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The Status Under International Law of Recent Guerrilla Movements in Latin America†

Guerrilla movements throughout the world have assumed various forms. They generally can be classified into two major types: partisan bands of resistance and harassment *supporting* the national troops, and dissident groups engaging in similar tactics *against* the army and centers of power of a nation. Such a classification does certainly lead to a risk of over-simplification, but it serves well to distinguish the basic motivations which may prompt the formation of irregular forces.

Although the term "wars of liberation" (and even "guerrilla warfare" as used to refer to such conflicts) is of recent usage, the concept certainly is not. Revolutionary wars and fights for independence have been occurring throughout the history of mankind. Yet the rapidly increasing technology of warfare during the last three-quarters of a century seemed at times to make guerrilla warfare obsolete. Everyone looked toward the ultimate conflict or major brush fire flare-ups in their thinking about war, including the law of war. "The state of the law may not seem satisfactory, but it must not be overlooked that when the rules were devised revolutionary wars were of little significance."[1]

Consequently, the status of the guerrillas and their movements in international law is a matter of some controversy. This article is directed primarily toward helping to clarify their position. The general philosophy or rationales of the guerrillas for their actions will be considered first. Then the status of the guerrilla movements in international law will be analyzed in relation to their rationales.

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[1]O. HEILBRUNN, PARTISAN WARFARE 144 (1962).

General Philosophy of the Guerrillas

The guerrilla movements in each Latin American country have at some time or another resorted to violence. A common consensus that force is sometimes necessary pervades their principles. But they do not advocate indiscriminate acts of violence; nor do they generally engage in such practices. Yet they clearly see that the way to success is through force. Che Guevara wrote:

> People must see clearly the futility of maintaining the fight for social goals within the framework of civil debate. When the forces of oppression come to maintain themselves in power against established law, peace is considered already broken.[2]

Actually, the guerrillas' justification for the use of violence might be summarized as the "no-other-way" rationale. The argument is simply that no alternative exists. With real justice suppressed and kept down by military strength, violence is accepted as the only means of restoring true legality.[3] A clandestine interview by a *Newsweek* correspondent with a leader of the outlawed National Students' Union is illustrative of the guerrillas' attitude:

> If there was no repression, things wouldn't be so violent. However, all forms of legal and parliamentary opposition to the government were eliminated long ago. Our country (Brazil) has only a ghost of a Congress. There is no meaningful vote. In other words, we have had no choice. The only road left to us is violence.[4]

The guerrillas claim to carry on the struggle for the benefit of the people who are oppressed by the régime. It is clear that such representation provides the only basis of clothing their campaigns with any legitimacy. It is also clear that such representation is essential to the success of the mission.

> Guerrilla warfare is a people's war, a mass struggle. To try to carry out this type of war without the support of the population is to court inevitable disaster.[5]

The truth of Che's statement was ironically proven by his own example. The inability to enlist the support of the Bolivian peasantry was a main reason for his downfall. Che's men tried constantly to persuade the peasants. Their misconceptions of the Bolivian peasants' revolutionary fervor was a major mistake.

The guerrillas plan their methods, violent and otherwise, to expose

[2]E. (CHE) GUEVARA, GUERRILLA WARFARE 15 (1961).

[3]*See* E. GUEVARA, *Id.* at 26, and Geyer, *The Blood of Guatemala*, NATION, July 8, 1968, at 8-9.

[4]NEWSWEEK, Dec. 8, 1969, at 67.

[5]E. (CHE) GUEVARA, GUERRILLA WARFARE—A METHOD 2 (1964).

governmental repression. The idea is to break down the facade of legality of those in power. By pressuring a dictator, they believe he can be forced to show his true oppressive nature. Once that oppression is demonstrated to the people, the guerrillas reason that the masses will join their campaign in increasing numbers.[6]

Latin American revolutionaries have thus turned increasingly to the use of armed conflict in order to gain control of various countries. The use of violence which accompanies such conflicts is advanced as a necessary ingredient in order to restore true legality. Does such a justification fit within the context of international law? The pursuit of this inquiry will first require an examination of the position of the guerrillas under international law.

Status of the Guerrillas in International Law

An understanding of the status of guerrillas in international law requires discussion of the nature of belligerency and insurgency. These terms of art are labels which denote the existence of certain factual conditions and the legal results which attach thereto. The reason for much of the confusion in this area is that even some of the foremost scholars in the field of international law have tended to list, as pre-conditions to the recognition of belligerency, conditions which are actually a legal result of attaching the label.

Lauterpacht (Oppenheim) contends that states alone possess the legal qualifications in international law to become belligerents,[7] but that possession of actual power to make war enables insurgents to become belligerents through recognition.[8] He lists four necessary conditions of facts which "create for other states the right and duty to recognize belligerency."

1. Actual hostilities amounting to civil war within a state.
2. The occupation, and some measure of orderly administration, of a substantial portion of the national territory by the insurgent forces.
3. The observance of the rules of warfare by the insurgent forces acting under a reasonable authority.
4. The practical necessity for other states to define their attitude to the civil war.[9]

The inclusion of the third category as a precondition to the recognition of belligerency is highly objectionable. It seems inconsistent to say that the

[6]*See Id.* at 7, 11; NEWSWEEK, *supra* note 4; Gerassi, *Uruguay's Urban Guerrillas,* NATION, Sept. 29, 1969, at 307.

[7]II H. LAUTERPACHT-L. OPPENHEIM, INTERNATIONAL LAW 248 (7th ed. 1952).

[8]*Ibid.*, at 249.

[9]*Id.*

insurgent forces must abide by such laws if those same laws do not indeed apply reciprocally to themselves.

The Hague Convention specifically indicates that "the laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

1. They must be commanded by a person responsible for his subordinates;
2. They must have a fixed distinctive sign recognizable at a distance;
3. They must carry arms openly; and
4. They must conduct their operations in accordance with the laws and customs of war."[10]

Guerrilla movements do not meet those conditions. Various courts conducting war-crimes trials following the Second World War, found that "guerrillas were not entitled to be classed as lawful belligerents for the reason that they did not comply with the terms of the Hague Regulations."[11]

Full complaince with Article 1 of the Hague Rules is furthermore unlikely.[12] Che Guevara noted, "If there is a real intention to begin the struggle from some foreign country or from distant and remote regions within the same country, it is obvious that it must begin in small conspiratorial movements of secret members acting without mass support or knowledge."[13] Guerrillas are not going to carry arms openly or in any way mark themselves distinctively. The essence of modern guerrilla warfare is to do precisely the opposite.[14]

The last condition listed by Lauterpacht (Oppenheim) as a condition for recognition is advanced as necessary, in order to prevent illegal interferences in the internal affairs of the State beseiged by the hostilities.[15] It is submitted that this last criterion is the only essential condition, and as such it serves more nearly accurately to reflect actual practices by modern states. Any decisions relating to recognition are, because discretion is exercised, political, [16] and such decisions are truly moved by practical necessity and interest.

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[10]Art. 1 of the 1907 regulations attached to the Hague Convention No. IV, 1907, Respecting the Laws and Customs of War on Land, U.S. TS 539, 36 Stat. 2295.

[11]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 212-13.

[12]J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 566 (1959).

[13]E. GUEVARA, *supra* note 2, at 109.

[14]Baxter, *So-Called 'Unprivileged Belligerency'-Spies, Guerrillas, and Saboteurs*, BRIT. Y.B. INT'L L. 327-28, 336-37 (1951).

[15]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 249-50.

[16]Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, a paper privately circulated to members of the American Society of International Law, to be published by the INT'L & COMP. L.Q., at 3.

Utilization of this sole criterion would undoubtedly still not lead to a recognition of belligerency for any of the Latin American rebel movements discussed in this article. But such a system would be more realistic, and would eliminate such unbelievable requirements as compliance before application. If some requirement relating to the observance of generally-recognized rules of warfare should be deemed desirable, it would certainly be preferable to phrase the condition in tems of a *willingness* to observe the rules.[17]

Clearly though, whether the present standards are applied or some which would be more realistic, the Latin American guerrilla movements cannot meet them. Thus, their recognition as belligerents by third party states is generally precluded as an illegal interference in internal affairs. Deprived of this recognition, the guerrillas' status under international law is determined primarily through the Geneva Conventions of 1949.

Concern over the lack of protection which had been afforded to war victims during the Second World War provided the impetus for a revision of the Geneva Conventions. Work began in earnest in 1945 and on August 12, 1949, the text of the new Geneva Conventions was approved. The result was four new Conventions, covering the wounded and sick in the field, the wounded, sick and shipwrecked at sea, prisoners of war, and civilian persons in time of war.[18]

Article 4 of the POW Convention defines prisoners of war. Basically, the term includes persons who are members of the armed forces, militia, or organized resistance movements of a Party to the conflict, who have fallen into the hands of the enemy. For members of the last two groups to qualify, however, they must meet four conditions—those listed in Article 1 of the Hague Rules. The Latin American guerrilla movements have been shown not to meet those criteria.

Not fitting within the defintion of the terms, the guerrillas do not qualify as prisoners of war, and consequently they are not entitled to the protec-

[17]*See* C. HYDE, INTERNATIONAL LAW 201 (2d ed. 1945), citing J. Beale, Jr., *The Recognition of Cuban Belligerency*, IX HARV. L. R. 406-07. Lauterpacht (Oppenheim) himself notes, "As observance of the generally recognized rules of warfare is one of the conditions of recognition of belligerency, recognition by other states provides evidence of the ability and the willingness of the insurgents to observe these rules." H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 209. A close reading of the sentence shows that he would require actual observance as the threshold to recognition and not simply a willingness to comply.

[18]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea) (Treatment of Prisoners of War) (Protection of Civilian Persons in Time of War) *opened for signature* August 12, 1949, 75 UNTS 31, 85, 135, 287; 6 UST 3114, 3217, 3316, 3516; TIAS 3362, 3363, 3364, 3365.

tions that result from attaching that label.[19] The guerrillas do not have to be confined under detailed rules regarding food, medical care and housing; Article 4 does not protect against their being shot.[20] If one is legally executed, it is not for a violation of international law, but rather for a violation of local law for which international law afforded him no protection.

Baxter refers to their position as one of 'unprivileged belligerency': "A guerrilla thus appears, like the spy, to be a belligerent who has failed to meet conditions established by law for favored treatment upon capture."[21] That term is perhaps not accurate as guerrillas are indeed not belligerents—or perhaps one could say they are belligerents in fact but not in law. The term would be accurate in the situation yet to be discussed wherein the parent state itself extends recognition of belligerency.

Finding the guerrillas cannot claim POW status, Baxter asks if they have protection anywhere else. He refers to Article 5 of the Civilian Convention and correctly indicates the expanded protection which applies to a guerrilla in occupied territory.[22] He claims, however, that "the failure of Article 5 to refer to areas where fighting is in progress outside occupied territory, or the territory of the detaining state, and suggests that both Articles 4 and 5 (Civilians Convention) were directed to the protection of inhabitants of occupied areas, and of the mass of enemy aliens on enemy territory, and that unlawful belligerents in the zone of operations were not taken into account in connection with the two articles."[23] He suggests, therefore, that the suspect is entitled only to a judicial proceeding concerned with determining the POW status of the captured individual.[24]

Baxter identifies incorrectly the nature of the trial to which the guerrilla detained in the zone of operations is entitled. "The right of detained persons to a fair and regular trial will be ensured, in occupied territory, by applying the provisions of Articles 64 to 76; there are no special provisions

[19]H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 130 (2d ed. 1966); H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 212; R. YINGLING and R. GINNANE, THE GENEVA CONVENTIONS OF 1949, 46 AM. J. INT'L L. 402 (1952); 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 131-33, 159-61).

[20]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 257; H. KELSEN, *supra* note 19, at 131.

[21]Baxter, *supra* note 14, at 338.

[22]Persons detained in occupied territories are protected specifically by Articles 64 to 76. Article 68 even covers certain instances in which the death penalty is prohibited in such cases.

[23]Baxter, *supra* note 14, at 328.

[24]"The judicial proceeding to which a suspect is subjected is accordingly a determination whether or not he meets the qualifications prescribed for treatment as a prisoner of war or as a peaceful civilian. What formulation of law is necessary to permit his 'punishment' if he fails so to qualify is essentially a matter of domestic law or practice." *Id.* at 338.

applying to the territory of the Parties to the conflict but the rule contained in Article 3 will be applicable: *i.e.*, the Court must afford 'all the judicial guarantees recognized as indispensable by civilized peoples'."[25]

The judicial proceeding Baxter allows in the latter situation is only that guaranteed under Article 5 of the *POW Convention* which has to do with determining that status when any doubt exists.[26] The purpose of this provision is to prevent the military officers from making this determination by requiring responsibility for it in the detaining Power.[27]

The protections of the captured guerrilla do not end, however, with a decision against POW status in the Article 5 proceeding. Before any sentence may be passed or an execution carried out, the guerrilla is entitled to a trial as provided in Article 3(1)(d).[28] This article comes into effect if it is determined that the captured individual cannot claim POW status. The guerrilla can be executed for his activities, but only after the benefit of a trial to determine guilt.

Such a trial is part of the humane standards provided in Article 3 which applies to "armed conflict not of an international character." The Article is common to all four Geneva Conventions of 1949 and was adopted largely through the efforts of the Red Cross.[29] Violence to life and person, taking of hostages, outrages on personal dignity, passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, and failure to collect and care for the wounded and sick are all acts specifically prohibited for Parties to such conflicts, occurring in the territory of one of the High Contracting Parties.

If the hostilities take place in the territory of a signatory to the Geneva Conventions, the guerrillas may be covered to the extent of the humanitarian commands set forth in Article 3. The protection is conditioned upon the hostilities being considered an "armed conflict." The legal effect of such "recognition" is the direct application of Article 3 to both sides of the conflict. If recognition of an armed conflict is not forthcoming, the parent State will consider itself free to treat the guerrillas as common criminals and deal with them solely in accordance with its own municipal law.

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[25]O. UHLER & H. COURSIER, COMMENTARY: IV GENEVA CONVENTION 58 (J. PICTET ed. 1958).

[26]"The judicial determination which is necessary before a person may be treated as an unprivileged belligerent is in consequence not a determination of guilt but of status only and, for the purposes of international law, it is sufficient to ascertain whether the conduct of the individual has been such as to deny him the status of the prisoner or of the peaceful civilian. . . . What is thereafter to be done to the individual who is found to lack a privileged status is left to the discretion of the belligerent." Baxter, *supra* note 14, at 343-44.

[27]M. WHITEMAN, *supra* note 19, at 168; H. KELSEN, *supra* note 19, at 131.

[28]M. WHITEMAN, *supra* note 19, at 168-69.

[29]*See* O. UHLER AND H. COURSIER, *supra* note 25.

The last sentence of Article 3 states that "the application of the preceeding provisions shall not affect the legal status of the Parties to the conflict." "This means, in particular, that the observance of the principles laid down in the Convention does not amount to recognition of the belligerency of the insurgents on the part of the legitimate government."[30]

A recognition of "insurgency," however, is inherent within a recognition of an armed conflict. The Article requires a recognition which then leads to the legal effect of the application of Article 3. It makes little difference whether that recognition is phrased in terms of the nature of the conflict or the nature of the participants. The legal results would be the same.

Insurgency may be defined as a condition of civil revolt which occupies a middle ground between belligerency and banditry.[31] The insurgents may have the same objectives and methods as belligerents, yet are denied that status because of the absense of some listed precondition. They may also appear as bandits at times, especially as viewed by the government against which they are fighting. The distinction here is determined by the political goal which the insurgents seek, whereas bandits seek personal gain.[32]

The term "armed conflict" is nowhere defined in the Conventions. The middle ground which it covers is admittedly quite broad, but still it is not an area incapable of delineation. Since the titles to each of the four Conventions includes the term "war," it can confidently be asserted that "... the delegates to the Conference had in mind non-international conflicts presenting certain analogies to war, and not the type of police action which happens almost daily in most metropolitan areas."[33]

The term is not, in other words, incomprehensibly vague. Writers in this field of international law have little difficulties in isolating factors which should call for attaching the label "armed conflict" to any particular hostilities.[34] The determination of the proper criterion is therefore not the difficulty.

The real problem posed in this area is that the parent state itself may feel it has a self-interest in not granting recognition of an armed conflict. The hesitancy of the parent state to concede any level of recognition to rebel movements obviously presents certain obstacles. Also, some governments have never ratified the 1949 Geneva Conventions.[35]

[30]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 211, 371; H. KELSEN, *supra* note 19, at 127.

[31]M. WHITEMAN, *supra* note 19, at 40.

[32]Baxter, *supra* note 14, at 338, 344.

[33]Bartelle, *Counterinsurgency and Civil War*, 40 N. DAKOTA L. REV. 274 (1964).

[34]For a discussion of the positions of the delegates to the Geneva Conference on the proposal to apply the Conventions to conflicts not of an international character *see* O. UHLER & H. COURSIER, *supra* note 25, 30–31.

[35]Bolivia had never become a contracting party to the 1949 Geneva Conventions. DEPT. OF STATE, TREATIES IN FORCE, at 342-43, 355 (1971). By January 1, 1971, a total of 134 states were parties to the POW and the Civilian Conventions.

These hurdles should not prove insurmountable, however, and in no way call for giving up. The effectiveness of international law lies to a large extent in self-enforcement, and the proper application of the Geneva Conventions will certainly prove to be no exception to the rule. Three different arguments or approaches could be followed to persuade parent states to apply the humanitarian precepts of Article 3.

1. *Recognition of Insurgency.* One possible approach to this problem would be to extend recognition of armed conflicts from third-party states. The present state of international law as to recognizing insurgency appears to be one of confusion. Sources indicate that "there is no precise definition of the criteria"[36] or that insurgency is "an incomplete belligerency"[37] and that the difference "is one of degree."[38]

The most sensible approach to the issue, and one which could quite easily be utilized in the recognition of armed conflicts, is that explained by Hyde. "Recognition of a condition of insurgency within a foreign country is an official reckoning with a *state of facts.*"[39]

As previously indicated, the criteria of when an armed conflict exists have sufficiently been determined. Formal declarations as to the existence of those facts, or the passing of diplomatic notes to that effect, would place more pressure upon the states affected by such hostilities not to deny their existence. The difference between criteria for a recognition of belligerency and a recognition of insurgency would thus become both clear and realistic.

The present system of international law presents an inherent contradiction: a civil war or attempt to gain control of a government is not per se illegal under international law.[40] Yet the parties will never meet the Hague requirements, so they can never be recognized as lawful belligerents by third party states, and the present practice is generally to refrain from recognizing them as insurgents.

Some will say that there is no contradiction here; they will contend that the guerrillas are utilizing illegal methods so they will just have to forego their rebellion. The response to just that observation has been convincingly advanced:

Indeed, a very similar argument was used by the United Kingdom when it was observed in 1922 that the codified rules of naval warfare forbade submarine warfare; those unable to rescue the passengers will just have to forego the use of submarines, argued the United Kingdom—successfully at

[36]T. Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COL. L. REV. 46 n.39 (1971).

[37]J. Kelly, *Legal Aspects of Military Operations in Counterinsurgency,* 1963 MIL. L. REV. 99.

[38]G. SCHWARTZENBERGER, A MANUAL OF INTERNATIONAL LAW 77 (5th ed. 1967).

[39]C. HYDE, *supra* note 17, at 203 (emphasis added).

[40]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 249; Baxter, *supra* note 14, at 343.

the Washington Naval Conference, with the result that in the world of affairs the legal restrictions so painfully worked out were ignored. The result might have been expected.[41]

The fact is that guerrilla warfare appears to have gained widespread acceptance by rebel movements throughout the world. So long as the Law of Nations remains a rigid, legalistic system, it will simply preclude itself from influencing certain real situations. Perhaps the time has again come to review international law as it applies to guerrilla movements.

A change in defining conditions for recognizing belligerency would not aid the Latin American guerrillas, but the expanded practice of third states to recognize the "state of facts" of an armed conflict, would clearly appear desirable as a means to help ensure compliance with the basic humanitarian provisions of Article 3.[42] Again, however, since the present system of international law does not utilize such a system of recognition, the rebel forces cannot anticipate recognition of their armed conflict from disinterested third states.

2. *Article 3 as customary international law.* An argument can be advanced that Article 3 simply represents a codification of customary international law and is thus binding on all nations, whether or not they have become signatories to the complete text of the Geneva Convention. Article 3 is no more than a command to observe at least a nominal respect for the dignity of man.

"It (Article 3) merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the states in question, long before the Convention was signed."[43] The enumerated prohibitions are aimed at acts which are so cruel and inhumane that no State could justify engaging in such activities. "The requirements of the Article are those which civilized states would be expected to perform anyway."[44]

The major obstacle to arguing that Article 3 represents a codification of customary international law, is the wording of the Article itself, which refers to armed conflicts not of an international character "occurring in the territory of one of the High Contracting Parties." A conflict in the territory of a non-signatory would thus appear not to be covered.

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[41]Rubin, *supra* note 16, at 18-19.

[42]"It (para. 4 of Art. 3) makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of states, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances, and as being above and outside war itself." O. UHLER AND H. COURSIER, *supra* note 25, at 44.

[43]*Id.* at 36.

[44]Bartelle, *supra* note 33, at 271; R. YINGLING AND R. GINNANE, *supra* note 19, at 396.

Such draftsmanship is highly unfortunate, and should be considered for amendment. The present wording of the clause gives non-signatory States a purely legalistic argument for not applying the provisions of Article 3. A review of the history of the Preamble to the Convention does not indicate that such a position was intended.

A Preamble indicating the general idea behind the Convention was reportedly dropped, despite the fact that most delegations favored one, because of "many objections to the proposal to include a reference to the divine origin of man and to the Creator, regarded as the source of all moral law."[45]

> It was thought necessary to give an account of the discussions concerning this Preamble, despite the fact that it was finally dropped altogether, since some of the ideas it contained have, fortunately, been reproduced in other Articles of the Convention, especially in Article 3 dealing with armed conflicts not of an international character. In drafting this latter Article, its authors based themselves very largely on the general ideas contained in the various draft Preambles.[46]

Again, the resulting draftsmanship appears unfortunate. The Hague Convention of 1907 expressly stated that it had the object to "revise the general laws and customs of war."[47] The extremely brief Preamble to the 1949 Geneva Civilians Convention states the purpose "of establishing a Convention for the Protection of Civilian Persons in Time of War." "Accordingly, the essential motive which had brought sixty-four nations together at Geneva, was left unexpressed solely on account of non-essential additions that one delegation or another wished to make."[48]

The resulting draftsmanship of the 1949 Geneva Conventions detracts somewhat from the argument, that the humanitarian ideals of Article 3 represent a codification of customary international law.[49] However, those ideals would not actually appear to have lost their status of international law merely from the drafting of a Convention.

In the first place, it may be that some of the provisions (specifically Article 3) are codifications of customary international law and others are

[45]O. UHLER & H. COURSIER, *supra* note 25, at 14.

[46]*Id.*

[47]Thus various courts have held that despite the participation clause in the Hague Convention, non-signatories were still bound to most of the substantive provisions of the Conventions, "inasmuch as they embody rules of customary International Law." H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 234.

[48]O. UHLER & H. COURSIER, *supra* note 25, at 14.

[49]"The spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable *erga omnes,* since they may be regarded as the codification of accepted principles. It must be recognized, however, that the Conventions themselves stipulate that in order to be binding on States they must be ratified by those States; that being so, it is difficult to see how they could be applied to the nationals of a State which is not party to them" *Id.* at 48.

not. In fact, since there are so many diverse provisions in the four Conventions, the drafting of the humanitarian ideals into one Article common to all four Conventions, may have provided greater impact than would the expression of those ideals in a Preamble.

Alternatively, it is certainly true that customary international law will continue as such whether it is codified or not. Just because the delegates were unable to reduce the accepted principles to a Preamble, does not end the status of the principles when they still remain accepted. The more persuasive analysis is that Article 3 does represent principles of customary international law.

3. *Demonstration of self-interest.* A final approach to encouraging parent state recognition of armed conflict, is in demonstrating to such states that their self-interest can actually be furthered by such recognition. This particular possibility will be explored hereunder, when further sections of the Geneva Conventions and the observance of the Conventions in Latin American guerrilla conflicts are discussed.

One further Article of the Geneva Conventions must be examined in order to complete the analysis. Article 2 is, like Article 3, common to all four of the Conventions. It provides that "the present Convention shall apply in 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."[50]

In cases in which one of the parties to the conflict is not a signatory, the Convention still applies if the non-signatory both accepts and applies all of the provisions.[51] Such a provision is in contra-distinction to the applicability of Article 3 which binds "each Party to the conflict."[52] The prohibitions of Article 3 are thus absolute—they cannot be avoided by the failure of the opposing party to follow them.[53]

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[50]"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." Geneva Civilians Convention, Art. 2.

[51]This provision constitutes an abandonment of the participation clause of the Hague Rules. H. KELSEN, *supra* note 19, at 126; H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 234–36, 371; R. YINGLING & R. GINNANE, *supra* note 19, at 394. "However, if the legitimate government is not bound by the Convention, the latter cannot be brought into operation by a declaration of the opposing party that it intends to apply the provisions of the convention." H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 371 n.1.

[52]Thus, it has been contended that Article 3 binds not only non-signatories, but Parties not even in existence at the time of the drafting of the Geneva Conventions. "At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention which they had not themselves signed. But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country or part of the country." O. UHLER AND H. COURSIER, *supra* note 25, at 27. *But see* R. YINGLING AND R. GINNANNE, *supra* note 19, at 396. "Insofar as Article 3 purports to bind the insurgent party to the conflict to apply its provisions, its legal efficacy may be doubted."

[53]H. KELSEN, *supra* note 19, at 127 n. 125.

The provisions of Article 2 apply when the conflict becomes one of an 'international' character, whereas Article 3 applies to armed conflicts 'not of an international character'. Therefore, "once the rebellious forces are recognized by the parent state—and, perhaps, if not by the parent state then by third states—the conflict takes on an 'international' character, and Article 2 applies."[54] The parent state, through its control of its power of recognitition, can thus place the conflict under the direct provisions of either Article 2 or Article 3.

In summarizing the foregoing analysis concerning the position of guerrilla movements under international law, the dominant observation is that the issue is essentially one of recognition. Under present practice the guerrillas are unable to qualify for recognition of belligerency from a third party state due to their inability to satisfy certain standards. Those same standards effectively preclude their being entitled to the status of prisoners of war.

The hostilities of the guerrillas thus cannot be afforded an 'international' status through the efforts of recognition by third party states. The guerrillas can be covered directly by Article 3 (if the hostilities are recognized as an armed conflict) or Article 2 (if the parent State recognizes them as belligerents.) Since the present system appears not to allow, or at least not in practice to allow, recognition of insurgency by third party states, the guerrillas are clearly dependent upon recognition by the parent state. And the latter is largely able to place the conflict under the direct provisions of Articles 2 or 3.

Schwartzenberger has written that patent states might sometimes find it advisable to recognize rebel movements as belligerents "to ensure that hostilities are conducted in accordance with the laws of war."[55] Some might argue, however, that such recognition cannot provide the supposed "ensurance" on the basis of the claim that "once Article 2 applies, the parent state is released from any of the obligations laid down by the Conventions, if the newly recognized belligerent refuses to accept and apply the provisions thereof."[56]

However, if that were the case, the government facing a guerrilla revolt might propose to recognize belligerency in order to achieve a tactical advantage. Knowing that the guerrillas will not comply with Article 1 of the Hague Rules, the governing state might be expected to contend that the failure to comply relieves it from being bound by the Convention, including

[54]*Id.*; H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 370 n.1.

[55]G. SCHWARTZENBERGER, *supra* note 38, at 77.

[56]H. KELSEN, *supra* note 19, at 127 n.125; *contra* H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 211-12.

the provisions of Article 3. Recognition of belligerency would thus be used as a means to escape those basic obligations.

That such a simple evasion of responsibility could be possible is simply incredible. The answer to such an assertion can only be that no escape from those minimal provisions is possible—that the provisions in Article 3 are simply a codification of customary international law. The Article is drawn in terms of minimum provisions "in the case of armed conflict not of an international character." Yet those same prohibitions, as customary international law, would be binding also in international conflicts. A recommendation to amend Article 3 to make this result apparent has been suggested,[57] and clearly seems desirable.

International law does dictate a minimal humanitarian protection for parties engaged in guerrilla conflicts. But have the parties in the Latin American conflicts actually practiced the dictates of Article 3? Attention will now be directed to this inquiry, and to the previously mentioned discussion on encouraging parent state recognition of the armed conflict as an advancement of the State's self-interest.

Methods Employed by Guerrillas in Relation to Article 3

The guerrillas in Latin America have pretty well observed sections 1(a), (c) and (d), and 2 of Article 3. In his manuals on guerrilla warfare, Che Guevara repeatedly admonishes the insurgents as to the treatment of the enemy, wounded personnel and civilians. He calls for an attitude of "absolute inflexibility toward all the despicable elements that resort to informing and assassination,"[58] and warns that "enemies can not be permitted to exist within the zone of operations in places that offer no security."[59]

Yet he writes of a humane approach to the conflict. A wounded enemy is to be treated with "care and respect" and with "all possible resources."[60] No prisoners are to be taken, as this would endanger the security of the insurgent band. Rather, "clemency as absolute as possible" is to be granted so that a prisoner will be "set free after receiving a lecture."[61]

The guerrillas' relations with the civilian population "ought to be regulated by a large respect for all the rules and traditions of the people of the zone, . . . "[62] All merchandise acquired from civilians is to be paid for in cash, and when no money is available, with "bonds of Hope," "something that certifies to the debt" and this "should be redeemed at the first oppor-

[57] *See* Rubin, *supra* note 16, at 20, 31.
[58] E. GUEVARA, *supra* note 2, at 28.
[59] *Id.*, at 36.
[60] *Id.*, at 48, 28.
[61] *Id.*, at 28, 46.
[62] *Id.*, at 28.

tunity."[63] No special courts are mentioned, but Che does advise that "except in special situations, there ought to be no execution of justice without giving the criminal an opportunity to clear himself."[64]

The Tupamaros in Uruguay have, at least prior to their kidnappings, also generally followed a humanitarian program of action. Contact with the enemy was avoided, and a measure of protection for the civilian population attempted.[65] Guatemalan insurgents, on the other hand, have been involved in numerous incidents which would constitute violations of Article 3. Even their actions toward the civilian population have involved outright terrorism.[66]

For the most part, however, the guerrillas in Latin America have observed most of the sections of Article 3. Such action on their part should hardly appear surprising. As has already been noted, the provisions of Article 3 outlaw conduct which is so savage and inhumane that their observance places no real burden on any party. These same principles would no doubt generally be observed by the insurgents whether they were enumerated in Article 3 or not.

It would probably be correct to assume that the guerrillas are not even aware of Article 3. Yet they do, to a large extent, apply the basic principles. Their unawareness of the codification of these concepts does not detract from the binding effect of Article 3 as international law. To the extent that the guerrillas actually practice the same principles enumerated in Article 3 their actions add force to those provisions.

On the other hand, it is clearly relevant that the guerrillas do not relate their activities directly to international law, nor give any indications that they would do so if they were aware of the exact provisions. They do not refrain from certain methods because they would constitute a violation of international law, but rather because it is to their advantage to do so. The rejection of the use of terror is thus a practical, not a moral or legal decision. When they feel obligated to do so, the guerrillas do not refrain from the use of violent methods.

The escalation in methods of terror can be illustrated by incidents which constitute clear violations of Article 3(1)(a) and (b), which include prohibitions against violence to life and person and the taking of hostages. Members of the Revolutionary Armed Forces (FAR) gunned down two officers of the American military mission in Guatemala City. The United States Ambassador met the same fate when he attempted to escape from a

[63] *Id.*, at 80, 43.

[64] *Id.*, at 28.

[65] Gerassi, *supra* note 6, at 310.

[66] Howard, *With the Guerrillas in Guatemala, N.Y. Times* June 26, 1966, at 25 (Magazine).

kidnapping attempt. The objective of the movement was to force American military involvement in Guatemala. They vacillated in choosing to emphasize their movement as either nationalistic or one of internationalism, but they always wanted the United States drawn into the struggle.

The Tupamaros shattered their cultivated image when they too turned to kidnapping foreign officials. Following a plan to capture five individuals, the Tupamaros succeeded with two in the space of a single day, and later added another. When the government refused to accede to their demands to release all imprisoned terrorists, the guerrillas killed one of their hostages.

All of the foregoing arguments advanced by the guerrillas as a rationale for the escalation of their terror, and which point mostly toward alleged United States intervention, are based on an idea of retaliation or reprisal. Consideration must be directed toward the concept of reprisals in international law to analyze the legality of the guerrillas' justifications.

Originally, private individuals performed acts of reprisal. They would forcibly seize property or subjects in retaliation for an injury inflicted upon them by a foreign country. States later began to perform such acts themselves, until reprisals by private persons "finally disappeared totally at the end of the 18th century."[67] Now the indications are that such acts may properly be performed only through the authority of a state. Such a holding would clearly undercut the guerrillas' position.

On the other hand, an argument can be advanced that the guerrillas have a claim to be entitled to engage in reprisals. Lauterpacht (Oppenheim) explains that "reprisals are admissable solely and exclusively in the case of international delinquencies."[68] That statement, taken literally, would include the guerrillas. In any event, an argument can be logically developed that to the extent that Article 3 gives protections of international law to the guerrillas, the guerrillas should be permitted to engage in acts of reprisal to the extent that the other side violates those protections.

Even if the foregoing argument is accepted, however, it provides no legal basis for the rationale advanced by the guerrillas to justify their attacks and kidnappings: "Reprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation."[69] The killing of hostages clearly goes beyond legal reprisal. Article 2(4) of the United Nations Charter restricts recourse to armed reprisals. The comclusion then would be that the guerrillas, like any party to international law, may engage in reprisals, but only within their legal scope. The objective must be to secure compliance with Article 3.

[67]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 139.
[68]*Id.* at 137.
[69]*Id.* at 141.

The guerrillas certainly do have a basis for claiming injury, although not in the direction of the alleged American involvement. In the cases of kidnappings at least, the motive was clearly based on the hope that the United States would pressure the Latin American governments into acceding to the rebels' demands. The common slogans of American imperialism and intervention were simply brandished as convenient labels. The sounder claim lies with direct violations of Article 3 by the governments opposing the guerrillas.

Various examples of government action which constitute violations can be cited. Officials of the Brazilian, Guatemalan and Uruguayan governments have reportedly administered torture and mutilation on captured guerrillas.[70] Such conduct by the government would violate sections 1(a) and (c). The evidence is also very strong that Che Guevera was executed on government orders following his capture, and not, as the official version was reported, that he died from wounds in the battle with the Bolivian army. This action would constitute a violation of sections 1(d) and 2.

Both sides have thus violated Article 3, and it appears that they will both continue to do so in the future, each justifying its acts on the basis of the violations by the other. How then is this circle to be broken? In the first place, recognition is going to have to be given to the fact that these illegal reprisals are not beneficial.

"Experience, especially during the First and Second World Wars, has shown that reprisals constitute a dangerous and ineffective means of securing compliance with the law of war. Instead of inducing the first violator of the law to observe his international duties (and usually there are difficulties in ascertaining who was the first to resort to unlawful warfare), reprisals resulted in a wider and wider abandonment of restrictions imposed on the belligerents by the law of war."[71]

Each side should realize that the final arbiter of their conflict, the local population, is dismayed by terrorism. The population becomes more receptive to the guerrillas' cause when the government treats the insurgents harshly. On the other hand, the Tupamaros found that much of the public sympathy they had enjoyed during their earlier days withered away when they turned to killing and kidnapping. Getting either side to admit the benefits of leaving out terror is difficult, and naturally is directly related to the attempt of getting the parent state to recognize the armed conflict.

The government against whom the guerrillas are fighting is certainly in the best position to improve this situation. The guerrillas are a small group

[70] NEWSWEEK, *supra* note 4; Litt and Kohl, *Guerrillas of Montevideo*, NATION, Feb. 28, 1972; Howard, *supra* note 66.

[71] Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in MANUEL OF PUBLIC INTERNATIONAL LAW 754 (M. Sørensen ed. 1968).

which, though perhaps well-organized and highly efficient, is still fighting against very great odds. The guerrillas facing these obstacles, as well as illegal acts committed against them in the very area in which they were to have gained protection, are not likely to make the first step in a de-escalation of violence. The guerrillas, unaware as they may be of Article 3, are aware of humanitarian principles. Their observance of these principles is unlikely, so long as there is no corresponding protection to themselves.

The governments, however, should be well aware of the codification, as well as the existence of these principles. They also hold the stronger position. The government certainly has the right to try to put down rebel movements within its territory. But such actions must be carried out with the observance of Article 3, if there is to be any hope that the present pattern of violence will be broken. The requirements of Article 3 are so minimal that they certainly would not overburden the government's attempts to deal with the guerrillas.

The following statement by Lauterpacht (Oppenheim) goes directly to the heart of the matter, and perhaps points the way to an eventual de-escalation of terror in the Latin American guerrilla movements:

> While the detaining state is entitled to put on trial prisoners of war for ordinary crimes and war crimes committed prior to captivity and offenses committed during captivity, *utmost restraint-dictated in addition by the apprehension of provoking reprisals-must be exercised in the matter of trials arising from what is in essence a political crime of treason and rebellion.*[72]

It is indeed a sad reflection on the nature of mankind that the basic humanitarian provisions of Article 3 have too often been violated. Perhaps some distant generation will someday question why they were even needed. In the meantime, concerned nations and individuals should seek answers as to how the observance of those provisions can best be encouraged.

[72]H. LAUTERPACHT-L. OPPENHEIM, *supra* note 7, at 210-11 (emphasis added).