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Eugene D. Fryer

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Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors

General Applicability of the Law of War to International Armed Conflict

Parties to the many substantial interstate armed conflicts since World War II have been disinclined for various generally political reasons to characterize those transactions as "war"¹ or their respective roles as those of "belligerent."² Instead, conflicts over time have been euphemized as "police actions" or

*J.D. University of Georgia; LL.M. Georgetown University Law Center; Captain, U.S. Army Judge Advocate General's Corps; Assistant Professor, U.S. Army Judge Advocate General's School. The views of the author do not purport to reflect the positions of the Department of the Army or Department of Defense.

¹A leading authority characterizes war as a contention by means of a violent struggle, through the application between two or more states of armed force for the purpose of one overpowering the other and imposing a settlement of his will. H. LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW*, Vol. II, Longman's, London (7th ed. 1952) (hereinafter Lauterpacht) 202. A declaration or ultimatum of war is required though seldom resorted to under the Hague Convention No. III Relative to the Opening of Hostilities of October 18, 1907, Article 1. Lauterpacht emphasizes that the violation of this requirement was charged against the major German war criminals in the indictment of the International Military Tribunal at Nuremberg. *Id.* at 293.

²The principles governing recognition of belligerency are essentially the same as those relating to the recognition of States and Governments. Certain conditions of fact, not stigmatised as unlawful by International Law—the Law of Nations does not treat civil war as illegal—create for other States the right and for some writers, the duty to grant recognition of belligerency. These conditions of fact are: the existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; and the practical necessity for third States to define their attitude to the civil war. Without the latter requirement recognition of belligerency might open to abuse for the purpose of a gratuitous manifestation of sympathy with the cause of the insurgents. In the absence of these conditions, recognition of belligerency constitutes illicit interference in the affairs of the State affected by civil disorders—an international wrong analogous to the premature recognition of a State or a Government. Refusal to recognize belligerent status notwithstanding the existence of these conditions must be deemed contrary to sound principle and precedent. Lauterpacht, *supra* note 2 at 249, 250.

The rights and obligations which may arise in the case of recognized belligerency include the obligation of third parties to observe neutrality toward the belligerents or otherwise clarify their

“pacification”³ or “fraternal assistance”⁴ and so forth, despite their bare distinguishability from the common understanding of war in terms of parties, methods and consequences.

One product, whether direct or not, of this aversion to the straightforward terminology of war and belligerency has been the chronic dispute over the firm applicability of the Geneva Conventions to the very type of international armed conflict in which they should be operative.⁵ Instead, hostile states either have ignored the question of the Conventions’ applicability⁶ or by political semantics have tenuously argued their inapplicability, or, to the same end, have represented their voluntary application, in whole or in part, leaving the question of the mandatory applicability of the law of war unsettled.⁷

This record of ambiguous state practice is the contextual background against which the present applicability of the Geneva Conventions to international

relationship. The belligerent parties under law are entitled to blockade, visit, and search and seize contraband articles on the high seas. The advent of recognized belligerency unquestionably triggers the application to the conflict of the full Geneva Conventions of 1949. *See specifically* Common Article 2, Geneva Conventions I-IV, *infra* note 5.

³Such themes pervaded the early periods of independent state action in the Suez (1956), Lebanon (1958) and the Dominican Republic (1965) before collective international sanction could be obtained. Detailed treatment of these general themes may be found in M. S. McDOUGAL AND F. P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, (New Haven: Yale Univ. Press, 1960) 253.

⁴Soviet Union action in Hungary (1956) and Soviet Union-Warsaw Pact measures with regard to Czechoslovakia (1968). This outlook is formulated as Soviet legal doctrine by G. I. TUNKIN, *THEORY OF INTERNATIONAL LAW* (W. E. Butler trans.) (Cambridge: Harvard Univ. Press, 1974).

⁵Common Article 2 of the four 1949 Geneva Conventions states the conditions under which the full protections of those conventions are applicable:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Common Article 2, Geneva Conventions of 12 August 1949, specifically: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of the Armed Forces in the Field of August 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362 (hereinafter, Geneva Convention I); The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949, [1955] 3 U.S.T. 3219, T.I.A.S. No. 3363 (hereinafter, Geneva Convention II); The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364 (hereinafter, Geneva Convention III); The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365 (hereinafter, Geneva Convention IV).

⁶Pakistan and India in Bangladesh (1971-72); Israel and the Arab States (1966 and 1972).

⁷As to inapplicability: North Vietnam in the recently ended Indochina conflict. The United States in 1974 indicated that it had voluntarily observed the Geneva Conventions, presumably to the full scope; *see* Note from the Government of the United States to the Federal Political Department of the Swiss Confederation, at note 10, index to *Treaties in Force*, January 1, 1975, at 393. The South Vietnamese government followed this line while the Provisional Revolutionary Government (Viet Cong) maintained silence.

armed conflict must be considered. State practice has proven initially the clear reading of the jurisdictional extension of Common Article 2 of the Geneva Conventions to be unfounded by state practice. Principal Western commentators on traditional international law do not admit of any form of formally cognizable international conflict other than declared war or a sub-war contest between formally recognized belligerents.⁸ This gap between traditional theory and operational conditions has permitted the conduct of substantial international armed violence free of the regularizing and humanizing influence of the Geneva Conventions.

Applicability of the Law of War to Internal Armed Conflict

Over the same span of years the incidence and intensity of noninternational, or internal, armed conflict has increased, often surpassing interstate clashes in terms of destruction and suffering.⁹ The Geneva draftsmen of 1949 had not neglected to provide a humanitarian legal regime for such conflicts. Under the provision which was finally approved, the full protections of the four Conventions would not apply, but instead a system of minimum protection according to stipulated standards.¹⁰

This minimum approach to the humanitarian standards applicable to internal armed conflicts, as most analyses make clear, was a compromise between those on the one hand who advocated the extension of the full protections of the Geneva Conventions regardless of the characterization of the conflict and those, on the other, who tended to view noninternational conflict as strictly within the police jurisdiction of the territorial sovereign.

⁸Hague Convention No. IV Respecting the Laws and Customs of War on Land of October 18, 1907, 36 Stat. 2277; T.S. No. 539; paragraph 6, Preamble and the Geneva Conventions of 1949, Common Article 2, *supra* note 1. See Lauterpacht, *supra* note 1 at 248.

⁹The Algerian war of independence from France of 1954-62; the abortive rebellion of Biafra from Nigeria of 1967-70, and the Indonesian anti-Communist upheaval of 1965-66. The recent Angolan struggle may be included in this class.

¹⁰Those standards are set out, in part, as follows:

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

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

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b. taking of hostages;
- c. outrages upon personal dignity; in particular, humiliating and degrading treatment;
- d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Despite the built-in deference of Common Article 3 of the 1949 Geneva Conventions for the primacy of law during internal uprisings against an incumbent government, the applicability of the article has been skirted in even the most massive internal conflicts since 1949.¹¹ Governments nevertheless have sought to preserve maximum flexibility, in the national interest, in dealing with internal armed conflicts by avoiding such formal international legal obligations as might arise once the conflict was acknowledged as more than purely local. Such obligations, in addition to those imposed on both sides to an internal conflict by Common Article 3 of the Geneva Conventions, might include others which attach in favor of the challenging group if its status as "insurgent" is thought to have been recognized by virtue of their treatment by the incumbent in any manner as a legal personality.¹² In this respect, state practice concerning the application of Common Article 3 to internal conflicts has produced the same unsettled situation as plagues the general applicability of the Geneva Conventions to international conflict, described above. The result has been the failure of Article 3, since 1949, to meet the minimum humanitarian expectations of its drafters.

Contemporary Efforts to Bring Internal Conflicts Within the Law of War

Accordingly, since 1968, experts of various international agencies and of the governments of most states have worked to close the gap between the 1949 Conventions and modern conditions of both international and internal armed conflict. In addition to extending fuller Convention protection to combatants and civilians during both types of conflict, these proposed supplemental Protocols¹³ would update and make more explicit the substantive and procedural protections of all four 1949 Conventions under conditions of both international and internal conflict.

Two provisions of the proposed protocols which have reached hard bargained

¹¹Note 9, *supra*.

¹²Insurgency, so far as foreign states are concerned, results, on the one hand, from the determination of those states not to recognize the rebellious party as a belligerent on the ground that there are absent one or more of the requirements of belligerency. On the other hand, recognition of insurgency is the outcome both of the unwillingness of foreign states to treat the rebels as mere law-breakers and of the desire of those states to put their relations with the insurgents on a regular, although clearly provisional, basis. . . . W. W. BISHOP, JR., *INTERNATIONAL LAW, CASES AND MATERIALS*, 3rd ed. (1962), p. 396.

¹³Protocol I (International Armed Conflicts) hereinafter Protocol I, and Protocol II (Non-International Armed Conflicts), hereinafter Protocol II, adopted by the Main Committees to the Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict, in *Report (to the United States Secretary of State) of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Third Session, Geneva, Switzerland, April 21-June 11, 1976, dated October 15, 1976, Appendix D.

final draft greatly affect the current relationship of the law of war to internal conflict. Article 1 of draft Protocol I literally internationalizes certain formerly internal frays for purpose of the application of the full Geneva Conventions, as supplemented by the further protections of Protocol I.¹⁴ In the event this Protocol is approved and enters into force as presently written, parties thereto could no longer credibly deny full Convention applicability to facts which indicate an internal struggle for "self-determination."¹⁵

The second major impact of the draft supplementary protocols may be occasioned by the approval and entry into force of Article 1 of draft Protocol II, which extends Common Article 3 of the 1949 Conventions to all internal armed conflicts which are not "internationalized" as a result of Article 1 of Protocol I, and which at the same time are greater in magnitude than mere riot or banditry.¹⁶ The previously illusive concept of "insurgency" therefore may come closer to legal definition in this draft Article,¹⁷ and both incumbents and insurgents may find less latitude in the future to parry the application of Article 3 semantically to internal conflicts. In the foreseeable event that incumbent contestants in self-determination struggles further deny the international character of a political conflict, and the full application to it of the supplemented Geneva Conventions, the contest should nevertheless fall into the residual category of insurgency provided by Article 1 of Protocol II; and the protections of Common Article 3 of the supplemented Geneva Conventions should attach.

Ascending from the more clear-cut case of the full applicability of (or of only Article 3) Geneva Convention safeguards to "internal" conflicts, it may with

¹⁴Article 1—General Principles, states:

1. The present Protocol, which supplements the Geneva Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in article 2 common to these Conventions.

2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Article 1, *Protocol I, Ibid.*, at Appendix D, p. 37.

¹⁵*Ibid.*, at ¶ 2.

¹⁶Article 1—Material field of application, states:

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

2. The present 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. Article 1, Protocol II, *supra* note 13 at Appendix D, p. 91.

¹⁷*Ibid.*, ¶ 1.

decreasing persuasion be argued that the protection of human rights continues by the application during hostilities of humanitarian provisions generally thought to apply only in non-hostility situations. Thus, a signatory incumbent regime should be bound during any internal conflict by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹⁸ and by the United Nations Covenant on Civil and Political Rights,¹⁹ Article 4 of which allows slight derogation in cases of proclaimed public emergency, except such derogations involving deprivation of life, torture, degradation and loss of recognition as a person before the law.

The present ambiguities concerning the applicability of the Law of War to internal conflicts are both inherent and designed that way through compromise. Similar ambiguity thwarts the clear application of the full Geneva Conventions to cases of international hostility. We may be assured that the upcoming "final" session of the Geneva Diplomatic Conference²⁰ will not dispose of such inherent or self-imposed contradictions. The presently existing consensus among the experts who drafted the articles concerning internal conflicts and self-determination struggles promises, however, to result in an extended discussion of Convention applicability to insurgency situations during the plenary session of the Diplomatic Conference, and, perhaps, in considerable change in this problem area.

¹⁸Approved by Resolution 260A (III) of the United Nations General Assembly, 9 December 1948; entered into force on 12 January 1951, 78 U.N.T.S. 277 (1951). The United States has not ratified this Convention.

¹⁹United Nations General Assembly Resolution 2220; 21 U.N. GAOR, Supp. 16 at 14; U.N. Doc. A/6546 (1966). The United States has not ratified this Convention.

²⁰The final session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict was convened during March and April, 1977.