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COUNTERINSURGENCY AND CIVIL WAR

TALMADGE L. BARTELLE*

*When Sunday comes, or times of holiday
Let's talk of fights—there's nothing I like more
Than news of Turkey or lands far away,
Where malcontents have loosed the dogs of war
You stand at the windows with your drop of drink,
And watch the river's colored traffic gliding—
And then when evening comes, go home,
And think how good it is to live in peace abiding.*
Goethe, *Faust*, Part I

The cold war is an expression of the admitted determination of the Sino-Soviet bloc to extend their "inevitable" world revolution by every available means short of open war with the Western powers. This includes aiding and abetting any case of insurgency or civil war that can best serve communist ends. This determination has caused an intensification of so-called "wars of liberation." The communists use domestic unrest as a mask to infiltrate into the political life of a country under the pretext of aiding legitimate national aspirations. They give active military assistance to insurgents but yet label the conflict "internal." Such conflicts have in reality internationalized civil wars, and if these wars appear a part of the communist quest for world domination, the attention of other powers is quite naturally drawn to them.

The "international civil war" presents certain analogies to "international war" and produces comparable, if not greater, suffering, yet only the latter type of conflict is endowed with elaborate rules for its conduct. This use of civil wars as a cold war technique has, unfortunately, exposed one of the fundamental weaknesses of international

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law For example, international law does not afford effective protection to victims of such "non-international" conflicts. Furthermore, the changing concepts of armed conflict and the participants in such conflict have refused to stay within the traditional legal and factual framework. This unsatisfactory condition of the law results from a lack of coverage in the customary and conventional laws of war Article 3, Geneva Conventions of 1949, has been considered a great success and a monumental step forward in international law, but as analysis will show, it is far from adequate.

I

CIVIL WAR IN

CONTEMPORARY INTERNATIONAL RELATIONS

A. *Communist Intervention in Civil Wars.*

On January 6, 1961, Chairman N. S. Krushchev made the following statement:

Liberation wars will continue to exist as long as imperialism exists, as long as colonialism exists. These are revolutionary wars. Such wars are not only admissible but inevitable, since the colonialists do not grant independence voluntarily. These uprisings must not be identified with wars among states, with local wars, since in these uprisings the people are fighting for implementation of their rights of self-determination, for independent social and national development. These are uprisings against rotten reactionary regimes, against the colonizers. The Communists fully support such just wars and march in the front rank with the people waging liberation struggle.¹

This statement clearly defines the views of the communists toward insurgency and revolution. The types of

1. Address to the Higher Party School, the Academy of Social Sciences, and the Institute of Marxism-Leninism attached to the Central Committee of the CPSU on January 6, 1961. Reprinted as Appendix III of the *Hearing Before the Subcommittee to Investigate the Administration of the Internal Security Act and Internal Security Laws of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., at 64-65 (1961). This document also contains a detailed analysis of the speech by Dr. Stefan Possony.

“revolutionary wars,” which have marked the period since World War II, have been entirely consistent with the Communists’ viewpoint. They are quick to label such “wars” as purely “local” disturbances, yet, in each case, outside communist assistance has been a significant moving force in attempting to displace an established government. They do not come face to face with the government they try to overthrow. Neumann² has stated that today’s revolutions are international in character, and has said that it is not always necessary to move across national boundaries in order to win major conflicts. “A central revolutionary authority, enforced by the new weapons of psychological warfare, can direct its orders by remote control through well-established revolutionary pipelines of the disciplined party within the border”³

Of primary concern to the communists is the formation of a mass basis for revolution. To do this, they emphasize the failures of democratic leadership to satisfy and integrate large segments of society. “In Agrarian societies, especially where feudalism rules, a discontented peasantry longing for liberation may also become a staunch supporter of the revolution.”⁴

This outside aid need not be in the form of regular soldiers but more than likely will consist of armed bands who cross the frontier and act as advisors to the local insurgents. Following World War II, the Greek Communists, advised by Moscow and supported by Yugoslavia, Bulgaria and Albania,⁵ began to vie for the control of the government of Greece. Greek rebels received war materials and medical supplies from Albania, Bulgaria, and Yugoslavia, and were further assisted by broadcasts from a station in Yugoslavia, and by freedom to come and go across the frontiers between Greece and its neighbors. Obviously, this support for the rebels constituted a threat to the political and territorial integrity of Greece.

In Laos, Communist China and North Vietnam (the latter

2. Neumann, *The International Civil War*, 1 WORLD POLITICS 333 (1949).

3. *Id.* at 349.

4. *Id.* at 345.

5. New York Times, Feb. 5, 1949, p. 2, col. 3.

owing much of its existence to the former) have actively assisted the communist rebellion against the Royal Lao Government.⁶ There was also substantial Soviet complicity in this matter.⁷ This assistance included supplies and military weapons.⁸ In fact, by February, 1962, North Vietnamese infiltrators in Laos had grown to 10,000, and consisted of combat troops, technicians, and advisers.⁹

The Communist offensive in South Vietnam had, from the beginning, received the active assistance of North Vietnam¹⁰ and Communist China.¹¹

The Hanoi Government's late 1960 decision to support the Viet Cong uprising virtually coincided with the fall of eastern Laos to friendly neutralist-Pathet Lao Forces. Free use of the Laotian corridor has facilitated the transport of supplies and reinforcements from North Vietnam to the south. By April, 1962 an estimated 16,000 North Vietnamese troops were believed to be among the guerrillas in South Vietnam.¹²

This Communist offensive was directed from outside South Vietnam and by 1961, the Viet Cong had gained effective control over substantial portions of South Vietnam.

B. *United States Counterintervention.*

The United States' response to this communist subversion of governments occurred early in the cold war and has remained one of the most constant of her foreign policies.

6. 41 DEP'T STATE BULL. 519 (1959).

7. "And the fact that the military outbreak in Laos last August followed conferences in Moscow and Peking between Soviet, Chinese Communist, and Viet Minh leaders is added evidence of the Soviet activity in this matter." *Id.* at 667.

8. *Id.* at 414.

9. CLUBB, *THE UNITED STATES AND THE SINO-SOVIET BLOC IN SOUTHEAST ASIA* 30 (1962).

10. For a detailed report of the North Vietnamese organization that supports the communist activities in South Vietnam, see BUREAU OF PUBLIC AFFAIRS, DEP'T OF STATE, FAR EASTERN SERIES NO. 110, *A THREAT TO PEACE, NORTH VIETNAM'S EFFORT TO CONQUER SOUTH VIETNAM* (1961).

11. In April, 1962 it was reported that up to 3,500 Chinese soldiers were assisting in the training of the North Vietnamese Army. *New York Times*, April 28, 1962, p. 1, col. 8.

12. CLUBB, *supra* note 9, at 44. It would seem that these facts would satisfy the "predominantly external interventions" (quantitative) requirement cited by Quincy Wright, *infra* note 110.

In the interest of resisting the communist subversion in Greece President Truman announced this policy:

I believe that it must be the policy of the United States to support peoples who are resisting attempted subjugation by armed minorities or by outside pressure. I believe that we must assist free people to work out their own destinies in their own way. I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.¹³

The United States' position was that it had the obligation to assist the legitimate governments in fights against illegal outside intervention. Implementing this policy in the Lebanon crisis President Eisenhower said:

About two months ago a violent insurrection broke out in Lebanon, particularly along the border with Syria which with Egypt, forms the United Arab Republic. This revolt was encouraged and strongly backed by the official Cairo, Damascus, and Soviet radios which broadcast to Lebanon in the Arabic language. The insurrection was further supported by sizeable amounts of arms, ammunition, money and by personnel infiltrated from Syria to fight against the lawful authorities. The avowed purpose of these activities was to overthrow the legally constituted Government of Lebanon.¹⁴

Only at the urgent request of the Lao Government, did the United States give assistance to the Lao Army to enable it to cope with the threat posed to that government by the communist insurgents. In this connection, the U. S. Department of State released the following statement on August 26, 1959:

Unlike the Sino-Soviet Bloc the United States does not believe that there should be recourse to the use of force in resolving this matter. However, the Communists have posed their threat to Laos in terms that require adequate military and police counter-

13. 93 CONG. REC. 1981 (1947) (address by President Truman to Joint Session of Congress, concerning aid to Greece and Turkey).

14. *Message to the Congress of the United States*, 39 DEP'T STATE BULL. 182 (1958).

measures if that nation's integrity is to be preserved.¹⁵

In each instance, it is noted that United States assistance to an established Government was taken as a measure to counter unlawful subversive intervention by communists from outside the territory involved. Thus, it is evident that civil wars since World War II have been more than likely the result of instigation, assistance, and direction by agencies from outside the territory in which the conflicts take place, unlike traditional civil war. These facts were not contemplated in international law in the classification of civil war in the traditional sense and in the rights and duties of participants in such a conflict.

II

TRADITIONAL CLASSIFICATION OF CIVIL WARS

A. *Belligerency*

Article 3, common to all four Geneva Conventions of 1949,¹⁶ by its terms, is applicable to "armed conflict not of an international character" and binds each party to the conflict to apply its provisions where the conflict takes place in the territory of one of the parties to the Convention.

A discussion of the nature of belligerency is necessary in order to understand "armed conflict not of an international character" and insurgency. The following factual conditions¹⁷ must exist before the status of belligerency may be extended to a revolutionary movement:¹⁸

1. Actual hostilities amounting to civil war within a state.

15. *Supra* note 6, at 374.

16. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 [1956], 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 [1956], 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [1956], 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1956], 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365.

17. "Belligerency is a fact and must be recognized as any other fact." 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 321 (1940).

18. 2 LAUTERJACHT, OPPENHEIM'S INTERNATIONAL LAW 249 (7th ed. 1952).

2. The observance of the rules of warfare by the insurgent forces acting under a responsible authority
3. The occupation, and some measure of orderly administration, of a substantial portion of the national territory by the insurgent forces.
4. The practical necessity for other states to define their attitude to the civil war

To meet the conditions of item 2, above, the insurgent forces must be commanded by a person responsible for his subordinates, have a fixed, distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws of war¹⁹ They must also act under the authority of an organization having some semblance of a government.²⁰

Obligations and Corresponding Benefits.

What then are the legal obligations and corresponding benefits which are imposed upon attaining the status of belligerency? Having thus attained the status of a belligerency, the customary laws of war would apply the same as if the conflict were between two States.²¹ The four Geneva Conventions of 1949²² would also apply in full with respect to States which are signatories to them, provided that the opposing belligerent accepts and applies them.²³ The hostilities then become "international" in character

Requirement of Recognition by Foreign States.

Belligerent rights and duties, however, are not automatically applicable upon satisfying these requirements, because of the requirement of recognition. While the existence of

19. DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE, para. 64 (1956).

20. 1 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 201 (2d rev. ed. 1945).

21. KEITH, WHEATON'S INTERNATIONAL LAW 172 (7th ed. 1944) LAUTERPACHT, *supra* note 18, at 371 DEP'T OF THE ARMY, *supra* note 19 SPECIAL OPERATIONS OFFICE OF THE AMERICAN UNIVERSITY, THE LEGAL STATUS OF PARTICIPANTS IN UNCONVENTIONAL WARFARE 6 (Dec. 1961).

22. *Supra* note 16.

23. LAUTERPACHT, *supra* note 18. at 371.

armed hostilities between two States does not require recognition on the part of foreign States in order to clothe the opposing parties with the rights and obligations of belligerents,²⁴ an insurgency may not acquire belligerent rights binding on foreign States until so recognized by such foreign States.²⁵ The effect of such recognition is that the rebels are then given an international character in respect to the rights and duties of legal warfare as regards the recognizing States.²⁶

One of the most important effects of the act of recognition is that the recognizing State would be under the obligations of a neutral State in relation to the government of the revolutionaries as well as to the legitimate government against whom the hostilities are directed.

However clear may be the legal distinction between insurgency and belligerency,²⁷ it has become, since the American Civil War, obscured by the requirement of recognition and the practice of States refusing to grant such recognition.²⁸ Although there is no legal obligation on foreign States to extend recognition of belligerency,²⁹ the recogni-

24. HACKWORTH, *supra* note 17, at §18.

25. LAUTERPACHT, *supra* note 18, at 249. See WILSON, HANDBOOK OF INTERNATIONAL LAW 40 (33d ed. 1940) "The Parent State cannot prescribe the attitude which a foreign State shall assume toward insurgents. It is, on the other hand, within the competence of the foreign State to determine its own attitude toward insurgents, so far as this may accord with the laws of humanity and its obligations to a friendly state. A foreign State has full right to deny to insurgents the right to exercise any belligerent right toward its subjects, or may even intern insurgents if they come within its jurisdiction, as in the case of Mexican insurgents entering Texas in 1914." See also, The Ambrose Light, 25 Fed. 408 (S.D. N.Y. 1885).

26. FENWICK, INTERNATIONAL LAW 146 (3rd ed. 1948). This legal recognition presupposes the existence of the four factual conditions of a belligerency, discussed above.

27. "The difference between the status of belligerency and that of insurgency in relation to foreign States may best be explained in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not. Insurgency, so far as foreign States are concerned, results 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 LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 270 (1947). See The Prize Cases, 67 U.S. (2 Black) 635 (1862).

28. BISHOP INTERNATIONAL LAW, CASES AND MATERIALS 339 (1953). "In the past fifty years, however, recognition of belligerency has grown very uncommon, and was refused by all parties concerned in the case of various civil wars (*a.g.*, Spain, 1936-39), in which, a century ago, such recognition would have been expected." *Ibid.* "Although the United States has been called upon in numerous instances during the past thirty years to define its policy toward civil conflicts in varying degrees of intensity in other states, it has in no instance recognized a state of belligerency in such a civil conflict." HACKWORTH, *supra* note 24, at 319.

29. HACKWORTH, *supra* note 28. "Refusal to recognize belligerent status notwithstanding the existence of [the requirements of belligerency] must be deemed contrary to sound principle and precedent." LAUTERPACHT, *supra* note 18, at 250.

tion of such status, in cases in which the insurgents meet all of the requirements of belligerents, would tend to clear up, to some extent, this obscurity

It can readily be seen that there is a need for the foreign soldiers participating in counterinsurgency operations to know the attitude of their government with respect to the conflict in order that their rights and obligations may become either fixed or at least the subject of determination. This, of course, places an antecedent obligation upon their government to make such a judgment. Foreign States may, however, be reluctant to extend recognition of belligerency because of political considerations. Withholding of such recognition is apparently a convenient means of permitting foreign States to render military and other assistance in a domestic conflict to the established government. More important is that it would deny the right of both the rebels and the established government to exercise belligerent rights against the withholding State. This prerogative is determined by the highest political authority of the recognizing State.³⁰

Recognition by the Established Government.

Recognition of belligerency of the insurgents by an established government is much less likely than recognition by a foreign State. Such recognition may be a sign of weakness of that government, and any act which would evidence weakness would enhance the prestige of the insurgents. Apart from this consideration, to place internal conflict on the same legal footing with an international war also brings about significant changes with respect to the rights and duties of the parties to the conflict, and between them and foreign States. These would include the right to visit and search neutral vessels, the right of capture for breach of blockade, and more significantly, the right to be treated as equals in accordance with the laws of war. Obviously enough, such recognition by an established government would be to the detriment of that government. Therefore, it is to be expected that an established government would resist such

30. *The Three Friends*, 166 U.S. 1, 65-66 (1897) HACKWORTH, *supra* note 17, at 161.

a change. It is noted that the recognition by foreign States is not binding on the established government,³¹ therefore that government may disregard the recognition by foreign States and treat the insurgents, upon capture, in accordance with its municipal laws.³²

B. Insurgency

Insurgency is a status which does not possess all of the qualities of a belligerency. It differs greatly from warfare in which regular armies are openly engaged in combat with the objective of winning control of the State by defeating the enemy military forces in the field. Insurgency has as its objective the winning of control of the State by first winning control of the civil population. It is more than likely characterized by armed bands springing up to harass the enemy within his own lines and then fading back behind the curtain of the civilian population.

"It nibbles at the foundations of the state, removing the underpinning by a process of erosion, until the whole structure crumbles and falls."³³ The very lack of military formality is its main characteristic—peaceful citizens at one time, guerrilla fighters at another. Insurgency is carried on by both full-time and part-time personnel,³⁴ and it may be said that its effectiveness may be measured, in part, in terms of the ability of the participants to lead "two lives"

Armed conflict for the control of a government is not *per se* a violation of international law.³⁵ Insurgents, then, are an organized body of men within a state pursuing public ends by force of arms and temporarily beyond the control of the established government.³⁶ They may not control fixed

31. LAUTERPACHT, *supra* note 18, at 251.

32. *Id.* at 252. But "recognition of insurgents as belligerents by the established government has the effect of placing the relation between that government and foreign States upon the basis of the international law of war and neutrality." CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 375.

33. Greenspan, *International Law and Its Protection for Participants in Unconventional Warfare*, 341 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE* 31 (1962).

34. GIAJ, *PEOPLE'S WAR PEOPLE'S ARMY* 142 (1962), Rigg, *Catalogue of Viet Cong Violence*, *Military Review*, Dec., 1962, p. 23.

35. HYDE, *supra* note 20, at 253.

36. WILSON, *HANDBOOK OF INTERNATIONAL LAW* 43 (1910).

territory, they may or may not wear a distinctive uniform, and may not necessarily bear arms openly. Does international law recognize a status short of belligerency? Are revolutionists, fighting for the reigns of government, sufficiently well organized to pose an effective resistance to an established government, to be without rights and obligations in relationship to the established government or foreign States?

Recognition of Insurgency

Foreign States, seeking protection of its citizens and means to prevent its citizens from assisting and giving aid to the insurgents may find it necessary to admit the fact of insurgency³⁷ Further, revolutionary conflict may not always be isolated as a purely domestic issue and thus may affect the trade of other States. It therefore may cause a consideration of whether, and to what extent, neutrality laws are applicable.³⁸

Legal Effect of Recognition of Insurgency

Authorities in the field of international law have attached various rights which may attend a condition of insurgency upon the recognition thereof by foreign States. It is said that insurgents may prevent supplies destined for the established government from abroad from entering the territory³⁹ Insurgents may requisition the property of foreigners and nationals on the same basis that the established government has the right.⁴⁰ One writer states that recognition of insurgency by foreign States entitles the insurgents to all the rights of belligerents within the territory of the State involved

37. In 1895, the President of the United States recognized the insurgency of the Cuban revolution against Spain (1895-1898) and admonished all persons to abstain from any violation of the neutrality laws of the United States, though not declaring neutrality, as no belligerency had been recognized. 1 MOORE, A DIGEST OF INTERNATIONAL LAW 242 (1906). In 1897 the United States Supreme Court, in condemning a vessel which was fitted and armed in the United States on behalf of Cuban insurgents, held that the neutrality law of the United States (Act of 1818) was applicable notwithstanding the fact that the insurgents had not been recognized as a belligerent power. *The Three Friends*, *supra* note 30, at 63.

38. JESSUP, A MODERN LAW OF NATIONS 53 (1952).

39. But they have no right to visit and search foreign ships on the high seas. GREENSPAN, THE MODERN LAW OF LAND WARFARE 620 (1959).

40. *Ibid.*

and its territorial water⁴¹ Further, it has been suggested that the exercise by insurgents of the prerogatives of belligerency on the high seas should not be regarded as an act of piracy by the recognizing government.⁴²

It appears, then, that the act of recognition of insurgency by foreign States, in itself, carries with it certain obligations towards the State involved. It may also be an expression on the part of the recognizing State that insurgents, upon capture, should not be executed as ordinary criminals.⁴³

This recognition of the fact of insurgency does not result in new international obligations for the recognizing state as would the recognition of belligerency,⁴⁴ although it would seem to make the execution of some of its domestic laws more burdensome.

Despite the fact that the legal status of insurgency in international law appears to be quite controversial,⁴⁵ it is concluded that civil war clearly invites the interest of foreign States. Even though the domestic laws of most civilized States declare insurgency to be criminal,⁴⁶ it would be expedient nevertheless to regularize these hostilities when they have reached major proportions either by recognition

41. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 110 (3rd ed. 1952).

42. HYDE, *supra* note 20, at 203. Even "acts of insurgents when duly authorized by those in control of the insurgent movement, if committed in furtherance thereof, and directed solely against the government sought to be overthrown" should not be regarded as piratical. *Ibid.*, at 774. See also Powers, *Insurgency and the Law of Nations*, 16 JAG J. 59 (May 1962).

43. JESSUP, *supra* note 38.

44. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 305 (1959) BORCHARD, *FIORÉ'S INTERNATIONAL LAW CODIFIED* 533 (1918). "[T]his Government has recognized only that there is an armed uprising against the regularly constituted Government of Mexico which has adopted measures of suppression which seem now about to be successful. The rebels, therefore, have no international legal status and it would seem that nationally they stand as illegal groups of armed men attempting to overthrow their own Government. They are from the standpoint of legal principle, both international and national, in no better position than ordinary outlaws and bandits." Letter from Secretary of State Stimson to Counsel Jones, April 10, 1929, in HACKWORTH, *supra* note 17, at 325.

45. SCHWARZENBERGER, *supra* note 41, at 30.

46. *E.g.*, the Penal Code of Argentina provides: "Anybody who takes up arms to change the Constitution or to overthrow the national government or any subdivision thereof shall be punished." DANFORTH, *THE ARGENTINE PENAL CODE*, art. 226 (American Series of Foreign Penal Codes No. 6, 1963). See also *THE FRENCH PENAL CODE*, arts. 209-220 (American Series of Foreign Penal Codes No. 1, 1960) *THE KOREAN PENAL CODE*, art. 87 (American Series of Foreign Penal Codes No. 2, 1960), *THE GERMAN PENAL CODE* § 80 (American Series of Foreign Penal Codes No. 4, 1961). Treason is the only crime defined by the United States Constitution. "Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3.

of belligerency, tacit observance of the rules of warfare as established by customary international law, or by the application of appropriate provisions of the Geneva Conventions of 1949.⁴⁷

The international legal significance that has been placed upon the status of insurgency and its legal effect upon foreign States is based upon the recognition of such status by those States. On the other hand, the legal relationship between insurgents and the established government during a civil war has not been based upon any considerations of recognition. In fact, there were no international rules which governed the relationship between an insurgent group and the established government. It was not until 1949 that conventional international law gave the status of insurgency a definite international legal personality. For the first time in conventional international law "armed conflict not of an international character," which obviously contemplates conditions of insurgency, became the subject of limited rights and responsibilities. Certain minimum standards were established for the treatment of persons who had taken no active part or who had surrendered or been rendered *hors de combat* during an armed conflict not of an international character. Prior to this time, the Geneva Conventions applied only to victims of wars between States.⁴⁸

III

ARTICLE 3, GENEVA CONVENTIONS OF 1949

Article 3, Geneva Conventions of 1949, by its terms, applies to "armed conflict not of an international character." Nowhere in this Article or in the Conventions is an attempt made to define the circumstances under which Article 3 applies. When does it apply? To what degree of internal conflict does it apply? Who is bound? It is perhaps because of the vagueness of some of the expressions in the Article

47. The applicable provisions of these Conventions will be the subject of discussion below.

48. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 28 (1960).

that one writer said that "a great deal is left to the discretion of the parties as to when the code comes into operation."⁴⁹ The article provides:

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

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

To this end, the following acts are and shall remain prohibited at anytime 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 hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall

49. Greenspan, *supra* note 33, at 41.

not affect the legal status of the Parties to the conflict.

The record of the discussions at the Diplomatic Conference of Geneva, 1949, reflects that some of the delegates advanced different conditions upon which the Convention would be applicable.⁵⁰ For example, the French delegate proposed to limit the application of the Conventions "to the case when the adverse party possessed an organized military force, an authority responsible for its acts acting within a determinate territory and having the means of respecting and insuring respect for the convention."

The Spanish delegation proposed this condition:

The Conventions should only be applied in cases where the legal government was obligated to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory

Australia suggested these conditions:⁵¹

The *de jure* government had recognized the insurgents as belligerents; or

The *de jure* government had claimed for itself the rights of a belligerent; or

The *de jure* government had accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

The dispute had been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

The United States proposed the following conditions:

That the insurgents must have an organization purporting to have the characteristics of a State;

That the insurgent civil authority must exercise *de facto* authority over persons within a determinate territory;

That the armed forces must act under the direction

50. *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II B, p. 121.

51. The Australian delegation suggested further that the phrase "non-international conflict" should not be used, but should be replaced by the terms "civil war in any part of the home or colonial territory of a Contracting Party."

of the organized civil authority and be prepared to observe the ordinary laws of war;

That the insurgent civil authority must agree to be bound by the provisions of the Convention.

It is readily seen that all of the foregoing proposals contain elements common to the status of belligerency⁵² They all seemed to recognize the danger of weakening the State when faced with conflicts caused by revolt, banditry and riot, by requiring it to apply to such conflicts international rules, which were intended for use in international wars, in addition to its own domestic laws. It also meant finding in advance, if and how an international treaty could bind, inside a country, parties, groups, and provisional governments not yet in existence.

Fortunately, the idea of attempting to promulgate a strict rule was abandoned since the discussions of criteria did not take into account the possibility of armed conflict within a State which fell short of the factual requirements of a belligerency⁵³ It was, of course, natural for difficulties to arise, because the signatories to the Conventions are States but in the event of civil war, one of the parties to the conflict is normally not a recognized belligerent.⁵⁴ This means then that Article 3, common to all four of the Geneva Conventions, imposes obligations upon entities which are not normally the proper subjects of international law⁵⁵ Whereas previously this respect for human personality as expressed in the Article had been applied only to military personnel, it is now concerned with individuals whether or not they wear a uniform, regardless of their allegiance, beliefs, race or any duty their government might have assumed in their behalf.⁵⁶ Its purpose is to regulate civil wars and insurrections by establishing legal obligations to observe certain minimum

52. LAUTERPACHT, *supra* note 18.

53. PICTET, *supra* note 48, at 35-37.

54. See Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 466 (1951).

55. Lauterpacht, *The Problems of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 362 (1952).

56. Sordet, *The Geneva Conventions and Civil War* 3 REV. INTERNATIONAL DE LA CROIX-ROUGE 136 (Supp. No. 8, Aug. 1960).

standards of conduct for compliance by "each party to the conflict."

Irrespective of the juridical character of the conflict, violence to life and person, in particular, murder of all kinds, torture, outrages upon personal dignity, humiliating and degrading treatment, taking hostages, and sentencing and executions prior to a trial affording all the judicial guarantees recognized as essential by civilized peoples, are expressly prohibited. The general principle behind these prohibitions is that those persons taking no part in the hostilities, including surrendered or captured combatants, wounded and sick⁵⁷ are in all circumstances to be treated humanely without distinction based upon any criteria similar to race, sex, religion, or wealth. "An impartial humanitarian body may offer its services to the Parties to the conflict," but the Article does not place any obligation upon any party to accept such services. It is also recommended in the Article that the parties enter into agreements for the application of "all or part of the other provisions" (of the entire Conventions). Further, of great significance is that the Article makes it clear that its application does not affect the legal status of the Parties to the conflict. This Article has opened a new dimension in the law of war and has extended considerably the international obligations of States.⁵⁸

By April, 1962, eighty-seven countries were participating in the 1949 Geneva Conventions.⁵⁹ Article 3 pertains to almost all of the armed conflicts of recent years, yet it has been reported that its provisions have not always been complied with.⁶⁰ France, in the case of Algerian conflict, did not seem prepared to admit that Article 3 of the Conventions applied

57. The convention for the Amelioration of the Condition of the Wounded and Sick in the Field, like Art. 3, also applies to individuals, thereby imposing international obligations on them. Lauterpacht, *supra* note. 55. Apparently civilians may be punished for failing to respect the wounded. Art. 18(2) provides, *inter alia* "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence."

58. "the observance of fundamental human rights has, in so far as it is the subject matter of legal obligations, ceased to be one of exclusive domestic jurisdiction of States and has become a matter of legitimate concern for the United Nations and its members." 1 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 740 (7th ed. 1952).

59. INTERNATIONAL REVIEW OF THE RED CROSS 203 (1962).

60. Greenspan, *supra* note 33, at 40.

to that conflict. She claimed that her participation in the rebellion, being directed by a small group of revolutionaries, was "police action", that it was an internal matter, and that her adversaries were considered common criminals.⁶¹ Great Britain, in the Mau-Mau rebellion, imprisoned several thousands of people without a trial who were accused of participation in that rebellion.⁶² Red Cross delegates were refused an armistice to collect the wounded lying in the streets during the Hungarian revolt in 1956.⁶³

Traditionally, governments have regarded rebels as offenders to a degree greater than that of ordinary criminals. They resent any attempt by outside bodies, including the Red Cross, to intercede on behalf of rebels.⁶⁴

As pointed out previously, some States feared that to apply the entire Convention in a civil war would tie the hands of the State in applying municipal law to suppress rebellion. They also thought that employing Article 3 would strengthen the legal position of the insurgency by giving it the status of a belligerency.⁶⁵ By the express terms of the Article, it guarantees that the legal status of the parties to the conflict will in no way be affected by its application. Further, in its form, there is no limitation on the unquestioned right of a State to put down a rebellion. The requirements of the Article are those which civilized States would be expected to perform anyway. It is difficult to conceive of a State that would

61. ALGERIAN OFFICE, WHITE PAPER ON THE APPLICATION OF THE GENEVA CONVENTIONS OF 1949 TO THE FRENCH-ALGERIAN CONFLICT 12 (1960). (France ratified the Convention in 1951) Whatever may be said about the organization of the rebels in Algeria, it is significant that more than forty thousand French troops were employed. Thus it is difficult to understand their refusal to recognize that this conflict fell within Art. 3.

62. JOYCE, RED CROSS INTERNATIONAL AND THE STRATEGY OF PEACE 187-188. (Great Britain had signed the Conventions but had not ratified them) It is difficult, under the circumstances, to tell whether a detention without trial is punishment requiring a trial by a regularly constituted court, as contemplated by Art. 3.

63. *Id.* at 170.

64. At the 19th International Red Cross Conference in 1912 the American delegation submitted a report on "The Role of The Red Cross in Civil War or Insurrection." The Russian delegation objected to the discussion, stating the general principle of the time, that "Red Cross Societies can have no duty to fulfill with respect to insurgent bands or revolutionaries, whom the laws of my country cannot regard as otherwise than as criminals." Soirdet, *supra* note 56, at 138. In 1955 the Red Cross approached the British authorities, requesting that it be permitted to perform certain humanitarian functions on behalf of rebels imprisoned during the Mau-Mau rebellion. Those authorities at first refused, but later relented and permitted visitation. JOYCE, *supra* note 62, at 187-188.

65. *Id.* at 63 ALGERIAN OFFICE, *supra* note 61, at 13.

contend before world opinion that it has a legal right to murder, torture, or mutilate, and leave untended wounded and sick on the ground that such victims are only common criminals.⁶⁶

It is to be noted that the acts forbidden by the Article are those which, committed on a wide scale, would most deeply shock the public conscience. This in no way impedes the application of municipal law. Even if insurgents are considered as criminals by the established government, such government is in no way hindered by the observation of Article 3. Few, if any, civilized states' legislation authorizes the application of treatment which Article 3 prohibits, that is, "violence to life and person" and "execution without a trial." Thus, a non-uniformed member of an insurgent force captured by the established government during a domestic conflict in which there has not been a recognition of belligerency is subject to the municipal laws of such government and may be prosecuted as an ordinary criminal except that, in addition, such insurgent would have the basic humanitarian protection of Article 3. This would still pertain if this insurgent were in uniform, carried his arms openly, and were a part of an organized unit. His wearing a uniform would immunize him from prosecution under municipal law only if there has been a recognition of belligerency. In that case, the customary laws of war would apply.⁶⁷ In an international war, a captive soldier cannot be punished for acts of legitimate warfare which he has committed against the enemy forces. He can neither be arraigned for such acts nor be prosecuted by a court. He has the right of the full application of the Convention Relative to the Treatment of Prisoners of War. Therefore, in internal armed conflict, regardless of what insurgents are wearing when captured, if there has not been a recognition of belligerency, the only safeguards to which they would be entitled as a matter of international law is

66. Yingling and Ginnane stated that "future generations may consider it a sad commentary on our times that the nations of the world thought it necessary in these Conventions to provide that in case of internal conflict, murder, mutilation, torture and other cruel treatment should not be practiced on prisoners and noncombatants." *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 396 (1952).

67. DEP'T OF THE ARMY, *supra* note 19, at 9.

Article 3, and provided the established government is bound by the Convention.⁶⁸

It should be noted, however, that should the parties to the conflict agree to bring into operation all or a part of the other provisions of the Convention, as provided for in Article 3, the fact that captives are uniformed could result in the application of the Prisoner of War Convention, provided the requirements of Article 4 are satisfied.⁶⁹

The fact that an insurgent was captured in uniform may encourage a policy of leniency toward him on the part of his captors on the ground that such a fighter is probably more chivalrous in conducting warfare than one who clandestinely foments terror. However likely that this may provoke a more favorable policy, the fact of wearing a uniform does not constitute a legal basis for a special status to captives in an armed conflict not of an international character.⁷⁰

A. *When The Article Applies.*

There were difficulties during the Conference about the expression "armed conflict not of an international character" which, it was considered, would encompass all forms of anarchy, and banditry if even a small group of individuals should revolt against the State.⁷¹ At what point should the suppression of an uprising be regarded as a conflict sufficient to bring the provisions of the Article into operation? Obviously enough, every-day crimes, public demonstrations against duly constituted authority, and police forces in pursuit of criminals or rioters do not amount to "armed conflict not of an international character" Furthermore, the very object of the entire four Conventions, of which Article 3 is but a small

68. See *The Geneva Conventions and The Trial of Cuban Prisoners*, INTERNATIONAL REVIEW OF THE RED CROSS 271 (1962).

69. Being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance, carrying arms openly, conducting operations in accordance with the laws and customs of war. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, *supra* note 16, at 3320.

70. During the French-Algerian conflict, the Algerian rebels complained that its army met the requirements of Art. 4 of the Prisoners of War Convention, yet they were tried under French law and placed in penitentiaries. ALGERIAN OFFICE, *supra* note 61, at 12.

71. FINAL RECORD, *supra* note 50, at 129.

part, is the protection of victims of war. In considering the titles to these Conventions, there is some clue as to when they apply. Two of the Conventions relate to the wounded and sick *forces in the field or at sea*. The other two Conventions relate to *prisoners of war* and civilians in *time of war* respectively. Accordingly, it would appear that Article 3 would apply only in circumstances which, without constituting international war, have all the characteristics of war and produce similar suffering. In other words, the record reflects that the delegates to the Conference had in mind non-international conflicts presenting certain analogies to war, and not the type police action which happens almost daily in most metropolitan areas.⁷²

B. *Who is Bound.*

Insofar as Article 3 purports to bind "each party to the conflict" to comply with its provisions, its legal efficacy may be doubted since from a legal point of view it appears difficult to bind, by an international Convention, a party not a signatory and in fact non-existent when the government accepted for its State the obligations of the convention. This question was raised during the Conference but little time was devoted to it, the majority of the delegates considering that both parties to an internal conflict should be so bound.⁷³ The answer to this question can be based on the contention that the insurgents are bound because the State, against whom they rebel, is bound and thus its subjects are bound.⁷⁴ Certainly,

72. *Id.* at 121.

73. *Ibid.* In connection with military action by the U.N. on behalf of a member State, Pictet contends that such State would be responsible for the treatment of captives and in the event of action by the U.N. in its own name, the States which had provided military contingents would be responsible jointly. PICTET, *supra* note 48, at 135. Further, in this connection, Secretary-General U Thant, in a letter to the President of the International Committee of the Red Cross, stated "I also wish to confirm that UNO insists on its armed forces in the field applying the principles of these Conventions as scrupulously as possible. [A] formal provision to this effect has been inscribed in article 44 of the regulations drawn up by the Secretary-General in accordance with Resolution 1001 (ES-I) of the General Assembly: the said Article reads as follows: 'Respect for the Conventions. The members of the Force are bound to respect the principles and the spirit of the general international conventions relative to the conduct of military personnel.'

A similar provision will apply to the United Nations Force in the Congo." Reported in COMITE INTERNATIONAL DE LA CROIX-ROUGE, *THE UNITED NATIONS AND THE APPLICATION OF THE GENEVA CONVENTIONS* 3 (Information Notes No. 7, Dec. 21, 1961).

74. GREENSPAN, *supra* note 39, at 623-624.

insurgents who are fighting for the reigns of government should be bound by some of the obligations of that government.⁷⁵ The number of States who have signed or acceded to these conventions indicate that they represent the weight of world opinion and set forth established law. Furthermore, to distinguish themselves from common criminals, insurgents will have some reason to respect Article 3.

Regardless of their disposition to obedience, the insurgents are not given authority to comply with all of the provisions of Article 3. Paragraph (1) (d) provides that the passing of sentences and the carrying out of executions without a trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" is prohibited. But there appears to be no legal authority which would permit the insurgents to try those persons whom they capture and wish to punish. International law does not give them the authority to convene a court for such purposes; and unless the revolution is successful, there would be no authority of the State.

It is difficult to understand why the official records of the Diplomatic conference did not discuss the question of reciprocity; nevertheless, the article is applicable automatically without any conditions with respect to reciprocal duties.⁷⁶ Apparently the delegates to the conference did not intend that the insurgents be authorized to convene a court for the trial of anyone for any reason. This is indicated from a consideration of the last paragraph of the Article which states that its application shall not affect the legal status of the parties to the conflict. This means that there is no recognition by the established government that the insurgents have authority of any kind.⁷⁷ The important result of this inadequacy is that members of the established government who violate the provisions of Article 3 cannot be tried by the insurgents,

75. "If [a rebel party] does not apply [Art. 3], it will prove that those who regard its action as mere acts of anarchy or brigandage are right." PICTET, *supra* note 48, at 37-38. Fidel Castro's revolutionary government, once it was in power, promised the International Red Cross Committee that it would obey Art. 3 of the Geneva Conventions. The Washington Post, Jan. 17, 1959. See also COMITE INTERNATIONAL DE LA CROIX-ROUGE, THE ICRC AND THE CONFLICT IN CUBA, (Information Note No. 670b, Jan. 9, 1959).

76. PICTET, *supra* note 48, at 35.

77. *Id.* at 47.

thus leaving the insurgents without this legal means to enforce compliance.

Article 3, as we have seen, is concerned with individuals, regardless of their allegiance or nationality. The parties to the conflict may well include foreigners who are assisting and advising both the insurgents and the established government. However, the Article does not determine the legality of such assistance. It is concerned solely with the welfare of the helpless. One must look beyond the Geneva Conventions to make the determination of the legality of intervention by foreign States. Such intervention concerns the relationship of government to government and not the relations of captor to captive.

IV

LEGALITY OF INTERVENTION IN CIVIL WARS BY FOREIGN STATES

A. *On Behalf of Insurgents.*

Is it legal for a foreign State to intervene for the purpose of rendering assistance to insurgents? It is generally understood that giving assistance by a foreign State to insurgent forces is prohibited by international law.⁷⁸ This position is based upon the propositions that international law recognizes the right of revolution;⁷⁹ that foreign intervention is necessarily directed against a portion of the population of a foreign State, which population has a right to employ its own resources to acquire the reigns of its government;⁸⁰ and, that foreign intervention violates the political integrity of the State.⁸¹

The U N Charter

The Charter of the United Nations provides that the Members "Shall refrain in their international relations from

78. LAUTERPACHT, *supra* note 18, at 660.

79. HYDE, *supra* note 20, at 253.

80. *Ibid.*

81. SCHWARZENBERGER, *supra* note 41, at 44.

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.”⁸² That foreign intervention for the purpose of rendering assistance on behalf of insurgent forces may also be a violation of the U N. Charter, is indicated by the passage of a resolution by the General Assembly on November 17, 1950, as follows:

[W]hatever the weapons used, any aggression whether committed openly or by fomenting strife in the interest of a foreign power, is the gravest of all crimes against peace and security throughout the world.⁸³

As previously noted, the legality of foreign intervention on behalf of insurgents does not influence the applicability of the provisions of Article 3 to those foreign soldiers who may be captives of the established government. Neither does it determine their legal status *vis-a-vis* the established government.

Status of Foreign Soldiers Assisting Insurgents.

Article 3, of the 1949 Geneva Conventions does not recognize a distinction between alien and national parties to an internal conflict. Consequently foreigners, acting on behalf of insurgents in a private capacity are not entitled to treatment any different upon capture than insurgents who are nationals of the State. They, like the nationals, would be subject to prosecution under the domestic laws of such State except that the humanitarian provisions of Article 3 would also apply. Unless the insurgents were legally entitled to exercise belligerent rights, foreigners would share the lot of the insurgents. In 1873 the Americans and British aboard the ship *Virginus*, which was employed in aid of the Cuban insurrection against Spain, were, upon capture on the high seas by the latter government, taken to Cuba and there con-

82. U.N. CHARTER art. 2, para. 4, 59 STAT. 1033, 1037 (1945).

83. U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20, at 13 (A/1775) (1950). See also Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 112, 115 (1959).

victed and shot.⁸⁴ When the nationals of one State enter another for private purposes, they subject themselves to the municipal laws of such other State.⁸⁵ It would not make any difference whether such foreigners wore the uniforms of the insurgent or not.

Whether uniformed members of a foreign military force who are acting under the orders of their government to render assistance to insurgents would, upon capture, be given a special status beyond that contemplated by Article 3 would appear to depend in part upon whether the established government and the foreign State would consider that they are at war with each other. If so, such foreign military members would be entitled to Prisoner of War status as the conflict would be international in character. Otherwise, the established government would not necessarily be bound to accord Prisoner of War status to such captured foreign soldier assisting or advising the insurgents. Should an international war subsequently develop between those two States because of the presence and assistance of the foreign forces, then of course, the international rules pertaining to Prisoners of War would apply.

Another view in this regard is found in a consideration of Article 2, common to all four, of the Geneva Conventions of 1949. It provides in pertinent part:

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.

Commenting upon this Article, Pictet points out that any difference arising between two states which leads to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.⁸⁶ Regardless of whether there has been fighting, and the number of persons

84. HYDE, *supra* note 20, at 244.

85. HACKWORTH, *supra* note 17, at 84.

86. PICTET, *supra* note 48, at 23.

involved, it is enough if such captives fall within the scope of the criteria for Prisoners of War status.⁸⁷ Thus, under this view, it appears that uniformed members of a foreign military force, who are captured while assisting the insurgents are to be accorded Prisoner of War status.⁸⁸

Having established the illegality of foreign intervention on behalf of the insurgents and discussed the indirect manner in which communist intervention has been accomplished, it is considered appropriate to determine the legal means the established government can employ to defend itself against such intervention.

*Countermeasures By The Established Government
Against Outside Intervention.*

What action may an established government of one state take in the territory of another state against armed bands who seek a safe haven in and receive supplies from the territory of such other state?

As previously stated, territorial contiguity with States friendly to the insurgents provides them with a means of obtaining arms and supplies and temporary retreat to a safe haven. The communist insurgents in Greece were able to operate effectively on its northern border as it was convenient for them to retreat inside the territory of Yugoslavia, Albania and Bulgaria. In Algeria, the rebels were able to evade the French army by fading across the border into Tunisia. In fact, it has been reported that the inability of the French to intercept arms shipments to the Algerian rebels from Tunisia and Morocco was one of the reasons for the failure of the French to obtain a victory. The French estimated that the rebels received 2,000 weapons per month from Tunisia alone.⁸⁹

It is not always easy to classify all these actions securely into one of the categories of international wrongs. They do,

87. Art. 4, *supra* note 69.

88. AMERICAN UNIVERSITY, SPECIAL OPERATIONS RESEARCH OFFICE, THE LEGAL STATUS OF PARTICIPANTS IN UNCONVENTIONAL WARFARE 7 (1961).

89. New York Times, Feb. 19, 1958, p. 1, col. 2.

however, present a problem because the operations are conducted in situations where there is no legal war⁹⁰ Therefore, numerous treaties contain provisions against permitting the toleration of, or support to groups concerned with frontier raiding and interference in the internal affairs of another State.⁹¹ There are also municipal laws which are designed to prevent breaches of neutrality⁹²

Under international law a State may not legally permit its inhabitants to conduct a hostile expedition from its territory against another State with whom it is at peace.⁹³ The toleration by a State of such an expedition implies complicity and therefore governmental participation in the conflict;⁹⁴ it may even be regarded as giving assistance to the hostilities by protecting the persons engaged, and such State may be said to be an accomplice. This principle is not attributable to the law of neutrality "It exists whether the foreign State be at war, or endeavoring to suppress unrecognized insurgents, or enjoying freedom from any internal disturbance."⁹⁵

Measures to be taken to prevent this type of unlawful intervention would of course, depend upon the circumstances. In cases where the Government, in whose territory the inva-

90. Brownlie, *International Law and The Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 713 (1958).

91. *Id.* at 719. Art. 1 of the convention signed by certain American republics at Havana in 1928 in respect to "the duties and rights of states in the event of civil strife" provides in part. "The contracting states bind themselves to observe the following rules with regard to civil strife in another one of them

1. To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.

2. To disarm and intern every rebel force crossing their boundaries.

3. To forbid the traffic in arms and war material, except when intended for the government, while the belligerency has not been recognized, in which latter case the rules of neutrality shall be applied. " 46 STAT. 2750 (1930).

92. *E.g.*, the neutrality Act of 1917 provides "Whoever within the United States knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both." 40 Stat. 223 (1917), 18 U.S.C. § 960. Note that this statute apparently does not require that a state of war exist in such foreign state.

93. LAUTERPACHT, *supra* note 18, at 704 8 MOORE, A DIGEST OF INTERNATIONAL LAW 908 2 HACKWORTH, *supra* note 17, at 336-342.

94. LAUTERPACHT, *supra* note 18, at 704.

95. HYDE, *supra* note 20, at 2254.

sions originate, cannot suppress these armed bands without assistance, military measures to include a frontier crossing could be taken with the consent of such Government.⁹⁶

In cases where the government in whose territory the armed bands originate is unwilling to suppress them, it would appear that Article 51 of the U N. Charter may permit military action across the frontier as a countermeasure. This Article provides in pertinent part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security

It is not likely that this provision contemplates that negligence by a government in permitting armed bands to operate from its territory constitutes an "armed attack" within the meaning of the Article. But it would seem that some grave breach of the peace or organized invasion by irregulars ordered by a government may come within the terms of the Article and consequently permit some preventive action. And especially so, if there is clear complicity of the government of the State from which they operate.⁹⁷ Do the provisions of Article 51 exclude the right of preventive measures in situations not amounting to "armed attack", that is, anticipated armed attack?

The customary rule of international law pertaining to this area is probably best stated as follows:

Whenever a government lends it countenance to individuals who are making hostile preparation within its territory, or even when the government does no more than fail to fulfill the obligations which international law imposes upon it to police its territory and to suppress the fitting out of hostile expeditions, it becomes responsible for the illicit acts which it has tolerated or failed to prevent.

96. There was an agreement between the United States and Mexico in 1882 which provided for the crossing of the frontier by the armed forces of either country in pursuit of hostile Indians. For this and other examples, see Brownlie, *supra* note 90, at 730.

97. *Id.* at 731.

In this event the state whose security is threatened has the right to intervene directly by way of self-help, and remove the menace to its security⁹⁸

This rule had its early origin in the *Caroline* case, where, in 1838, Canadian revolutionaries gathered in New York on the Niagara River awaiting transportation to Canada. The Canadian Government, as a countermeasure, crossed the river into New York and suppressed the expedition by burning the boat, *The Caroline*, to be used by the insurgents for transportation to Canada, and killing several of them in the fight. The United States Secretary of State stated that if there was a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation" preventive self-defense might be employed.⁹⁹ Although it may be argued that Article 51 has restricted the customary rule formulated in the *Caroline* case, it has never been so decided. Consequently, it would seem to be a better view that the customary rule is still a permissible source of legal reference,¹⁰⁰ and that Article 51 has only supplementary thereto. This is especially true since the "inherent right of self-defense" would appear to be meaningless in the event of an initial nuclear attack or a situation where the Security Council, because of difficulties among its members, is unable to take appropriate action under the Charter. It is because of these situations, not contemplated by the drafters of the Charter,¹⁰¹ that a more liberal exercise of the right of self-defense is clearly indicated.

During the Algerian conflict, French soldiers chased a band of Algerian rebels from Algeria into Tunisia, whence they came, and fought a battle in that territory. France claimed this as a right under international law.¹⁰² In 1916, the United States soldiers pursued Villa's bandits from New Mexico across the Mexican border. The United States' position was stated as follows:

98. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 373-374 (1921).

99. HYDE, *supra* note 20, at 239.

100. BROWNIE, *supra* note 90, at 732.

101. GOODRICH AND HAMBRO, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* 107 (1949).

102. BROWNIE, *supra* note 90.

If Mexican Indians whom Mexico is bound to restrain are permitted to cross its border and commit depredations in the United States, they may be chased across the border and then punished.¹⁰³

This doctrine of "hot pursuit" has been recognized by authorities on international law when applied on the high seas,¹⁰⁴ and was based upon the right of self-defense in case of necessity. The question which suggests itself is whether this doctrine has similar applicability on land.¹⁰⁵ Obviously it would be difficult to analogize between the two for the reason that no State has jurisdiction over international waters. It would seem, however, that the necessity of self-defense would be greater on land than at sea, especially in conflicts such as that previously described in Greece, Laos, Algeria and Vietnam. Although the *Caroline* case was not a genuine case of hot pursuit, the rule formulated in the *Caroline* case would probably permit reference to this doctrine. Even so, any proposed action taken under this doctrine should be weighed against all possible consequences.¹⁰⁶

To whatever extent the right of self-defense may be meaningful, the present conflicts in Laos and Vietnam illustrate that a militarily weak nation may be incapable of effectively exercising such rights to self-defense and, accordingly, cannot hope to survive against insurgents who are aided by stronger foreign States. Their only chance to survive may have to be based upon other international legal rights. Therefore, another means open to the established government as a countermeasure against outside intervention is that of requesting the assistance of a foreign government.

B. *On Behalf of the Established Government.*

The obvious question in this connection is whether it is

103. 1 WEARTON, INTERNATIONAL LAW DIGEST 230 (2d ed. 1887).

104. Pursuit lawfully commenced in territorial waters and continued without interruption into international waters. See HYDE, *supra* note 20, at 794.

105. Text writers make no reference to this question except that 2 HACKWORTH, *supra* note 17, at 291, and 1 HYDE, *supra* note 20, at 240, mention it as it pertains to United States practice with the Mexican problem.

106. See Scott, *The American Punitive Expedition Into Mexico*, 10 AM. J. INT'L L. 337 (1916).

legal for a foreign State to intervene for the purpose of rendering assistance to the established government.

There is divided authority as to the legality of foreign intervention on behalf of an established government. One view, as expressed by many authorities, is that "since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it."¹⁰⁷

Another view is that foreign States have a legal right to aid the established government in putting down a revolt.¹⁰⁸ The argument on this principle is that if assistance is given to the legitimate government it is not a case of unlawful intervention as it would be to give assistance to the insurgents who are revolting against its lawful authority. Consequently, the determination of whether such assistance is given would be a matter of policy rather than a matter of right or obligation under international law. This argument, of course, presupposes no recognition of belligerency on the part of the assisting government. For once there is such recognition, the foreign State loses its right, which it had during the period of insurgency, to assist the legitimate government and therefore must treat both belligerents alike.¹⁰⁹

Thus it appears that international law has no well defined and clear-cut rules relating to the legality of intervention on behalf of an established government in a civil war. Writers in this area have, for the most part, discussed intervention from the viewpoint of external forceable action which would interfere with a State's right to the enjoyment of full political independence and deny its sovereign existence without taking into account the "international civil

107. Wright, *Subversive Intervention* 54 AM. J. INT'L L. 521, 529 (1960). "The proper stand for a foreign State to take in a case of domestic disturbance within another State can be none other than that of disinterestedness and non-intervention." CHEN, *supra* note 32, at 335. "[C]ivil war is entirely permissible, and to side with the legitimate Government involves intervention in the internal affairs of that State." Wehberg, *Civil War and International Law*, in THE WORLD CRISIS 182 (1938). See also HYDE, *supra* note 20, at 254, and HALL, A TREATISE ON INTERNATIONAL LAW 293 (1917).

108. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES 922. See also Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 67 (1937) wherein he stated. "There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority."

109. BRIGGS, *supra* note 108, at 992.

war” Since World War II it has been difficult clearly to define purely internal conflicts which are completely isolated from the outside world. The forces of the interior are, in most cases, stirred up and assisted from the outside. It is apparent, then, that this distinction would seem to take the case beyond the law relating to intervention in civil war, that is, civil war in the traditional sense. The international civil war, civil war conceived, instigated, assisted and directed by outside countries, has not been the subject of distinction by authorities in considering the legality of “intervention.”¹¹⁰ Accordingly, this very old debate as to what extent intervention in a civil war may be a violation of international law would seem to be relevant only in a purely local conflict. In the international civil war of today there is an ideological clash, a war of communism versus democracy, a war where armed bands have a safe haven in, receive logistical and other assistance from other States. This type of civil war constitutes a real danger to international peace.¹¹¹ It naturally invites the interest of great powers who are sympathetic to these special points of view. Consequently, practice on the matter of intervention has been, and for some time to come, will be determined more often by political motives than by legal principles.

In each instance when the United States forces have entered a foreign State to render assistance to the established government, they have done so pursuant to the invitation of that government. It is because of the concept of sovereignty that a State has complete authority over everything within its boundaries. Consequently, the relationship between foreign soldiers who enter the territory of another

110. Quincy Wright seems to argue that counter-intervention at the invitation of the established government may be justified depending upon the actual quantity of outside intervention. He states “There undoubtedly were propaganda and perhaps military assistance from the outside [in the Lebanon crisis], but the problem is to determine, as in the Manchurian case in 1931, and the Chinese case of 1949, whether the movement was predominantly a domestic revolt or predominantly an external intervention. In order to justify its intervention before the United Nations it would seem incumbent upon the United States to prove the latter.” Wright, *United States Intervention in Lebanon*, 53 *AM. J. INT’L L.* 112, 125 (1959).

111. In Vienna in 1961, President Kennedy warned Premier Krushchev that there could not be too many “wars of liberation” without a direct confrontation of United States and Soviet power.

State and that State must be based upon the will of such State.

Status of Foreign Soldiers Assisting the Established Government.

The legal relationship between foreign soldiers, whose government sends them to assist in putting down a rebellion and the established government is usually established by treaty¹¹² Of course, in the absence of a treaty, the municipal laws of the established government apply to them to the same extent as they would to the insurgents or other subjects of the established government. It has become usual, however, that in instances where the relationship between United States personnel and the established government has been defined by agreement, jurisdiction over such personnel has been retained by the United States.¹¹³

On the other hand, foreign soldiers who assist the established government in counterinsurgency operations do not have a legal status different from anyone else when captured by the insurgents. Article 3 is the only protection such captives have. The Article is binding upon insurgents to the same extent as it is upon any other party to the conflict.¹¹⁴

Although there are no geographical limitations upon the applicability of the Uniform Code of Military Justice, and the jurisdiction of a courts-martial does not depend upon where the offense was committed,¹¹⁵ certain legal questions arise with respect to whether United States personnel en-

112. The United States has such agreements with South Vietnam, Lebanon, and South Korea.

113. " (1) The United States courts-martial may exercise exclusive jurisdiction over the members of the United States Military Establishment in Korea. " Treaty on Jurisdiction Over Offenses by United States Forces in Korea, July 12, 1950, 5 U.S.T. & O.I.A. 1408, T.I.A.S. No. 3012. " The military authorities of the United States shall have the exclusive right to exercise all criminal and disciplinary jurisdiction over all persons subject to its military law. The United States undertakes to maintain discipline over all such persons and to insure full respect by them for the laws of Lebanon. " Agreement on the Status of United States Forces in Lebanon, Aug. 6, 1958, 10 U.S.T. & O.I.A. 2166, T.I.A.S. No. 4387. The Treaty on Mutual Defense Assistance in Indochina with Cambodia, France, Laos and Vietnam, Dec. 23, 1950, provides that officers and enlisted personnel of the United States Army, Navy, and Air Force will be immune from civil and criminal jurisdiction of the host country. 3 U.S.T. & O.I.A. 2756, T.I.A.S. No. 2447.

114. FINAL RECORD, *supra* note 50, at 121.

115. 5 U.C.M.J. DEP'T OF THE ARMY, MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 8 (1951).

gaged in counterinsurgency operations such as those now being conducted in Vietnam, can be tried for those offenses made punishable "in time of war"¹¹⁶ But no attempt will be made to discuss the legal relationship between the American soldier and his own government as this subject is beyond the scope of an article devoted primarily to the relationship between the harassed Government with its own citizens and outside States.

V

CONCLUSIONS AND RECOMMENDATIONS

A. *Conclusions.*

Civil wars are the wars of the present, and will likely be the vehicle for international conflict for some time in the future. They reflect the development and ferment of the contemporary world and "constitute the dynamic element of world affairs today"¹¹⁷ During these conflicts the fighting is fierce and there are large numbers who suffer as a result of them. Added to this is the fact that it is difficult to make a legal distinction between armed forces and the civilian population in instances where the parties to the conflict do not recognize a special protective status for each.

An insurgent force is not a sovereign nation, neither does it possess any other international legal personality. Thus it cannot maintain usual relations with other nations of the world. It is partly for this reason that the international rules relating to the conduct of war between States do not apply to it. Attempts have been made, however, to formulate some international rules applicable to a state of insurgency. This is a step in the right direction but the status of insurgency in international law still remains controversial.

Article 3 of the Geneva Conventions of 1949 has been considered a great success in the establishment of rules to

116. U.C.M.J. arts. 99-105.

117. Neumann, *supra* note 2, at 334-335.

regulate internal conflict, but a close consideration of the Article shows that it is only a beginning. It stipulates only a minimum amount of rights. As far as its application is concerned, it is not clear what is the international responsibility of parties who disregard it, nor whether the penalties for grave breaches of the Geneva Conventions are applicable to violations of this particular Article. Moreover, no mandatory international control mechanism exists.

Even though the present development of international relations makes it difficult to insure that States take action in this matter, the existence and strengthening of legal enactments is necessary today to regulate internal conflicts.

Since, as has been noted, internal armed conflicts are not a purely internal matter for a State, the international community should express its views in the form of providing for intervention in humanitarian matters in favor of the victims of such conflicts.

B. Recommendations.

Arrangements should be made for discussions by qualified individuals and organizations, such as the International Red Cross, with a view to adopting a draft rule which would be submitted to States for approval. This rule could be in the form of a protocol to be annexed to the Geneva Conventions calling for a wider application of the Conventions to the extent that they will embrace armed conflicts not of an international character. The protocol would provide for the establishment of an organization within the Red Cross or other impartial humanitarian body to make a determination as to when an insurgency has reached the stage of a *de facto* belligerency¹¹⁸. In such cases the protocol would provide that the Geneva Conventions would apply to the conflict in full.

The adoption of this measure would provide rules for the protection of war victims in insurgency civil wars and at

118. *De facto* belligerencies are not uncommon in recent history. For example, the French action in Indochina, the conflict between Katanga and the central Government of the Congo, the Spanish Civil War, and the Civil War in Cuba, all, at one stage or another, reached a *de facto* belligerency.

the same time it would not force the recognition of belligerency by foreign States or the established government. It would also preclude the exercise of belligerent rights by the parties to the conflict against foreign States and thus leave the latter's neutrality laws undisturbed. This would, as a result, permit foreign States to render assistance to an established government. Further, captives who met the requirements of Article 4 of the Prisoner of War Convention would be accorded treatment provided by the Convention. This would embrace the trial by the insurgents of its captives in accordance with the laws applicable to members of its own armed force.¹¹⁹ Grave breaches of the convention would then be punishable not only by the State which had suffered the harm but by other States not involved with the conflict,¹²⁰ thereby affording a control and enforcement mechanism.

This would solve the problem of the requirement of recognition of belligerency, which, under the present state of the law, is a prerequisite to the application of the entire Conventions.

There would seem to be no reason, humanitarian or otherwise, to lift insurgency out from under the punitive provisions of the local law prior to a time when the conflict had reached the stage of a *de facto* belligerency. Governments have the right to protect themselves from violent overthrow. Internal order demands laws against attacks on the government and its forces. But it is difficult to imagine that an established government would be concerned with the prosecution of all insurgents under its local law where an internal conflict had reached such a major proportion.

It is conceivable that a revolution within a State, but inspired and assisted by an outside government, may be successful. In such a case, the United States may find it propitious to render assistance to a counterrevolutionary

119. Subject to the conditions of para. 1(d) of Art. 3, *supra* note 69.

120. Arts. 49 and 50, Geneva Convention for the Amelioration of the Wounded and Sick in the Field, *supra* note 16. There are corresponding articles in the three other Conventions, *supra* note 16.

force desirous of regaining control of their former State. The present status of international law with respect to the legality of intervention for the purposes of assisting insurgents would apparently preclude such intervention by the United States. This is indeed unfortunate because the legal objections, that such intervention would violate the political integrity of the State, is based upon a factual assumption that there was no prior outside assistance involved in the conflict. That assumption may have been true in traditional civil war. This being the case, it would seem that the rule based upon a consideration of facts corresponding to traditional civil war would be subject to an exception by virtue of a different set of facts. In other words, if that is the law as it relates to traditional civil war, does it mean that this same law applies to the international civil war—one which is instigated and assisted by other States? This distinction of facts would certainly indicate a need for a distinction in law. Accordingly, the international law in this respect should be modified, or clarified.

The civil war is internationalized by virtue of the assistance of outside States. Thus, this modification of the law relating to intervention could present certain analogies to the sanction of reprisals in "international war", that is, retaliatory actions to force the offending party to conform to the rules of warfare.

It is understood that it would take a considerable amount of time before these two recommendations could be realized fully. However, there are certain actions that the United States could take in the furtherance of these objectives. (1) They should be made a part of the foreign policy of the United States. (2) The United States should urge their adoption by the Organization of American States (among which are some States probably vulnerable to communist subversion). From time to time this Organization has found it appropriate to promote their interests by means of treaties, conventions, resolutions and declarations. The adoption of these recommended proposals, this writer believes, would be a significant step forward from what is now an unsatisfactory state of international law.

Article 3 includes a recommendation that the parties to the conflict endeavor to bring into force all or a part of the other provisions of the Convention. The United States should not adopt a policy urging the application of *all* of the provisions of the Conventions in an insurgency type of civil war. One of the important problems posed by civil war is that of converting the insurgent into an ally. In fact, the mission of the United States Special Forces detachment includes taking appropriate action to cause enemy units to defect.¹²¹ Such action is usually accomplished by an offer of the established government to grant amnesty to members of the insurgent forces for taking up arms against the government.¹²² If efforts in bringing into operation all of the provisions of the Conventions are successful, any subsequent offer of amnesty would not be effective as an inducement to the insurgents to defect because those insurgents who qualified as Prisoners of War when captured could not be tried for acts of legitimate warfare against the established government by virtue of their new status. Thus the insurgents may see no advantage in accepting the offer of amnesty, knowing that they cannot be tried for taking up arms against the established government, and continue fighting until captured. Accordingly, any policy adopted with a view to the application of *all* of the Conventions in an insurgency type of civil war would appear to be unsound.

New Problems call for new solutions. The international legal questions raised by the conflicts in Southeast Asia and elsewhere do not fit into any familiar mold; yet they vitally affect the foreign policy of a nation committed to the rule of law; and means must be found to update the Law of Nations to deal with the power realities of the postwar world.

121. Asprey, *Special Forces Europe*, Army, Jan. 1962, p. 56.

122. *E.g.*, the late President Ngo Dinh Diem offered conditional amnesty to South Vietnamese who were fighting his government under the communist flag. He invited all men and women "who have been deceived, exploited or enrolled by force by the Communists" to rally to the side of the national Government. *Richmond Times-Dispatch*, April 17, 1963, p. 15, col. 2.