing methods which are independent from the parties themselves such as the institution of 'guaranty' where a powerful sovereign acts as a guarantor, to ensure the respect of the treaty between two States, which means this did not exclude the possibility of a third party machinery.

6. Conclusions as to the Views of Classical Writers

In my opinion, the following conclusions can be made:

(i) All the references to the necessity of observing the laws of war were made in connection with 'public wars' that is wars between sovereigns and princes, and not civil wars. The exception being Vattel who in this matter does not differentiate between civil and international wars which means that in civil wars, in the opinion of the majority of writers, the question is left entirely to the discretion of the rulers.

(ii) They stressed the necessary of compliance with the laws of war by linking the concept of just wars to **jus in bello** which made the resort to just wars, connected with the necessity of conducting justly, that is to observe the laws and customs of war.

This is a very important element which can induce the belligerents to respect the laws of war, since the hatred and violations of those rules may be mitigated if the belligerents believe deeply that observance of the laws of war is a duty imposed by just war itself.

Thus, the doctrine of just war, which is essentially a doctrine aiming at limiting resort to war, has been made the very vehicle through which we can impose compliance with the rules of warfare.

(iii) Self-interest has been advanced as a very important means of encouraging belligerents to respect the laws of war. All classical writers stress the importance of the idea that the object of war is to live in peace. This means among other things, that we must observe the laws when conducting our wars, since victory by means contrary to the laws of war will not bring a real base for permanent peace. The vanquished would wait for any

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[34] Soitis, op. cit., supra. chapter 4, n.62, p.58.

[35] Op. cit., supra. chapter 1, n.9, Vol.1, pp.243-244.

occasion to avenge their losses. This will not be in the interest of those who won the war, whereas, on the contrary by observing the laws of war, enemies can be converted to friends.

(iv) In connection with unjust wars, it seems that classical writers condemn any resort to them, since they are against the law of nature, however whenever they erupted all acts are to be considered unjust, especially actions contrary to the law of war. On the other hand, it is in the context of unjust wars that classical writers tried to develop certain means of ensuring respect for the laws of war and develop also certain fundamental principles concerning criminal justice in general. Thus, the first reference to the need to punish those guilty of waging unjust wars, and those who order or commit violations of the laws of war, and also the non-availability of the plea of superior orders, as a defence in connection with the committing of such crimes can be observed.

(v) However, generally classical writers rested the need to ensure respect of the laws of war on the good faith, justice, and self-interest. There was no attempt to introduce third party control, which leads me to speculate that the evolving notion of sovereignty had made such an attitude unworthy of consideration at that time.

C. Internal Wars and Compliance with the Laws of War in Customary International Law

It has been said in the third chapter that customary international law, considered civil wars to fall within the domestic jurisdiction of States, which means that it is criminal law and not international law which regulate the relation between the established Government and the rebels. The question of compliance then finds no place, since there is nothing to comply with.

However, the legal device through which customary international law allowed the application of the laws of war to internal conflict was the institution of recognition of belligerency. Thus, once that recognition has been obtained the civil war becomes in effect an international conflict which means that the question of compliance and observance of the laws of war arises in these circumstances. On the other hand, it must be noted that the cases of recognition of belligerency are very rare, and the majority of civil wars were not conducted in accordance with the laws of war.

There is a wide consensus between writers that one of the major legal effect of recognition of belligerency is the obligation on both parties to comply with the laws of war. Castren observes that:

> "...[S]ubsequent to the recognition (of belligerency) the lawful Government is under an obligation to comply with the international rules of war in warfare against the insurgents, and is likewise entitled to expect the insurgents to observe them."[36]

Consequently then, it is not only the Government which is obliged to respect the laws of war, the insurgents also are bound to do so.

The question which arises in this context is how to justify the application of rules, which are meant to regulate the relation between two States, to insurgents who are not subjects

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[36] E. Castren: Civil War. Suomalainen Tiedeakatema, Helsinki, 1966, p.152.

of international law. In this context, Zorgbib observes:

> "Le parti insurgé, une fois reconnu, possède une compétence spécialisée projétée vers une finalité particulière: la conducte des hostilités-compétence spécialisée mais intégrale qui le met vis-à-vis de son adversaire dans le même situation d'un ennemi étranger."[37]

Thus, at least in the matter of application of the laws of war the insurgents are regarded as having the status of a subject of international law. Castren makes this very point, he notes:

> "...[I]nsurgents recognised as belligerent are nonetheless subjects of the law of nations to some extent, particularly in regard to the law of war."[38]

Therefore, the insurgents are obliged to respect too the laws of war like the established Government.

This is the most important legal effect of the recognition of the status of belligerency. Zorgbibe observes in this regard that:

> "La communauté belligérente jouit donc des 'pouvoirs implicites' nécessaires à la conduite des hostilités. Elle doit appliquer les lois de la guerre et a le droit à leur application."[39]

State practice also suggests that once the recognition of belligerency has been given, the insurgent movement is entitled to 'exercise complete sovereign authority within the territory actually within its authority'[40]. This means that the legal personality of insurgents is here extended to other branches of the law, other than the laws of war.

The conclusion then at this stage is that once the recognition of belligerency has been granted, the two parties are international persons, at least in connection with the duty to adhere to the laws of war. The question of compliance by implication, then, is the same as in international wars which leads us to raise the question, what are the means of securing observance of the laws of war in the context of customary international law.

1. The Means of Compliance in Customary International Law

The traditional means of ensuring respect for the laws of war apply in the context of international wars and civil wars, when the recognition of belligerency is accorded. According to Oppenheim:

> "...[S]ince war is not a condition of anarchy and lawlessness, international law requires that belligerent shall comply with its rules in carrying on their military and naval operations."[41]

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[37] Zorgbib, op. cit., supra. chapter 2, n.66, p.52.

[38] Op. cit., supra. n.36, p.152.

[39] Op. cit., supra. n.32, p.52.

[40] H.A. Smith: Great Britain and the Law of Nations. Vol.1, Kraus Reprint Co. Millward, New York, 1975, p.329. See also pp.330-333.

[41] Op. cit., supra. chapter 4, n.37, Vol.2, 7th ed., p.557.

In the opinion of these learned jurists, war conducted in accordance with the rules of the laws of war is 'legitimate warfare' and the measures which constitute such legitimate warfare in customary law are classified under three heads as follows: (i) The first class comprises measures of self-help, reprisals; punishment of war crimes committed by enemy soldiers and other enemy subjects and the taking of hostages. (ii) The second class includes complaints lodged with the enemy and with neutral States; good offices; mediation and intervention by a third and neutral State. (iii) The third class comprises the right to compensation.[42]

However, it seems that the first class of means of enforcing the laws of war constitutes the means which the parties resorted to frequently in practice, and even among the means mentioned in that class, it is reprisals which stood as the real means of ensuring respect for the laws of war.

Regarding the general position on the observance of the laws of war Schwarzenberger pointed out that this 'rests primarily on the expectation of their self-enforcement.'[43] In other words, reciprocity governs the attitude of belligerents concerning observance and compliance with the laws of war.

According to him, the rules of war which do not interfere seriously with the necessities of war benefit greatly from the principle of reciprocity, such as rules relating to the protection of the wounded and sick. In this sphere, the principle of reciprocity benefits both sides and hence, operates as a very positive means of ensuring respect for the rules of war.

However, the real problem of observance is represented by those rules of warfare in which the standard of civilization overrides the necessities of war or a true compromise is achieved between them.[44] In that case two hypothesis exist. The first is that the belligerent party instruct their army to observe the laws of war, and would punish any violations of the laws of war, in that case no problem can arise, since law is respected.

In the second hypothesis, it is the authorities of the belligerent power themselves who order, or connive at large-scale violations of the laws of war. In this case, which more closely reflects the practice of States (as the two world wars reveal), international law does not provide any means of stopping such violations.

According to Schwarzenberger in this case, the belligerent victim of such violations has either:

> "...[T]o bide his time, rely on the effects of his enemy's lawlessness on public opinion in allied and neutral countries and settle accounts when victory is won."[45]

However, if that belligerent prefers immediate action, the only means provided by international law is reprisals, which in the opinion of Schwarzenberger 'reverse the operation of the chief working principle behind the laws of war from positive to negative

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[42] Ibid, p.558.

[43] Op. cit., supra. chapter 4, n.44, Vol.2, p.452.

[44] Ibid.

[45] Ibid, p.453.

reciprocity."[46]

Because of the prominent role played by the institution of reprisals in the domaine of ensuring respect for the laws of war, I propose to deal with them briefly.

1.1. Reprisals

Reprisals constitute in customary international law the main means of enforcing the law of war; in the words of Draper:

> "It is probably the oldest and most primitive mechanism for the application of the law of armed conflict."[47]

They were known and practised by States for a long time. Nahlik maintained the reason for this is that:

> "Dans un presque-vide juridique et organisationel il était bien naturel de ne compter que sur ses propres forces et ses propres moyens pour dissuader l'adversaire de poursuivre les atrocités auquelles il était livré à l'encontre des personnes ou des biens dépendant de celui qui voulait protéger."[48]

This means that in the absence of a centralised agency which supervise the application of the law, individual members have to take the law into their hands and seek revenge. Thus, unlawful acts are remedied by unlawful acts.

Many judgments especially by prize courts, upheld the right of belligerent to resort to reprisals.[49] Lord Sterndale in the Noordam Case stressed that:

> "A Convention of this kind [Hague Convention No. XI] cannot deprive one belligerent of the right of reprisal against another, especially if that other belligerent is breaking every canon of international law."[50]

The Oxford Manual of 1880 maintained the legality of reprisals as a mode of ensuring respect for the laws of war, however, under strict conditions of necessity and proportionality.[51]

On the other hand Lauterpacht-Oppenheim observed that:

> "...[R]eprisals between belligerent cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied. Every belligerent and every member of his forces, knows for certain that reprisals are to be expected in case they

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[46] Ibid.

[47] G.I.A.D. Draper: Implementation and Enforcement of International Humanitarian Law in Armed Conflicts. 28 International Affairs, 1972, p.49.

[48] S.E. Nahlik: Les problèmes des répresailles à la lumière des travaux de la Conférence Diplomatique sur le droit humanitaire. 82 RGDIP, 1978, p.130.

[49] See the Annual Digest and Reports of International Law (1919-22), Case No.288. See also Case No.297. Longmans Green & Co., London, New York, Toronto, 1932.

[50] Ibid, p.430.

[51] See Articles 85 and 86 in Schindler and Toman (eds.), op. cit., supra. chapter 2, n.63, p.48.

violate the rules of legitimate warfare."[52]

Some writers doubted the efficacy of reprisals in practice, to them reprisals have been used as a 'convenient cloak for violations of international law.'[53] The majority of writers especially since the end of the 19th century and the advent of the First World War have become increasingly critical of reprisals.[54]

The general picture is that reprisals were admitted in customary international law as an effective means of ensuring respect for the laws of war. However, because in practice they usually hit the innocent, a growing body of opposition to their use has arisen.[55]

Moreover, it seems to me that reprisals in effect represent a very good instance of the operation of the unlimited notion of sovereignty, since the intervention of a third party for the enforcement of the laws of war and hence repression of violations of such laws) was not allowed at that period.

2. Case Studies

It is very important to try to find in the practice of civil wars, in which recognition of belligerency has been granted, the means by which the belligerent tried to secure the observance of the laws of war.

2.1. The American War of Independence (1774-83)

In that war the institution of recognition of belligerency, as a legal institution has not appeared yet. However, at the beginning of the war Sir James Robertson, the British Chief Commander, wrote to General Washington of his readiness to conduct the war according to the rules of humanity,[56] and inviting him to take the necessary measures to punish violations of the rules of war. General Washington accepted the offer.

It seems in general that:

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[52] Op. cit., supra. n.41, p.562.

[53] Ibid, p.563.

[54] For a different opinion on the subject, see R.G. Bierzanek: Reprisals as a Means of Enforcing the Laws of War: The Old and the New Law, in Cassese (ed.), op. cit., supra. chapter 4, n.94, p.237 ff.

[55] In this context, Kalshoven writes:

> "There are, however, two main drawbacks: belligerent reprisals tend to constitute an over-reaction to the original wrong, and they are likely to hit innocent people".

F. Kalshoven: The Law of Warfare. A.W. Sijhoff & Henry Dunant Institute, Geneva, 1973, p.111.

[56] Sir J. Robertson wrote:

> "Monsieur, ayant reçu une commission du roi qui me nomme commandant en chef de ses forces dans le pays, un des premiers soins que je prends, c'est de vous convaincre de mon désire de faire la guerre conformément aux règles tracées par l'humanité, et aux exemples que nous recommandent les nations les plus civilisées. Je vous fais cette déclaration de ma résolution dans l'espoir de trouver une disposition analogue de votre côté. Pour attaindre ce but, convenons de prévenir ou de punir les violations des règles de la guerre, chacun dans la sphère de notre commandement."

Op. cit., supra. n.34, p.60.

> "...[I]l n'y a aucun doute qu'en règle générale, les lois de la guerre furent observées de part et d'autre dans les hostilités entre les troupes Britaniques et Americanes."[57]

This means that reciprocity in adherence to the laws of war was essential for compliance with the law in that case. The history of that war also affords us with examples of the desire of the belligerent to punish violations of the usages of war. Thus, General Washington on September 24th, 1776 wrote against the practice of plundering and ordered punishment for those guilty of its use:

> "I have ordered instant corporal punishment upon every man who passes our lines, or is seen with plunder, that the offenders may be punished for disobedience of orders; and I have enclosed to you (Joseph Reed) the proceedings of a court-martial held upon an officer who with a party of men robbed a house a little beyond our line of a number of valuable goods...He was met by a brigade major who ordered him to return the goods taken contrary to orders; which he not only refused to do but drew up his party and swore he would defend them at the hazard of his life; on which I ordered him to be arrested and tried for plundering, disobedience of orders and mutiny. For the result I refer to the proceedings of the court, whose judgment appeared so exceedingly extraordinary that I ordered a reconsideration of the matter, upon which, and with the assistance of fresh evidence, they made shift to cashier him."[58]

It is clear that there is a real will on the part of General Washington to abide by the laws and customs of war and enforce them when they are broken. In my opinion, this serves two important purposes; first to make the troops conform to what he agreed with the British, and secondly to keep discipline within his army.

However, the first attempt to issue orders which make some acts war crimes and establish tribunals of adjudication was during the Mexican War when the famous General Order 20 of February 19, 1847 was issued by General Winfield Scot. The order states that:

> "Assassination, murder, poisoning, rape or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and pictures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the US military forces, or by such individuals against other such individuals or against Mexican or civilians should be brought before military commissions."[59]

These commissions were used extensively, they dealt mainly with criminal offences which would be tried in civilian courts. General Scot also established a 'Council of War' which tried violations of the laws of war proper. The main charges referred to this council were guerilla warfare or violations of the laws of war by guerillas, and enticing or attempting to entice soldiers to desert their service.[60]

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[57] Ibid.

[58] Cited by E. Colby: War Crimes. 23 MLR, 1924-1925, pp.500-501.

[59] W. Winthrop: Military Law and Precedents. 2nd ed., Government Printing Office, Washington, D.C., 1920, para.1298, p.832.

[60] Ibid, para.1299, p.832.

The importance of the creation of military commissioners lays in the fact, that they were the originals of the military courts created later in the American Civil War.

2.2. The American Civil War

In this case I will concentrate on the means of enforcing the rules of war, stipulated in the Lieber Code, and also the real practice vis-à-vis this subject in the conduct of the belligerents.

It is to be stressed at the outset that the mere fact of codifying the rules of war in an official act, and the instruction of the army to follow its rules, is in itself a real means of ensuring respect for the laws of war, since ignorance of the law often leads to barbarity.

The main means envisaged by the Code to ensure compliance with the law, reflect in essence what customary international law says about the matter, reprisals, punishment of war crimes and lastly the taking of hostages.

2.2.1. Reprisals

The Code admits of reprisals, as a clear legal means of ensuring respect for the laws of war. Article 27 states:

> "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage."[61]

This is an exposition of the general principle. The Code then lists the criteria to which resort to reprisals must be adhered to. Article 28 indicates that reprisals are never 'measures of revenge.' They are only 'means of protective retribution'. Hence, reprisals may be resorted to only 'after careful inquiry into the real occurrence, and the character of their misdeeds that may demand retribution.'[62]

It is clear here that resort to reprisals does not depend on the free will of the belligerent, but on stringent criteria, which if adhered to in practice, would make recourse to it very rare.

The Code contains specific cases where reprisals are permitted and instances where it is forbidden. As to the first, they are permitted in Articles 58, 59, 63 and 65.[63] This is an example. Article 58 provides:

> "The law of nations knows of no distinction of colour and if an enemy of the US should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint."[64]

As to the second, the Code prohibits reprisals in case of Article 70, which states that:

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[61] Op. cit., supra.n.51, p.7.

[62] Ibid.

[63] Ibid, pp.11-12.

[64] Ibid, p.11.

> "The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself of the pale of the law and usages of war."[65]

However, the practice shows that many examples of reprisals existed. On July 30th, 1863, President Lincoln issued an order of 'counter-retaliation'. In it was stipulated that:

> "...[F]or every Union soldier killed in violation of the laws of war a rebel soldier...(was to' be placed at hard labour...and (so) continued...until the other...(should) receive the treatment due a prisoner of war."[66]

Moreover, when the Confederate forces executed two Union prisoners as retaliation for the execution of the Union of two of its officers for espionage charges, Present Lincoln ordered the immediate seizure of General Lee's son and a Confederate prisoner and hanged them the moment authentic information was received of the execution of the Union officers.[67]

Furthermore, in 1862 President J. Davis declared that in retaliation for the use of slaves by the Union forces, Union's Generals Phelps and Hunter were to be tried as outlaws and executed upon capture.[68]

The cruelty especially of the Confederate army vis-à-vis prisoners of war they captured led Congress to adopt a resolution recommending retaliation to stop such acts. Discussions in the Congress reveals that the general mood was with the adoption of an open policy of retaliation, as the only means of inducing the Confederates to conform to the laws of war. Thus, Senator Lane supporting such policy, argued:

> "Now, sir, if this is to be a war of extermination let not the extermination be all upon one side. Mercy to felons and traitors is cruelty to our own soldiers in southern prisons...they now indulge in a system of warfare the most barbarous and atrocious known to the history of modern civilisation, and they can do no worse if we resolve, in justice to our soldiers to mete out to those we have captured from the rebel army their own measure; at least until they shall reform their conduct in reference to our men. Will any acts of ours further exasperate those felons and traitors and demons, in human shape."[69] Congressman Wade argued for giving the same inhuman treatment of Union prisoners, he stressed "I have no doubt that a prompt and stern resort to retaliation will have...beneficial effect."[70]

However, a minority of senators and congressmen argued against such course. Congressman Hendricks stated:

> "I am free to say I do not feel that the condition of my friends in the southern prisons will be made any better, and they be made any happier, by seeing some men in our

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[65]Ibid, p.13.

[66]Cited by R. Arens: Vicarious Punishment and War Crimes Prosecutions: The Civil War or Alice Through the Looking Glass. WULQ, 1951, p.75.

[67]Ibid.

[68]Ibid, p.74.

[69]Ibid, p.78.

[70]Ibid, p.79.

prisons here in the North starved to death."[71]

Senator Summer observed that:

> "I believe that the Senate will not undertake in this age of christian light, under any inducement, under any provocation, to counsel the executive Government to enter into any such competition with barbarism."[72]

However, on January 31st, 1865, the US Senate passed a resolution which generally leans towards advocating a policy of retaliation. It stated:

> "The executive and military authorities of the US are hereby directed to retaliate upon the prisoners of the enemy in such manner, in conformity with the laws and usages of war among civilised nations, as shall be effective in deterring him from the perpetration in future of cruel and barbarous treatment of our soldiers."[73]

The conclusion is that reprisals which were originally seen in the Lieber Code with suspicion and distrust since they may lead belligerent in the words of Article 28 'nearer to the intercine wars of savages', have become in practice an accepted Federal and Confederate policy in dealing with what they see in each other's conduct as violations of accepted rules of war.

The two belligerent claimed that the purpose for resorting to retaliation and counter-retaliation was to enforce respect for rules of warfare. However, the practice shows clearly that it is the innocent who became the victim, and that instead of stopping violations reprisals have led to more violations.

2.2.2. Punishment of War Crimes:

The second method used in the American Civil War to enforce the laws of war, was the creation of what is called 'military commissions' with the mandate to try criminals of war. The practice shows that even before the Lieber Code some instances of creating 'military commissions' to deal with violations of the laws of war can be found. In 1861, at Yorktown, General McClellan ordered that:

> "All acts committed by either officers, soldiers or other persons, connected with the army, or by inhabitants or other persons, which are commonly recognized as crimes against society; or which may be done in contravention of the established rules of war, shall be punished by a court or military commission."[74]

The Lieber Code contains a series of crimes punishable by death penalty (Articles 44, 46, 47, 88, 89, 91, 95, 96 and 101). Generally, the acts punishable by death penalty concern acts of treason by citizens and spying by enemy subjects. Military commissions which grew

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[71] Ibid, p.78.

[72] Ibid.

[73] Ibid, p.79.

[74] R.M. D'Apolito: My Lai: Jurisdiction over the Guilty Civilians. 6 NELR, 1970, p.108.

essentially from custom and use[75] had jurisdiction to deal with the following persons: (i) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (ii) inhabitants of enemy's country occupied and held by the right of conquest; (iii) inhabitants of places or districts under martial law; and (iv) officers and soldiers of our own army, or persons serving with it in the field who, in time of war, become chargeable with crimes or offences not recognisable or triable by criminal courts or under the Articles of war.[76]

During the period of the Civil War and until the end of reconstruction these commissions tried nearly 2000 cases.[77]

The main offences in violation of the laws of war dealt with by these commissions were: breaches of the law of non-intercourse with the enemy, engaging in illegal warfare as a guerrilla, spying, taking life or obtaining any advantage by means of treachery, abuse or violation of a flag of truce, etc.[78] The US Supreme Court upheld the decisions of such courts in many instances. It also stressed that one of its duties is the application of the laws of war. Thus, in the Ex Party Quinn Case, it stated:

> "...[F]rom the beginning of its history this court has recognised and applied the law of war, for the conduct of war. The status, rights and duties of enemy nations as well as of enemy individuals."[79]

After the end of the war, however, President Johnson decreed on May 29th, 1865 a general amnesty for all with the exception of the leaders of the rebellion. The Lieber Code did not in fact prohibit trial of rebels after the war for treason (Articles 154 and 157). Indictments were issued against President J. Davis and his Cabinet. He was held for two years in prison and the members of his Cabinet for shorter periods. None were tried. Only Henry Wirtz was tried and hanged for his brutal treatment of Union prisoners of war.[80]

The practice of the American Civil War shows that very modest steps were taken to ensure respect for the laws of war, reprisals in theory were restricted within certain limits of necessary. However, the practice did not conform fully to that stipulation.

As to the use of military courts, it seems that their practice confined itself in the big majority of cases to enemy violations and also of citizens who helped the enemy. In other words, the majority of cases turned around spying and treason which can be explained easily by the desire of the Union to protect its armed forces. Hence self-interest was the obstacle to a real extension of the powers of these tribunals.

Moreover, there is no indication whatsoever that the established Government, in this case

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[75] Op. cit., supra. n.59, para.1307, p.838.

[76] Ibid, para.1309-1313, pp.839-841.

[77] Op. cit., supra. n.74, p.198.

[78] Ibid, p.108.

[79] H. Lauterpacht, (ed.): Annual Digest and Reports of Public International Law Cases. (1941-1942), Butterworth & Co. Pub., Ltd. London, 1945, p.568.

[80] W.A. Dunning: Reconstruction Policy and Economic 1865-1877. Harper & Brothers, New York, 1962, p.22.

the Federal Government, had contemplated, or thought of the introduction of third party machinery, for the control of the application of the laws of war. This would I suspect, have been considered a direct violation of its sovereignty. Thus, reprisals and military commissions were in a way the means of enforcing the laws of war, which were in accordance with the requirements of sovereignty and non-intervention.

2.3. Other Cases

The general picture is that in other cases of civil wars which occurred during the 19th and early 20th century, no recognition of belligerency has been granted, except perhaps in the Boer war, which meant that no respect has been shown by the belligerents to the laws of war, since especially in the view of the established Government the matter is solely regulated by criminal law and thus sovereignty overrides any other consideration.

In the Paris Commune, which lasted only 70 days, and resulted in 30,000-35,000 deaths, the established Government's view was that criminal and military law regulated relations between themselves and the rebels It declared in one instance that:

> "Quelques hommes reconnus pour appartenir à l'armée saisis les armes à la main, ont été passés par les armes, suivant la rigueur de la loi militaire qui frappe les soldats combattant leur drapeau".[81]

This meant that they were tried and executed for treason, not according to the laws of war, but according to the military law of the French army. This stand of the established Government led the insurgents to follow a policy of reprisals, which meant a serious escalation in atrocities.

The insurgents declared that:

> "le gouvernement de Versailles se met en dehors des lois de la guerre et de l'humanité; force nous sur d'user de répresailles. Si, continuant à méconnaitre les conditions habituelles de la guerre entre peuples civiles nos ennemis massacrent encore un seul de nos soldats, nous répondons par l'exécution d'un nombre égal au double de prisoniers."[82]

The result was horrible, prisoners killed, hostages taken and executed by the two sides. There was a complete absence of laws of war, which meant that the question of compliance had no place. Thus sovereignty led in the end to the absence of humanity.

The same picture prevailed in other cases of civil wars, in the Spanish Latin American wars, violations of the laws of war was systematic, especially by the Spanish troops.[83] The Greek war of independence also witnessed the most flagrant violations of the laws of war by both sides, total disregard for the laws of war prevailed in these instances. Siotis concluded in regard to this war that:

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[81] Op. cit., supra. n.34, pp.87-88.

[82] Ibid, p.88.

[83] Ibid, pp.64-68.

> "Sans donner l'énumération d'ailleurs inutile des crimes les plus cruels nous pouvons conclure que les lois de la guerre ne furent nullement appliquées dans le conflit."[84]

It seems that in these cases established Governments saw themselves as acting in a manner which was consistent with their sovereignty, hence their right to put down rebellion by any means at their disposal, the concept of absolute sovereignty was still at its height.

In the Boer War, the answer as to whether the British troops were conducting the war according to the laws of war, is by no means clear. At least, it is certain that no official instruction to the army to conform to the Hague Regulations of 1899, to which Britain was a party, had been issued. However, statements from British officials were contradictory. Field Marshall Lord Wolseley, the Commander-in-Chief at the War Office, wrote:

> "I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races...To accept to tie our hands in any way, no matter how small, by the 'laws and customs of war' proposed for civilized nations at the peace conference would in my opinion be suicidal, for the Boers would not be bound by any such amenities."[85]

He then added:

> "I cannot conceive how any notifications by us during the present war, that we shall act upon the above referred to 'laws' etc. would help us, but I can imagine many positions and circumstances where any such one-sided adherence to those laws could be prejudicial to our military interests of the moment."[86]

The heart of this argument is that the British cannot apply rules of war because that would be against the military advantages which may be gained by non-adherence.

However, in total opposition to this stand, Major-General Sir John Ardagh, the Director of Military Intelligence (1896-1901) who acted as an expert on land warfare to the British delegate at the Hague Conference of 1899 stressed:

> "Although the Boers have not acceded formally to the Hague Conventions and its provisions are not binding technically in a war between a contracting and a non-contracting power, the consequence of this condition is to relegate the conditions upon what is and is not permissible to the general body of international law, in which principles identical with the above have for many years been incorporated. For practical purposes, therefore, the Hague Convention may be properly applied to by both sides."[87]

However, it seems that there was a general consensus that even if the Hague Convention of 1899 did not apply (since the insurgents also did not issue any declaration that they recognised this convention) usages and customs of war apply in the context.

The practice shows that gross violations occurred and that Lords Roberts and Kitchener

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[84] Ibid, p.72.

[85] Cited by S.B. Spies: Methods of Barbarism?. Human & Rousseau, Cape Town, 1977, pp.13-14.

[86] Ibid, p.14.

[87] Ibid, p.12.

used methods which were against the usages of war. They resorted to reprisals, the taking of hostages and collective responsibility not as means of enforcing respect for the laws of war, but in order to induce the insurgents to lay down their arms and surrender.

When Lord Roberts on May 3rd, 1900 occupied the locality of Brandford, he issued the following warning:

> "I shall hold Brandford responsible for any damage done to the railway from this point to Karee Siding (south of Brandford). You can make what arrangements you like for the protection of the line and telegraph, but if either are damaged the six principal inhabitants of Brandford will be made prisoners of war and dealt with by martial law."[88]

Thus, collective punishment as a reprisal for any attacks of trains and telegraph lines, has been resorted to, this is in flagrant violation of customs of war, since it is the duty of the belligerents to protect such objects and not the civilians. Roberts also ordered that civilians should be sent on trains as hostages to prevent attacks by the insurgents.

The Boar's official account of the negotiations with the British at the end of the war, stressed that:

> "...[N]ot the arms of the enemy which directly compelled us to surrender, but another sword which they had stretched out over us-namely, the sword of hunger and nakedness, and what weighted most heavily of all, the awful mortality amongst our women and children in the concentration camps".[89]

It is by all accounts clear that concentration camps were against the customs of war. However, there is evidence that the British have convened war crimes in some instances to punish flagrant violations of laws and customs of war.[90]

The general conclusion is that the British Government by failing to instruct its forces to adhere to the Hague regulations to which it was a party, has in fact opened the way for the non-respect of the laws of war which followed. Demands of military advantage had prevailed over demands for respect of the law and humanity.

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[88] Ibid, p.51.

[89] Ibid, p.284.

[90] Ibid, at p.294. Thus, the 4th clause of the Vereeninging Agreement stipulates that:

> "No proceedings civil or criminal will be taken against any of the burgers for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts, contrary to usages of war which have been notified by Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities."

The second sentence of this clause had not been in the original draft. It has been added upon a request of the Cabinet, since in the words of Chamberlain it is necessary:

> "...[T]o bear in mind that we have inflicted death penalty on our own officers and men for acts contrary to the usages of war and that the exemption of Boers from liability to prosecution for such offences might arouse strong feelings here and in colonies."

Ibid, p.294.

3. The Effects of Codification of the Laws of War and Means for Compliance with Them. The efforts which began as from 1864 to codify the laws and customs of war, did not in general bring important changes to the question of implementation, enforcement and supervision. In fact, all the conventions concluded were expressly to apply only to wars between States, civil wars were excluded, the State retained its freedom in dealing with its enemies. The conventions relied for their application on the good will of the parties to carry out their obligations in the spirit of reciprocity.

The first Geneva Convention of 1864 dealt with the amelioration of the condition of the wounded in the armies in the field. Pictet observes in connection with that convention:

> "The Convention was the point of departure for the great movement in international law for the protection of war victims represented by the Geneva Convention as a whole."[91]

However, Article 8 concerning implementation stipulates that:

> "The implementing of the present convention shall be arranged by the commanders-in-chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention."[92]

Therefore, the Convention is not self-executing. The Government must enact the necessary instructions to their armies to comply with it. Local legislation is a necessary means of implementing the Convention. There is no mention of reprisals in it, this can be interpreted that they were excluded. That interpretation would be in accordance with the object and purpose of the treaty which is the protection of the weakest victims of war, namely the wounded. However, the Convention does not contain any sanction clause which may be applied against soldiers and officers who may breach its rules.

The Declaration of St. Petersburg of 1868 (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 grammes weight) also relies on the goodwill of the parties to respect their obligations. Further, it contains what is called 'the general participation clause' which in practice reduces the obligation of the parties to nothing, when a non-party enters the war. It stipulates:

> "This engagement is compulsory only upon the contracting or acceding parties thereto in case of war between two or more of themselves; it is not applicable to non-contracting parties, or Parties who shall not have acceded to it."

It then added:

> "It will cease to be compulsory from the moment when, in a war between contracting or acceding parties, a non-contracting or a non-acceding party shall join one of the belligerent."[93]

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[91] J. Picted (ed.): Commentary I Geneva Convention: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. ICRC, Geneva, 1952, p.11.

[92] Ibid, p.251.

[93] Ibid, p.96.

Thus, the obligation to observe the Declaration is very fragile indeed, since it can be ended at any time, when a non-contracting or non-acceding State enters the war.

The two Conventions of 1864 and 1868 contain no clause dealing with the prosecution of their violations. This led Monyier, one of the founding fathers of the ICRC, to say that the two Conventions:

> "...[N]e sont pas une loi imposée par une autorité supérieure à ses subordonnées mais...seulement un contrat, dont les signataires ne peuvent édicter des peines contre eux-mêmes."[94]

However, following the adoption of the Geneva Convention of 1864, a general practice developed, whereby the belligerents began to admit voluntary medical personnel sent by the ICRC in order to assist regular medical services. Domb observes in this respect that:

> "Obviously the mere presence of personnel belonging to the ICRC constituted a deterrent for the potential violations of the Convention."[95]

In fact, the Convention of 1864 was very useful in the Franco-German War of 1870. Relief activities were undertaken on behalf of the wounded by the national societies of the belligerents and neutral States. The ICRC coordinated such activities, and created and managed the first 'international agency for the relief of sick and wounded personnel', better known as the 'Basel Agency.'[96]

On the other hand, the Hague Conventions of 1899 and 1907 regulate essentially the conduct of war. They were not vigorous enough concerning means of ensuring respect for them. However, they contained some measures which in general were modest and rest primarily on the will of the party itself. The main means included are:

(i) Instruction to the armed forces (enacting manuals): It must be noted that even before the Hague Conventions, many States have in fact, issued manuals which embody the rules and customs of war, for example, France in 1877, Portugal in 1890, Spain in 1882 and Italy in 1896.[97]

However, the new factor in the Hague Convention is that the enacting of such manuals has become obligatory, and also the substance of the rules have been defined in the regulations themselves. Thus, it establishes unity in this field. Article 1 of the IV Hague Convention on Land Warfare of 1907 stipulates:

> "The contracting powers shall issue instructions to their armed forces which shall be in conformity with the regulations respecting the laws and customs of war on land, annexed to the present Convention."[98]

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[94] Op. cit., supra. n.10, p.206.

[95] F. Domb: Supervision of the Observance of International Humanitarian Law. 8 IYHR, 1978, p.181.

[96] See in this respect, G. Willemin, R. Heacock and J. Freymond: International Organisation and Evolution of World Society. Vol. 2, ICRC, Geneva, 1984, p.20.

[97] Op. cit., supra. n.47, pp.54-55.

[98] Op. cit., supra. n.51, p.65.

Accordingly, new manuals were issued by many States in application of this Article, such as Germany in 1902, France in 1913, the UK in 1914, and the US in 1914. Draper observes in connection with the German Manual that 'the work was in fact a polemic for inhumanity.'[99] However, it seems that the measure of enacting manuals, is a very important element in the efforts of dissemination of the laws of war, which can reduce violations.

(ii) Relief societies for prisoners of war: this is in my view an indirect means of ensuring respect of the laws of war, since they assist the parties to the conflict to fulfil their obligations under the conventions. Article 15 of the 1907 IV Convention of the Hague, opens the way for the possibility of creating relief societies, which can undertake charitable activities for POWs such as distributing relief in places of internment.

However, such societies must be established in accordance with he laws of their country, which means that only national societies can act. In practice, it seems that the ICRC was not banned from acting under the same Article (7).

(iii) Compensation: Article 3 of the IV Hague Convention of 1907 stipulates that:

> "A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[100]

Generally compensation can be claimed after the end of the conflict, which may mean that only the victor can claim it. Despite this, tribunals have been set up to deal with some problems relating to compensation. Thus, Gray listed 435 Arbitral tribunals set up between 1792 and 1972. She found that at least 261 had dealt with claims for damages, 45 of these concerned international wars and 36 concerned civil wars.[101]

In the context of civil wars, it must be made clear that all claims were connected with damages to alien property during civil wars, rebellions and insurrections. The application of Article 3 to civil wars was not, however, uniform. It has sometimes been held to be applicable to internal conflict on other occasions, not.

In the Caire Case, the Franco-Mexican Claims Commission's President Verzijl noted:

> "Je crois tout de même devoir admettre que, les Etats, en s'accordant sur le principe pour la guerre internationale l'ont considéré encore comme un principe nouveau, d'application restreinte, et qu'ils n'ont point voulu en reconnaitre l'applicabilité générale dans tous les cas où la responsabilité internationale pour les actes d'une force armée serait en jeu."[102]

In fact, he refrained from the application of Article 3, to civil wars, his main argument as it appears implicitly from the passage cited above, is that it applies only between States.

However, Judge Max Huber in the British Claims in the Spanish Zone of Morocco Case, maintained that at least the general principle contained in Article 3 of the IV Hague

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[99] Op. cit., supra. n.47, p.55.

[100] Op. cit., supra. n.51, p.65.

[101] C.D. Gray: Judicial Remedies in International Law. Clarendon Press, Oxford. 1987, p.11.

[102] Estate of Jean-Baptiste Caire (France) v. Mexican States (1929), 5 UNRIAA, 1929, p.528

Convention, applies to civil wars. He pointed out:

> "...[S]ans doute, cette convention [IV Hague Convention] n'est directement applicable à aucune des situations dont le rapport doit s'occuper, mais le principe qu'elle établit mérite d'être retenu également en ce qui concerne l'éventualité d'une action militaire en dehors de la guerre proprement dite."[103]

However, Schwargenberger stressed that:

> "[It is]...doubtful whether such a restrict view of Article 3 of the IV Hague Convention is any longer accurate. It is probably preferable now to treat this Article as being declaratory of customary international law."[104]

It seems to me that the importance of this Article in the context of civil wars, is fading away, since it protects generally alien property. It belongs to an era when foreigners especially of powerful States, enjoyed special treatment. Nowadays the picture has changed dramatically, since foreign owned property is regulated by local law, which makes compensation very hard to attain.

(iv) Reprisals: The Hague Conventions are silent on the question of the legality of reprisals. This led to different positions on the level of doctrine. Some rely on Article 50 of the IV Hague Convention, which condemns collective penalties on civilian population, as a very important limit on recourse to reprisals.[105] However, the practice during the two world wards witnessed widespread recourse of the belligerents to reprisals.

The general picture concerning the Hague Conventions of 1899 and 1907 is that no real progress has been made in the area of developing means for ensuring respect for the laws of war, to match what has been done at the substantive level. All the means mentioned depended in their implementation on the will of the parties. States, it seems, wanted to protect their sovereignty in its absolute form, since no third party control is envisaged. Also Article 2 limits the obligations of the parties to a great extent, since it maintained the 'General Participation Clause' whereby the conventions would apply only between contracting parties, and then only if all the belligerents are parties to the Convention.

However, it was in the case of the Geneva law that the beginning of new ideas concerning means of ensuring respect for humanitarian law, can be traced. This is, in my view, due partly to the subject-matter of such conventions, which dealt with the protection of war victims. In this area, States were in general ready to accept some obligation concerning the means of application, since the victims do not constitute a real danger to the conduct of war. Secondly, they do so because it is in the interests of their own soldiers.

The Geneva Convention of 1906, which was a revision of 1864 Convention on the amelioration of the situation of the wounded and the sick continued the tradition of including the clause of 'General participation' (Article 24) which goes against the object of

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[103] Affaire des Biens Britaniques au Maroc Espagnol (Espagne contre Royaume Uni) (1925), 2 UNRIAA, p.615.

[104] Op. cit., supra. n.43, p.680.

[105] See in this respect, Bierzanek, op. cit., supra. n.54, pp.232-257.

the Convention itself, in my opinion. However, it contained a very important provision, which concerns the enforcement of the Convention.

Article 28 indicates that the parties have to take the necessary legislative measures to repress 'individual acts of robbery and ill treatment of the sick and wounded'. Thus, it introduced the element of punishment of violation of humanitarian law, as a means of enforcing the law. In practice only two States[106] have given effect to that provision in the form of enacting laws.

Of two Geneva Conventions of 1929 the first concerned the Sick and Wounded and was a revision of the 1906 Convention. The second was wholly concerned with prisoners of war. These two Conventions brought some fundamental elements of progress in the area of implementation, enforcement and control of application of humanitarian law. These elements are:

(i) The infamous 'general participation clause' has been done away with. Thus, Article 25 of the Wounded and Sick Convention and identical Article 82 of the Prisoners of War Convention provide:

> "The present Convention shall be respected by the high contracting parties in all circumstances. If, in time of war, a belligerent is not a party to the Conventions, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto."[107]

This is a real triumph of the idea of humanity over military concerns, since the entrance of a non-party to the war does not affect the obligation of the belligerents to continue to apply the Convention. This may in fact, encourage the non-party State to respect the Conventions.

(ii) Reprisals were expressly prohibited in the Prisoners of War Convention the last sentence of Article 2 stipulates:

> "...[M]easures of reprisals against them [POW's] are forbidden".

This is the first instance of prohibiting this inhuman method in an international instrument. However, the First Convention (Sick and Wounded) contained no such provision. Nahlik observes that:

> "...[Q]uant aux blessés et malades, on croyait en toute évidence qu'une interdiction expresse des répresailles serait superflue."[108]

He then quickly notes:

> "...[O]r, les expériences néfastes de la seconde guerre mondiale ont démontré qu'aucune limitation de la licence du belligérent ne pouvait être présumée".[109]

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[106] Op. cit., supra. n.10, p.207.

[107] Op. cit., supra. n.51, p.264 and 290.

[108] S.E. Nahlik: Le problème de sanctions en droit international humanitaire in: Swinarski (ed.), op. cit., supra. chapter 1, n.1, p.473.

[109] Ibid.

In fact, during the second world war the practice showed that the belligerents did not respect these provisions.

(iii) The System of Protecting Power: The Convention on POW's, introduces for the first time in an international instrument the idea that States at war should entrust the mission of controlling the implementation of their obligations contained in the Convention to a third party machinery.

The idea of protecting power is an old institution in international law. However, its use in the context of the laws of war is traced to the Franco-German war, when Prussia requested the USA to protect its interests in France.[110]

Article 86 introduces this institution formally into the Law of Geneva. Thus, the guarantee of the regular application of the Convention 'will be found in the possibility of collaboration between the protecting powers charged with the protection of the interests of the belligerent.' The main functions of the protectors are:

(a) Lending good offices in any case of dispute regarding the application of the Convention (Article 87).

(b) Receiving complaints from POW's (Article 42).

(c) Conferring with representatives of POW's (Articles 43- 44).

(d) Supervising judicial prosecutions against POW's (Articles 60, 62, and 66).

In practice, the institution worked very well in the First World War, before its formal insertion in a treaty. In the Second World War, the number of neutral States who could act as protecting powers was reduced dramatically. Switzerland represented at the end of the war 35 States, Sweden and Spain also acted as protecting powers.[111]

Article 86 worked well during the Second World War. However, Pictet who recognised the value of this Article especially for the protection of POW's saw 'the drawback of the Article was that it abandoned though it did not altogether exclude the idea of obligatory control by a neutral and independent agency.'[112] In fact, the acceptance of the services of the protecting power was not mandatory, Article 88 also allowed the ICRC to perform its function in protecting the POW's. But, this also was not mandatory, since the consent of the belligerents was required.

The general conclusion is that despite these developments in the field of strengthening means of enforcement of the laws of war, especially that of Geneva. It seems to me that even in cases of international wars, States were still hesitant to bind themselves especially by the control of third parties. They still prefer, as the Hague Conventions witnesses, means which depend entirely on their consent and will.

Thus, until 1929, no obligatory third party machinery has been arrive at in the context of international war.

In civil wars, the situation is worse, for two reasons. First, the Conventions were

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[110] See G. Abi-Saab: The Implementation of Humanitarian Law, in Cassese (ed.), op. cit., supra. chapter 4, n.94, pp.311-313. See also M. Takemoto: The Scrutiny System under International Humanitarian Law. 19 JAIL, 1975, pp.1-2.

[111] See G. Abi Saab (ibid, p.313), and Pictet, op. cit., supra. n.91, pp.86-93.

[112] Op. cit., supra. n.91, p.90.

expressly to be applied between contracting States. Secondly, the recognition of belligerency, which was the only device through which the laws of war can be applied in civil war, had become obsolete; no recourse to it was made at the conclusion of the Conventions at the Hague and Geneva.

This leads me then to deal with two points, which in my view, may throw some light on how in practice the question of observance of the law of war in internal conflict has been coped with, the two points being: (i) The role of the ICRC in internal conflicts up to the Second World War; and (ii) the Spanish Civil War and the question of compliance.

(i) The role of the ICRC in internal conflicts up to the Second World War:

It must be made very clear that in the context of civil wars, the ICRC lacked any legal basis upon which to claim to control the application of the laws of war. States were not ready to give any third party, be it the ICRC or any other organ or institution, any power to control their actions during civil wars. Indeed, even in international wars, the intervention of the ICRC can be made only with the consent of the belligerents.

Moreover, States generally claim that insurrection is a purely domestic affair and there is no room for the application of the laws of war. Hence, there is nothing to control. However, despite these enormous legal handicaps, the ICRC managed on many occasions to intervene by lending its relief and assistance to the victims of war. Thus, it did contribute at least implicitly to induce the belligerents to conform to certain basic standards and rules of the laws of war.

In the Russian Civil War, the ICRC delegate after meeting Lenine, succeeded in obtaining an agreement to create what was known as the 'political red cross' which consisted of a group of neutral red cross societies and the Russian Red Cross. Its mission consisted of visiting political prisoners and providing them with relief and assistance.[113]

It seems that in general, the application of the laws of war were absent. Magliazza observed that:

> "...[L]a guerre civile Russe 1917-1920 permit d'ailleurs de constater non-seulement l'absence de toute application des lois de la guerre, mais encore l'absence de toute protestation contre une pratique de telle sorte."[114]

Therefore, the very modest contribution of the ICRC was overshadowed by the gross violations of basic humanity.

At the Xth International Conference of the Red Cross in Geneva in 1921 the intervention of the ICRC was given a 'legal basis' at least, in the context of the law of the Red Cross movement which is not binding on Governments. It was given the 'mandate of intervening in the work of relief in the event of civil war'.[115] Acting on this new mandate, the ICRC succeeded in 1932 in obtaining from the warring factions in the civil war in Upper Silesia,

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[113] M. Veuthey: The Red Cross and Non-International Conflicts. RICR, 1970, p.411.

[114] A. Migliazza: L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme. RCADI, 1972/III, p.212.

[115] International Red Cross Handbook, ICRC and League of Red Cross Societies. 12th ed., Geneva, July 1983, p.641.

an authorization to visit the camps of the prisoners, and give the necessary relief and care to women and children.

However, the most important thing was the agreement of the two parties to apply the whole Geneva Conventions to the conflict, thanks to ICRC efforts. This was the first instance in history where the parties to civil war accepted the application of the Geneva Conventions in their totality to the conflict.[116]

In my opinion, the importance of this case must not be exaggerated. None of the belligerents was the legal Government; Upper Silesia was administered by an international commission representing the League of Nations and finally it was not a State in international law hence, the conflict cannot be said to have the legal characteristics of a real civil war.

The ICRC also intervened in the Hungarian Revolution in 1919 by giving relief and assistance to the victims. However, its offers of aid have been rejected by both belligerents in the Irish Civil War, as being hostile.[117]

The conclusion is that the ICRC acted in an area where only State sovereignty was predominant. It tried to accommodate itself to that demand by acting in practice, only when the consent of the belligerent was given, and even when it was authorised to offer its services, its mandate was not to supervise the application of the laws of war (since in many cases the established Government does not recognise their application at all) and its observance by the belligerents, but was confined only to activities of visitation of POW's and distributing relief and news. In that sense the ICRC was pragmatic. It was not a guardian of the law but a rather timid assistant in inducing the established Government to apply a minimum of fundamental rules of humanity, which cannot be seen in any way as a violation of its sovereignty.

(ii) The Spanish Civil War and the Question of Compliance:

In this war, no recognition of belligerency was granted. The main reason was political. The powerful States during this period (the UK, France and the US) were against such course, because it would internationalise the conflict which they wished to remain purely local. The legal Government, however, considered that it was fighting an international war against Germany and Italy.[118]

The practice of war shows that despite the absence of recognition of belligerency which is the key to the operation of the laws of war in internal conflicts, the general view of third States, the League of Nations and the ICRC, was that certain fundamental rules of humanitarian law should be applied to the conflict. Cassese considered that this attitude

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[116]Schlogel, op. cit., supra. chapter 4, n.96, p.126.

[117]Ibid.

[118]When the Spanish Government raised the question of the situation prevailing in the country to the League of Nations, it justified this on the ground that:

> "If the Spanish Government has now asked for a meeting of the Council it is solely for the reason that an international war exists in fact, and that this war, if it is still ignored, may when it is least expected, produce a situation which can no longer be controlled."

Minutes of the 49th Extraordinary Session of the Council of Geneva (Dec. 10-16th, 1936), op. cit., supra. n.23, p.388.

cannot be considered as:

> "...[A] partial recognition of belligerency since the State concerned, all too clearly, emphasised they withheld any such recognition but rather as an indicative of the gradual development of customary rules concerning civil war".[119]

Cassese found that the Spanish case produced an interesting development in the law of civil wars, namely that even in the absence of recognition of belligerency, four rules of humanitary law are applicable to the civil war on the condition however that its intensity must match the Spanish civil war. These rules are:

(i) The rules on the protection of the victims of the war, especially the wounded and sick. The two parties declared to the ICRC their intention to apply the 1929 Geneva Convention on the subject.

(ii) The prohibition of the intentional bombing of civilians. Many States declared the illegality of such practice.[120] The League Assembly adopted a resolution on September 30th, 1938 which states that 'the intentional bombing of civilian population is illegal'[121] in the context of the Spanish Civil War.

(iii) The rule forbidding attacks on non-military objectives especially of open towns. The Assembly and the Council adopted resolutions condemning such practice.[122]

(iv) The rule authorising reprisals against enemy civilians, in the event where the enemy has previously attacked civilians. The last point concerns of course the methods by which humanitarian law is enforced, it shows that the brutal means of reprisal was accepted.

In fact, the Spanish Civil War witnessed many acts of reprisals, in which many innocents were the victims. The taking of hostages was also resorted to.[123] The trails and executions carried out by both sides, especially by the rebels, were not for violations of laws of war, but for fighting with the other side. The policy of trial and execution continued even after the end of the war.[124] Thus, reprisals, taking of hostages and summary executions were frequently used by the belligerents, in my view they were not employed as a means of ensuring respect for the laws of war but simply as a means of prosecuting the war, through

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[119] A. Cassese: The Spanish Civil War and the Development of Customary Law Concerning International Armed Conflicts, in Cassese (ed.), op. cit., supra. chapter 4, n.1, p.293-4.

[120] The British PM specifically mentioned the illegality of intentional bombing of the civilians. See House of Commons Debates. Vol. 337, June 21st, 1938, Col. 937. Similarly, the French and British Governments drew the attention of the Franco Administration that:

> "Direct and deliberate attacks on civilian populations are contrary to the principles of international law as based on the established practices of the civilised nations, to the laws of humanity and the dictates of public opinion".

Cited by Cassese, ibid, p.299.

[121] Ibid.

[122] Ibid, p.305.

[123] For details, see M. Junod: Warrior without Weapons. Translated by E. Fitzgerald, Jonathan Cape, London, 1951, pp.98 ff.

[124] A.V.W. Thomas and A.J. Thomas Jr.: International Legal Aspects of the Civil War in Spain (1935-39), in Falk (ed.), op. cit., supra. chapter 2, n.8, p.125.

which the will of the other party to fight is broken.

However, the protests of the League of Nations against the violations, and the work of the ICRC can be considered as modest steps in the field of inducing the parties to respect the law. The League, in reality, protested verbally but no concrete actions to stop the violations were taken.

The ICRC on the other hand was in the field and helped, with its customary silence, to contribute modestly to improve the situation of the victims. Moreover, it distributed relief and acted as an intermediary in the exchange of prisoners which sometimes took place.[125]

D. The General Conclusions

(i) From the beginning, it seems that the laws of war were based on the assumption that they are applicable between States and not within them. The rise of the concept of State, with its inevitable Westphalian components of sovereignty and non-intervention, closed any attempt to give the insurgents legal status. Thus, by reason of that sovereignty, States were free to do as they saw fit. Hence, the attention of classical writers was basically concentrated on the subject of the law between States only.

Even on the matter of law between States, the methods for ensuring compliance with its rules rested primarily on self-help, good faith and reciprocity. The concept of sovereignty was absolute, no third party machinery or interventions were thought of or proposed.

In this respect, it is the state of nature in its Hobsian sense that prevailed. Thus, talk of means of ensuring respect for international law in general, was in total contrast with the spirit and reality of that period. The modest suggestions made by classical writers always rely on the will of the belligerent. This to me, is an entirely logical situation, since these writers were essentially concerned with giving conceptual basis to the Westphalian model of State. In this model, the concept of third party machinery was absent.

(ii) The era of codification did not depart essentially from what has been said in the first conclusion, although it made law more clear and unified, it did not provide effective means of ensuring respect for the laws of war, especially in The Hague Conventions. The latter Conventions concentrated on indirect means of ensuring respect for the laws of war, rather than effective and direct means, like the intervention of a third party. Thus, the ideas of dissemination, the obligation to publish military manuals were inaugurated officially, which must be seen as important steps in the long road of producing effective means for compliance with the law.

Geneva law, on the other hand, with its concentration on the protection of the victims of war rather than regulating the conduct of war in the field made modest but important developments in the area of compliance. The protecting power institution was introduced, punitive measures for violations of the rules of protection of the victims were suggested to the State and the role of the ICRC was accepted. However, all these initiatives were to be carried out only between States and with their consent. Sovereignty still overrode the dictates of humanity.

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[125] For an excellent account of these activities, see the work of the ICRC delegate at that time Marcel Junod in Spain, op. cit., supra. n.123, pp.87-134.

(iii) In civil wars, the obsolescence of the recognition of belligerency which in many ways facilitated the application of the laws of war, as witnessed in the American Civil War, has in the Spanish case encouraged violations of the laws of war, since the parties were under no firm legal basis to respect the laws of war. Protests by third States also lacked that legal basis.

In the matter of means of ensuring respect for the laws of war once recognition has been granted, it is customary methods which apply in civil wars, reprisals, taking of hostages and also punishment of war crimes.

(iv) Another interesting phenomenon can be observed in the Spanish Civil War. The Spanish Government did not, in fact, attempt to characterise protests made by the third States of the League against violations of the laws of war, as intervention with internal affairs which, in my opinion, means that at least morally drastic violations of the rights of the victims of war, cannot be justified at all and in all circumstances as necessary means to protect the monopoly of sovereignty.

(v) In the overwhelming majority of cases of civil wars, the ICRC, in acting to give relief and assistance,indirectly helped in the application of the law of war. It has never claimed that it supervise the application of the law. This is the only way by which it has been accepted by the States.

SECTION II: Article 3 of the Geneva Conventions and Compliance

The era after the Second World War witnessed, in relation to the subject of enforcement and implementation of humanitarian law, two important events. First, the trial of war criminals, for war crimes against peace and crimes against humanity at Nuremburg and Tokyo. It must be remembered that the first attempt after the First World War to try the German Kaiser and also those who were accused of war crimes (Versailles Treaty Articles 228-230) was disastrous. The German Emperor was not at his trial because the Netherlands refused his extradition. Moreover, Germany refused to hand over to other States war criminals and it proposed instead to try them in Germany itself.

The trials were, in effect, a mockery of justice. Thus, the Commission of Allied Jurists, which was set up in January 1922 to inquire into the Liepzig trials concluded unanimously that 'some of the accused who were acquitted should have been convicted and that in the case of those convicted the sentences were not adequate.'[126] Thus, the trials were not international and also were not a good case for enforcing the law of war.

However, although the trails in Tokyo and Nuremburg were confined to the losers of the war, they were a very important landmark in the history of enforcing humanitarian law. They established a precedent which may be resorted to at any time. Pictet rightly observed:

> "En tout état de cause Nuremberg a marqué l'avènement d'un droit international pénal. Si l'experience fut imparfaite elle fut riche en enseignement et montre à la foi, la voie à suivre et les erreurs à éviter."[127]

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[126] Cited by S. Glueck: War Criminals, Their Prosecution and Punishment. Knopf, New York, 1944, p.32.

[127] Op. cit., supra. n.10, p.208.

The introduction of the concept of crimes against humanity is a novelty, and it is important in the case of internal wars, since atrocities against the citizens by their own Government have become international crimes. This is a limit on States sovereignty, since Government officials who commit crimes of genocide may be tried and punished. This has been confirmed by the Genocide Convention of 1951.

The second most important development is the clarification and consolidation of means of ensuring compliance with humanitarian law, contained in the Geneva Conventions of 1949. The new system of enforcement includes the following:

(i) Reprisals against the victims of war are prohibited expressly in all Geneva Conventions (e.g. Article 13 of the 3rd Convention and Article 33 of the 4th Convention) expressly forbid reciprocal torture or execution of soldiers or civilians.

(ii) The institution of protecting power: It has been defined by Pictet as 'a State instructed by another State (known as the power of origin' to safeguard its interests and those of its nationals in relation to a third State 'known as the State of residence.'[128] The institution of protecting power is 'la pièce maîtresse de ce système [of control] est l'institution de la puissance protectrice.[129]

The main changes introduced by the Geneva Conventions, consist in extending its role to the four Geneva Conventions. It has also been made mandatory at least in principle. Official substitutes were provided for (see common Article 10.10.10.11) its functions have been defined and enlarged this in addition to the traditional functions, the whole Convention.

Thus, according to common Article 8.8.8.9 'the present Convention shall be applied with the cooperation and under the scrutiny of the protecting powers'. Pictet observes in his commentary:

> "This command is addressed to the parties to the conflict in the first place, since the responsibility for application is theirs. They are ordered to accept the cooperation of the protecting power. If necessary, they must demand it."[130]

In practice in the words of Abi-Saab the system 'n'a pas fonctionné de façon satisfaisante".[131] Therefore, since 1949, the cases in which a protecting power has been designated were very rare, in fact, only in three cases (Suez, Goa and Bangladesh) and even in these cases, it did not work according to the way it was designed in Geneva in 1949.[132]

The reasons for such a state of affairs have been well put by the UN Secretary-General in one of his reports concerning human rights in armed conflicts. They are:

> "The relatively small number of States which could be considered as truly neutral by

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[128] Op. cit., supra. n.91, p.86.

[129] G. Abi-Saab: Les mécanismes de mise en oeure du droit humanitaire. 82 RGDIP, 1978, p.104.

[130] Op. cit., supra. n.91, p.95.

[131] G. Abi-Saab: Le réinforcement du système d'application des règles du droit humanitaire. 14 RDMDG, 1974, p.277.

[132] See in this respect, Forsythe: op. cit., supra. n.7, pp.46-48. See also El Kouhene, op. cit., supra. chapter 4, n.278, p.173.

> all parties to the armed conflicts, the cumbersome and time consuming procedure of appointment of a Protecting Power which calls for the agreement of the belligerents as to these powers at the time when hostilities are raging, the fact that the military phases of some of the armed conflicts were over before A Protecting Power could be appointed. The burden in terms of material and human resources which is imposed on States solicited as potential Protecting Powers has also been mentioned as a deterrent as well as the risks of political embarrassment vis-à-vis the parties to the conflict".[133]

(iii) Punishment of violations of the Conventions.

The precedent of the trials at Nuremberg and Tokyo seems to have influenced those who met at Geneva in 1949. It is to be noted that Article 6/1 (a) of the Agreement of London (December 8th, 1945) defines war crimes as:

> "...[V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[134]

This definition in fact, is found in the Geneva Conventions of 1949. Thus, common Articles (49, 50, 129 and 146) and common Articles (50, 51, 130 and 147), introduce a very important system for suppressing breaches of the Conventions, where the parties are obliged to enact legislation for the suppression of breaches. Moreover, they are under obligation to search for and try persons guilty of such breaches. They can also hand over such criminals to any other contracting party who has made out a prima facie case against them.

It must be stressed that these obligations are made in relation to the category of 'grave breaches of the Convention' which are:

> "...[T]hose involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment including biological experiments, wilfully causing greater suffering of serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[135]

The general view is that in practice these innovations did play only a very modest role. The reasons according to Sandoz are:

> "...[O]n peut y voir trois raisons principales: la difficulté psychologique dans un climat de guerre qui suscite généralement la haine de l'ennemi; le fait que la responsabilité des infractions incombe souvent aux autorités elles-mêmes coupables soit intentionnellement soit, plus souvent, du fait de négligence dans l'instruction en matière de droit international humanitaire-et que la séparation des pouvoirs judiciaires et politiques est souvent sérieusement compromise dans ses situations; l'absence, enfin, répétons le, de juridiction obligatoire et de moyens coercitifs

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[133] Report of the Secretary-General: Respect for Human Rights in Armed Conflicts. A/7720 of Oct. 20th, 1969, para. 8.

[134] See the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on Aug. 8th, 1945, op. cit., supra. n.51, p.826.

[135] Ibid, pp.324, 350, 408 and 479.

supranationaux permittant d'imposer aux Etats le respect de leurs engagements."[136]

Nonetheless, Blishchenko maintains that:

> "...[L]'application des Conventions de Genève dans plusieurs conflits armés a révélé l'éfficacité du régime instaurant la responsabilité en cas de violations".[137]

The examples given to substantiate this claim is that the US from 1965 to August 1973 made 36 accusations of war crimes against army personnel in court martial. 20 cases have been tried and condemned.[138] Similarly, the trial and punishment in Angola in 1976 of mercenaries fighting with the rebels.

However, these examples are singular cases, since many violations took place which may easily be considered as 'grave breaches' but have never been brought to trial. This happened in many conflicts which took place after 1949. In this respect, Meyer correctly wrote:

> "...[T]he criminal sanctions against violations have not proved to be very effective. The Nuremberg and other post 1945 war crimes trials remain rather singular. Although many grave breaches of the law have occurred since 1945, only a few have been repressed."[139]

The general conclusion is that the important developments made in Geneva in 1949 in connection with the means of control of the application of humanitarian law were from the theoretical point of view a real advancement, because they introduced the missing element of third party control. Furthermore, they opened the possibility of cooperation between States in the domaine of punishment of war crimes.

In practice, it seems that these innovations had no real impact. Self-interest, the claim of freedom of action, and military security, have prevailed over any other reasons. Moreover, the absence of a permanent international penal institution, which can try those guilty of grave breaches, had a negative effect, since the search for and trial of those persons has in practice remained in the hands of States, which often would take into consideration political reasons in any decision to try such criminals. The second conclusion is that all these innovations in a way were expressly restricted to international wars, internal wars, then, have not benefitted from them.

Following this introduction, I now turn to Article 3 itself in order to see how the problem of compliance is dealt with. The following points will be considered:

A. Travaux Préparatoires of Article 3 and the Question of Compliance

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[136] Y. Sandoz: Mise en oeuvre du droit humanitaire, in: les dimensions internationales du droit humanitaire. UNISCO-Institut Henry Dunant, ed. A. Pédone, Paris, 1986, p.321.

[137] I. Blishchenko: Responsabilité en cas de violations du droit international humanitaire, ibid, p.333.

[138] Ibid, p.334.

[139] M.A. Meyer: Report on the Proceedings of the Conference on the Application of International Humanitarian Law. British Red Cross Society, March 12th, 1986. London, p.3.

Initially, the question of means of ensuring respect for humanitarian law in internal conflicts, was not a real subject of discussion at the Conference in 1949. The central question was; whether to codify at all any rules applicable to internal conflicts, this meant that it was the question of the definition of armed conflicts of a non-international character and what are the rules to be applied to such conflicts, that took much time and energy. States, it seems, were not ready yet to tie their hands substantively and procedurally. They concentrated on the first rather than the second choice.

Despite this general statement, references were made to some points which have an important impact on the question of compliance with the law in the context of internal wars, such as the legal basis of the obligation of insurgents to apply Article 3, the question of reciprocity and the role of the ICRC in the context of such wars.

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1. Protecting Power in Civil Wars

During the initial discussion of the Draft Article 2/4 of the ICRC, some States made the point that the proposed Article brought the institution of protecting power to civil wars, which was not acceptable in their view. Canada stressed that in its present form, the fourth paragraph would justify a demand on the part of a small group of rebels for the recognition of protecting power, and except in the case of a large-scale civil war in which extensive section of the national territory was in the rebels hands, this would be absurd.[140]

This meant that protecting power may operate only in conditions of civil war which resemble international war in intensity, and where the insurgents have the characteristics of a State. In all other cases, this would not be acceptable, presumably because it can be considered as an intervention in the internal affairs of the belligerent Government. On the other hand, Mexico took a different view, since in the context of civil wars, the ICRC can act as a protecting power since this would protect the right of the State and place the question on purely humanitarian grounds.[141]

The third view which it seems was more to the liking of the defenders of the doctrine of State sovereignty, was against any reference to protecting power, even when undertaken by the ICRC. General Oung of Burma noted 'the mere presence of aliens on the national territory might be a source of suspicion.'[142] This in fact, excludes any intervention of third parties, even by impartial organisations such as the ICRC, for distributing relief and assistance.

In fact, all the five drafts which have been submitted to the Conference, except the second draft of the first group which stipulates that:

> "The provisions relating to Protecting power shall however not be applicable except in the instance of special agreement between the parties to the conflict."

The other draft did not mention at all any reference to Protecting power which means in

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[140] Final Records of the Diplomatic Conference of Geneva, 1949. Vol. 2 section B, Federal Political Dept. Bern, 1950, p.13.

[141] Ibid, p.11.

[142] Ibid, p.50.

my opinion that States have implicitly excluded any possibility for third party control of the application of the rules of Article 3. This of course, would be considered an unwanted intervention in their internal affairs.

2. The Legal Basis of Obligation of the Insurgents

This is a very important legal and practical question, since if the established Government can be held as obliged to respect and apply Article 3 because it signed and ratified the conventions. This is not the case with insurgents since the Conventions are open only to States. It is to be remembered that the institution of recognition of belligerency has afforded this legal basis for holding the insurgents bound to apply the laws of war

In the Diplomatic Conference, some delegations tried to establish such basis. The representative of Monaco has offered two reasons for holding the insurgents bound by the rules contained in the Article applicable to internal conflicts:

> "First because the humanitarian provisions of the Geneva Conventions are of a super-contractual character, and also, and more particularly, because the contracting parties undertake not only to respect them, but to ensure respect for them, an article providing for their dissemination among the population through institution. Therefore rebels are a part of the population in revolt of the contracting States."[143]

The argument, it seems, stress that the rules contained in the Article dealing with internal conflicts are in fact, jus cogens rules, which States are to respect independently of the Conventions, and secondly that the duty of dissemination means that everybody knows the rules. However, it appears to me that the weakness of such an argument is that it implicitly still holds the insurgents as part of the country and under the control of the Government, which is not the case.

Greece on the other hand, observed that the insurgents are bound by the Conventions. In its view:

> "...[F]ailure by the insurgents to accede to the Conventions was not an insurmountable obstacle".[144]

He based his argument on two reasons: (i) The Conventions which were being drafted could and should be consideredas law-making conventions, i.e. as rules which should be applicable not only on behalf or against the contracting parties, but also in circumstances which were analogous to those governed by the said conventions. (ii) Insurgents and even bandits were obviously nationals of some State, and were thereby bound by the obligations undertaken by the latter.[145]

It seems to me, that these two arguments were couched in such a way as to exclude any conclusion that insurgents are even implicitly 'parties to the Conventions' which means that it is only the actions of the Government which binds the insurgents. This interpretation is

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[143] Ibid, pp.78-9.

[144] Ibid, p.94.

[145] Ibid.

in favour of the claim of the established Government that it holds the monopoly of representing the whole population, even when its authority is challenged from within.

However, the words 'each party' found in Article 3 have been interpreted by Pictet in the following fashion:

> "Each of the parties will thus be required to apply Article 3 by the mere fact of that party's existence and of the existence of an armed conflict between it and the other party. The obligation is absolute for each of the parties, and independent of the obligations on the other party"[146]

This means that insurgents are bound by the Conventions, even if they are non-parties to the Conventions, it is the material element and not legal consideration which can be considered in this context. In other words, the effective control of certain parts of territory and the conduct of hostilities obliges the insurgent to respect its obligations.

On the other hand, Pinto stresses:

> "Au cours de la période de la guerre civile, l'exécution des obligations conventionnelles relève...de toute autorité qui prétend exercer et exerce un pouvoir d'Etat. Les autorités insurgées sont tenues de respecter, à ce titre le droit international général et conventionel. C'est là une conséquence du principe d'effectivité".[147]

This interpretation would in effect give no legal status to insurgents, and in the same time obliges them to respect the Conventions.

3. Reciprocity

The idea of reciprocity was included in some drafts submitted to the Conference. This was done when the intention of these drafts was to apply the whole Conventions to internal armed conflicts. However, when it was decided that only minimum rules would apply to such conflicts, the reciprocity clause was dropped intentionally.[148]

Thus, the obligations contained in Article 3 are absolute, in the sense that the non-acceptance of the application of the Article by one belligerent or its violation, does not entitle the other party to breach its obligations.

4. Reprisals and the Taking of Hostages:

The four Conventions of Geneva all contain an Article prohibiting reprisals (Convention I Article 46; Convention II Article 47; Convention III Article 13 and Convention IV Article 33). However, Article 3 does not contain such a prohibition. The question then is whether they are permitted in the context of internal conflicts.

The travaux préparatoires do not show any efforts at dealing with this subject. Despite this fact, Pictet stresses in his commentary that the silence of Article 3 is not a real obstacle. To him reprisals are prohibited because:

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[146] Op. cit., supra. n.91, p.51.

[147] Pinto, op. cit., supra. chapter 2, n.66, p.528.

[148] See Pictet, op. cit., supra. n.91, p.51.

> "...[T]he acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently any reprisal which entails one of these acts is prohibited, and so, speaking generally is any reprisal incompatible with the 'humane treatment' demanded unconditionally in the first clause of sub-paragraph (1)."[149]

It seems to me, that this interpretation is consistent with the object and the purpose of the Article, which is the protection of all victims of internal conflicts. Reprisals would in effect, deprive such persons from the protection provided by Article 3.

The taking of hostages, which is in fact a form of reprisal, was expressly prohibited by Article 3. Thus, it is not only killing hostages which is prohibited, but even their taking is illegal. However, the important question is whether this prohibition applies only to persons hors de combat, or even to insurgents, combatants. The **travaux préparatoires** show that there is some evidence to support the contention that the prohibition of taking hostages applies only to persons hors de combat, combatants are not immune.

In this respect, during the discussion of the Draft Article submitted by the second working group (which eventually became Article 3 after the introduction of some amendments) the Netherlands argued without opposition:

> "...[T]he new text covered only two categories of persons. Those who had been placed hors de combat. As a result of this certain persons remained without protection, which was particularly regrettable in the instance of prohibiting the taking of hostages".[150]

According to Norway, the Government would then be free to execute combatants or take them as hostages.

The conclusion in general is that these institutions of enforcing law (reprisals and taking of hostages) which in general are used against the innocent are prohibited at least vis-à-vis non-combatants and the sick and wounded in the context of internal conflict, which must be seen as a very important step in restricting the discretion of Governments in internal conflicts.

5. Punishment of Violations

Article 3 is silent on this point, which means the breach and violations by soldiers and officers of its minimum rules, may very well go without any prosecution. The concept of grave breaches is not included in Article 3. The **travaux préparatoires** do not help in this respect. Therefore, when Italy suggested that 'the parties would be responsible for all acts committed by persons belonging to their armed forces'[151] no real discussion took place on the issue.

Article 3 on the other hand prohibits only 'summary justice', which means that the established Government can try and punish the insurgents according to due process of the local law. The mere fact of taking arms is punished, the suggestion that only those who

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[149] Ibid, p.55.

[150] Op. cit., supra. n.140, p.84.

[151] Ibid.

commit violations of Article 3 can be tried was not accepted. In this regard, the State sovereignty won the day, since insurgents can be tried and punished. The fact that they did not commit war crimes is irrelevant, whereas soldiers of the established Government may not be punished even for gross violations of Article 3. The Government is completely free to do what it sees fit in the circumstances. Thus, prosecution of violations of humanitarian law, which is an effective means of enforcing respect for the law, is totally absent in the context of internal conflicts.

6. The Role of the ICRC

Paragraph 2 of Article 3 gives the right of initiative to the ICRC or any other impartial organisation. During the Diplomatic Conference, the ICRC was not left out in the context of internal wars. In the discussions of the drafts submitted, the working groups, all views expressed supported the role of the ICRC in internal conflicts with the possible exception of Burma.

However, the main difference was whether its offer of services must be obligatory or open to the consent of the belligerents. Britain and the USA proposed at different times that its services must be accepted by the belligerents. However, even the ICRC delegate was against such a course. He stressed that:

> "The strength of the ICRC was its independence, which would be jeopardized if the ICRC were mentioned in any mandatory clause."[152]

The Soviet draft on the Article applicable to internal conflicts did not, however, mention the ICRC at all. This omission has been attacked by the UK and France, the latter observing that 'the mention of the ICRC corresponds to an avoidable necessity, etc.'[153] This led the Soviet Union to declare that it would agree to the mention of the ICRC.

The final outcome was that the ICRC may offer its services to the parties, which means that the consent of the Government is needed for the ICRC to carry out its activities. Moreover, it is to be stressed that the ICRC does not act as a protecting power, it has no explicit right to control the application of Article 3, its main work consists of giving assistance and relief to the victims.

Pictet comments on Article 3/2 as follows:

> "This paragraph may therefore appear at first sight to be merely decorative and without any real significance. Nevertheless, it is of great moral and practical value. Although it is extremely simple, it is adequate and the international Committee itself asks for nothing more."[154]

It seems that the mere mention of the ICRC is a triumph for humanitarianism. Since, even if the parties decline its offer. The new factor according to Pictet is that the parties 'can no

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[152] Op. cit., supra. n.140, p.95. The US amendment provided that the words 'may offer its services' was replaced by 'shall be requested to finish' was rejected by the Special Committee at its 38th meeting (July 8th, 1949).

[153] Ibid, p.99.

[154] Op. cit., supra. n.91, p.58.

longer look upon it as an unfriendly act, nor resent the fact that the organisation making the offer has tried to come to the aid of the conflicts.'[155]

7. Conclusions

The main conclusions to be drawn from the **travaux préparatoires** and the question of compliance with Article 3 are:

(i) It is to be noted that the main procedures for controlling and enforcing the application of humanitarian law (Protecting Power, and prosecution of violations) have been reserved for only international conflicts. Recourse to such methods in internal conflicts can be considered as intervention and a breach of sovereignty, since the established Governments would consider such methods as obstacles in fighting their opponents.

(ii) I think also that States were more concerned about punishing insurgents for the violation of their laws, rather than their possible infringement of humanitarian law. Sovereignty is best served by trying insurgents for high treason, rather than the breach of some rule of the law of war, since the second choice would appear to give respectability to the insurgents.

(iii) There was a general consensus that the ICRC has the right of initiative (which meant that a fundamental legal development has been achieved), and that the mere offering of services to the belligerent can of course, be refused. But, it can never be considered as intervention in the internal affairs of States. However, there is also a general view that the activities of the ICRC are of assistance and relief and not supervision of the application of the law.

(iv) Although reprisals have been said to be implicitly prohibited as a means for enforcing the rules of Article 3, the fact that they were not so mentioned is a loophole which can be exploited in practice.

(v) It seems to me that the general mood was not yet ripe for the acceptance of any means of controlling the application of the rules of Article 3. This in the eyes of the established Governments, would be a very serious handicap in their dealings with insurgents, and would in any event give a valid ground for the insurgents to claim a certain legal status. Since any means of control accepted would be resorted to by the two belligerents. It also, seems that the very minimum rules included in Article 3 do not deserve any complex system of control, especially by third parties.

B. Subsequent Practice of Article 3 and Means of Compliance with its Rules

Under this heading, three points are to be examined, which all have relation to the means of enforcement.

1. Reprisals and Taking of Hostages

In internal conflicts the practice shows clearly that these inhuman methods have been resorted to not as a means of compelling the other party who violates the law to respect its obligation under Article 3, but usually as a means of conducting the war itself. Reprisals

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[155] Ibid.

were therefore, used in Vietnam and Algeria against the civilian population, and especially in connection with POW's. The insurgents resorted to the execution of the Governments captured soldiers as a reprisal against the execution of their captured comrades; resort to the taking of hostages as a form of reprisal has been used by both parties to internal wars.[156] Also resort to collective punishment of non-combatants for the acts of insurgents have been used in Vietnam.[157]

2. The ICRC Role:

The ICRC in practice intervened in many internal conflicts, in Algeria, Vietnam, Yemen, Nigeria and many other situations. Wilhem concludes that:

> "Il est permis de dire que le CICR, par ses multiples interventions, par ses visites aux détenus de toute nature, joue dans une large mesure le rôle d'un organisme qui concourt à l'observation régulière des règles de l'Article 3."[158]

Cassese affirms that whenever the ICRC decides to offer its services the practice confirms that:

> "...[l]es parties au conflit ne peuvent ni refuser, ni entraver son action humanitaire et de contrôle."[159]

These statements then have the implication that the ICRC has become, in practice, a real organ of controlling the application of the dispositions of Article 3.

In my opinion, the role of the ICRC as an organ of control of the observance of Article 3, must not be exaggerated, since claims of intervention and breach of sovereignty may be labled against such an attempt, and would also endanger the ICRC's humanitarian mission. The ICRC itself knows these limits. Thus the ICRC's President Mr. A. Haye, stated at the XXIV International Conference of the Red Cross in Manilla (November 1981):

> "...[S]a préoccupation principale n'est pas de qualifier juridiquement les situations conflictuelles ou de préciser le status des personnes à protéger. Il sait d'ailleurs bien qu'il n'a ni la compétence ni le pourvoir d'imposer ses vues à ce sujet. De plus il risque en le faisant de ne plus avoir accès aux victimes. Son attitude est donc dictée par l'intérêt même de ces dernières. Ce que le CICR souhaite, non pour lui, mais pour les victimes que la communauté internationale lui a donné mission de protéger et d'assister, ce sont des possibilités d'action concrète, au-dela des interprétation juridiques."[160]

This reference was made to both international and non-international conflicts and indicates the aim of the ICRC is to avoid legal controversies with belligerent and concentrate on the

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[156]See Veuthey, op. cit., supra. chapter 4, n.189, pp.129-131.

[157]For good detailed examples see: S. Melman (ed.): In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the US as Shown by Published Reports. 1968, pp.184-191. See also Miller, op. cit., supra. chapter 4, n.205, p.165.

[158]Wilhem, op. cit., supra. chapter 4, n.131, p.396.

[159]Op. cit., supra. chapter 3, n.101, p.565.

[160]Cited by El Kouhene, op. cit., supra. chapter 4, n.278, pp.191-192.

protection of the victims.

2.1. In Algeria

The ICRC sought always the consent of the French Government in its activities. Thus on its report on the Algerian conflict it was indicated that 'the ICRC's humanitarian action was more limited and depended on special authorisations for which it had to ask on each occasion.'[161] Moreover, when the French Government on February 2nd, 1955 allowed the ICRC to visit places where FLN combatants were detained, it was firmly understood that the ICRC reports concerning detention conditions, would be communicated to the French alone. Furthermore, the ICRC delegates 'would not deal with the reasons for imprisonment or for assignation of residence.'[162]

The ICRC was able to exercise a form of periodic inspection of places of detention. After these visits, the delegates of the ICRC would usually discuss the situation with the camp commander at the camp and inform him of their observations, and sometimes made suggestions as to how to overcome these shortcomings.[163]

The ICRC also contacted the insurgents and its efforts led in some cases to the release of French POW's. The ICRC also engaged in cooperation with the French Red Cross and the Algerian Red Crescent, in large relief and assistance operations for civilians and refugees.

2.2. In Nigeria

The ICRC reminded the two parties of their obligations to conform strictly to the dispositions of humanitarian law and especially Article 3.[164] The two parties indicated their readiness to apply the Geneva Conventions. However, violations were immense.

The most important aspect of the ICRC work, however, was relief.[165] It must be stressed that the distribution of relief needs Government approval. Thus, the question of the Government consent was a major problem in Nigeria. This led at one time to the Government accusing the ICRC of intervention in its internal affairs, and eventually the ICRC representative in Lagos was declared persona non grata.[166] This incident indicates the limits of action of the ICRC, even when struggling for humanity regard must be paid to the delicate sensibilites of sovereignty. Freymond correctly put it:

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[161] Report on the ICRC and the Algerian Conflict. Geneva, 1962, p.3.

[162] Ibid, p.4.

[163] Ibid, p.6.

[164] Rapport d'activité. CICR, 1967, pp.37-8.

[165] For details see E.I. Nwogugu: The Nigerian Civil War: A Case Study in the Law of War. 14 IJIL, 1971, pp.33-34; and P. Mertens: Les modalités de l'intervention du Comité International de la Croix-Rouge dans le conflit du Nigeria. 15 AFDI, 1969, pp.183-209.

[166] See D. Forsythe: Humanitarian Politics: The International Committee of the Red Cross. Johns Hopkins Univ Press. Baltimore/London, 1977, p.46.

> "...[L]e CICR, meme s'il est le seul ou le principal representant de la politique humanitaire n'est qu'un des acteurs et il n'est pas le plus puissant."[167]

Heutsch, summarised the situation of the ICRC in Nigeria which, in my view, can be envisaged in any internatal conflict by stating:

> "...[L]a guerre du Nigeria a mis en évidence, plus cruellement peut-être que beaucoup d'autres conflits, les obstacles diplomatiques auxquells se heurte une enterprise de secours internationale au coeur d'une guerre civile acharnée et, dans cette enterprise, les possibilités et les limites d'une organisation telle que le CICR."[168]

The conclusion in regard to the practice of the ICRC is that nobody can deny the positive impact of its intervention in making the war more humane. Its activities may in fact, result in a de facto supervision of the the application of Article 3.

The other important conclusion has been well put by Forsythe:

> "The ICRC is interested in the welfare of individuals; a party to the conflict may be primarily interested in securing control of the Government, or putting down a challenge to one's rule."[169]

The result is that the belligerents try to reduce their obligations. Political necessity overrides humanitarian considerations. However, the role of the ICRC is to secure the protection of the victims of war. This aim cannot be held to obstruct political aims of the belligerents.

3. Punishment of Violations of Article 3

One of the weaknesses of Article 3, as it has been indicated, is that it contains no provisions for prosecution and trial of those who violate its fundamental rules. It seems, however, given the existence of a real political will and concern for humanitarian law, there is no reason why violators of such fundamental rules should not be punished, since their breach can fit easily in the category of 'grave breaches' contained in the Geneva Conventions.

Cassese sustains that "rien n'exclut formellement que parmis les 'infractions graves' en question figurent les violations les plus importantes de l'Article 3.'[170]

However, State practice indicates that during the war, captured insurgents are either executed in the field, which is a flagrant violation of Article 3, (which expressly prohibits summary execution) or are tried and convicted for treason, which is a crime according to national but not international law.

After the war, States are more interested in establishing conditions for national unity, rather than caring for enforcing humanitarian law. Amnesty laws, militate against any attempt to try war criminals in the context of internal war. Thus, in Iraq, Decision No.1076 of August 16th, 1979 and Decision 1077 of the Revolutionary Command Council declared a

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[167] J. Fremond: Guerres, révolutions, Croix Rouge, réflexions sur le rôle du Comité International de la Croix Rouge. Institut Universitaire des Hautes Etudes Internationales, Genève, 1976, p.69.

[168] Ibid, p.69.

[169] Op. cit., supra. n.166, p.139.

[170] Op. cit., supra. n.159, p.565.

general amnesty for all prisoners and fugitive Kurds who were fighting a war of secession, without any exception.[171]

Moreover, there is no case of a third State attempting to try persons who committed gross violations of Arfticle 3 in the course of civil wars in another State. Any attempt would be considered as an intervention in the internal affairs of the State concerned, which is a valid argument, since Article 3 does not envisage such a possibility.

It is to be noted that insurgent movements had in some cases set up 'people's and revolutionary courts' to try captured Government soldiers for war crimes, especially against the civilians. This happened in Algeria.

However, a real attempt to enforce the rules of humanitary law including Article 3, has been made in the case of Bangladesh. In April 1973 the new State declared officially its intention to try 195 Pakistani prisoners 'for serious crimes, which include genocide, war crimes, crimes against humanity, breaches of Article 3 of the Geneva Convention, murder, rape and arson.'[172] The important precedent is the inclusion of breaches of Article 3 in the list of crimes to be prosecuted. This is a major event, since it is the first attempt to enforce Article 3 in court.

In July 1973, Bangladesh's Parliament enacted the International Crimes Tribunal Act. Thus, the Government was permitted to set tribunals to try war criminals. However, the trials never took place and in 1974 Bangladesh allowed India to repatriate the 195 Pakistani POW's without any assurance that they would be tried. The reasons were not legal, they were political. Pakistan supported by China had made it clear that any prospect of pacific trilateral relations between it and Bangladesh and India were dependent on the return of the prisoners.[173] However, despite the lack of trial, the case of Bangladesh offers a very good precedent for the future enforcement of general humanitary law and especially Article 3 violations.

1.3. Vietnam

Violations of Article 3 and indeed of all the rules of humanitarian law were common. Despite this, no real efforts were made to prosecute the violators. General Westmorland, the Commander of US forces in Vietnam, issued a statement part of which reads as follows:

> "...[W]e are sensitive to the incidents [killing of civilians and other crimes] and want no more of them. If one occurs, by mistake or accident, we intend to search it carefully for any lesson that will help us improve our procedures and our controls."[174]

Despite this vague statement on the intention of enforcing respect for the laws of war, the practice seems to indicate that the view of the US Commander was that the very nature of

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[171] Yearbook on Human Rights for 1979. UN Pub., New York, 1986, p.99.

[172] Cited in the Review (ICJ), No.11, Dec. 1973, p.30.

[173] For a detailed discussion of the question see: J.J. Paust and A.P. Blaustein: War Crimes Jurisdiction and Due Process: The Bangladesh Experience. 11 Vand.JIL, 1978, pp.1-38.

[174] Op. cit., supra. n.157, p.421.

the Vietnamese war allowed these crimes to happen and that it is very hard to try to punish violators in these circumstances. Taylor stated in this regard that the enthusiasm for the body count policy, devastation of large areas of the country, slaughter of villagers are 'due to features of the Vietnam conflict which have made the laws of war unusually difficult of application'[175]. Few cases were tried by martial courts. Schwarz was sentenced to life imprisonment by a military court in Danang, for participating in the killing of 12 Vietnamese villagers.[176] Many other trials took place.[177] The most famous was the May Lai (or Donmy) which occurred on 16 March 1968 where Lieutenant Calley ordered the killing of 347 civilians including women and children. Calley himself killed 22 civilians. The Investigation Commission found 30 persons guilty, only 4 were tried and only 1 person, Calley, was condemned.[178]

In the aftermath of Calley case the US Department of Defense issued a directive on the implementation of the laws of war. Among the objectives listed in this directive: (i) to ensure that the law of war and the obligations of the US Government under that law are observed and enforced by the armed forces of the US;
(ii) to ensure that the alleged violations of the law of war, whether committed by the US personnel or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.[179]

After that the Directive added 'Under the head of Policy A', armed forces of the US will comply with the law of war in the conduct of military operations and related activities in armed conflicts, however, such conflicts are characteristed.[180] The last sentence indicates clearly that these efforts of implementing and enforcing the laws of war are not confined to international conflicts, but also internal conflicts.

Therefore there is nothing to prevent the punishment of violation of Article 3. This is a very interesting precedent, which can be used by other States, in order to create a favourable atmosphere for the real enforcement of the laws of war in internal conflicts. On the other hand, it seems that States which are faced with civil wars, will not go that far in their view. This will tie their hands in dealing with their enemies.

4. The Nicaragua Case and the Question of Ensuring Respect for the Rules of Article 3 of Geneva Conventions

The Court, it must be stressed, has not dealt at length with the question of ensuring respect for the application of common Article 3 and the means thereto. However, it emphasised some important points in connection with the obligation of States to respect Article 3.

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[175] T. Taylor: Nuremburg and Vietnam. Random House, New York, 1970, p.152.

[176] Ibid, p.153.

[177] See op. cit., supra. n.131, pp.333-34.

[178] See Ch. Rousseau: Le droit des conflits armés. Ed. A. Pédone, Paris, 1983, p.185. See also 80 RDGIP, 1974, pp.495-6.

[179] Rovine, op. cit., supra. n.8, (1974), p.702.

[180] Ibid, p.703.

Thus, it held that:

> "The Court considers that there is an obligation on United States Government, in terms of Article I of the Geneva Convention to 'respect' the conventions and even 'to ensure respect' for them 'in all circumstances' since such an obligation does not derive from the conventions themselves but from the general principle of humanitarian law to which the conventions merely give specific expression."[181]

It then added that:

> "The United States is thus under obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3."[182]

The Main legal consequences of the pronouncement by the Court are in my view: (i) The obligation to 'ensure respect' for humanitarian law has become, in the opinion of the Court, one of the general principles of humanitarian law[183]. In my opinion, this means that States are under obligation not to encourage directly or indirectly, other States or insurgent groups of violating Article 3. They are under legal obligation to use all their efforts to stop such violations whenever they occur by using all their material and diplomatic influence, in accordance with the principles of the Charter of the UN, as defined by the Friendly resolution.

(ii) All actions of third States which have the intention of 'ensuring respect' for the rules of Article 3 cannot be considered as intervention in the internal affairs of the State conducting a civil war.

(iii) Third States also in order to ensure respect for Article 3 may resort to the trial and punishment of persons who committed gross violations of Article 3 whenever these violators come into their hands.

5. Conclusions on Compliance with Common Article 3 in Practice

(i) The practice makes it clear that the absence of any means of controlling the application of Article 3 meant that many violations cannot be prevented since there is no body who can control the Government or the insurgents in their observance of the rules of Article 3. Thus, the arguments of sovereignty and non-intervention which in effect pushed away any attempt to institute a real machinery of control, meant in practice that many victims deaths and sufferings could not be prevented.

(ii) The ICRC, by its work of assistance of relief, however, when accepted by the legal Government, can effectively contribute to the amelioration of the conditions of the victims of war, especially persons who have no protection under Article 3. Hence, the ICRC contributes indirectly to the implementation not only of the rules of Article 3, but other humanitarian rules as well. However, it seems that any successful work by the ICRC must

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[181] 25 ILM, 1986, para.220, p.1073.

[182] Ibid, para. 220, p.1073.

[183] See also R. Abi-Saab: The 'General Principles' of Humanitarian Law According to the International Court of Justice. IRRC, 1987, No.259, pp.373-4.

always be undertaken with the consent of the Government. Respect of the sovereignty of the State is the cornerstone of any succession operation by the ICRC.

(iii) Absence of penal sanctions coupled with the enactment of amnesty laws at the end of civil wars, meant in practice that demands of political expediency overrode demands of humanitarianism. However, in my opinion, there is nothing to prevent States from enforcing respect for the rules of Article 3 by the trial and punishment of its violators. The precedent of Bangladesh, read together with the pronouncement of the ICJ in the Nicaragua Case, may very well furnish a sufficient legal base for such actions.

SECTION III: Protocol II and the Question of Compliance

Introduction

My contention in this section is that claims of sovereignty and non-intervention have been successfully used by States to block any development concerning means of ensuring respect for humanitarian law. The Protocol in fact, does not contain any means of control of its application, except the obligation of dissemination. There is no mention of the ICRC in any form. This led El Kouhene to rightly state that:

> "...[O]n constate donc encore une fois que c'est paradoxalement l'Article 3 qui 'développe et réaffirme' le Protocole II."[184]

This indicates that Article 3 is in advance in relation to Protcol II.

My second contention is that human rights instruments can play a significant role as a means of controlling the application of fundamental rights of humanitarian law. The practice of the UN and regional organisations show this tendency very clearly. In order to prove the first contention, it is necessary to go to the **travaux préparatoires**, and to prove the second it is essential to consult State practice and international organisations practice. In the **travaux préparatoires**, I will deal with different conferences, ICRC experts, Government experts, and especially the Diplomatic Conference itself.

A. The Travaux Préparatoires and the Question of Compliance

1. ICRC Experts Conferences

Two important points concerning the observance of the application of the rules of the proposed Protocol II were dealt with by the Red Cross experts. The first concerned the reinforcement of the role of the ICRC, and secondly, whether other mechanisms of supervision can be developed.

Concerning the first point, some experts felt that the parties to an internal conflict are bound to accept the offer of the services of the ICRC. However, other experts were reluctant to endorse such a course of action. They expressly invoked the principles of intervention and sovereignty.[185] They expressed the hope that 'the ICRC would continue

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[184] Op. cit., supra. n.160, pp.177-178.

[185] These Experts feared that:

> "The strengthened right of initiative might be treated by some as a form of interference in the internal affairs of State".

to carry on its activity in pragmatic manner, as it has successfully done in the past'[186] which means that the consent of the Government is needed for the ICRC to act.

On the second question, the experts consulted in 1969 were of the opinion that the ICRC should be invested with "internationally recognised functions of supervision, in order that it should be binding on the Governments to accept its assistance for the application of humanitary rules."[187] This meant that the ICRC would act as a body which oversees the observance of the application of humanitarian law, however, the term protecting power was not mentioned.

In the 1970 Conference, the mood changed. Two opinions emerged, the first supporting the idea of creating a supervisory body which should be international, apolitical and neutral. Some felt that it 'should be composed of personalities known to be impartial.'[188] Others considered that such a body could be set up by the UN or could constitute one of the branches of the ICJ[189]. However, some experts, presumably concerned about the impact of such suggestions on the ideas of sovereignty and non-intervention, were 'hesitant' about such suggestions.

In his second report on human rights and armed conflict, the UN Secretary-General supported the first idea. He wrote that:

> "Conditions may now be ripe to encourage consideration of the idea of gradually moving away from the **ad hoc** approach... towards setting up, on a durable standing basis, an agency of implementation under the aegis of the United Nations. An absolute prerequisite for the establishment and success of such an agency would be that its character would be exclusively and strictly humanitarian; it would have to be scrupulously non-political and it should strive to offer all guarantees of impartiality, efficiency and rectitude."[190]

The conclusion is that the ICRC experts were divided on the subjects of either studying the role of the ICRC or creating other machinery for the supervision of the application of humanitarian law to internal conflicts. It would seem to me, that their stand and understanding of the position of the concepts of sovereignty and non-intervention in the world today, have contributed essentially to that difference of opinions.

They also believed that:

> "The question of reinforcement, or even of the imperative nature of the right to offer humanitarian services, was one of the most difficult problems, and that the time has not yet come when the right to act automatically in cases of non-international conflict can be given to a body, whatever it may be."

CGEDHL (24 May-12 June, 1971). V. Protection of Victims of Non-International Armed Conflicts. Geneva, 1971, p.74.

[186] Ibid.

[187] Ibid, p.76.

[188] Ibid, p.77.

[189] Ibid.

[190] Report of the Secretary-General, A/8052, para.246, p.77.

2. The Government Experts Conferences

The Second CGEDHL (1972) especially witnessed an important discussion concerning ways of implementing Protocol II. Six Articles were proposed under the chapter dealing with 'Executory provisions', which in fact indicates the urgency with which the ICRC takes up the matter of enforcement. The most important Article was Article 37 which is entitled 'Cooperation in the observance of the present Protocol.' This Article in fact made it obligatory for each party to the conflict to 'call upon a body which offers all guarantees of impartiality and efficacy to cooperate in the observance of the present Protocol etc.'[191]

Thus, a third party is called to ensure that the parties observe the application of humanitarian rules in internal conflict. However, their power of discretion was limited to the choice of the humanitarian body which they prefer, but does not extend to the question of choosing that body or not.

The Western Experts in general supported the ICRC proposed Article 37 and even tried to strengthen it. It was proposed that the body which was to be appointed according to Article 37 would have its competence extended throughout the territory where the conflict is taking place.[192] Moreover, the ICRC has been indicated as the compulsory substitute of the humanitarian body when it is lacking. The UK Experts proposed that the impartial body which supervise the implementation and observance of the Protocol II is the ICRC.

However, non-Western States were in general sceptical about giving any mandatory form to the third party involved in observing the application of Protocol II. It was argued that the mandatory form of the ICRC proposed Article 37 was unacceptable since 'The use of the conditional would have been more conducive to rallying Governments to the Article in question.'[193] It was suggested implicitly that the mandatory form limited the discretion of Governments, hence it is not in their interests.

The Indonesian Experts submitted an amendment which would make the agreement of the established Government necessary, if draft Article 37 is to work, they stated:

> "...[I]nternational law should not try to weaken the powers of the sovereign States in situations which were actually threatening their very sovereignty and existence."[194]

Thus, in this view any stipulation in favour of mandatory appointment of a body for supervising the implementation of the Protocol was seen as an incursion of State sovereignty and this deprives the Government in very dangerous circumstances from its right to do what it sees fit.

However, the other Articles did not raise much discussion.[195] Nevertheless, at least one expert was sceptical about the practical consequences of the Article dealing with dissemination. He feared that:

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[191] CGEDHL (Session 3 May-3 June, 1972). 1. Report on the Work of the Conference. Geneva, 1972, p.93.

[192] Ibid, p.44. The proposal submitted by the Experts of Austria and Switzerland. CE/COM II/62.

[193] Ibid, para.2.300, p.94.

[194] Ibid, para.2.303, p.94.

[195] Ibid, pp.92-97.

> "The dissemination of the present Protocol might help increase the possibility of rebellion, as the rebels would be able to find all information relating to their treatment in the text of the Protocol."[196]

The **travaux préparatoires** of the Government Experts Conferences show that there was a consensus, at least about the idea that third party control of the application of humanitary rules in internal conflicts is needed. However, there was no consensus concerning the legal nature of such control and whether it is mandatory or discretionary. Those who defended the right of the State want a discretionary control, which in practice would mean that the Government is at liberty in accepting or refusing the control.

3. The Diplomatic Conference:

Under the title 'Execution of Present Protocol' Part VII of the draft Protocol II of the ICRC contained four Articles dealing with the question of enforcement and implementation of Protocol II [Article 36: Measures for Execution, Article 37: Dissemination. Article 38: Special Agreements and Article 39: Cooperation in the observance of the present Protocol].[197] It seems from the reading of these draft Articles that the ICRC has, especially in regard to third party role in internal conflicts, opted for the idea of discretion, rather than any mandatory form, which would not be accepted by the majority of States.

Again the discussions in the conference, especially in the last session of the Conference in 1977, of the Articles in question show clearly how the use of the arguments of sovereignty and non-intervention have virtually led to the elimination of any measures for implementing the Protocol II except a single weak Article on Dissemination.

Eide, who was a member of the Norwegian delegation summarised the whole feeling concerning the Articles on implementation. He stated:

> "The concern for sovereignty, however, made the Governments participating in the conference very reluctant towards norms of implementation. The majority of States were not only reluctant to accept any kind of international supervision, but even to undertake an obligation of a specific nature concerning the international dissemination of the Protocol."[198]

In other words, the majority of States saw any reference to means of implementation as incompatible with their sovereignty.

On one hand, Rosemary Abi-Saab writes that:

> "...[E]n réalité toute semblance d'intervention, même par un organisme humanitaire impartial, n'était pas acceptable pour certaines délégations qui ont su rendre suffisamment crédible leur menace de refuser un texte qui attaquerait de la manière la plus minime soit-elle le principle de la souveraineté étatique dans le maintain de l'ordre."[199]

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[196] Ibid, para.2.325, p.96.

[197] For the texts of the Articles see: 1 ORDCHL (1974-1977), Geneva, p.44.

[198] A. Eide: The New Humanitarian Law in Non-International Armed Conflicts, in Cassese (ed.), op. cit., supra. chapter 4, n.94, p.295.

[199] R. Abi Saab, op. cit., supra. chapter 3, n.159, p.187.

On the other hand, Cassese argued that:

> "This lack of any international scrutiny, which clearly resulted from the joint view of third world and socialist countries is no doubt most unfortunate, for it results in stultifying the effect of the Protocol."[200]

In my opinion, all these views are in a way correct statements and observations of what really happened to measures for implementation during the conference, ideas of sovereignty and non-intervention, killed all attempts at remedying this loophole (of supervision) in internal conflicts.

It is proposed here to deal with the **travaux préparatoires**, since they provide strong evidence of the workings of the principles of sovereignty and non-intervention, and how they were used to nullify piece by piece the proposals of the ICRC.

Although the four Draft Articles (36-39) were interlinked it may be said that they contain two elements regarding means of implementing Protocol II. Firstly, elements and measures which depended on the parties themselves (mutual means) and secondly, third party machinery.

(i) As to the first category, three Articles of the ICRC draft (36, 37 and 38) deal with it. They include:

(a) The obligation of each party to the conflict to take the necessary measures for ensuring respect for the Protocol by its persons subjected to its authority, either military of civil;

(b) dissemination of the Protocol; and

(c) special agreement between the parties to extend the application of other rules of humanitary law to their conflict.

Articles 36, 37 and 38 which dealt with these measures did not raise fundamental objections during the discussions at the Committee level. The new versions of those Articles adopted at the Committee level did not differ fundamentally from what was proposed by the ICRC. Nevertheless, they were not favourable to defenders of sovereignty and non-intervention. Thus, for instance draft Article 37 of the ICRC dealing with dissemination included a reference to the study of the Protocol II in the programmes of military and civil instruction. This reference was deleted. The new version speaks of the obligation of the parties to disseminate the Protocol so that it may become known to the armed forces and the civilian population which means in the end that the Government is free to choose ways of dissemination.

Similarly, Article 38 dealing with special agreements in the ICRC version opened the possibility for the parties to bring by 'special agreements or by declarations' addressed to the depository of the Geneva Conventions or the ICRC all or parts of Geneva Committee of 1949. It is to be noticed here that the ICRC explained that by 'declaration' it meant unilateral declarations by either party, it stressed that:

> "If such a declaration was made by one party alone, it would be binding only on that party, in that case, the ICRC, by communicating it to the other party, would

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[200] A. Cassese: Status of Rebels under the 1977 Geneva Protocols. 39 ICLQ, 1981, p.419.

encourage it to make a similar declaration".[201]

The implication of this ICRC statement is very clear. The insurgents can make a unilateral declaration which would embarrass the Government, and would give the insurgents a golden opportunity against the established Government. These hypotheses led at the Committee level to the modification of the wording of the Article in order to emphasise the mutual element even in declarations. This of course goes with the desire of the established Governments to close any door through which the insurgents may appear as responsible movements capable of acting at the international level, which would undermine the legitimacy of the Government in holding power.

Despite these changes, the three Articles 36, 37 and 38 were adopted at the Committee level by consensus. This indicates that there was a large measure of acceptance, that the parties to the conflict hold the ultimate responsibility for implementing the Protocol. In other words, the measures are left to the parties themselves. This stand goes with the theoretical view of the majority of States that they prefer mutual and agreed ways of enforcing international law rather than third party involvement in that process.

(ii) Third party machinery: Draft Article 39, which was the subject of heated discussion in the Conference, stipulates that:

> "Co-operation in the observance of the present Protocol. The parties to the conflict may call upon a body offering all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross, to co-operate in the observance of the provisions of the present Protocol such a body may also offer its services to the parties to the conflict."[202]

The ICRC delegate at the Diplomatic Conference explained the rationale behind the inclusion of this Article in Protocol II, as follows:

> "The parties might come up against certain difficulties in applying the provisions of Protocol II, in which case the assistance of a body monitoring its implementation might be both desired and useful."[203]

He tried to assure defenders of sovereignty by insisting that:

> "...[I]ts activities [of the humanitary body] however, could only be an auxiliary character."[204]

He also insisted that the mention of the ICRC was by way of an example, the parties were at liberty to choose any impartial body they like. The right of initiative of the ICRC, however, was confirmed in Article 39.

Despite these ICRC assurances and despite the discretionary nature of resorting to third party cooperation for the implementation of Protocol II, the very mention of such a

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[201] 9 ORDCHL (1974-1977), Geneva, CDDH/I/SR 59, para.48, p.245.

[202] Op. cit., supra. n.197, p.44.

[203] Op. cit., supra. n.201. CDDH/I/SR59, para.52, p.246.

[204] Ibid.

possibility in the context of internal armed conflicts, was enough for some States to demand its deletion, because it constitutes an intervention in their internal affairs and a breach of their sovereignty.

Some Third World States led the attack against Article 39. In this context, they were greatly supported by Socialist States, which as a matter of principle stand against third party machinery in whatever form, in international law and international relations. They do not believe in neutrality in the age of which Socialism and Capitalism still live together. Mexico led the attack by pointing out that Article 39 was 'unacceptable since it would permit an intolerable interference in the internal affairs during a non-international Armed Conflict'. Mexico maintained that Article 39 was in fact, in a conflict with the Article of the Protocol prohibiting intervention.[205]

Iraq was very explicit, it stated that:

> "The distinction between international and non-international conflict was being lost. Article 39 dealt with matters involving the infringement of State sovereignty, and internal matters would become international matters. The sovereignty of the State over its territory would cease to exist."[206]

Implicitly then, the mere possibility of third party machinery, has been seen as leading to the inevitable taking of important powers of the State, which would deprive it from overcoming its enemies.

India on the other hand, gave another reason why in its view Article 39 had no place in the context of Protocol II. It stated that once the Article is adopted it:

> "...[W]ould inevitably be used for political reasons by a party opposing or in rebellion against a government. A government which refused the services of the ICRC or some other impartial body called in by the rebel party might be accused of having something to hide."[207]

The Ukrainian Soviet Socialist Republic endorsed, with other Socialist States (Cuba and Mongolia), the view advocated by the above Third World States. The delegation of Ukraine stressed:

> "...[I]t had some doubts regarding the wording of Article 39. There was nothing to prevent the ICRC offering its help, even without such an Article, which in any case would have no effect on its activities. It might be possible to amend the Article by adding a reference to national Red Cross societies, but since some delegations thought that the provisions of Article 39 would endanger State sovereignty he was prepared to support the Mexican proposal that Article 39 should be deleted."[208]

Therefore, it is not only third party control of the application of Protocol II which is seen as infringement of the sovereignty of the State, but even any mention of the ICRC.

However, Western States especially backed by some delegates from the Third World,

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[205] Ibid, para.56, p.247.

[206] Ibid, para.64, p.248.

[207] Ibid, para.87, p.252.

[208] Ibid, para.67, p.249.

supported what was proposed by the ICRC. Draper, the UK delegate, expressed their view when he stated that the provisions of Article 39 'were of undoubted value in Protocol II'.[209] He then added that 'it was self-evident that such conflict (internal) would lead to some erosion of sovereignty, but Article 39 in no way derogated from such sovereignty.'[210] Tunisia stressed the same point of view:

> "Article 39 was simply giving the parties the possibility of calling on the good offices of impartial bodies to that end. As long as it imposed no obligations, there was nothing in it that was prejudicial to the sovereignty of the State."[211]

This initial discussion of the ICRC Article 39 which shows a fundamental rift between two conceptions of sovereignty, led the Committee to refer Article39 to working groups and sub-groups.[212] Finally, Article 39 which was adopted at the committee level simply states 'the ICRC may offer its services to the parties to the conflict' and even this modest version, which is in fact, identical with Common Article 3/3, was not accepted by consensus as draft Articles 36, 37 and 38, it was adopted by 34 votes, 17 against and 2 abstentions.[213]

In the simplified version of Protocol II submitted by Pakistan, only Article 37 which became Article 19 in the final version of Protocol II survived. It simply stated: 'this Protocol shall be disseminated as widely as possible.' All the other three Articles had been deleted. It must be repeated that the deletion of those Articles and other provisions of Protocol II has been done in the name of simplicity and the protection of sovereignty and non-intervention in the internal affairs of States.[214]

The main conclusion to be drawn from the **travaux préparatoires** is that the day of more procedural requirements for the control of the application of humanitarian law, in internal conflicts, has not yet arrived, all moves in such direction have been stopped. It is very clear that the failure of the Protocol to provide for a thorough system for the implementation of humanitarian law has been the result of insisting that it infringes the sovereignty of the State. The concept of sovereignty in the view of the majority denies any control of application of international law, when it is applied to internal conflicts.

After dealing with **travaux préparatoires**, it seems to me, appropriate to discuss some issues which relate directly to means of ensuring respect for humanitarian law, in the light of Protocol II as adopted. They include the question of reprisals; repression of violations of Protocol II; the relation between Article 3 and Protocol II concerning the right of initiative of the ICRC; and the question of relief.

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[209] Ibid, para.69, p.249.

[210] Ibid, para.69, p.249.

[211] Ibid, para.73, p.250.

[212] On the complicated drafting history of Article 39. See op. cit., supra. n.201, CDDH/234/REV.1, p.125, para.63.67 & para.111.114, p.135 and CDDH/I/323/REV.1, p.157-158.

[213] Op. cit., supra. n.201, CDDH/I/SR63, para.38, p.297.

[214] See the important statement of the Pakistani delegation made by Judge Hussain, 7 ORDCHL (1974-77), CDDH/SR.49. paras.10-11 & 12 pp.61-62.

3.1. Reprisals

Many commentators agree that the absence of a prohibition of reprisals in internal conflicts in Protocol II is a sad event, since the implication is such recourse may tolerated in case of violation of the rules of the Protocol. Bierzanek stresses that:

> "The fact that Protocol II does not contain any prohibitions of reprisals considerably reduces the practical importance of the prohibition of reprisals adopted till now, since non-international conflicts in our times constitute no less a danger for human rights than international ones."[215]

Eide comments on the fact that there was no prohibition against reprisals by stating:

> "The likelihood of an escalation in cruelty has not been much reduced by the performance at the Diplomatic Conference."[216]

In fact, the ICRC's draft Protocol II contained two provisions which prohibit reprisals, first against the wounded and the sick, Article 19 stipulates:

> "Prohibition of reprisals: measures of reprisals against the wounded, the sick, and the shipwrecked as well as against medical personnel, medical units and means of medical transport are prohibited."[217]

Also Article 26/4 stipulates:

> "Attacks against the civilian population or civilians by way of reprisals are prohibited."[218]

Thus, the protection of the victims of internal wars was assumed also by the way of prohibiting reprisals.

When Article19 was opened for discussion, Australia explained its amendment for its deletion on the ground that:

> "...[R]eprisals at least under international law, involved an act by one State against another State. However, in internal conflicts the concept of reprisals would seem to be inapplicable since one party was not a State and the other party was fighting within its own territory and against its own people."[219]

Iraq on the other hand, specifically thought that the inclusion of an Article on reprisals was an intervention in the internal affairs of States. It stressed that:

> "Draft Protocol II dealt with internal conflicts, in the context of which the idea of reprisals was inconceivable since a State must protect its own citizens. It must be left to municipal law to organise the relationship between citizen and State. A provision of the kind proposed [Draft Article 19] would be an interference with sovereignty and

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[215] Op. cit., supra. n.105, pp.25-27.

[216] Op. cit., supra. n.198, p.299.

[217] Op. cit., supra. n.197, p.38.

[218] Ibid, p.40.

[219] 11 ORDCHL (1974-1977), Geneva, CDDH/II/SR29, para.60, p.290.

would never be applied."[220]

It seems to me that the delegations which proposed the deletion of Article 19 and 26/4 (on reprisals) did not at all imply they supported their legitimacy, they wanted to leave their regulation to their natural laws. This view is confirmed by Indonesia which noted that it:

> "...[W]as not opposed to the prohibition of reprisals; on the contrary it disapproved of any act of that kind, but considered that Article 19 as it stood represented an interference in national affairs, an international Protocol should not prescribe how a State should treat its own nationals. It was for the State itself to take appropriate measures and it would appear that most States had done so."[221]

This initial discussion led the Committee to refer the matter of reprisals to working groups and subgroups.[222] After a very lengthy discussions and amendments. Article 10 bis was adopted at the committee level; it stipulates:

> "Article 10 bis Unconditional Respect:
> The provisions of Parts II and II and of Article 26, 26 bis and 27 and 28 shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".

Thus, a compromise was found, where the idea of prohibition of reprisals was emphasised, without using the word itself in order to appease supporters of its deletion.

At the final session, Pakistan proposed the deletion of this Article; the US supported that stand on the ground that 'the whole concept of reprisals had no place in Protocol II.'[223] India specifically invited all Third World countries to follow its example in supporting the deletion of Article 10 bis. Their delegate stressed that:

> "While appreciating the desirability of comprises, he felt compelled to take a stand against certain comprises which tended to jeopardize the national sovereignty of States."[224]

Finally, the Article was deleted by 41 votes to 20 and 22 abstentions.

The main conclusion to be drawn concerning the place of reprisals in the context of Protocol II is that it is the argument of sovereignty and non-intervention which killed it, even in its comprise formula in Article 10 bis.

It seems to me that despite this above fact, there is room for arguing against the use of reprisals as a means of enforcing the rules of Protocol II. Nahlik maintains that it may be

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[220] Ibid, CDDH/II/SR/32, para.52, p.336.

[221] Ibid, CDDH/II/SR/33, para.8, p.34. The Iraqi delegate made the same point:

> "...[H]e wished to make it clear that supporting the proposal to delete Article 19, his delegation did not mean in any way to express an opinion in favour of reprisals.

Ibid, CDDH/II/SR/33, para.13, p.342.

[222] For the drafting history see 10 ORDCHL (1974-1977), CDDH/405/RE.1, pp.231-235.

[223] Op. cit., supra. n.214. CDDH/SR/51., para.7, p.108.

[224] Ibid, para.8, p.108.

possible to find "des traces indirectes dans quelques dispositions sur les guaranties fondamentales, telles que, par example, l'interdiction des 'punitions collectives' ou de la 'prise d'otages!'".[225] Nevertheless, he admits 'mais le ne sont que des débris de ce qu'on avait auparavant envisagé.'[226]

Italy, in its explanation of vote on Article 10 bis (it abstained) brought an interesting legal argument to support the contention that the deletion of the Article (10 bis) has no negative effect on the prohibition of reprisals. It noted that Protocol II contains many provisions which mention obligations, which the parties must respect 'in all circumstances' or rules which must be followed 'as a minimum'. This language highlights the need for unconditional respect for those rules. That kind of language was used in some fundamental Articles of Protocol II such as Article 8 (Persons whose liberty has been restricted); Article 12 (Protection and care). Italy, in fact, stated:

> "Clearly all those provisions demand unconditional respect and their legal force is in no way diminished by the deletion of Article 10 bis."[227]

These kinds of argument are valid and can be very well used to argue against this inhuman method of enforcing humanitarian law.

The prohibition of reprisals, it must be noted, has been argued for in the ICRC Commentary on the Additional Protocols. It has been advocated that:

> "The prohibition of collective punishment was included in the Article relating to the fundamental guarantees [Article 4] by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation. In fact, to include the prohibition on collective punishments amongst the acts unconditionally prohibited by Article 4 is virtually equivalent to prohibiting reprisals against protected persons".[228]

Thus, the idea of prohibiting collective punishments has been used as a vehicle for upholding the illegality of reprisals in the context of internal wars. This interpretation in my view is wholly consistent with the object and purpose of the Protocol II, which is essentially the protection of victims of war from all forms of inhuman treatment and there is no doubt that reprisals are a very clear example of inhuman treatment, since they always hit the innocent.

3.2. Repression of Violations of the Rules of Protocol II:

The Protocol itself is silent on this point. The **travaux préparatoires** show also that there was no concern whatsoever for criminal prosecution of violations of its rules. In fact, neither the ICRC in its draft Protocol, nor States during the discussions raised the issue.

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[225] Op. cit., supra. n.48, p.166.

[226] Ibid.

[227] Op. cit., supra. n.214, CDDH/SR/51, p.121.

[228] Sandoz et al., op. cit., supra. chapter 3, n.23, p.1374. See also C.J. Greenwood: Reprisals and Reciprocity in the New Law of Armed Conflict, in Meyer (ed.), op. cit., supra. chapter 3, n.190, pp.227-250.

On the other hand, Article 6/5 of the Protocol in effect, encourage the enactment of amnesty laws at the end of hostilities. This may very well mean that all flagrant violations of the Protocol may go unpunished. In this context, it seems that Protocol II takes into account only the interests of States, in building a new atmosphere of political reconciliation after the war, without paying attention to the need for the enforcement of humanitarian law.

Against this background, two possible positions can be taken in regard to the question of the repression of violations of Protocol II; either they do not exist, because they are not mentioned, or it can be argued that despite that absence of their mentioning, they still can be contemplated. Sandoz takes the first position. He writes:

> "...[L]a violation de l'Article 3 des Conventions de Genève ou de dispositions du Protocol II ne pouvait être qualifiée d'infractions grave sticto sensu aux conventions et au Protocole, il n'y a qu'une obligation d'y mettre fin, mais pas d'obligation de punir leur auteur."[229]

However, Blishenko argues for the second position. To him, the effect of Articles 13 (civilian population cannot be the object of attack) 7, 10, 12, 14, 15 and 17 of Protocol II is that:

> "Il faut on conclure que les actes précités devraient être considérés comme des crimes appellant la poursuite et le châtiment des criminels."[230]

In his view, the violations of the above Articles constitute war crimes which must be punished. He stressed that:

> "...[L]es Protocoles de 1977 additionnels aux Conventions de Genève de 1949 sur la protection des victimes de la guerre partant de la présomption que tout ordre de caractère criminel est inadmissible' c'est-à-dire un ordre qui tend à enfreindre les dispositions de la convention et des Protocoles. Toute personne qui intime un tel ordre devrait être considérée coupable de crime de guerre."[231]

According to him, punishment of war crimes is possible in internal and international wars alike. It seems to me that there is some support for this stand in State practice. Thus, in his letter of Transmittal of January 29th, 1987 to the US Senate recommending the acceptance of Protocol II, President Reagan stated that:

> "This Protocol II makes clear that any deliberate killing of a non-combatent in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murders."[232]

It is very clear that violation of some rules of Protocol II have been characterised as war crimes and crimes against humanity, punishable under the law. This is a very encouraging

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[229] Op. cit., supra, n.136, p.299.

[230] Op. cit., supra. n.137, p.340.

[231] Ibid, p.341.

[232] The Letter of Transmittal of January 29th, 1987. 81 AJIL, 1987, p.911.

precedent, since the silence of the Protocol has been interpreted in a positive way, in the direction of enforcing respect for humanitarian law.

3.3. The Relation Between Article 3 of the Geneva Conventions and the Protocol II, in Relation to the Question of Right of Initiative of the ICRC.

With the deletion of draft Article 39 which provides for the right of the ICRC to offer its services to the parties to the internal conflict, Protocol II does not contain any reference to the ICRC. The question then arises as to whether the right of initiative of the ICRC mentioned in Article 3 does or does not apply to conflicts covered by Article 1 of the Protocol II.

To some authors, the deletion in the Protocol of any mention of the ICRC does not in any way affect its right to offer its services. In this respect, Abi Saab contends that Article 3:

> "...[E]t en particular ses dispositions concernant l'offre de service par les organismes humanitaires, continue à s'appliquer à tous les conflits régis par le Protocol II."[233]

He then added that:

> "...[P]aradoxalement, nous pouvons dire que sur ce point c'est l'Article 3 commun qui 'développe' et 'complète' le Protocol II plutôt que le contraire."[234]

This means that the ICRC would be able to offer its services even in cases of conflicts defined by Article 1 of the Protocol, and not only in conflict of lesser intensity regulated by Common Article 3.

Bothe holds the same view. To him, the deletion of draft Articles 36-38 and 39 does not constitute a real loss of substance in the matter of executing the Protocol since in his view:

> "Les questions règlées par les Articles 38 et 39 sont largement couvertes par les dispositions de l'Article 3 communs aux quatre Conventions."[235]

Then, in his opinion, the ICRC can offer its services in conflicts covered by Article 1 of the Protocol II and also there is nothing to exclude the possibility that the parties to the conflict can conclude agreements which bring more humanitarian rules into the conflict. He even suggests that these special agreements are not confined only to the Geneva Convention but also to the First Protocol.

However, Cassese is more sceptical. He maintains that:

> "Le Protocol II non-seulement n'établit aucun mecanisme international; visant à en surveiller l'observation, mais il fait même un pas en arrière par rapport à l'Article 3 of 1949."[236]

First, because the mention of the right of initiative of the ICRC has been deleted and

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[233] G. Abi Saab: Les conflits de caractère non-international, in Les Dimensions internationales du droit humanitaire. Ed. A. Pédone. Institut Henry Dunant. UNESCO, Paris, 1986. p.270.

[234] Ibid, pp.270-71.

[235] M. Boethe: Conflits armés internes et droit international humanitaire. 84 RGDIP, 1978, pp.89-100.

[236] Op. cit., supra, n.159, p.572.

second, because there is no similar provision like Article 1 of the Geneva Convention which obliges each party to respect and ensure respect for the Conventions. On the contrary, in his view, there is a provision in the Protocol which goes against the spirit of Article 1 of the Geneva Convention of 1949. That is Article 3/2 of the Protocol II (on non-intervention). In Cassese's opinion:

> "Cela peut impliquer qu'aucun autre Etat contractant ne peut exiger le respect du Protocol de la part d'un Etat sur le territoire duquel une guerre civile est en cours, car cette Etat pourrait considérer une telle démarche comme une grave ingérence dans ses affaires intérieures."[237]

His conclusion is that:

> "La seule consolidation qui nous reste est que l'Article 3 'englobe' le Protocol. Je veux dire par là que toutes les fois qu'on appliquera le Protocole, l'Article 3 trouvera nécessairement application, et le conflit armé interne bénéficiera des garanties prévues en faveur du respect de l'Article 3".[238]

He then insists that:

> "...[T]outefois le CICR et les autres Etats parties aux quatre conventions de Genève ne pourront exiger l'application rigoureuse du Protocole mais seulement de l'Article 3".[239]

He then adds:

> "C'est pourquoi on peut dire que le Protocole est comme un guerrier sans armes: il édicte des commandements, mais ne dispose d'aucun moyen efficace pour les faire observer."[240]

It seems to me, that the contentions of Cassese are too restrictive. In my view, the parties to the Protocol II can always demand from the party who accepted the application of Protocol II in its internal conflict, strict adherence to the rules of that Protocol, since matters which are regulated by that international instrument are no longer within its domestic jurisdiction. Article 3 of the Protocol cannot bar that demand.

Similarly, there is very strong support for the first position taken by G. Abi Saab and Bothe (that the ICRC can always offer its services even in conflicts of Protocol II). In fact, no delegation stated categorically that in the context of conflicts regulated by Article 1 of the Protocol II, the ICRC has no role to play. On the contrary many delegations confirmed the ICRC's right of initiative.

Thus, Italy argued that:

> "Article 3 common to the 1949 Conventions remains fully applicable in all conflicts of a non-international character, whether or not they come within the field of

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[237] Ibid, p.573.

[238] Ibid.

[239] Ibid.

[240] Ibid.

application of Protocol II".[241]

This means automatically that the right of the ICRC to offer its services was upheld.

The ICRC made a statement in the conference to the effect that:

> "The power extended to the ICRC of offering its services in such conflicts [internal] remains inviolate, even if it is not confirmed in the present Protocol."[242]

The ICRC Commentary also goes in this direction. It states:

> "Common Article 3 gave the ICRC the right of initiative in situations of non-international armed conflict. Even in the absence of explicit reaffirmation, it continues to apply, since Protocol II has an 'additional' character."[243]

It then adds:

> "The parties to the conflict retain complete freedom to refuse or accept such an offer of services, but it may not in itself be considered as a hostile act or as intervention; moreover, the Protocol provides for the possibility of appealing to a humanitarian organization in particular by mentioning the possibility of undertaking international relief actions."[244]

The conclusion is then very clear. The ICRC has the right of initiative even in the context of the conflicts regulated by Protocol II, its offering of services can never be seen as an intervention in the internal affairs. In this respect, Article 3 indeed develops Protocol II and not vice-versa. Again this interpretation in my view, is consistent with the object and purpose of the Protocol.

3.4. Relief and Assistance

In my opinion, relief is a very important indirect means of ensuring respect for the application of humanitary law, in the context of internal conflict, its distribution can save the right to life and prevent starvation and diseases.

However, the issue of relief which is humanitarian in essence, has very strong political overtones. Governments which experience civil wars, seem to have grave misgivings about it, since it is 'equated with foreign intervention, with foreign assistance to rebellion or at least a danger of these things happening.'[245]

The ICRC in its Draft Protocol II, submitted 3 Articles under Part VI under the title 'Relief.'[246] The main points were:

(i) Relief to civilians shall be agreed to and facilitated by the parties to the conflict; (ii) it

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[241] Op. cit., supra. n.214, CDDH/SR/53, p.161.

[242] Ibid, p.164.

[243] Op. cit., supra. n.228, para.445, pp.1345-1346.

[244] Ibid.

[245] Bothe et al., op. cit., supra. chapter 3, n.186, p.694.

[246] For the text of the Articles, see op. cit., supra. n.197, p.43.

has not to be seen as an intervention; (iii) the obligation of the parties to the conflict and other contracting States to facilitate and accelerate the entry, transport, obstruction or passage of relief; (iv) relief societies shall be permitted to pursue their humanitarian activities.

At the outset of the discussions, which were lengthy, Nigeria, which experienced unhappy memories of relief during its civil war stressed (and was supported by Third World countries) that:

> "In non-international armed conflict relief action could make the situation worse; outside interference could magnify what was a small matter to the State concerned."[247]

Many amendments and compromises were necessary before the adoption of a single Article (18) in the simplified version. It must be noted that the essence of those amendments, compromises, was to preserve the liberty of the established Government to accept or refuse such relief. Article 18 provides:

> "Article 18 Relief Societies and Relief Actions
>
> 1. Relief societies located in the territory of the high contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
>
> 2. If the civilian population is suffering undue hardship owing to the lack of the supplies, essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the high contracting party concerned."[248]

Article 18 in fact fills a gap, since Article 3 does not contain any mention of relief. However, the sovereignty of the State and the fear of intervention have been looked for, since the Article as a whole is based on the idea that States are the principal agents for the organisation of relief. Similarly, the consent of the State concerned is expressly provided for, when international relief is envisaged.

However, a practical difficulty may appear, and that is whether the consent of the established Government is necessary even to areas controlled by the rebels. The literal interpretation of Article 18/2 is very clear, the consent of the contracting party is needed always.

According to Bothe 'when it comes to humanitarian relief, the competing claims of international status must not be allowed to determine the question of required consent'[249] and then he adds that:

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[247] H.S. Levie (ed.): The Law of Non-International Armed Conflict, Protocol II to the 1949 Geneva Conventions. Martinus Nijhoff, Dordrecht, Boston, 1987, pp.571-572.

[248] Op. cit., supra. n.245, p.693.

[249] Ibid, p.697.

> "It is rather physical control of those areas through which relief consignment have to pass or where they are distributed which, for practical reasons, have to be decisive."[250]

The commentary of the ICRC on the two Protocols goes nearly in the above direction. It states that:

> "The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organisation fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief action must take place."[251]

Despite the humanitarian intent of such arguments the practice suggests that the consent of Government is essential. Thus, Meyer notes that:

> "It may be said that in most cases under the Geneva Conventions and the additional Protocols, relief organisations are only able to operate if they have some form of Governmental authorisation, abstain from political or military activity, and maintain impartiality in their humanitarian work."[252]

Efficaty to him, means getting continued authorisation from the Government, which would prevent the actions of relief from being characterised as intervention.

In this respect, when in June 1987 India undertook a relief supply by air over Jaffra, Sri Lanka condemned the act as violation of its sovereignty. However, when the Indian Red Cross sought the consent of the Sri Lanka Government, the latter accepted, but stressed that it did so 'purely in the interest of good-neighbourly relations.'[253]

It is to be stressed that the ICRC is not mentioned expressly as having the right to provide relief and assistance, in the context of Article 18. However, some argued that the right of initiative of the ICRC, includes also the right to provide relief and assistance and that this right however has become a part of customary law.[254] Some other authors are sceptical. Jakovijevic maintains:

> "The existing rules are certainly not sufficient to ensure the right to humanitarian assistance in this type of armed situation."[255]

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[250] Ibid.

[251] Op. cit., supra. n.228, para.4885, p.1479.

[252] M.A. Meyer: Humanitarian Action: A Delicate Balancing Act. IRRC, 1987, No.260, p.494. However, Meyer admits that:

> "The terms 'High Contracting Parties' refers to the established Government. However, in some cases, the authorities concerned from an operational view point will be the insurgents, the Government in power not having to grant transit to relief".

Development of the Law Governing Relief Operations, in Meyer (ed.), op. cit., supra, chapter 3, n.190, p.221.

[253] Ibid, IRRC, p.491. See also The Guardian dated June 26th, 1987 at p.10.

[254] Ibid, IRRC, p.490.

[255] B. Jakovijevic: The Right to Humanitarian Assistance: Legal Aspects. IRRC, 1987, No.260, p.478.

That is in internal conflicts. However, to me, the first stand is more in conformity with the humanitarian spirit of the Protocol as a whole.

3.4.1. Humanitarian Aid and the Nicaragua Case

The ICJ, in fact, made a very important pronouncement concerning the issue of humanitarian aid, the question which was raised was whether the decision of the US Congress on October 1st, 1984 to restrict the funds of assistance to the Contras to 'humanitarian assistance' can be characterised as intervention in the internal affairs of Nicaragua.

The Court first stressed that:

> "...[T]here can be no doubt that the provisions of strictly humanitarian aid to persons or forces in another country, whatever their political affiliation or objectives cannot be regarded as unlawful intervention, or as in any other way contrary to international law."[256]

It then made it clear what are the feature of such aid, which cannot be seen as intervention. First, it said that it must conform to the principles declared by the 20th International of the Red Cross,[257] and especially that:

> "...[A]n essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human sufferings and to protect life and health and to ensure respect for the human being' it must also, and above all be given without discrimination to all in need in Nicaragua, not merely to the Contras and their dependents."[258]

The contribution of the Court lies in the fact that it stressed the element of giving the humanitarian assistance to all those who are in need, without discrimination on political grounds. Thus, it is the element of non-discrimination which is essential rather than the consent of Government or other bodies. In this respect, the judgment of the Court is more advanced than the Protocol II and is more in conformity with the ideas of humanity rather than sovereignty.

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[256] Op. cit., supra. n.181, para.245, p.1078.

[257] These principles are:

> "The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavour-in its international and national capacity-to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for human beings. It promotes mutual understanding, friendship, co-operation and lastly peace amongst peoples".

And that:

> "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavour only to relieve suffering, giving priority to the most urgent cases of distress."

See ibid, para.242, pp.1078-79.

[258] Ibid, para.242, pp.1078-79.

B. The Compliance with Humanitarian Law after the Adoption of Protocol II

In the report of ICRC's activities, delivered by its President at the 25th International Conference of the Red Cross (Geneva, October 1986), he stated that:

> "...[n]ot only are conflicts increasing in number and length, but practices prohibited by international humanitarian law are becoming more and more common: The taking of hostages and sometimes their subsequent murder, acts of terrorism, torture and other ill-treatment of detained persons, and people reported unaccountably missing, it has even reached the point where whole civilian populations are subjected to starvation for the purpose of war."[259]

He then added that:

> "Grave problems are being encountered in the application of humanitarian law."[260]

This means that especially in internal conflicts, which constitute the majority of conflicts which are taking place, the picture of observance of the law is very grim indeed.

In El Salvador, despite widespread revelations that certain officers are involved in rampant violations of human rights, attempts to prosecute them have failed. Thus, in 1983 the then US Vice-President, G. Bush visited El Salvador and brought with him a letter from the US President which included a list of military and civilian officials identified by the US as being involved in death squads. The message contained an ultimatum 'suspend or cashier them' or the US aid will be cut by January 1st, 1984. However, nothing happened, no officer was charged and the aid continued.[261] This case indicates that there is an obvious lack of political will to stop such violations.

It seems to me that two institutions at least in practice have contributed greatly to the question of controlling the application of humanitarian law in internal conflict, and by this they contributed to a certain measure to fill the loopholes left by Protocol II in this area. They are: (i) the role of the ICRC; and (ii) the role of human rights instrument. I think that their success, in practice, can be explained by the fact that their use cannot be seen as a breach of the sovereignty of the State, or as an intervention in its internal affairs. Since the ICRC has established a good record as a humanitarian organ devoted to humanitarian needs, and secondly because human rights have been generally accepted as a valid limitation upon State sovereignty.

1. The Role of the ICRC

It must be contended that the mere presence of the ICRC in situations of internal conflicts would, in practice, lead to a better protection of the victims of war, hence, implicitly reinforcing the application of the fundamental guarantees of humanitarian law.

The non-recognition of the application of Protocol II or even Article 3 and the absence of any solid legal ground upon which the ICRC can oblige the parties to the conflict to

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[259] IRRC, 1987, No.256, p.61.

[260] Ibid.

[261] Hopkins (ed.), op. cit., supra. chapter 4, n.461, Vol.3, (1983-84), 1985, p.525.

accept its intervention, has not in practice prevented the ICRC from action. It seems to me that the ICRC acts in fact on the assumption that its right to offer relief and assistance and its right to initiative has become a customary rule.

A simple look at the monthly bulletins of the ICRC and its other publications, clearly reveals the immense work carried out, both in the past and at present. Moreover, they show that the ICRC is present in nearly every internal conflict. In fact, it is reported that the ICRC is present in Ethiopia, Chad, Uganda, Burundi, South Africa, Namibia, Sudan, Angola, Mozambique, Nicaragua, El Salvador, Peru, Afghanistan, Kampuchea, Philippines, Indonesia, Burma and Lebanon.[262]

In all these conflicts its main work consisted in:

1. Visits to detainees and detention centres of prisoners;
2. Looking after displaced persons by providing food, shelter and medical care;
3. Establishing hospitals and first aid posts for the wounded and sick;
4. Monitoring the situation of civilians in conflict areas;
5. Looking after refugees etc.

These activities, of course, would reinforce the application of the fundamental rules of humanitarian law and prevent breaches of humanitarian law, at least partially.

The success of the ICRC in these areas has been explained, among other things, by El-Kouhene in the following fashion:

> "Il [le CIRC] oppose à la raison d'Etat la raison humanitaire. Et partout où il va sa devise est la neutralité, c'est la principale garantie de l'efficacité de son action, de son autorité morale et de sa credibilité."[263]

Thus, it seems that States at least publicly, in recent times, have abstained from challenging or accusing the ICRC of intervention in their internal affairs, when the ICRC seeks to act in internal conflicts.

2. The Role of Human Rights Instruments in the Control of Application of Fundamental Humanitarian Rules

The aim of human rights law and instruments is the protection of the rights and freedoms of the individual in times of peace especially. However, in times of wars and emergencies certain fundamental rights and freedoms are also protected by such instrument.[264] In fact,

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[262] See ICRC Worldwide 1988, ICRC Pub., Geneva, pp.3-20.

[263] Op. cit., supra, n.160, p.194.

[264] Under the European Convention on Human Rights, 4 non-derogable rights are mentioned (Article 15/2: The right to life, freedom from torture, the prohibition of slavery and ex post facto laws): the United Nations Covenant on Civil and Political Rights, lists seven non-derogable rights (Article 4/2. Thus, the four rights mentioned in the European Convention are included plus the prohibition against imprisoned for nonfulfillment of contractual obligations, the right to be recognized before the law, and freedom of thought, conscience and religion). Lastly under the American Convention on Human Rights, no derogation is permitted from eleven rights, including the right to nationality, the right to participate in Government and the obligation of States to ensure and protect the judicial guarantees essential for the protection of these rights. That in itself is a non-derogable right under Article 27/2 of the Convention. See T. Buergenthal: The Inter-American System for the Protection of Human Rights in: T. Meron (ed.): Human Rights in International Law: Legal and Political Issues. Vol.2. Clarendon Press, Oxford, 1984, p.450.

the African Charter of Human Rights does not contain any clause on emergencies and wars, which would imply that the Charter is applicable in times of peace and wars either international or internal.

Thus, when the Government does not proclaim the application of Article 3 of the Geneva Conventions or Protocol II, human rights instruments adhered to by the Government still apply, at least in their part reserved for emergencies. The UN Covenant on Political and Civil Rights, goes even further. Its Article 4 stresses that the derogation from the Covenant can only be valid when the public emergency is publicly proclaimed. This led Robertson to note that:

> "...[I]n order for a derogation to be lawful, the public emergency must be 'officially proclaimed'. This means that in situations of undeclared war or civil strife no derogation is permissible in the absence of an official proclamation of a State of emergency, so that all the rights proclaimed in the Covenant continue to be respected."[265]

Carty in fact, insists that:

> "There is a consensus that the State does not have an unqualified right to declare that a State of emergency exists which justifies derogations from human rights. A public emergency has to exist as a matter of objective fact, which is reviewable where the State submits to the jurisdiction of an international body."[266]

In other words, even in cases of public emergencies, the sovereignty of the State is not absolute. This is the logical effect of international conventions on human rights.

In this respect, it must also be indicated that the Siracusa principles on limitations and derogations provisions in the Covenant interpreted the obligation of States under its Article 2 (to ensure the enjoyment of the rights for all persons within their jurisdiction, and their duty to adopt measures to secure an effective remedy for their violations) to mean in cases of emergencies that States shall take special precautions to ensure:

> "That no official or semi-official groups engage in a practice of arbitrary and extra-juridical killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect".[267]

This means in effect that the right to fair trial and due process of law must be respected in all times. This will lead in practice to a real protection of victims of wars.

Carty also indicated that in emergencies:

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[265] A. H. Robertson: Human Rights as Basis of International Humanitarian Law. Proceedings of the International Conference on Humanitarian Law. San Remo (24-27 Sept., 1970). Grassi Instituto Ed., 1970, pp.67-68.

[266] A. Carty: Human Rights in a State of Exception: The ILA and the Third World, in T. Campbell, D. Goldberg, S. McLean and T. Mullen: Human Rights from Rhetoric to Reality. Basil Blackwell, Oxford, 1986, p.62.

[267] The Siracusa Principles on the Limitations and Derogations Provisions in the International Covenant on Civil and Political Rights. 7 HRQ, 1985, p.10. It must be noted that the said principles were drawn up by 31 distinguished international lawyers in 1984 in Italy.

> "...[N]o measure taken may discriminate solely on grounds of race, religion, colour, nationality, sex or social origin. The judiciary retains the power to ensure that there is no encroachment upon non-derogable rights, and that measures affecting derogable rights are in accordance with the principle of proportionality."[268]

At least, we can indirectly assume that the fundamental rules of humanitarian law are contained in the non-derogable rights of human rights instruments. Hence, States which have not ratified Protocol II cannot derogate from its fundamental rules on the protection of the victims of war since they are the same or, at least, incorporated in the non-derogable rights.

Through the non-derogable rights clauses contained in instruments of human rights, human rights law and humanitarian law, (at least in the part relating to the protection of the rights to life, prohibition of torture, inhuman treatment and punishment and the right to fair trial), can meet. Hence, human rights can play a useful role in furthering the application of humanitarian law in civil wars.[269]

However, it must be stressed that the existence of permanent institutions and organs which deal with alleged violations of human rights, can profitably be used during times of internal wars (which are a clear example of emergencies which threaten the life of the nation) to stop or at least prevent such violations from being committed. It is precisely in that respect that human rights instruments, organs and procedures, can play a valuable role in monitoring and controlling the application of fundamental human rights, which are identical with the fundamental guarantees of humanitarian law.

In this respect, I will concentrate on two case studies, first the UN instruments and institutions and their contribution to the control and application of humanitarian rules, through the human rights approach, with a special emphasis on the case of El Salvador, and secondly, the inter-American system and the protection of human rights in internal conflicts with special emphasis on the Nicaragua case, among other cases. It is hoped that these two case-studies will give us a clear picture of how, on the universal and regional levels, human rights instruments have been used as a means of controlling the application of fundamental humanitarian rules during situations of civil wars.

2.1. The UN System and the Control of Application of Humanitarian Rules During Civil War Situations

Different UN organs have dealt with questions of violation of human rights, in States where civil wars are taking place. These organs include the UNGA, the ECOSOC, the UNCHR and its Sub-Commission on Non-Discrimination and Minorities.

These organs act under the UN Charter which contains several important references to the protection of human rights (particularly Articles 1, 13, 14, 34, 55 and 60) or under special procedures devised for these organs, which permit them to deal with gross violations of

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[268] Op. cit., supra. n.266, p.63.

[269] For a comprehensive study of the question of humanitarian law and non-derogable rights, and the problems posed in this area see: T. Meron: Human Rights in Internal Strife. Their International Protection. Grotius Pub., Ltd. Cambridge, 1987, pp.29-70. See also F. Hampson: Human Rights and Humanitarian Law in Internal Conflicts, in Meyer (ed.), op. cit., supra. chapter 3, n.190, pp.55-80.

human rights such as Resolution 1235 XLII of June 6th, 1967 or Resolution 1503 (XLII) May 27th, 1970, both resolutions were adopted by the ECOSOC.

These organs denounced the violations, invited States concerned to respect rules of international law relating to the protection of human rights and even humanitarian law, appointed special rapporteurs to deal with specific cases of gross violations of human rights in certain countries. They invited the States concerned to punish those who are guilty of committing the violations, and even explicitly invited States engaging in civil wars to apply and conform to Article 3 and the Protocol II.

2.1.1. El Salvador Case

The UN practice clearly shows, in the case of El Salvador, that all the above mentioned steps have been taken in relation to that conflict. Thus, one year after the eruption of civil war in that country, the UNCHR at its 37th session on March 11th, 1981 requested its Chairman to appoint a special representative with a mandate to investigate all grave human rights violations and to recommend steps the Commission could take to help secure the enjoyment of human rights[270] in El Salvador. The Government of El Salvador and other States were invited to extend their cooperations to the Rapporteur. The ECOSOC approved the decision of the Chairman of the UNCHR on May 8th, 1981.

The Special Rapporteur then visited El Salvador and had a meeting with the President, the Vice President and members of the Junta. He then submitted an interim report, which pointed out that a consistent pattern of gross violations of human rights existed and which culminated with attempts on human life.

Moreover, it was reported that members of the State security apparatus and violent groups of the left and right, were involved in committing murder and violations of human rights; also it is revealed that executive and judicial organs had adopted a widespread attitude of passivity and inactivity in regard to these gross violations.[271]

On October 28th, 1981, the UN Secretary-General transmitted this interim report to the UNGA. The latter then adopted Resolution 36/155 on December 16th, 1981 (by a vote of 90 in favour 22 against and 53 abstentions). The Resolution contains several interesting points. In Paragraph 3 it states that the UNGA:

> "...[D]eeply deplores all acts of violence and all grave violations of human rights and fundamental freedoms, and regrets in particular the persistence of a situation in which Government paramilitary organisations and other armed groups continue to act with total contempt for the life, security and tranquillity of the civilian population."[272]

Paragraph 4 stipulates that the UNGA:

> "...[D]raws the attention of all parties concerned to the fact that the rules of international law, as contained in Article 3 of the Geneva Convention of 12 August 1959, are applicable to armed conflicts not of an international character and requests

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[270] 35 UNY, 1981, p.958.

[271] Ibid, p.958.

[272] Ibid, p.962.

> the parties involved to apply a minimum standard of protection to the affected population."[273]

In paragraph 7, the Government was urged to take the necessary measures to ensure full respect for human rights. Lastly, in paragraph 9, the parties to the conflict were invited to cooperate and not interfere with the activities of humanitarian organizations, which are dedicated to alleviate the suffering of the civilian population.

In fact, the UNGA has touched many important issues of humanitarian law, it stressed the need for the protection of the civilians, and the need to provide them with relief and importantly, it did not hesitate to proclaim the applicability of Article 3 to the situation. This is an innovation, since neither the text of Article 3 nor its **travaux préparatoires** gives such a right to the General Assembly.

In practical terms the action of the UNGA was confined to demand from the Government to ensure respect for human rights, no sanctions were envisaged. El Salvador, however, rejected the resolution as 'biased' and said 'it overstepped the humanitarian sphere and included highly political considerations which fell exclusively under internal jurisdictions.'[274] It further noted that it did not recognise the legitimacy of the nomination of the Special Rapporteur and the validity of his report.

This means that the Government clings to ideas of sovereignty and non-intervention to oppose the UN actions. Nevertheless, the interesting thing is that El Salvador did not specifically question the competence of the UNGA to characterise its conflict as being governed by Article 3.

Tunisia on the other hand, maintained that it was essentially up to regional organisations (in this case the OAS) to find solutions for problems of its members.[275] However, even Latin- American States did not oppose the resolution on that stand which means that they do not question the validity of the UN action. They rather concentrated on the element of selectivity of cases. Cuba stressed that the elimination of martial law and respect for human rights cannot be claimed to constitute interference in the internal affairs.[276]

At its 38th session, the UNCHR examined the second report of its Special Rapporteur. In this report it was observed that:

> "...[S]erious and massive human rights violations have persisted because of the continuing conflict."[277]

Nevertheless, some positive signs have been mentioned, a slight increase in the punishment of human rights violations was noted, also the authorities concern to encourage judiciary activity was pointed out. Moreover, the report spoke of 'cases of humanitarian treatment

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[273] Ibid.

[274] Ibid, p.959.

[275] Ibid, p.960.

[276] Ibid, p.961.

[277] 36 UNY, 1982, p.1124.

by both sides to persons captured in combat.'[278] The UNCHR endorsed the report and:

> "...[C]alled on all Salvadorian parties to cooperate with humanitarian organisations and requested them to apply a minimum standard of human rights protection and humanitarian treatment of civilians."[279]

The UN Sub-Commission on Non-Discrimination and Minorities recommended the Government to apply the rules of international law, particularly Common Article 3.[280]

The UNGA for its part adopted Resolution 37/185, December 17th, 1982, (71 in favour, 18 against and 55 abstentions). The Resolution repeated in paragraph 2 the application of Article 3 to the situation, and at paragraph 9 it:

> "...[S]trongly urges the Government of El Salvador to fulfil its obligations towards its citizens and to assume its international responsibilities in this regard by taking the necessary steps to ensure that human rights and fundamental freedoms are fully respected by all its agencies, including its security forces and other armed organisations operating under its authority or with its permission."[281]

El Salvador rejected the resolution this time by stating:

> "...[T]hat it contrasted the report of the special representative and distorted reality."[282]

Thus, the outcry of these different organs have resulted in slight improvement in the situation of human rights, also the rejection by El Salvador of the UNGA Resolution was not so strong, since it did not at all invoke the breach of its sovereignty as a result of the UNGA action. Indirectly, the use of arguments of human rights have led the Government to try to do something about the violations, as the report of the Special Rapporteur reveals.

In his third report of January 1983, to the UNCHR, the Special Rapporteur noted that the gross violations of human rights are the responsibility of the Government and the left as well. He emphasised that despite a slight increase in the punishment of human rights violations, he had not heard that any of the proceedings had resulted in a conviction.[283] He mentioned that the Geneva Convention and the two Protocols:

> "...[W]ere still not properly complied with, notwithstanding humanitarian treatment to, and even released persons captured in combat."[284]

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[278] Ibid.

[279] Ibid, p.1123.

[280] The Review (ICJ), 1982, No.29, p.24.

[281] Op. cit., supra. n.277, p.1127.

[282] Ibid.

[283] 37 UNY, 1983, pp.887.

[284] Ibid.

He seems to hold the view that the parties to the conflict are expected not only to apply rules of Article 3, but the whole rules of humanitarian law, including those relating to international conflicts. He recommended that the Government should adopt the following measures:

> "The repeal of all legal enactments and other measures that were incompatible with international human rights instruments, institution of real Government control over the armed forces, and all armed organisations and individuals, adoption of legal measures to prevent and punish human rights violations, mass campaigns to promote respect for human rights and administrative and social reforms."[285]

The UNCHR by a resolution of March 8th, 1983 endorsed the report and declared:

"...[O]nce more that the provisions of the 1949 Geneva Convention on the Laws of War were applicable to the armed conflict."[286]

This organ of human rights then found it necessary to arrive at the conclusion that for a better protection of human rights, not only fundamental human rights must be respected but, also all rules of humanitary law contained in Geneva Conventions.

The UNGA also followed this road and urged the parties to respect all rules of humanitary law. Resolution 38/101 (December 16th, 1983). Paragraph 3 stipulates that the UNGA:

> "Again draws the attention of the Salvadoran parties concerned that the rules of international law, as contained in Article 3 and Additional Protocols I and II thereto, are applicable to armed conflict not of an international character, such as in El Salvador, and requests all parties to apply a minimum standard of protection of human rights and of humane treatment of civilian population."[287]

The resolution was adopted by 84 in favour, 14 against and 45 abstentions. Thus, in the view of a substantial number of States, the humanitarian rules applicable to international conflicts are also applicable to civil wars. This is a very interesting development, since the attitude of the majority of States at the Diplomatic Conference (1974-1977) was otherwise.

El Salvador stated that:

> "The text was not constructive for the promotion of human rights, it was partisan, interventionist and...ineffective and irrelevant".[288]

It seems to me, that these objections were largely directed against the negative attitude of the UNGA toward the elections which took place in March 1982 in the country, rather than the obligation of El Salvador to respect humanitarian rules contained in Geneva Conventions and the two Protocols. However, Indonesia with eyes on East Timor considered the text to

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[285] Ibid, p.888.

[286] Ibid.

[287] ibid, p.889.

[288] Ibid, p.891.

be an intervention in El Salvador's internal affairs.[289]

In November 1984, the Special representative reported on the human rights situation in El Salvador. He indicated that the new Government was actively pursuing a policy of improving the human rights situation in the country. It had disbanded the intelligence section of the Treasury police, dismissed up to 45 local commanders, restricted the activities of 'death squads' and created a separate secretariat for public security in the Ministry of Defence, as well as a special commission to investigate political crimes having international relevance.

Moreover, an investigation was ordered by the Minister of Defence of alleged participation of an army unit in a massacre of 68 peasants in July 1984.[290]

Continued pressure of the UN among other things, has in fact, led El Salvador to adjust itself at least partially, in order to conform to accepted human rights and humanitarian standards. The UNGA, after welcoming the changes made in El Salvador, stressed that it:

> "12. Deeply deplores the fact that the capacity of the judicial system in El Salvador to investigate, prosecute and punish violations of human rights continues to be patently unsatisfactory and therefore urges the competent authorities to continue and strengthen the process of reform of the Salvadoran penal system, in order to punish speedily and effectively those responsible for the serious human rights violations which have been committed and are still being committed in that country."[291]

No country, even El Salvador, challenged the UNGA approach as intervention or breach of sovereignty. However the main criticism was the rejection of selectivity in the text. Guatemala indicated that such a double standard (singling out certain countries for human rights violations while maintaining silence with respect to others for the same violations) weakened the credibility of human rights institutions and respect for the UN Charter.[292]

It is to be noted that the Covenant on Civil and Political Rights of 1966 also established a system of supervision for the specific rights included in the Covenant. The Human Rights Committee, instituted under Article 40 has in fact the specific mission of such supervision.[293] The main function of the Committee is to study reports submitted by the States parties, in accordance with Article 40/1 and to transmit its reports and such general comments as it may consider appropriate, to the States parties. It may also transmit these general comments to the ECOSOC, along with the copies of the reports it has received from the party States. However, it seems that El Salvador did not submit its reports on time, which made it difficult for the Committee to study the situation.

It is reported that:

> "The Committee has conducted a constructive dialogue with States parties, has sought considerable information from States, and has been the source of much information

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[289] Ibid, p.890.

[290] 38 UNY, 1984, p.868.

[291] Ibid, p.869.

[292] Ibid, p.870.

[293] 10 HRLJ, 1989, p.112. As at January 1st, 1989, there were 87 States which ratified the Covenant.

and publicity about the Covenant. In so doing it has contributed to a wider dissemination of information and a raising of consciousness on human rights issues in the Governments and populations of States."[294]

2.1.2. Other Cases

It must be stressed that the UN organs have also dealt with questions of violations of human rights in many other countries. The UNCHR has in fact established many subsidiary organs to deal with issues prevalent in internal conflicts. It establish ad hoc working groups of experts to deal with specific countries, such as the ad hoc working group on South Africa (1967), the ad hoc working group on Human Rights in Chile (1975). From 1979, the Commission replaced the ad hoc working groups by the designation of Special Rapporteurs, Special representatives and special envoys.

In 1979, it appointed a Special Rapporteur in Chile, and in the same year another one in Equatorial Guinea; in 1981 a Special Representative in El Salvador, and also another one in Bolivia in 1982; in Guatemala, Iran, 1982; Poland 1982 and Afghanistan 1984 (Ermacora).The functions of special rapporteurs seem to contain an element of fact-finding, preparing a report on the situation of human rights, and also an element of mediation, since they engage in dialogue with the established Government.

The UNCHR, also from 1980, resorted to 'thematic procedures'. They consist in appointing a working group or special rapporteur to examine specific themes, primarily on the basis of desk research and visits to different countries. In this context, the Commission created six thematic procedures: (i) The working group on enforced or involuntary disappearances (1980). (ii) The Special Rapporteur on summary or arbitrary executions (1982). (iii) The Special Rapporteur on torture (1985). (iv) The Special Rapporteur on religious intolerance (1986). (v) The Special Rapporteur on mercenaries (1986) and (vi) The Special Rapporteur on monitoring investments in South Africa (1987).

It is clear that the great majority of these themes have a direct relation with internal conflicts. They often take place in such a conflict.

It has been asserted in effect that:

> "...[T]aken together the thematic procedures could well be regarded as an embryonic United Nations High Commissioner for Human Rights".[295]

And that those procedures:

> "...[C]onstitute the only devices of the United Nations which act continuously and report publicly on human rights violations on a worldwide basis within the limitations of their mandate. They tend to do this impartially and without political bias."[296]

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[294] F. Jhabvala: The Practice of the Covenant's Human Rights Committee, 1976-1982, Review of the State Parties Reports. 6 HRQ, 1984, p.105. See also D.D. Fisher: Reporting under the Covenant on Civil and Political Rights: The First Years of the Human Rights Committee. 76 AJIL, 1982, pp.142-152; and P.R. Ghandi: The Human Rights Committee and the Right of Individual Communication. 27 BYIL, 1986, pp.201-251.

[295] M.T. Kamminga: The Thematic Procedures of the UNCHR. 34 NILR, 1987, p.321.

[296] Ibid, p.331.

And also that the thematic approach is therefore:

> "...[A]n effective antidote against the often heard criticism that the UN's response to human rights violations is selective and politically prejudicial. For this reason alone the thematic procedures deserve to be nurtured and strengthened".[297]

These different techniques used by the UNCHR (Special Rapporteurs for specific countries or thematic groups) have all contributed in different degrees to reveal the violations of human rights and they tried to remedy situations by mediation, recommendation and lastly by outright denunciations. Governments generally seem willing to cooperate with those groups, which means that they do not see that their work is an intervention in their internal affairs.

As examples of the work of these organs and techniques, the Special Rapporteur on Afghanistan submitted a report to the UNCHR in which it was revealed that the situation in Afghanistan can be considered as a situation of gross violations of human rights. On the basis of the report, the UNCHR adopted a resolution, in which it expressed its distress at:

> "The widespread violations of the right to life, liberty and security of person, including the common place of torture against the regimes opponents, indiscriminate bombing of the civilian population and deliberate destruction of crops".[298]

It ended by urging the Government to put a stop to such violations.

Thus, a whole range of denunciation of practices, which are essentially a violation of humanitarian law and the rights especially of the victims of war, and not strictly speaking human rights, has been seen by the UNCHR as an element of its competence.

Also the UNCHR in its 43rd session adopted a resolution in which it calls upon Sri-Lanka to cooperate with the ICRC in delivering humanitarian aid and continue to supply information to the UNCHR. [299]

Moreover, the working group on enforced or involuntary disappearances, which was created by Resolution XXXVI of February 29th, 1980 by the UNCHR, has done some very encouraging work. The group consisted of five persons, who acted in their personal capacity. Their mission was to seek and receive information from Governments, inter-Governmental organizations, humanitarian organizations and other reliable sources. The working group, as from 1980, has used all its influence to pressure Governments to reveal what happened to thousands of missing people. The group was able to visit some countries where disappearances were alleged to happen such as Cyprus, Bolivia and Peru.

In 1985 the group, as an example, reported having received 4,500 allegations of enforced or involuntary disappearances, and it was able to transmit some 2,200 sufficiently

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[297] Ibid, p.311.

[298] The Review (ICJ), No.34, 1985, p.31. Also, the UNGA in its Resolution 38/29 of Nov. 23rd, 1983 (116 in favour, 20 against and 17 abstentions) renewed its appeal to all States national and international organizations to continue to extend humanitarian relief assistance in order to alleviate the sufferings of the Afghan refugees in coordination with the UN High Commission for Refugees, op. cit., supra. n.283, p.234.

[299] The Review (ICJ) No.38, 1987, p.24.

documented cases to various Governments.[300] In its report to the UNCHR in 1987, the group identified 39 countries in which enforced or involuntary disappearances persist.[301] Also the working group in 1987 asked 14 Governments to explain 1,094 new cases of disappearances which occurred in that year.[302]

It should be mentioned that especially in cases of recent and new disappearances, the group was able to send telegrams and make appeals which have resulted in the release of many individuals and has caused Governments to acknowledge that they are detaining others. However, in relation to old cases of disappearance, the working group was able in some instances to clarify their situation and fate.[303] There is a general consensus that the working group on enforced and involuntary disappearance has over the years become an effective instrument of implementing human rights, in a very difficult domaine.[304]

By resolution of the ECOSOC 1982/35 of May 7th, 1982, Mr. Amos Wako, a Kenyan lawyer, was appointed as a Special Rapporteur to study the question of summary or arbitrary executions. In his first report he revealed that at least 2 million people had been executed arbitrarily in 37 countries over the past 15 years; he indicated that there is a close relationship between summary or arbitrary executions and violations of human rights, especially the right not to be subjected to torture, inhuman treatment etc.[305]

In his second report he made clear that summary or arbitrary executions takes place frequently in situations of upheaval, internal conflict etc.[306] In his report to the 44th Session of the UNCHR (1988), he indicated that he had asked 27 Governments to respond to allegations of executions and had intervened with urgent appeals to 14. He also dealt with the question of executions by armed opposition groups such as the Renamo insurgents in Mozambique.[307]

The work of the Special Rapporteur on summary or arbitrary executions is in fact, very useful in protecting the fundamental right to life. Thus, it helped even in indirect ways to stop impending killings by intervention directly to the Government concerned. Also by investigating past practices of summary or arbitrary execution, and finally in his 1988 report he indicated that he was engaging also in finding international norms of investigating suspicious deaths.

On the other hand, there is no doubt that even if his work is not confined to countries

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[300] D. Weissbrodt: The Three 'Theme' Special Rapporteurs of the United Nations Commission of Human Rights. 80 AJIL, 1980, p.686.

[301] Op. cit., supra. n.299, p.25.

[302] The Review (ICJ) No.40, 1988, p.19.

[303] D. Weissbrodt: Country Related and Thematic Developments at the 1988 Session of the United Nations Commission of Human Rights. 10 HRQ, 1988, p.545.

[304] See in this respect, ibid, pp.545-546, and op. cit., supra. n.300, pp.685-87 and op. cit., supra. n.302, p.19.

[305] The Review (ICJ) No.30, 1983, p.37.

[306] The Review (ICJ) No.32, 1984, p.39.

[307] Op. cit., supra. n.302, p.19.

which experience civil war, in practice it is in civil war situations that summary executions occur on a large scale. Thus, indirectly the work of the Special Rapporteur will inevitably especially benefit the victims of internal war to escape such inhuman and cruel practices.

2.1.3. Conclusions on the UN System and the Control of Application of Humanitarian Rules

(i) The UN different organs have been able to denounce violations of human rights abuses and thereby violations of basic humanitarian standards, through the vehicle of human rights. This confirms first that human rights are accepted by States as valid limitation upon their sovereignty and secondly, that there is a strong link if not absolute identity between the minimum rules of humanitarian law and human rights, especially in the field of the protection of war victims.

(ii) The near absence of any means of controlling the application of humanitarian law in internal conflict (apart from the pragmatic role of the ICRC) has made the role of the UN essential in that area. The political and moral effect of the UN action in dealing with violations of human rights and humanitarian law cannot be ignored. It led in practice, as the El Salvador case shows, to the Government being pressured to take steps towards ending inhuman practices.

(iii) However, the UN's main means for supervising the application of human rights and humanitarian rules in internal conflicts, as the case of El Salvador shows, are publicity and denunciation but not direct actions to stop such violations. This is understandable since due regard must be paid to the legal and political obstacles in the way of any direct action.

The role of public opinion, publicity etc., can be very effective in our world, where means of communication are fast and well-developed. The Government living in a state of a civil conflict cannot go on ignoring the calls of the international community. Some action is needed on its part to appease the critics and these actions will benefit human beings and the victims of internal wars.

2.2. The Practice in the Context of Latin-America

Under the Inter-American Convention on Human Rights, the Inter-American Commission on Human Rights can receive complaints from individuals (Article 44) and also from States (Article 45). The Commission is empowered also to conduct on-site observation of the situation of human rights with the consent of the Government concerned; but Government refusal to grant such consent does not prevent the Commission from preparing a report and issuing public statements that may embarrass the Government.[308]

All these mechanisms for supervising the application of the obligations contained in the Convention have also been used in the context of emergencies and civil wars. Thus indirectly they contributed to the observance of fundamental humanitarian rules.

In fact, the very presence of the Commission in a country torn by civil war (under Article 48 of the Convention) has sometimes led to the improvement of the situation of human

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[308] See in this respect, B.G. Ramcharan (ed.): International Law and Fact-Finding in the Field of Human Rights. Martinus Nijhoff, The Hague/Boston/London, 1982, pp.20-21.

rights and humanitarian law standards especially in relation to the protection of the victims of war. One of the principal activities of the Commission, in its visits or on-site observatory missions in member countries, is the inspection of jails and detention centres, and the finding out of reasons for the detention and imprisonment and whether torture and inhuman treatment had taken place. There is no doubt that such inspections are very important during emergencies and internal upheavals, where the number of detainees and interned persons can be large.

The presence, for example, of the Commission in the Dominican Republic in October 1961 saved hundreds of lives and led to the release of large numbers of prisoners from detention camps.[309] This has been the result of the efforts of the Commission in the internal conflict in that country.

However, here I will concentrate on the Nicaragua Case because the actions of the Inter-American Commission of Human Rights have induced the Government to take important measures to remedy violations of human rights and humanitarian law. This of course does not mean that other cases will not be studied, at least shortly.

2.2.1. Nicaragua and the Inter-American Commission on Human Rights and the Control of Application of Human Rights and Humanitarian Law

The Commission has on many occasions brought the attention of the Nicaraguan Government to the fact that it had violated some important human rights of its nationals and even in some cases mentioned the violations of humanitarian law. Thus, in its report on the situation in Nicaragua in 1978 (when the Somoza regime was in power) the Commission noted in relation to the internal war which was taking place at that time, that it:

> "Deplores the loss of any human life notwithstanding the circumstances. But, at the same time, it is evident that with regard to this fundamental right to life, the contending parties have the duty of respecting the unarmed population which is unable to protect itself."[310]

The Commission went even further:

> "Moreover, the Government of Nicaragua assumed the solemn obligation of respecting international norms of humanitarian law, especially those set forth in the Geneva Convention of civilians in time of war, signed on 12 August 1949 which also is applicable in armed conflicts not of an international character, ratified by Nicaragua on December 17, 1953."[311]

This indicates that the Commission went even beyond the express provisions of the IV Geneva Convention (on civilians) that it applies only in international wars, and considered that Nicaragua even in its internal conflict is bound by that Convention. It is clear that the

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[309] Op. cit., supra. n.264, p.481.

[310] N. Buergenthal: Human Rights. The Inter-American System. Part 3. Cases and Decisions. Vol.4, issue 22, May 1983. Release 83.1. Oceana Pub., Dobbs Ferry, New York, 1983, p.67.

[311] Ibid, p.68.

object and purpose of the Commission was to afford greater protection to the civilian population which was suffering greatly from the conflict.

In the same report, the Commission found that Nicaragua was 'responsible for serious attempts against the right to life in violations of the international humanitarian rules'.[312] The Commission, which is a human rights instrument, has used the human rights approach to denounce in express terms violations of humanitarian law. This had been done presumably, on the assumption that there is no difference between the two kinds of rules.

However, it is with Sandanista Government that the Commission was able to obtain many concessions, which directly benefitted the victims of the civil war in that country.

In its annual Report for 1982/83 the Commission referred to Decree 1233 of April 11th, 1983 issued by the Government which established what is called the 'Anti-Somoza People's Courts' with the mandate of bringing to trial the country's own nationals for war crimes and crimes against humanity, committed by the National Guard during the war against the Somoza regime.

The Commission took a negative step vis-à-vis these courts, the reason being that 'Anti-Somoza Courts' were tainted from the beginning by that indistinguishable prefix 'Anti' which conveys or conditions their lack of impartiality, independence and autonomy'.[313]

Also, in its annual report of 1985/86, the Commission dealt with the decision of the Government on October 15th, 1985 to establish a State of emergency, by which many important human rights were suspended including **habeas corpus**. It indicated:

> "This suspension runs counter to the provision of Article 27/2 in fine of the American Conventions on Human Rights and creates conditions in which serious abuses against the security of the individual could occur."[314]

The Commission then urged the Government to repeal those measures and restore the right of **habeas corpus** for all individuals detained by its security service.

The Commission, in the same report, dealt with the prison situation especially for persons jailed for security reasons. It observed that:

> "...[A] substantial improvement in the prison conditions for those jailed for political reasons is essential."[315]

The Commission has, in fact, raised many issues which are intimately connected with the civil war which was taking place, and used the machinery of human rights instruments to demand action from the Government to improve the situation, which would benefit the victims of internal war in the first place.

The Commission has also investigated the regime's dealing with its Meskito Indian minority. Thus, in its report of June 7th, 1984 indicated that:

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[312] Ibid, p.71.

[313] Ibid, Part 3 Cases and Decisions 24/1, Vol.4, issue Nov. 1986, Release 86.1. 1986, p.15.

[314] Ibid, Part 3, Cases and Decisions 24/2, Vol.4, issue April 1987. Release 87.1, p.9.

[315] Ibid, p.15.

> "...[H]undreds of Miskitos Indians have been arbitrarily detained without formalities, under vague accusations of counter-revolutionary activities".[316]

And added that many other Miskitos:

> "...[W]ere placed in isolation for long periods and in some cases the Commission verified they were tortured and illegally punished."[317]

The Government has never questioned the Commission's actions, it did not characterise them as intervention or breach of its sovereignty. In fact, all the evidence suggests that the Government has tried its best to heal the criticisms labled by the Commission.

In this context, as we stated in Chapter IV Section III, the Government granted amnesty to all Miskitos and even other persons who had been accused of violent actions against the Government (Decree No.13523 of December lst, 1983). The Government also satisfied one of the most important proposals of the Commission, namely the orderly and voluntary repatriation of the Miskitos who had fled the country (Decree No.1353 of September 4th, 1983).[318]

On the other hand, it is reported that:

> "Perhaps the most hopeful sign in Nicaragua is that the Government has demonstrated sensibility to criticism of human rights abuses by the Americas Watch and other groups and, in a number of instances, has taken measures that directly respond to those criticisms."[319]

An example of the allegations by inhabitants of region 6, a conflict area, that widespread abuses by the authorities of that region has led the Government to investigate them. The result was the conviction of a number of military officers and others receiving prison sentences in March 1984.[320]

The practice in Nicaragua shows clearly how an organ for the control of application of human rights, serves useful to the cause of giving respect to fundamental humanitarian rules in situations of internal wars. The intervention of that organ leads to the reduction of violations of human rights, which are essential in times of upheavals and civil wars, such as the right to life, prohibition of torture and inhuman treatment and the right to fair trial and due process.

2.2.2. Other Cases

It must also be indicated that the Inter-American Convention on Human Rights and also the Inter-American Court of Human Rights have, over the years, dealt with various questions of humanitarian law in different countries of Latin America, always through the

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316 Hopkins, op. cit., supra. chapter 4, n.461, p.612.

317 Ibid.

318 Americas Watch Report: Human Rights in Nicaragua. 1984, p.14.

319 Ibid, p.7.

320 Ibid.

medium of human rights.

In its report on the situation in Uruguay (1977) the Commission laid down, in effect, the minimal rules which must be observed by the Government in its treatment of captured combatants and political prisoners in general. It stated in this respect:

> "The Commission has repeatedly condemned practises used by groups which, in an attempt to impose their political and ideological opinions, resort to all forms of criminal activity, such as murder, kidnappings, assault, maintenance of private jails and cruel treatment. On the other hand on other occasions the Commission has generally maintained that the authorities cannot deprive subversives of the minimal treatment to which enemy combatants and prisoners are entitled both during international and during armed conflict that are not of an international nature."[321]

The Commission held also that the holding of detainees in prison for long and unspecified periods, without any charge being brought against them, even when it is allowed under special legislation, is a clear violation of human rights. Detainees have the right to fair trial and to due process of law.[322] The Commission arrived at the conclusion that captured insurgents must be treated as prisoners of war, even in situations of internal conflicts, hence it went even beyond what Article 3 and Protocol II lay down for this category of victims.

The Commission and the Court also in many instances, dealt with the problem of States of emergencies and disappearances of persons. These problems, in fact, always arise in situations of internal conflict. In connection with the question of situations of emergency, the Inter-American Court on Human Rights in an Advisory opinion on **habeas corpus** in emergency situations, requested by the Commission, declared:

> "The Court must also observe that the constitutions and legal systems of States parties that authorize expressly or by implication the suspension of the legal remedies of **habeas corpus** or of 'amparo' in emergency situations cannot be deemed compatible with the international obligations imposed on these States by the Convention."[323]

In effect, the Court added a new non-derogable right which must be observed in situations of emergencies, since this right does not appear in the list of non-derogable rights in the Convention (Article 27/2) and there is no doubt the respect of **habeas corpus** in situations of civil war will benefit greatly the victims of war, since in such a situation arrests are frequent and abuse commonplace.

The Commission, in one of its recommendations to member States, considered that:

> "...[E]ven in emergency situations stemming from political upheavals, an attempt be made to hold to a minimum the restriction on fundamental rights or the violations of such rights; particularly that the death sentence not be imposed for political offences or for common crimes linked to political offences, and that steps be taken for the proper punishment of those who indulge in excesses of violence, in acts of cruelty or torture, in abusive attacks on or affronts to personal honor and human

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[321] Op. cit., supra. n.310, p.39.

[322] Ibid, p.40.

[323] Inter-American Court of Human Rights. Advisory Opinion No. 8/87 of January 30th, 1987. 27 ILM, 1988, para.43, p.523.

dignity."[324]

On the other hand, the Court in its advisory opinion on Restrictions to the Death Penalty of September 8th, 1983 requested by the Commission made clear that:

> "The Convention imposes an absolute prohibition on the extension of the death penalty to crimes for which such a penalty was not previously proved for under its domestic law."[325]

This means that States which are confronted with civil wars and which have not the death penalty before those conflicts, cannot introduce such penalties even after the declaration of State of emergency. In this respect, the decision went beyond what Protocol II stipulates since the latter, as we have seen, does not contain an express prohibition on the introduction of the death penalty once civil wars erupt.

As to disappearances which are common practice in Latin- America, especially in cases of internal conflict, the Commission condemned this inhuman and cruel practice as a violation of the Convention on Human Rights. Thus, in its Annual Report for 1982/83 considered that the practice of disappearances:

> "Constitutes a very serious present or potential violation of such fundamental rights as the right to life, to freedom and to personal security and integrity of a human being. Moreover, it places the victim in an absolutely defenceless position, with serious violation of the rights to justice, to protection against arbitrary arrest and to due process of law."[326]

Thus, on the basis of violations of certain fundamental human rights contained in the Convention, the Inter-American Commission was able to make resort to disappearances which are not prohibited expressly in the Convention a violation of the Convention. Thus, again through the vehicle of human rights rules and instruments, inhuman practices, which are commonplace in internal conflicts, are made illegal.

On July 29th, 1988, the Inter-American Court of Human Rights for the first time dealt with the question of forced disappearance in Velasquez Rodriguez Case, against the Government of Honduras. The Court made several important pronouncements in regard to the question of disappearance and also on the limits of State power. It noted that:

> "The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."[327]

The Court then added that:

> "...[I]nternational practice and doctrine have often categorized disappearances as a

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[324]Burgenthal: op. cit., supra. n.310, Part 3. Cases and Decisions, Vol.4, 24 issued May 1983. Release 83.1 1983, p.13.

[325]Ibid, Vol.4, 25.1. Issued Nov. 1986. Release 84-2, p.33 (Advisory Opinion No.3/83 of Sept. 8, 1983).

[326]Ibid, Vol.4, 1. Issued Nov. 1986. Release 86.1, p.1.

[327]Inter-American Court of Human Rights: Judgment in Velasquez Rodriguez case (forced disappearance and death of individual in Honduras) July 29, 1988. 28 ILM, 1989, para.150, p.321.

crime against humanity, although there is no treaty in force which uses this terminology".[328]

Then the Court invoked the basis upon which it considers disappearance as illegal and hence, a violation of the Convention. First, it stressed that:

> "...[W]ithout question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action."[329]

The second ground upon which it considered that disappearances are a violation of the American Convention on Human Rights was stated in this fashion:

> "The practice of disappearances, in addition to directly violating many provisions of the Conventions [especially Article 4 The Right to life]...constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention"[330].

It then added that:

> "...[T]he existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner to guarantee the rights recognized in the Convention."[331]

The Court in fact, found Honduras responsible for violating the Convention and ordered the State to pay the necessary reparation to the victim's family. Thus, the machinery of the human rights instrument has, in fact, led to the establishment of an effective control for the application of some fundamental humanitarian rules, by holding the legal Government responsible legally for some actions which are widespread in internal conflicts, such asdisappearances. The primary beneficiaries from such control are the real victims of internal wars.

As a conclusion, it seems to me that the practice in the context of Latin America is a very welcome legal development. It shows that the system of control of application of human rights seems to be more acceptable to States. First, because they agreed to it when ratifying the Treaty. Secondly, because the consent and the cooperation of the Government is always sought. Thirdly, the human rights approach does not raise the question of the legal status of insurgents and this indirectly does not in any way question the legitimacy of State power.

All these factors open the way for more protection of the victims of internal wars, in the absence of application of humanitarian rules contained in Article 3 and the Protocol II.

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[328] Ibid, para.153, p.321.

[329] Ibid, para.154, pp.321-322.

[330] Ibid, para.158, p.323.

[331] Ibid.

3. General Conclusions Concerning the Contribution of Human Rights Machinery to the Application and Enforcement of Humanitarian Rules in Internal Conflicts

(i) Because of the absence of any mechanisms for the control of application of Protocol II and Article 3 (apart from the right of initiative of the ICRC) and because of reluctance of States to proclaim even the application of those instruments in their internal wars, it seems that human rights instruments, with permanent organs, and through the existence of certain fundamental non-derogable rights, even in cases of emergencies and wars in those instruments, all these offer a good hope for inducing States to respect and apply those fundamental rights and freedom, which are identical with humanitarian law applicable in internal conflicts.

The use of human rights machinery has the advantage of escaping the condemnation as intervention in the internal affairs of State or as a breach of their sovereignty, since there is a wide consensus that human rights constitute an agreed limitation upon State sovereignty. Also, the system is to some extent effective, the international community in the UN framework, and also in the regional framework of the OAS, have demonstrated how human rights organs have sometimes induced States concerned to adopt measures which contribute to real protection of some fundamental humanitarian rules in cases of internal wars.

(ii) The importance of human rights organs in supervising the application of human rights is greater in times of internal conflicts. Since their role is to uphold that declaration of emergencies does not justify any gross violations of human rights. These organs can examine the necessity of such derogations and can always insist upon the application of certain fundamental human rights whatever the circumstances may be. This of course will automatically contribute to the making of such wars more humane, especially for the helpless victims.

(iii) Practice also shows in a very clear way that States have rarely condemned the actions of human rights organs in dealing with specific questions of humanitarian law, such as the protection of detainees who committed offences in connection with the conflict, better protection of civilian population, the right of the victims to receive relief and assistance, and even of invoking humanitarian instruments, such as the Fourth Geneva Convention, Article 3 and Protocol II.

FINAL CONCLUSIONS

My research and study of the influence of the two important principles of contemporary international law, namely: sovereignty and non-intervention, on the development or lack of development of humanitarian law applicable in internal conflicts, has resulted in establishing the following points:

It is established beyond any doubt that the subject matter of humanitarian law, applicable in internal conflicts, touches directly, on the concepts of sovereignty and non-intervention. The reason being that the main aim of that branch of international law, is to regulate the conduct of the State vis-à-vis its own citizens, hence making the subject of their (the citizens) treatment, a matter which is no longer solely within the domestic jurisdiction of the State. It becomes a matter of international concern and subject to international law.

This prospect frightens many States, they prefer to keep their full discretion, which sovereignty and non-intervention give them, so they can subdue their internal enemies, who take up arms against them swiftly, and without regard to any international legal restraints.

The first and second chapters, which dealt respectively with sovereignty, and non-intervention from the point of view of their meaning, content, limitations, and their place in contemporary times, establish that those two principles, are still the basis of the organization of our world.

The Westphalian model of the organization of international society, based on the existence of independent territorial units, on pluralism and distinctiveness still survive.

Thus, the claims entertained by some quarters that the State model with its inevitable component parts, sovereignty and non-intervention, has reached its end (mainly because the nature of our present world problems, such as disarmament, pollution, under development etc., impose the necessity of universal solutions). These predictions have not materialized in practice.

In fact, State practice in its different forms (treaties, UN Declarations, States pronouncement etc.,) unequivocally confirms the contrary, and establishes that sovereignty and non-intervention are not withering away. They are maintained in effect, as the most important pillars of present day international relations.

Moreover, it is asserted that sovereignty and non-intervention, are essential for the weaker units of the international community. They (the two principles) help the peoples of those States to keep their national identity, protect their right to decide freely their political and social organization, and eventually can be used as legal and political weapons in their fight against inequality.

However, there is a near general consensus, that sovereignty can no longer be interpreted in our present era along the lines of a Hobsian outlook of international society, in other words sovereignty is not absolute in character. Since many developments in the context of international law and international relations, for example in the fields of the use of force and especially of human rights (which concerns us in this thesis) have restricted the sovereign rights of States, the effect of this limitation (of human rights) in the words of D'Amato is:

> "... [H]uman rights in international law means that the State is not the sole entity that

possesses rights, it is not the alpha and omega of international law".[1]

This limitation of human rights, is very important in the context of internal conflicts, it indicates clearly that the relationship of the citizens to their own State even in these dire situations of conflict, where the most inhuman practices may be resorted to, is somehow regulated by international law.

In fact, human rights law contains the idea of non-derogable rights (the right to life, prohibition of torture and inhuman treatment, and the right to fair trial and due process of law). These rights constitute, it is asserted the point of meeting, between human rights and humanitarian law. Since those 'sacrosaint rights' can be very useful for the protection of the victims of internal wars, even when the State does not acknowledge the application of instruments of humanitarian law, to the conflict (Article 3 of the Geneva Conventions and Protocol II of 1977).

The UN has in fact, used human rights as a door through which, it discussed issues of violations of human rights in internal conflicts. It seems that States have never tried to justify those violations, by invoking the pleas of sovereignty and non-intervention. This indicates that they accept human rights as a real limitation on their conduct both in peace and in times of war and emergencies.

Furthermore, it is established that self-determination in our present era, that is in the post-colonial period, means essentially respect for individual and group rights within sovereign States. Self-determination is the other name of respect of human rights. Thus, a State which does not conduct itself in line with the requirements of human rights forfeits its right to claim the benefits of its sovereignty.

However, it must be indicated that this fundamental limitation (of human rights), even if no one doubts its importance, does not mean that human rights are enough for a better treatment of the victims of internal wars. Those victims in fact, need some other rules and standards which can only be satisfied by humanitarian law, such as the right to correspond for those detained or interned for offences relating to the conflict, the right to receive relief and assistance, the right not to be displaced and all the rules connected with the means and methods of warfare.

After these preliminary points, I will turn now to the main conclusions concerning the influence of sovereignty and non-intervention, on three specific areas of humanitarian law applicable in internal conflicts, namely: The definition of internal conflicts, the protection of the victims of such conflicts and the question of compliance and implementation of humanitarian law in the context of internal conflicts. These subjects were dealt with in Chapters III, IV and V, respectively.

A. On Definition of Internal Conflicts

1. In Customary International Law

It seems that customary law gave priority to the sovereignty of the State and non-intervention in its internal affairs, in the sense that whenever established Governments are

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[1] D'Amato, op. cit., supra. chapter 5, n.1, p.89.

faced with internal armed opposition, customary law protects them. That law gives them (the Governments) full discretion to deal with the situation on their terms. This is implicit in the fact that Governments faced with such upheavals are not obliged to recognize the application of the laws of war to the internal conflict.

However, it must be stressed that the institution of the recognition of belligerency, was in fact the legal device through which customary law became relevant to civil wars. That institution (of recognition of belligerency) clarified to some extent the criteria which must exist in an internal conflict, in order to be regulated by international law. Thus, it has altered the term 'civil war', from a nebulous concept to an identifiable legal term. This means that the recognition of belligerency has afforded the legal framework for the definition of civil wars in customary international law.

On the other hand, it is asserted here that the notions of sovereignty and non-intervention, were largely behind both the high thresholds (which must exist in the internal conflict in order to qualify for the granting of the recognition of belligerency), and also the rarity of cases of the granting of such recognition.

Thus, States by demanding very high thresholds for civil wars (in terms of high intensity, duration, effective control of the national territory, and the existence of a political organization of the insurgents) to which the laws of war would apply. They in fact, wanted to retain their full discretion in the overwhelming cases of civil wars, which do not attain such thresholds.

However, even when the civil war attains these very high thresholds, States (which granted the recognition of belligerency) always try to play down the legal significance of such an act, by insisting that their action (of recognition) was directed only by humanitarian motives. This in order to deny any legal status to their opponents, and by the same token maintain their claim that they (States) are the only legitimate authority.

Besides, the granting of belligerent rights to the insurgents by third States is always seen by the established Government fighting an internal war, as an unfriendly act, and therefore, an intrusion in its internal affairs. This fact in itself, does not encourage third States, to rush to such recognitions, in cases of internal conflicts taking place in other countries. Moreover, it is established here that the rarity of cases of internal wars in which recognition of belligerency was granted, confirms that sovereignty and the fear of intervention were behind such a state of affairs.

It seems that established Governments prefer to conduct their war against their internal enemies in accordance with their full discretion, which sovereignty gives them, and not according to the rules of the laws of war. The latter would restrict their freedom of choosing the means and methods of dealing with their internal enemy, would give respectability to the insurgents, and would finally signal that the established Government is far from being in control of the situation in the country.

On the other hand, because the recognition of belligerency was in fact, a limitation of State sovereignty, in the sense that once it has been granted, the Government in power has to apply the laws of war. States faced with internal wars, claimed (on the basis of their sovereignty, and the duty of other States not to intervene in their internal affairs), that they are the sole power able to acknowledge the existence of the conditions and the criteria of

the recognition of belligerency. This clearly means that sovereignty has the upper hand in that process.

Similarly, it is asserted here, that sovereignty and non-intervention were among the principal causes of the obsolescence of the institution of the recognition of belligerency. Since such an obsolescence would serve the interests of Governments fighting internal conflicts, and even the interests of third States, the former because in the absence of such recognition. There are no legal restrictions on their power to crush their enemies, and the latter (third States) it gives them, the total freedom either of meddling in the internal conflicts of other States, or abstaining from any action, without being obliged to resort to the recognition of belligerency.

Finally, it is my belief that the institution of recognition of belligerency was in a way, an attempt to bring the notion of objectivity into the realm of international law, in the sense that whenever some conditions of fact and law are present in a situation of an internal strife, the laws of war would apply.

However, in the decentralized system of the organizations of international community, such an attempt has no chance of success, mainly because it conflicts with sovereignty and non-intervention. Objectivity requires the existence of a universal agency which is above the States and has the competence to take binding decisions and the capacity to enforce them.

In the absence of such an agency or institution (which is in itself a flagrant example of States' preference for sovereignty and non-intervention), the possibility that States might be guided by political and economic considerations in their decision to grant or withhold the recognition of belligerency, rather than objective and legal criteria, remains open.

2. In the Context of Common Article 3 of Geneva Conventions of 1949

In 1949, the ICRC, suggested a definition of 'armed conflicts not of an international character', which would in effect, cover a large segment of internal conflicts. It was the first attempt to define and regulate internal conflicts in an international instrument. However, the travaux préparatoires of the Diplomatic Conference of 1949, reveals that the principles of sovereignty and non-intervention were used extensively to limit to a greater degree any incursion into the domestic jurisdiction of States.

Two tactics have been resorted to. The first stressed that the ICRC definition was unacceptable, because the criteria included in it (definition), were not strong enough, which means that many internal conflicts would be regulated by international law.

States stressed at that stage that the condition for their acceptance of the application of the whole Geneva Conventions to armed conflict not of an international character was a strong and emasculated definition.

The definitions advanced especially by sovereignty-oriented delegations were designed expressly for the protection of the sovereignty of the State, and the prohibition of intervention in its internal affairs. The criteria suggested for such definitions, were very stringent, in fact, they were to a large extent, a mere codification of the recognition of belligerency in customary international law.

States wanted to make it clear, that their sovereignty must not be curtailed in any

situation of internal conflict, otherwise, their authority and legitimacy would be threatened. Their internal enemies would be indirectly encouraged to take up arms against them, because they know in advance that they would be treated in accordance with the laws of war.

The second tactic, which was eventually adopted, was based on the absence of any definition of 'armed conflicts not of an international character' in the text of common Article 3. It was in fact, a compromise formula, since the need for a definition in the text of the article, was dropped, when it was agreed that only some minimum general rules of humanitarian law, would apply to internal conflicts instead of the whole Geneva Conventions. This means that the restrictions on State sovereignty, and the chances of intervention in its internal affairs, facing internal conflicts, were kept to a minimum.

On the other hand, it must stressed that the **travaux préparatoires** do not suggest that by adopting the second tactic (absence of definition). States which tried to define 'armed conflicts not of an international character' have abandoned their earlier definitions, thus, opting for lower thresholds in the definition of common Article 3. Although, it seems to me, that humanitarian spirit, and interpretation in good faith and in accordance with the object and purpose of Article 3, would be clearly against such an approach.

However, the absence of definition, and the absence in the text of Article 3, of any indication, of which authority has the power to acknowledge and verify the existence of 'an armed conflict not of an international character', has in practice played directly into the hands of States fighting internal strife.

Thus, they argued in most cases of such conflicts (which occurred after the entry into force of Geneva Conventions) that they did not fall in the ambit of Article 3. Moreover, they insisted, that they are the only legally responsible authority, which can decide the existence of such conflict. In other words, any attempt by any third party to intervene in that field (of the determination of the existence of armed conflict not of an international character) would be easily seen as unwarranted intervention in their domestic affairs.

The UN practice seems not to contradict the above the contention, at least until the beginning of 1970s. However, thereafter, the UN (through the idea of combatting widespread, massive and gross violations of human rights) has stressed the all importance of the application of common Article 3, to ongoing civil wars, in order to mitigate the sufferings of the victims of such unhappy experiences. Thus, the UN has not hesitated at least indirectly, to determine and indicate the existence of 'an armed conflict not of an international character'.

3. Protocol II

In this protocol, which is devoted wholly to the question of internal conflicts, a definition of 'armed conflicts not of an international character' was adopted. However, it seems on that precise issue (of definition), sovereignty-oriented States (most Third World countries, Canada, Rumania and to some extent the UK) have won the day. The criteria of the definition, were greatly emasculated, so as to make the application of the protocol very limited in practice.

The attempt of more humanitarian-oriented delegations (the Holy See, Sweden, Norway,

Italy and to a certain degree Egypt and most Socialist countries) to lower the thresholds of internal conflicts, contained in the definition (in order to make the protocol apply to a greater number of civil wars) failed.

Since sovereignty oriented-States made it clear, either a stronger definition, or no protocol at all. In their view, the lowering of the thresholds of the definition would result inevitably, in the breach of their sovereignty and hence, would open the door for foreign intervention in their domestic affairs.

On the other hand, it seems that the **travaux préparatoires**, of the Diplomatic Conference (1974-1977) establish that the overwhelming majority of States felt the need for a clear definition of 'armed conflicts not of an international character', in order to avoid the imperfections of Article 3. However, many States used the device of definition as a real vehicle for strengthening their sovereignty and preventing any third party intervention in their internal affairs, simply by making the threshold of internal conflicts very hard for insurgents to gain.

In this context, Article 1 of the Protocol ignores the demands of guerrilla warfare, which is the main method of warfare used by insurgents. Since the definition stresses the importance of the control by the insurgents of a part of the national territory.

Similarly, in regard to the important question concerning the moment at which the protocol would be applicable, Article 1 is silent. But, there is evidence to the fact that some sovereignty oriented countries continued, even after the adoption of Protocol II, to stress that the acknowledgement by the established Government of the existence of an armed conflict not of an international character, was a **conditio sine qua non**, for the application of Protocol II.

Furthermore, they indicated that no third party can intervene or verify such determination. In other words, they claimed that sovereignty gives them that right (of determining the existence of an internal conflict) alone.

However, it is my view, that in practice, the objective character of the criteria of Article 1 of the second protocol can be apparent, if the legal Government acts in good faith in the fulfilment of its international obligations. Moreover, it seems to me, that the arguments of human rights, and the need for the protection of the victims of non-international conflicts, would go against any pretended exclusive right of the established Government in that field (determination of the existence of an armed conflict not of an international character), in the meaning of Article 1.

Consequently, it seems that on the level of the issue of definition of internal conflicts, as from customary law to Protocol II, the principles of sovereignty and non-intervention, have been used, either directly or implicitly, by States to block any real progress in this field.

Thus, even if Article 3 and Protocol II can be considered as a timid limitation upon State sovereignty in the field of definition, many loopholes exist in both instruments. This makes sovereignty-oriented States free to accept or reject the application of those instruments to their internal wars.

However, there is hope that international organizations and especially, the UN can be instrumental in acknowledging the existence of internal wars to which either Common

Article 3 or Protocol II apply, whenever, some objective criteria exist in an internal conflict, such as the intensity, duration, organization of the rebels etc.

The UN used in fact, its concern for the protection of human rights, as a basis for its intervention in those situations (the case of El Salvador illustrates that). However, everything depends in the end on the political will and determination of the international community to give more respect to the plight of the victims of such wars rather than to some absolute conceptions of sovereignty and non-intervention.

II. The Protection of the Victims of Internal Wars

A. In Customary International Law

In customary international law, the laws of war can be applied only, when the recognition of belligerency takes place. Thus, whenever, such recognition is granted, the sovereignty of the State is curtailed to some extent. Since the victims are under the protection of international law and not the national law.

In this context, captured insurgents are to be treated as prisoners of war, rather than common criminals, also the sick and wounded are under the protection of some basic humanitarian standards. However, the treatment of the civilians, and especially the 'disloyal citizens' (those who support the insurgents) was very harsh (in order to inhibit them from helping the enemy). In fact, the absence of clear rules which regulates the fate of civilians in customary law, meant that States were free to devise internal rules which protect State sovereignty, rather than respecting fundamental humanitarian considerations.

On the other hand, in the absence of the recognition of belligerency (which is the usual case in the overwhelming majority of civil wars), customary international law, leaves the State totally free, claims of sovereignty and non-intervention reign supreme, humanity and moderation, have no place.

The practice suggests that in those situations, there is no evidence that States felt bound by any other standards than the dictates of their sovereignty. The victims were harshly treated, the idea of human rights was not born yet.

B. The Protection of the Victims of Internal Conflicts under Common Article 3

It seems that the tragedies of the Spanish Civil War, coupled with the rise of the idea of human rights, and the ICRC efforts to humanize civil wars have in different degrees, led to the adoption of some fundamental rules of humanitarian law for the protection of the victims of armed conflicts not of an international character.

Those rules constituted modest, but important inroads into the sovereignty of the State, since Governments are no longer free to deal with their internal enemies, as they like. However, it is asserted here, that States used specifically the arguments of sovereignty and non-intervention, to deny the application of the whole Geneva Conventions to internal conflicts.

Thus, it was fiercely argued in the case of civilians for instance, that because they hold the nationality of their State, they are bound by the duty of allegiance, hence they were not eligible for any kind of extensive international protection.

Captured insurgents are still seen as mere criminals, protected only from summary

execution, in this sphere the claims of sovereignty and non-intervention were specifically used to destroy any attempt at giving those insurgents any legal status.

In practice, however, even the modest humanitarian standards contained in Article 3, were not adhered to faithfully by States in the overwhelming majority of cases, they still hold to their sovereign rights and freedoms, in choosing the means for eliminating their enemy, the generality and vagueness of those standards have helped in opening the door to abuse.

Moreover, it must be established here that the generality of the rules of Article 3, have not hindered the United Nations action, thus it stressed in its practice that respect for human rights, leads logically and necessarily to the imposition of real restraints on methods and means of warfare, and hence to a greater and real protection of the victims of internal wars.

C. In the Context of Protocol II

It is asserted here, that the subject of the protection of victims of war constituted the main contribution of Protocol II to humanitarian law applicable to internal conflicts. Thus, although the principles of sovereignty and non-intervention, have been used to kill many important rules on methods and means of warfare, and also some important rules concerning the protection of the victims of war (as we have seen in Chapter IV Section III), the second protocol elaborates many important rules for the protection of the victims of internal wars.

In this context, the civilian population is protected in a very effective way. Many important specific rules have been adopted, to limit the freedom of manoeuvre of the established Government and the rebels alike. Thus, compared with Article 3 of the Geneva Convention, there is no doubt that protocol has filled many normative gaps, which were not regulated before. Articles 13-17 witness to that effect.

It seems also that the philosophy of human rights has induced States to try to give thorough protection to civilians, since the rules contained in the Articles dealing with that protection, are all designed to protect the fundamental human rights, of rights to life and prohibition of inhuman treatment in all its forms.

Similarly, the sick and wounded, together with persons who care and assist them, and the installations used for that purpose are all protected by many detailed rules. In this context, no State dared to see in these rules a violation of its sovereignty and intervention in its affairs, the idea of humanity reigned supreme in that arena.

Captured insurgents and civilians detained or interned in connection with offences committed in relation with the conflict (although still basically considered as criminals) are afforded better protection. The conditions of their detention and internment are regulated on a more humanitarian basis. Furthermore, the questions of trial, judgment and the sentencing of this category of victims, have been all fixed in a very humanitarian spirit.

Thus, although the claims of sovereignty and non-intervention still hold the balance, because the captured insurgents and civilians tried for offences related to the armed conflict are still basically seen as common criminals. The restriction of State's sovereignty is that those criminals are not tried and sentenced according to the Government dictates, but in accordance with some general standards and rules.

It seems that in connection with the protection of the victims of internal conflicts, we can confidently conclude that real developments have been enregistered. In my view, the concept of human rights has paved the way for the relative ease by which States accepted those rules.

There was in fact, a general consensus among States attending the Diplomatic Conference (1974-1977), that the victims of internal strife should be effectively protected. The human rights limitation on their sovereignty has taught them that adherence to humanitarian norms in their treatment of their citizens, would not in any way, challenge their sovereignty or open the way for foreign interference.

Sovereignty must mean among other things, that the established Government must respect certain basic standards of human treatment and human dignity. Thus, respect for fundamental human rights in all circumstances must be the real basis of the legitimacy of authority and power, not force and totalitarianism.

It must be noticed, that with a good faith interpretation and in accordance with the object and purpose of the treaty (Protocol II), the rules concerning the protection of the victims of internal wars contained in Protocol II, can be interpreted, as implicitly containing many other important rules on methods and means of war, and many other humanitarian and human rights rules.

In practice, although no State has accepted specifically the application of Protocol II to its internal conflicts (with the possible exception of El Salvador), it seems at least indirectly, that the rules of Protocol II, on the protection of the victims of war had no real influence upon the conduct of civil wars over the last 10 years. There are numerous examples of brutality and cruelty occurring in many places.

However, the case of the Nicaraguan Civil War illustrates that the Government made some effort to adhere to certain humanitarian standards, not through the acceptance of the application of humanitarian instruments (Article 3 or Protocol II) but through an approach based on human rights. Thus, it accepted many of the recommendations of the Inter-American Commission on Human Rights in the field of the protection of the victims of war. The reason seems to be that an approach based on human rights is preferred by Governments, because it does not involve any implications that the State accords any legal status to the insurgents.

II. The Question of Compliance and Implementation of Humanitarian Law in Internal Conflicts

A. In Customary Law

It seems that in customary law, the concepts of sovereignty and non-intervention have in fact, blocked any development of any machinery for the control, supervision, enforcement or implementation of humanitarian law, either in international or internal conflicts.

Thus, even in the law between States, the methods for securing compliance with its rules rested essentially on self-help, good faith and reciprocity. The concept of sovereignty was absolute, no third party machinery or intervention were thought of or proposed.

Reprisals, and the taking of hostages were the traditional means of forcing the enemy to conduct itself with the laws of war, and they were both inhuman. They fell always on the

innocent.

Sovereignty meant in the eyes of the established Governments, that no third party could actually judge their adherence to the laws of war, and any attempt in that direction could be characterised as intervention.

Moreover, Governments were not ready to punish those of their soldiers who committed war crimes. Under sovereignty, they are protected whenever they are defending the State even, in doing so, they commit horrible crimes.

B. In the Context of Article 3

It seems that the same tradition of customary law continued. States were, in fact, more concerned about punishing insurgents for the violation of their national laws, rather than their breach of the rules of humanitarian law. Sovereignty and non-intervention were best served by punishing insurgents for high reason, rather than breach of some humanitarian standards.

The institution of protecting power was rejected on the express ground that it constituted a breach of sovereignty and an intervention in the internal affairs of States. No express prohibition of reprisals is found, which was in itself a clear gap. However, Article 3 expressly prohibited the taking of hostages, which must be seen as an advance.

The practice shows clearly that the absence of any means of controlling the application of Article 3, means that violations go unpunished. Thus, the arguments of sovereignty and non-intervention which were used to end any attempt at instituting a real machinery for the control of application of humanitarian law, meant in practice, that many deaths and inhuman treatment of victims cannot be prevented.

On the other hand, the ICRC has been given what is known as 'the right of initiative' which allows the committee to give relief and assistance to the victims, however, on the express consent of the State concerned.

The ICRC through its right of initiative has, in practice, contributed effectively to the amelioration of the conditions of the victims of war, and especially prisoners. Hence it contributed indirectly to the implementation not only to the minimum rules of Article 3, but also to other humanitarian and human rights standards. However, the consent of the Government must be sought in any action of the ICRC, which means that respect of the sovereignty is the cornerstone of any real contribution of the ICRC in the context of civil wars.

Moreover, it must stressed that the absence of penal sanctions for violations of the rules of Article 3, coupled with the adoption of amnesty laws at the end of internal conflicts meant, in practice, that imperatives of political expediency overrode demands for respect for the law.

C. In Protocol II

Sovereignty and non-intervention arguments have been used extensively by sovereignty oriented States, to kill any attempt at instituting any procedural requirements for the control of application of the rules of Protocol II. The only means adopted are good faith of the parties, and the dissemination of the rules of the Protocol.

This indicates clearly that suspicion of intervention and fear of breach of sovereignty had put an end to any speculation of the possibility of third party control.

Even the mention of the ICRC right of initiative was not included, although it survives under Article 3. However, it seems, that practice shows that the instruments and organs of human rights can fill the gap in the area of controlling the application of humanitarian law, at least, to some extent.

The examples of the UN and the Inter-American experiences in the context of some internal conflicts (especially El Salvador and Nicaragua) are cases in point. The explanation of the tacit acceptance of States of this approach lies in the fact, in my opinion, that the use of human rights machinery has the advantage of escaping the condemnation as an intervention in the internal affairs of States, or a breach of their sovereignty. Because there is a general consensus that human rights are a legal limitation of State sovereignty.

The general conclusion then of this thesis is that sovereignty and non-intervention have been used in connection with the main three themes of humanitarian law applicable in internal conflicts (namely: definition the protection of the victims of war and compliance and implementation), in a very extensive way, either directly or indirectly.

They (sovereignty and non-intervention) have won the day in many instances, especially in the domain of definition of internal conflicts and compliance with humanitarian law. However, many inroads into State sovereignty have been made, notably in the area of protection of the victims of internal war.

Human rights and their development have, in different ways, influenced and will influence in future developments in the field of humanitarian law applicable in internal conflicts. Human rights show to the States that respect of the fundamental rights of individuals and groups, in peace or emergency and war times, is a sure way of gaining legitimacy for their authority. They (human rights), it is asserted, are not a negation or challenge to sovereignty, they are in fact another name for exercising sovereignty in a civilized way.

Thus, despite all the cruelties and horrors of civil wars, and the efforts of sovereignty-oriented States, we can safely advance that many normative developments have been enregistered in Article 3 and Protocol II of 1977. This has strengthened the humanitarian law applicable in internal conflicts, at least from the normative point of view. In fact, the mere adoption of Article 3 and the Protocol II must be seen in themselves as fundamental advances for humanity.

A final observation concerning the value of normative and legal restraints in diminishing the evils of civil wars is in order in my view. One should note that there are many people who maintain that internal conflicts are always and will be always cruel and ruthless, for the simple reason that each side in the conflict, seeks a total victory over its opponent, and not a truce or a compromise.

In such an atmosphere of hatred and vengeance, any talk about legal restraints is pointless, irrelevant and impractical. According to this view, neither the test of morality nor restraints of legal norms have much, if any place, in situations of civil wars.

However, it seems to me, on the contrary, legal restraints are very important in order to attain that very victory in cases of those unhappy experiences (civil wars). Otherwise,

victory will be equated with a total extermination of a large segment of the population.

This state of affairs in my view, is not in the interests of the winning party itself, since its chances of gaining real political support among the governed would be very slight indeed. In fact, the lack of political support would encourage the reign of totalitarianism, and violations of basic human rights of the population, and thus the victory of one party in gaining political control will result in the loss of the population of their freedoms, which would in its turn open the way for further turmoil and war.

In my opinion, if legal restraints especially norms concerning the protection of the victims of war, are not respected, the fight may be turn into a 'dirty fight'. The latter has been correctly defined by Nigel in these terms:

> "...[T]o fight dirty is to direct one's hostility or aggression not at its proper object but at a peripheral target which the proper object can be attained indirectly".[2]

In my view, fighting dirty in the context of internal conflicts, by attacking the civilian targets for example, will never result in a lasting victory. The experiences in Algeria and Vietnam have firmly established that attacking the civilians, has not resulted in the breaking of the morale of the population or the destruction of the insurgent movement.

On the contrary, the breeding ground for the insurgents widened and recruitment rose when the violations of humanitarian law become more brutal. This means that the normative restraints contained in Article 3 and especially Protocol II can be very useful in reducing events of underhanded tactics. Consequently, this would restrict resort to total war, diminish the sufferings of the victims of internal wars, and by the same token make sovereignty more human.

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[2] T. Nigel: War and Massacre, in Ch. Beitz, M. Cohen, T. Scanlon and J. Simons (eds.): International Ethics. PUP, Princeton, New Jersey, 1985, p.64.

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