Terrorism and "Wars of National Liberation" from a Law of War Perspective

Traditional Patterns and Recent Trends

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Contents

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Abbreviations: AJIL = American Journal of International Law; AkronL.Rev. = Akron Law Review; Am.U.L.Rev. = American University Law Review; ASIL Proc. = Proceedings of the American Society of International Law; BYIL = British Year Book of International Law; EPIL = Encyclopedia of Public International Law, ed. by R. Bernhardt; Ga.J.Int'l & Comp.L. = Georgia Journal of International and Comparative Law; GYIL =

I. Introduction

"The law of war does not apply to acts commonly considered to be acts of international terrorism", was stated in the 1982 Report of the Committee on International Terrorism of the International Law Association. The Committee has qualified this statement by adding the following: "However, recent developments in the humanitarian law of war seem significant"[1].

The legal relationship between the problems of terrorism[2] and the laws of war is not one of the questions of international law the importance of which is self-evident for all observers (as holds true even for committees of the ILA). The phenomena of terrorism as "private" political violence on the one hand and of war as militarily organized violence conducted in principle by States' organs on the other hand seem to be two very distinct forms of political action with totally different legal régimes[3].

However, it is not merely a consequence of recent trends in humanitarian law that the laws of war have started to govern certain acts of terrorism. The classical laws of war always were applicable to specific acts of terrorism. All violent acts committed in the course of warfare operations, as well as all acts committed in time of war and in the territories falling under the laws of war were – at least in general – governed by the laws of war. Acts of terrorism in occupied territories or acts of sabotage in the belligerent "hinterland" were not only covered by the (internal) régime of martial law, but

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German Yearbook of International Law; ICRC = International Committee of the Red Cross; ILA = International Law Association; ILM = International Legal Materials; RdC = Recueil des Cours de l'Académie de Droit International; RBDI = Revue Belge de Droit International; Rev. de Droit Pénal Mil. et de Droit de la Guerre = Revue de Droit Pénal Militaire et de Droit de la Guerre; Va.J.Int'lL. = Virginia Journal of International Law.

[1] ILA-Report 60th Conference Montreal 1982, p.352 para.12.

[2] The usual attempt to define "terrorism" will be omitted in this paper. As F. Kalshoven stated: "I am acquainted with use of the term in the media or by the police and even in legal writings, and often I can make a fairly shrewd guess what impression the user wishes to convey. But this is a far cry from saying I would be able to connect the term with a specific legal notion. I seriously doubt it constitutes a term of art" (ASIL Proc. 79th Meeting 1985, 117). The term thus is used in a pragmatic way referring to the phenomena usually described as "terrorism" in popular language.

[3] There exists, nevertheless, some literature on the overlapping and interdependence of both legal régimes – cf. K. Hailbronner, International Terrorism and the Laws of War, GYIL vol.25 (1982), 169–198; H.-P. Gasser, Interdiction des actes de terrorisme dans le droit international humanitaire, in: Revue internationale de la Croix-Rouge, No.760 (1986), 207–221; G. Schwarzenberger, Terrorists, Hijackers, Guerrilleros and Mercenaries, in: Current Legal Problems, vol.24 (1971), 257–282.

also – under an international legal perspective – by the customary laws of war, which later became codified in a number of conventions.

Operations by resistance movements and partisan warfare in occupied territories during the Second World War[4] are a good example of the close entanglement of strategies of terrorism and warfare operations. The process of decolonization and the rise of the political concept of "wars of national liberation"[5], which Third World States tried to anchor in international law, further complicated the distinction between terrorism and warfare, since these "liberation struggles" were often fought mainly according to "terrorist" strategies.

Every diplomat involved in "lawmaking" in matters of terrorism knows the difficulties which arise in multilateral fora when negotiating on texts concerning terrorism. The claim raised by "progressive" States that "wars of national liberation" should be excluded totally from the ambit of texts dealing with international terrorism has to be brought into a delicate balance with the desire of the States most concerned by acts of international terrorism to develop rules that are generally applicable to all forms of "terrorist" violence. Every UN General Assembly resolution on terrorism passed in the last decades proves this difficulty[6]. To give another example, in the negotiations on an international convention against the taking of hostages the question of the legal status of members of "national liberation movements" almost led to a deadlock which could only be prevented by a complicated "formula compromise"[7].

The need felt by most Third World States for an international legal régime concerning "wars of national liberation" brought an important school of thought in international law doctrine to the conclusion that such "liberation wars" must be (and are) governed by the existing laws of war[8].

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[4] For an historical assessment cf. W. Hahlweg, Guerrilla – Krieg ohne Fronten (1968), 110–148, or W. Laqueur, Guerrilla (1977), 202–238.

[5] Cf. Hahlweg, ibid., 149–193; Laqueur, ibid., 278–325; cf. also G. Abi-Saab, Wars of National Liberation in the Geneva Conventions and Protocols, RdC vol.165 (1979 IV), 353 (369 *et seq.*); H.-J. Uibopuu, Wars of National Liberation, EPIL Instalment 4 (1982), 343–346; J.J.A. Salmon, Les guerres de libération nationale, in: A. Cassese (ed.), The New Humanitarian Law of Armed Conflict (1979), 55–112.

[6] Cf. L.C. Green, Double Standards in the United Nations: The Legalization of Terrorism, in: Archiv des Völkerrechts, vol.18 (1979/80), 129–148.

[7] Cf. W.D. Verwey, The International Hostages Convention and National Liberation Movements, AJIL vol.75 (1981), 69–92; K.W. Platz, Internationale Konvention gegen Geiselnahme, ZaöRV vol.40 (1980), 276–311.

[8] Cf. for example G. Abi-Saab, Wars of National Liberation and the Laws of War, Annales d'études internationales, vol.13 (1972), 93–117; N. Ronzitti, Resort to Force in

This approach has always been heavily disputed by the Western States and an important group of European and American scholars[9]. Varying assessments of violent operations by PLO and ANC commandos as acts of "terrorism" or "wars of national liberation" are a manifestation of the contradictory positions in existence today.

With Art.1, para.4 of the First Additional Protocol of 1977 the international community tried to solve this dispute by attempting to reach a compromise. National liberation movements were brought – under specific circumstances – under the laws of war, but by the same token the movements were subjected to the existing legal régime of international humanitarian law.

This solution was again heavily attacked by certain groups. The debate held in the United States on the desirability of ratifying Additional Protocol I casts a spotlight on the still remaining controversy[10]. As one important Pentagon official[11] remarked:

> "In my view, the upshot of the Diplomatic Conference was a pro-terrorist treaty, that calls itself humanitarian law. It is a vindication of the rhetoric, the aims, and the practices of terrorist organizations. It is a repudiation of the philosophy that holds that one's means must be limited even in war ... It is a repudiation of the view that individual rights take precedence over collective interests. In other words, it is a repudiation of the core of our legal philosophy"[12].

The approach underlying this statement prevailed in the Reagan Administration[13] and thus the "pro-terrorist" character of the Additional

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Wars of National Liberation, in: A. Cassese (ed.), Current Problems of International Law (1975), 319–353 (350 *et seq.*); A. Grahl-Madsen, Decolonization, The Modern Version of a "Just War", GYIL vol.22 (1979), 255–273; Abi-Saab (note 5), 372 *et seq.*

[9] Cf. e.g. E. Klein, Nationale Befreiungskämpfe und Dekolonisierungspolitik der Vereinten Nationen, ZaöRV vol.36 (1976), 618–653 (638, 651); D. Schindler, The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols, RdC vol.163 (1979 II), 121–160 (136); Uibopuu (note 5), 346; C. Tomuschat, Rights of Peoples. Some Preliminary Observations, in: Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug (1986), 337–354 (346 *et seq.*).

[10] Cf. Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, AJIL vol.81 (1987), 910–925.

[11] D.J. Feith, Deputy Assistant Secretary of Defense for Negotiations Policy.

[12] D.J. Feith, Protocol I: Moving Humanitarian Law Backwards, Akron L.Rev. vol.19 (1986), 533 (534). Cf. also the article by the Judge Advocate General's corps member Major Guy B. Roberts, The New Rules for Waging War: The Case Against Ratification Of Additional Protocol I, in Va.J.Int'lL. vol.26 (1985), 109 (123, 167).

[13] With respect to this statement see W. Solf, A Response to Douglas J. Feith's "Law in the Service of Terror – The Strange Case of the Additional Protocol", in Akron L.Rev. vol.20 (1986), 261–289 (261–262): "Apparently, Mr. Feith's views have had decisive influ-

Protocol I was used as an official argument not to submit the Protocol to the Senate for ratification. In his letter of Transmittal of Additional Protocol II President Reagan stated that "Protocol I is fundamentally and irreconcilably flawed"[14]. However, the reasoning underlying this position is open to serious criticism and deserves further analysis.

This paper will begin such analysis with an examination of the existing legal régime concerning acts of terrorism committed during armed conflicts. The rules guiding States' response to terrorist acts vary with the legal nature of the conflict. The present analysis will thus be divided into two parts, dealing, first, with the rules of the classical laws of war concerning international armed conflict and, second, with the rules on non-international armed conflict.

A comparison of both legal régimes is necessary to assess the legal significance of the changes brought about by Additional Protocol I. On the basis of this comparison, an evaluation will be made of the advantages and disadvantages of the solution found in 1977. The evaluative portion of this study will attempt to answer the following questions: First, are the objections raised against Additional Protocol I really justified? And second, could the solution laid down in Additional Protocol I perhaps be helpful in further developing international legal rules on terrorism?

This article will conclude with some observations on what potentially could be derived from the regulation of the laws of war for solving the legal problems lawyers face in dealing with terrorism. The potential result of such a foray into the laws of war is much more promising than a skeptical lawyer would expect, but much less than what a number of optimists has claimed is possible.

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ence on the formulation of U.S. Government policy regarding the ratification of the 1977 Protocols".

[14] Reprinted in AJIL vol.18 (1987), 910 (911).

II. The Legal Régime of International Armed Conflicts

1. Customary Law and the Hague Regulations

The customary laws of war do not regulate every violent action with a political background. They are only applicable when an "international armed conflict" exists[15]. This notion could be described – in an analogy to the definition of "war" used by Ingrid Detter De Lupis in her recent treatise[16] – as referring to a conflict involving the use of military force between groups of combatants, as those have been defined in the contemporary law of war[17]. This description at first sounds rather elliptic, but makes a good sense, as will be shown, as the concept of "combatant" is relatively well defined in international law.

The basic questions of applicability of the laws of war, thus, refer to the essential notion of "combatant". Combatants are the lawful military actors according to the laws of war. The basic example of this type of lawful military actor is the member of the State's regular armed forces, i.e. the regular soldier[18]. However, as early as the 19th century irregular soldiers of various types were common phenomena, and during the Hague Peace Conferences an important group of States wanted to enlarge the category of "combatants" by including irregular forces fighting on behalf of a State[19].

As a result of these tendencies the requirements of "combatancy" were codified in a rather balanced way under Art.1 of the Hague Regulations, which reads as follows:

> "The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
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> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and

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[15] Cf. K.J. Partsch, Armed Conflict, EPIL Instalment 3 (1982), 25 (26); C. Greenwood, The Concept of War in Modern International Law, International and Comparative Law Quarterly, vol.36 (1987), 283 (295 *et seq.*).

[16] I. Detter DeLupis, The Law of War (1987).

[17] Ibid., 24.

[18] Cf. E. Castrén, The Present Law of War and Neutrality (1954), 144 *et seq.*; A. Steinkamm, Die Streitkräfte im Kriegsvölkerrecht (1967), 111 *et seq.*; A.M. De Zayas, Combatants, EPIL Instalment 3 (1982), 117 *et seq.*; C. Rousseau, Le droit des conflits armés (1983), 69 *et seq.*; Detter DeLupis (note 16), 106 *et seq.*

[19] Cf. G.I.A.D. Draper, Combatant Status: An Historical Perspective, Rev. de Droit Pénal Mil. et de Droit de la Guerre, vol.11 (1972), 135–143 (141 *et seq.*).

4. To conduct their operations in accordance with the laws and customs of war".

These provisions mean that even irregular forces must be integrated into a regular command structure responsible to the belligerent State's government and that they must be assimilated to regular forces acting openly as military units in accordance with the rules of warfare[20]. Persons not fulfilling these conditions – and the restrictive wording excluded a great number of persons taking part in hostilities[21] – are excluded from combatant status, which also entails their being denied the corresponding status of prisoner of war with its special protection. All persons acting under civilian disguise, i. e. spies, saboteurs, regular soldiers conducting covert operations under civilian feigning, partisans and members of resistance movements in occupied territories, had no protection under the laws of war[22].

The belligerent State's authorities thus enjoyed total freedom in coping with the actions of these "unprivileged fighters" as they will be called here following the terminology created by Richard R. Baxter[23]. This liberty in its repressive policies included in particular the possibility to react with summary execution of all "unprivileged fighters" captured by the State's armed forces[24].

Art.23 (b) of the Hague Regulations explicitly prohibits the killing or wounding treacherously of individuals belonging to a hostile nation or army. One of the most prominent examples of such a "treacherous hostile act" is the attack under civilian camouflage. Members of the regular armed forces wearing civilian clothes in order to assume the guise of civilians – as tactic adopted in the course of World War II in a number of raids by commandos and parachute troops – forfeit their combatant status and are entitled to no better or worse treatment than other "unprivileged fighters"[25]. As a consequence they can also be punished for hostile acts committed against enemy armed forces, a punishment which would be excluded in the case of prisoner of war status.

The same treatment was reserved for partisans and guerilla fighters not

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[20] Cf. Castrén (note 18), 146 *et seq.*; Steinkamm (note 18), 204 *et seq.*

[21] Cf. R.R. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerillas and Saboteurs, BYIL vol.28 (1951), 323–345.

[22] Cf. Baxter, ibid., 327 *et seq.*; Steinkamm (note 18), 244 *et seq.* (269, 281); the only exception are Arts.29, 30 of the Hague Regulations, which define the category of "spy" and require that spies shall not be punished without trial.

[23] Baxter (note 21).

[24] For an analysis of the practice of summary executions cf. M. Veuthey, Guérilla et Droit Humanitaire (2nd ed. 1983), 217–223.

[25] Baxter (note 21), 341.

fulfilling the conditions of Art.1 of the Hague Regulations as well as for persons committing individual hostile acts, traditionally called «franc tireurs». Since partisan bands and armed groups of resistance movements normally did not act openly in military units wearing distinctive emblems and carrying arms openly, their members were also not entitled to the status of "combatants". Even when these prerequisites were met, most partisan movements did not enjoy the privileges given by Art.1 of the Hague Regulations, since this norm required that the volunteer corps be constituted before occupation of the territory by the enemy and that the armed movement be attributable to a High Contracting Party. The latter requirement meant that the armed movement had to be responsible to the recognized government of a belligerent State[26]. Most partisan movements in World War II, however, acted under the command of non-recognized revolutionary or exile governments.

The traditional customary laws of war thus made no distinction between the different forms of "unprivileged belligerency" whether they involved covert actions by the regular armies of belligerent States, operations of guerilla warfare by partisan groups or acts of political terrorism against Occupying Powers. All persons participating in such "illegitimate" hostile actions were left to the mercy of the capturing State, which meant that they were subject to treatment as common criminals under normal municipal law or, if applicable, martial laws. As a result, these persons were often subjected to capital punishment for their violent hostile actions or – a fate met by most captured members of partisan groups in World War II if they were not executed summarily – for the mere participation in guerilla warfare, which was often defined as a crime by the martial law of the Occupying Power[27].

2. Geneva Conventions of 1949

The experiences suffered in World War II led to the conclusion that the rules of humanitarian law should be improved and assimilated to the changed conditions of modern warfare. A result of the negotiations initiated by the ICRC in this regard was the adoption of the four Geneva Conventions in 1949.

The requirements of "combatancy" remained in principle unchanged. Art.4 A of the (Third) "Convention relative to the Treatment of Prisoners

[26] Cf. Steinkamm (note 18), 204 *et seq.*
[27] Cf. Baxter (note 21), 338.

of War" contained the old catalogue of conditions set forth in Art.1 of the Hague Regulations, but explicitly included among those considered combatants – thus reflecting the experiences of World War II – "organized resistance movements, belonging to a Party to the Conflict and operating in or outside their own territory, even if this territory is occupied", provided that such movements fulfil the four conditions set up for volunteer corps in Art.1 of the Hague Regulations[28].

Also included were "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" (Art.3 A (3) of the Third Geneva Convention), thus still leaving unprotected members of volunteer corps and resistance movements responsible to such a non-recognized authority[29].

Under the provisions of the Third Convention the protection given to prisoners of war was substantially improved. Of particular importance for combatants accused of having committed "terrorist" acts punishable as war crimes was the newly included provision of Art.85 of the Third Convention. Especially during and after World War II it was arduously disputed whether "war criminals" could claim privileged treatment as prisoners of war[30]. Contemporaneous State practice generally excluded combatants accused of war crimes from prisoner of war status and instead treated them as common criminals[31]. To remedy this weakness in the safeguards the ICRC proposed in its draft that combatants accused of war crimes should enjoy the protection and the privileges of prisoner of war status until convicted by a final judicial decision[32]. Initially, even this proposal was heavily debated[33], but during the 17th Red Cross Conference at Stockholm in 1948 a new approach gained preponderant support which went even further than the ICRC proposal[34]. As a final result of this change of attitudes, Art.85 now states:

"Prisoners of war prosecuted under the laws of the Detaining Power for acts

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[28] For historical background and an interpretation of this provision cf. J. Pictet (ed.), Commentaire à la IIIe Convention de Genève (1958), 59–69.

[29] Ibid., 69–72.

[30] Cf. Pictet (note 28), 437–438; G. Schwarzenberger, International Law as applied by International Courts and Tribunals, vol.II (1968), 453–454; G. Winands, Der Status des Kriegsverbrechers nach der Gefangennahme (1980), 19 *et seq.*

[31] Cf. the judgments of the U.S. Supreme Court, the French Cour de Cassation and the Italian Corte di Cassazione, cited by Pictet, ibid., 438.

[32] Cf. Pictet (note 28), 439; Winands (note 30), 23; A. Rosas, The Legal Status of Prisoners of War (1976), 368.

[33] Cf. Pictet, ibid., 439; Rosas, ibid., 368; Winands, ibid., 23–24.

[34] Cf. Pictet (note 28), 440; Rosas (note 32), 368; Winands (note 30), 24.

committed prior to capture shall retain, even if convicted, the benefits of the present Convention".

This solution was strongly rejected by the Socialist States[35], which declared reservations modifying the régime of Art.85 to make it correspond to the basic rule contained in the original ICRC draft[36].

The extension of the benefits of the Third Convention to combatants convicted of war crimes, nevertheless, does not mean that the sentences pronounced may not be executed. An underlying basis of the entire discussion clearly seems to have been that the benefits referred to are only the benefits given by the Convention to prisoners of war prosecuted for acts which they committed subsequent to capture[37] – i.e., in particular, the right of appeal, the suspension of death sentences for six months in accordance with Art.101 and the minimum standards for the execution of prison sentences laid down in Art.108, including regular visits by delegates of the Protecting Power.

The basic distinction between (lawful) combatants, who were entitled to claim prisoner of war status, and "unprivileged fighters", who were still left to the mercy of the Capturing Power, however, was left unchanged. Only for a particular group – the civilian population in occupied territories[38] – was a protective system of specific safeguards created. Art.4 of the Fourth Geneva Convention "Relative to the Protection of Civilian Persons in Time of War" includes in the group of the persons protected by the Convention all persons "who ... find themselves ... in the hands of a Party to the Conflict or Occupying Power of which they are not nationals". As long as partisans and terrorists in occupied territories are not combatants, they must be categorized as part of the civilian population of

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[35] Ibid.

[36] The reservations are reprinted in: D. Schindler / J. Toman (eds.), The Laws of Armed Conflicts (2nd ed. 1981), 493–520. Australia, New Zealand, the United Kingdom and the United States raised objections against these reservations, cf. ibid., 494, 510, 518 and 520; for an evaluation of the reservations cf. Winands (note 30), 29–31.

[37] Cf. Rosas (note 32), 369; Winands, ibid., 27–28; W. Meier, Die Bestimmungen über das Kriegsverbrechens- und Besatzungsstrafrecht in den Genfer Abkommen zum Schutze der Kriegsopfer (1964), 87–88; but cf. also the restrictions stated by Pictet (note 28), 447 for the possibility of prosecuting war crimes during the ongoing conflict.

[38] For the protection of the civilian population in time of war cf. M. Greenspan, The Modern Law of Land Warfare (1959), 154–205; J. Mirimanoff-Chilikine, Protection de la population et des personnes civiles contre les dangers résultant des opérations militaires, RBDI 1971, 619–670 and 1972, 101–142; K. Obradovic, La protection de la population civile dans les conflits armés internationaux, RBDI 1977, 116–142; R.C. Algase, Protection of Civilian Lives in Warfare, Rev. de Droit Pénal Mil. et de Droit de la Guerre, vol.12 (1977), 245–261.

occupied territories. In consequence, all safeguards of the Fourth Convention are applicable to them, in particular the guarantees with regard to criminal prosecution under Arts.64 *et seq.* Provisions of a particular significance in this context are Art.68, which creates an important safeguard against imposing the death penalty for minor offences, Arts.71–75, which provide for a system of procedural safeguards concerning criminal trials, and Art.76 on the treatment of detainees.

Art.5 of the Fourth Convention, on the other hand, gives a far reaching possibility to the Occupying Power to derogate from the mentioned safeguards for the treatment of partisans and terrorists if the Occupying Power deems the privileges given by the Convention to be prejudicial to its security.

3. Additional Protocol I

The reality of warfare continued to change in the decades after 1949. Although the world has seen nearly thirty conventional inter-State wars since 1945[39], which often were waged in the traditional mould of field battles fought by large-scale conventional armies, the violent conflicts in the course of the decolonization process began to change the image of modern armed conflicts[40]. The claims of the Third World for recognition of this new type of warfare, propagated under the notion "wars of national liberation", as a new category of international armed conflicts[41], became more and more pressing. At the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law" held at Geneva from 1974–1977[42], the political pressure towards recognition of the international character of these "wars of national liberation" became so intense that the problem could not longer be neglected[43].

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[39] Counted by the author on the basis of the work of K.J. Gantzel / J. Meyer-Stamer (eds.), Die Kriege nach dem Zweiten Weltkrieg bis 1984 – Daten und erste Analysen (1986).

[40] Cf. e.g. O. Kimminich, Guerrilla Forces, EPIL Instalment 3 (1982), 201–204 (202); G.I.A.D. Draper, The Status of Combatants and the Question of Guerilla Warfare, BYIL vol.45 (1971), 173 (183–184).

[41] Cf. above notes 5 and 8.

[42] Cf. M. Bothe/K. Ipsen/K.J. Partsch, Die Genfer Konferenz über Humanitäres Kriegsvölkerrecht, ZaöRV vol.38 (1978), 1–85.

[43] Cf. B. Zimmermann, in: Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ed. by the ICRC (1987), paras.92 *et seq.*; M. Bothe / K.J. *Partsch* / W. Solf, New Rules for Victims of Armed Conflicts (1982), 38 *et seq.*

The compromise found after long negotiation is laid down in Art.1 (4) of the First Additional Protocol (Add. Prot. I). This provision is framed as a clarification or legal fiction – both possibilities can be read into the provision – according to which the legal notion "international armed conflict", in the sense of Art.2 common to the Geneva Conventions, shall "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations" and the Friendly Relations Declaration. For Contracting Parties of Additional Protocol I, the dispute on the international character of "wars of national liberation" has thus found a clear solution.

Additional clarification is brought about by a restrictive formula circumscribing what may be considered as conflicts of "national liberation"[44]. Such conflicts only include armed struggles related to the exercise of the right of self-determination, as circumscribed in the Friendly Relations Declaration[45], which leaves a rather narrow field of application for the new rule if seen in connection with the "numerus clausus" of objectives prescribed by Art.1 (4) of Add. Prot. I.

The changed delimitation of the Geneva Convention's field of application alone, however, would have had only limited effects. Since practically all "wars of national liberation" are waged in the form and by the means of guerilla warfare, the fighters of a "movement of national liberation" would have remained "unprivileged belligerents" left to the mercy of the other party if the Diplomatic Conference had not changed the rules on combatancy and prisoner of war status.

The task of adapting this complex of rules to the exigencies of guerilla warfare was not an easy one. Complicated negotiations[46] led to a result which

> "bears all the signs of a compromise. And indeed it was: the final text was negotiated by the American and Vietnamese delegations, both of whom knew what they were talking about, the experience of the Vietnam War still being fresh in their minds. During the war in Vietnam, members of Vietcong guerilla units who were captured while actually engaged in combat ("carrying arms openly") were treated by the U.S. Military Assistance Command as prisoners of war (but not granted formal POW status), whereas a Vietcong who had commit-

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[44] Cf. Zimmermann, ibid., paras.107 *et seq.*; Partsch, ibid., 46 *et seq.*

[45] GA-Res.2625 (XXV) of 24 October 1970.

[46] For the history of these negotiations cf. W.-R. Born, Guerillakämpfer nach Artikel 43 und 44 des am 8. Juni 1977 verabschiedeten I. Zusatzprotokolls zu den Genfer Konventionen, in: Neue Zeitschrift für Wehrrecht 1979, 1–24 (11–24).

ted an act of terrorism did not receive that treatment. In a nutshell, that practice is identical with what is required by Protocol I, and the new rules thus go no further than American practice in Vietnam"[47].

Fundamental to this new regulatory concept is the separation of combatant status and prisoner of war status, two institutions connected closely until now. The concept of combatant status in Additional Protocol I has, under Art.43, been more broadly defined than before. Combatants are, according to Art.43 (2), all members of the armed forces of a Party; the armed forces of a Party are defined by Art.43 (1) as consisting "of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party". It is true that Art.43 (1) further requires that "such armed forces shall be subject to an internal disciplinary system" which shall enforce, *inter alia*, compliance with the rules of the laws of war; but the crucial requirements set by Art.1 of the Hague Regulations and confirmed under Art.4 A Third Geneva Convention, namely that the members of the forces should wear a distinctive emblem and should carry arms openly, have been omitted from the definition of combatancy.

Militarily organized resistance movements and partisan groups in occupied territories as well as "national liberation movements" in situations mentioned by Art.1 (4) are thus given the possibility to qualify as "armed forces" in the sense of Art.43 (2), which reserves its members the favorable status of combatants. An additional condition for "national liberation movements" acting in situations referred to in Art.1 (4) is established by Art.96 (3) of Add. Prot. I. To bring the Geneva Conventions and the Additional Protocol into play, the "liberation movement" must address a unilateral declaration to the depositary in which it undertakes to apply the Conventions and the Protocol.

The traditional requirements aimed at clearly distinguishing combatants from the civilian population – a concept which is basic for the protection of the civilians – have thus been excluded from the definition of combatancy. A treaty that claims to improve humanitarian law, however, could not totally repudiate this distinction which reflects a basic principle underlying all humanitarian law. In consequence, it was integrated in the provision of Art.44 on prisoner of war status, albeit in a rather complicated way.

All combatants are declared by Art.44 to become, in principle, prisoners

[47] H.-P. Gasser, Agora: Protocol I to the Geneva Conventions – An Appeal for Ratification by the United States, AJIL vol.81 (1987), 912–925 (921–922).

of war if captured. Para.3 of Art.44, however, reaffirms the traditional requirements of combatancy by stating that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". Failure to meet this requirement generally leads to the forfeiture of the right to be treated as prisoner of war.

For certain conditions the Diplomatic Conference, however, has created an exception in sentence 2 of Art.44 (3), which reads as follows:

> "Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate".

The wording is rather cryptic. What are such "situations where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself"? What is the difference between being "engaged in an attack or in a military operation preparatory to an attack" in the sense of the general rule and a "military engagement" or a "deployment" in the sense of the exception? As to the first question, the history of the negotiations at Geneva in 1973–1977 seems to give a clear and precise answer. Only situations involving guerilla warfare in occupied territories and "wars of national liberation" constitute such exceptional circumstances[48]. Only in these two situations entailing a basic military asymmetry is there a need seen as legitimate by the Contracting Parties to disguise the combatant status outside of military operations in the strict sense. Even this conclusion, however, was disputed by a small minority of States during the Conference which claimed that the exception could be applicable also in classical inter-State wars[49].

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[48] The rapporteur of the drafting commission stated: "That exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success". – Report of the Rapporteur, Oral Records XV, p.453, CDDH/407/Rev.1, para.19. – Cf. also J. de Preux, in: ICRC-Commentary (note 43), para.1698; M. Arrassen, Conduite des hostilités, droit des conflits armés et désarmement (1986), 47 *et seq.*; Bothe / Partsch / *Solf* (note 43), 253; Solf (note 13), 276–277; G.H. Aldrich, Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I, in Va.J.Int'l L. vol.26 (1986), 693–720 (708).

[49] Cf. Arrassen, ibid., 48 with further references.

As to the second question, there was a considerable difference of opinion during the Conference on the interpretation of terms[50]. The wording reflects a mere "formula compromise" which leaves room for differing interpretations. Clarifications on this point will only be possible by the subsequent practice of the Contracting Parties[51].

Despite the fact that the wording of Art.44 (3) is rather ambiguous[52], it is quite clear that an attack led directly out of civilian disguise is not only prohibited but constitutes an act of "perfidy" depriving the offenders of any combatant status[53]. Art.44 (4) gives a further clarification in this sense by providing: "A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war ...". This traditional consequence, however, is not the final result of the compromise solution negotiated by the Diplomatic Conference. Para.4 of Art.44 continues: "... but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol". The formula used, again, is rather elliptic[54].

A more detailed analysis proves that this provision must be construed so as to preserve the procedural guarantees given to prisoners of war also for the combatants protected by this paragraph. With respect to treatment in captivity, the latter category of prisoners must be given all the protec-

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[50] Cf. de Preux (note 48), paras.1706–1714; cf. also Solf (note 48), 276–278, who recommends the use of an interpretative declaration on this subject-matter.

[51] Cf. de Preux, ibid., para.1714.

[52] Another example of the article's ambiguity is its use of the notion "combatant". Sentence 2 of para.3 of Art.44 declares "he shall retain his status as a combatant" – thus implying he would otherwise have lost his status as a consequence of his failure to distinguish himself from civilians. Para.4 of the same article, on the other hand, speaks of "a combatant who falls into the power of an adverse Party while failing to meet the requirements ..." – implying that despite failure to distinguish he remains a combatant. The conceptual contradiction in these passages creates difficulties in understanding the basic system underlying the new rules.

[53] See sentence 3 of Art.44, para.3: "Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c)", which implies that acts which do not comply with the requirements to distinguish could be considered as perfidy. See also Art.37 which provides: "It is prohibited to kill, injure or capture an adversary by resort to perfidy"; as an example of perfidy, Art.37 mentions under (c) "the feigning of civilian, non-combatant status".

[54] de Preux, however (note 48), para.1720, writes: "This provision does not require a great deal of explanation". This can be understood, nevertheless, in the context of his explanations to the first sentence of Art.44 para.4.

tion accorded to prisoners of war, including the respective judicial safeguards. But having forfeited prisoner of war status itself, these prisoners can be prosecuted for acts which, if committed by a lawful combatant, would be a lawful act of combat. Despite Art.85 of the Third Convention such prisoners can therefore be prosecuted for their "military" operations against the armed forces of the capturing power[55].

On the basis of the above examination of the new rules on combatancy, the following conclusion may be drawn: The law of international armed conflicts now distinguishes – as far as Additional Protocol I is applicable – among three different categories:

(i) combatants who qualify for prisoner of war status;

(ii) combatants who are protected according to Art.44 (4);

(iii) violent offenders not specifically protected under the new rules, i. e. the traditional "unprivileged fighters".

The fate of the last group, consisting of the traditional «franc tireurs» who act individually, and of "terrorists" in a narrow sense (individual offenders or groups not integrated into military units and organisations) is governed – as before – only by the rules on the protection of the civilian population. Since the rules of this general system of protection have been improved substantially, the new regulation of Part IV of Add. Prot. I also deserves a short description.

The basic principle of humanitarian law is the rule requiring a distinction between military targets and civilian population and the corresponding prohibition of non-discriminatory warfare. This principle has been seen by some authors as constituting part of customary law for decades[56]. However, Art.48 Add. Prot. I is the first conventional norm to codify the principle with the formula: "The Parties to the Conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives". Art.51, in addition, prohibits all forms of non-discriminatory warfare and, in para.2, explicitly mentions the "terrorist" tactics to be outlawed:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

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[55] Cf. de Preux (note 48), para.1719; Bothe / Partsch / *Solf* (note 43), 255.

[56] Cf. E. Rosenblad, International Humanitarian Law of Armed Conflict (1979), 53–54; O. Kimminich, Schutz der Menschen in bewaffneten Konflikten (1979), 131; A. Randelzhofer, Flächenbombardement und Völkerrecht, in: Um Recht und Freiheit, Festschrift für F. A. von der Heydte (1977), 471–495.

These norms are very helpful for all attempts to draw a clear borderline between the acts regarded as legal acts of combatancy and illegal as well as illegitimate acts of political violence not justified by the laws of war. In consequence, they can further be useful in defining the notion of "armed conflict". An "armed conflict" can – according to the basic idea underlying Additional Protocol I – only be a conflict which is in general fought by militarily organized operations against military objectives. This approach does not exclude the possibility that atrocities may be committed by armed forces against the civilian population; otherwise Art.85 (3) (a) of Add. Prot. I would be meaningless, which defines "making the civilian population or individual civilians the object of an attack" as a "grave breach" in the sense of Art.85, i. e. a war crime. Rather it makes clear that "armed struggles" fought only by violent acts against civilian objectives can never be an armed conflict in the sense of the Geneva Conventions and the Additional Protocols.

Additional Protocol I has also improved the protection of persons who are in the power of a Party to the conflict, a protection which in the Fourth Geneva Convention was in principle restricted to civilians in occupied territories. Art.75, which is also applicable to "non-privileged fighters", has created a system of fundamental guarantees comparable to common Art.3 of the Geneva Conventions. As a sort of "convention in miniature" it prohibits, *inter alia*, atrocities against life, health or well-being of protected persons, contains guarantees for detention or internment and provides for a number of procedural guarantees in the case of criminal prosecution.

In order to implement this elaborate system of protection, a number of rules on the repression of breaches was included in Part V Section II of Add. Prot. I. For that purpose Art.85 contains a large list of violations of particularly important provisions and basic principles to be defined as so-called "grave breaches" – a list which includes the act of "making the civilian population or individual civilians the object of attack". These "grave breaches" are to be regarded, according to Art.85 (5), as war crimes involving the individual criminal responsibility of its perpetrators. In addition to stating rules of substantive criminal law Art.88 mentions some obligations concerning mutual assistance in criminal matters[57]. Para.2 of Art.88, in particular, deals with the problem of cooperation in

[57] See Art.88 (1): "The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol".

matters of extradition: "... when circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition".

Proposals to require strict application of the principle *aut dedere aut punire* or at least to exclude explicitly the "political offense exception", however, found no consensus at the Conference and were abandoned[58]. The implementation system, nevertheless, is not as weak as the wording of Art.88 of Add. Prot. I seems to indicate. Art.88 must be read in connection with the implementation provisions of the Geneva Conventions. According to Art.146 of the Fourth Geneva Convention, each contracting party shall be under the obligation to search for persons alleged to have committed grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. If it prefers, it may also hand over such persons for trial to another contracting party concerned, provided that this State has established a *prima facie* case.

The preceding explanations should have demonstrated that Additional Protocol I contains many provisions which will be extremely important for a reassessment of the interdependence between the laws of war and the legal rules on terrorism. For a realistic evaluation of the current legal significance of Additional Protocol I, however, it should be borne in mind that until 1988 only some 70 States had ratified this treaty. Among the States which have not yet become parties are all nuclear powers except China – the United States and France having explicitly refused to ratify Additional Protocol I; moreover, no State actually involved in an "international armed conflict" has ratified[59]. The system of the Geneva Conventions unchanged by the new rules has thus remained the core of applicable humanitarian law up to now.

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[58] Cf. Zimmermann (note 43), paras.3575–3580, with further references.

[59] Cf. Status of Four Geneva Conventions and Additional Protocols I and II, as of December 31, 1986, 26 ILM 553 (1987); in August 1989, however, the Soviet Union has announced that it will ratify Add.Prot.I.

III. The Regulation of Non-International Armed Conflicts

1. Historical Development of the Rules

The legal régime of "non-international armed conflicts"[60] differs greatly from the traditional laws of war as codified in the Geneva Convention System. The basis of this difference is obvious: The traditional laws of war, on the one hand, are a set of rules governing the relations between subjects of international law; the regulation of "non-international armed conflicts", on the other hand, is concerned with a conflict fought inside a single State. The latter type of conflict normally occurs between a recognized government and a rebel movement. Under traditional international law such a conflict was seen as a purely internal affair.

In a conflict considered an internal affair, the rebels who resorted to arms had no special protection but were subject to the internal laws, penal and security, of the State concerned[61]. Only when the *de jure* government recognized the rebels as belligerents was the international legal régime of the laws of war applied to the civil war. The recognition of belligerency under traditional customary law when given, however, led to the full application of the laws of war designed for inter-State wars[62].

Considering the grave consequences of this step, States proved to be very reluctant to employ the device of recognition of belligerency, and in our century it nearly disappeared totally by way of desuetude[63]. The Russian and the Spanish Civil Wars, with all their brutalities, demonstrated at the same time how unsatisfactory the total absence of international law

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[60] For a survey of the existing legal framework on internal conflicts cf. F. Kalshoven, "Guerrilla" and "Terrorism" in Internal Armed Conflict, Am.U.L.Rev. vol.33 (1983), 67–81.

[61] Cf. E. Castrén, Civil War (1966), 97 *et seq.*; A.V. Lombardi, Bürgerkrieg und Völkerrecht (1976), 86–87; M.B. Akehurst, Civil War, EPIL Instalment 3 (1982), 88–92 (92); W. Solf, The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice, Am.U.L.Rev. vol.33 (1983), 53–65 (59); J.E. Bond, Application of the Law of War to Internal Conflicts, Ga.J.Int'l & Compl.L. vol.3 (1973), 345–384 (367 *et seq.*).

[62] Cf. Castrén, ibid., 135 *et seq.*; R.R. Baxter, Ius in Bello Interno: The Present and Future Law, in: J.N. Moore (ed.), Law and Civil War in the Modern World (1974), 518–536 (518); M. Veuthey, Les conflits armés de caractère non-international et le droit humanitaire, in: A. Cassese (ed.), Current Problems of International Law (1975), 179–266 (205); Lombardi, ibid., 86–87; Schindler (note 9), 145–146; G.I.A.D. Draper, Humanitarian Law and Internal Armed Conflicts, Ga.J.Int'l & Comp.L. vol.13 (1983), 255–277 (257).

[63] Cf. Lombardi (note 61), 87 *et seq.*; Veuthey, ibid., 206.

rules on this issue was, and made the necessity for a new framework obvious[64].

Thus, the ICRC in the late forties developed the so-called "Stockholm Project", adopted by the 17th International Red Cross Conference in Stockholm in 1948, which tried to bring civil wars into the ambit of the traditional laws of war by means of an automatic extension clause on civil wars in common Art.2 of the Geneva Conventions[65]. This attempt, however, failed during the Diplomatic Conference at Geneva 1949, despite the ardent support of the USSR and the Eastern European States[66]. The reason was quite simple: Most Western Powers, and especially the colonial powers still very dominant at that time, were not willing to accept such an extension of the laws of war, as they rejected any restriction in the repression of rebellious movements[67]. As a result, the ICRC had to abandon its project in favour of a more restricted approach which finally led to the adoption of common Art.3 of the Geneva Conventions[68].

2. Common Art.3 of the Geneva Conventions

This provision, even if it was originally a compromise solution, has to be regarded as a major success in international lawmaking on the laws of war. Not by accident is it often called "a convention in miniature"[69], since it was designed by the ICRC to be a "microcosm" of the remainder of each Convention and to contain the basic humanitarian rules that are universally accepted[70]. It establishes a minimum standard in the manner of a human rights codification by fixing a number of essential guarantees. Explicitly prohibited by common Art.3 are: arbitrary killings, mutilations, cruel treatment; torture; taking of hostages; degrading treatment.

Of considerable importance are also the guarantees concerning fair trial in criminal proceedings. Subsection (d) of para.1 prohibits "the passing of sentences and the carrying out of executions without previous judgment

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[64] Cf. Akehurst (note 61), 92; R. Abi-Saab, Droit humanitaire et conflits internes (1986), 39 *et seq.*

[65] Cf. Abi-Saab, ibid., 47 *et seq.*; Draper (note 62), 262–263; J. Pictet, Commentaire à la IVe Convention de Genève (1958), 35.

[66] Cf. J. Toman, La conception soviétique du conflit armé non-international, in: Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug (1986), 309–335 (316).

[67] Cf. Abi-Saab (note 64), 56 *et seq.*; Draper (note 62), 263–264.

[68] Cf. Abi-Saab, ibid., 50–67; Lombardi (note 61), 88 *et seq.*; Pictet (note 65), 36 *et seq.*

[69] Cf. Pictet, ibid., 39.

[70] Cf. Draper (note 40), 209.

pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

Protected are not only civilians but also members of armed forces *hors de combat*. Whether guerilla fighters and terrorist offenders fall under this category, however, is doubtful, while at the same time it is obvious that they are not "persons taking no part in the hostilities". Thus, it has been questioned whether guerilla fighters enjoy to any extent the humanitarian protection of common Art.3[71].

Most authors have, nevertheless, concluded that irregular fighters such as guerilleros are included also in the ambit of protection of common Art.3[72]. However, since the conclusion is not undisputed, States could be tempted to exclude guerilla fighters and other irregulars from receiving any protection. Moreover, even when an interpretation denying any protection is rejected, it should be borne in mind that common Art.3 does not recognize any "combatant" status for the members of the armed forces and rebel movements involved in an internal conflict, who thus cannot claim immunity from criminal prosecution for acts which would be lawful as acts of "combatancy" if the general laws of war were to be applied.

The controversies which really endanger the practical application of common Art.3, however, concentrate on the question of its scope of application. Common Art.3 will apply when there is an armed conflict not of an international character occurring in the territory of a Party to the Geneva Conventions. But every attempt to give some further precision to the notion "armed conflict", defining it in order to reach a general consensus on its application, raises serious problems. The minimum threshold of applicability is especially uncertain, with States tending to deny applicability by means of a high threshold[73] and the scholarly literature unable to reach a consensus on this question[74].

An analysis of contemporary practice, including the particularly impor-

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[71] Cf. ibid., 211.

[72] Cf. Pictet (note 65), 45–46; G.I.A.D. Draper, The Geneva Conventions of 1949, RdC vol.114 (1965 I), 57–165 (85).

[73] Cf. Draper, ibid., 88, 92–93.

[74] Cf. Pictet (note 65), 40 *et seq.*; R.-J. Wilhelm, Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international, RdC vol.137 (1972 III), 311 (332); Baxter (note 62), 525 *et seq.*; Veuthey (note 62), 183 *et seq.*; R. Zacklin, International Law and the Protection of Civilian Victims of Non-International Armed Conflicts, in: Essays on International Law in Honour of Krishna Rao (1976), 282–295 (288 *et seq.*); Lombardi (note 61), 90–96; Schindler (note 9), 146–147; Draper (note 62), 263–268; Abi-Saab (note 64), 67–71.

tant practice of the ICRC, nevertheless, allows for identification of certain general characteristics regarding what constitutes an "armed conflict" in the sense of common Art.3.

An historical approach allows for initial certainty in determining negative criteria, i. e. what "armed conflict" is not. "Armed conflicts" must be distinguished clearly from "simple acts of banditry"[75], internal tensions with only spontaneous violence, sporadic troubles, unorganized riots and individual acts of political violence such as "terrorist" incidents, which are all below the threshold[76]. Art.3 requires an organized and sustained struggle of a rebellious group against the government forces or other militarily organized groups in contrast to these sporadic forms of political violence. Thus, some element of military organization and political control must be present on both sides[77]. To be classified as an "armed conflict", it is furthermore necessary that the conflict be fought by military means, i. e. by hostile operations against the enemy's armed forces and military targets in order to weaken that side's military capacity[78].

Thus, "exchanges of armed violence with 'tip and run' gunmen not engaged for the purpose of gaining political control in the State, but solely to cause maximum disorder or an anarchical situation"[79] are excluded from the ambit of common Art.3. Included in the category of "armed conflicts", however, are not only civil wars in the classical sense, which are fought between traditional field armies engaging in conventional military operations, but also guerilla wars in which one side employs disguise in "hit and run" tactics, as long as such operations are integrated into a scheme of political control and are targeted in general against military objectives[80].

The fundamental importance of common Art.3 has been reinforced by its transformation into customary law. This article's standards were al-

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[75] Pictet, ibid., 41.

[76] Cf. also Baxter (note 62), 525; Lombardi (note 61), 93–94; Schindler (note 9), 147; A. Eide, Troubles et tensions intérieures, in: Les dimensions internationales du droit humanitaire, publ. by UNESCO/Institut Henri Dunant (1986), 279–299 (281 *et seq.*).

[77] Cf. Draper (note 40), 209.

[78] Cf. Pictet (note 65), 42.

[79] Cf. Draper (note 40), 209.

[80] That the notion "armed conflict" has a much broader content than the classical notion of "civil war" is demonstrated already by an historical analysis of the drafting history of Art.3, cf. Veuthey (note 62), 184–185.

ready seen in 1949 as partly codifying traditional customary law[81]. In the last decade, the idea that such minimum standards should be seen *in toto* as a part of customary law won increasing acceptance in international law doctrine. The International Court of Justice, in the *Nicaragua* judgment in 1986, ultimately stated that common Art.3 should be seen as an expression of the "fundamental general principles of humanitarian law"[82]. This seems to imply that the ICJ regards these "minimum rules" which reflect "elementary considerations of humanity"[83] as customary law, if not also as *jus cogens*.

Related to this idea it is also argued that the standards of common Art.3 are binding not only for the Contracting Parties (i. e. the Member States of the Geneva Conventions) but for all groups participating in internal armed conflicts[84].

3. Additional Protocol II

With regard to the existing deficiencies of common Art.3 the ICRC and the Red Cross Movement, as well as the UN General Assembly, urged that protection for the victims of armed conflicts be improved and a new international instrument which could fulfil this purpose be negotiated[85]. In particular, the lack of a combatant status for members of armed forces in non-international armed conflicts was seen as a major gap which should be closed. Thus, the ICRC presented at the beginning of the 1970's a draft protocol which envisaged that the entire regulation of the Geneva Conventions should apply for cases of "civil wars" in a classical sense where both parties possess the "constituent elements of a State"[86]. At the same time, the ICRC sought to improve the protection given by common Art.3. For this purpose, the draft provided for an enlargement and clarification of the essential guarantees applicable in all internal armed conflicts.

However, the Diplomatic Conference at Geneva in 1974–1977 proved to be a catastrophe for the concept laid down in the ICRC draft. As a member of the British delegation, G. I. A. D. Draper, described it:

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[81] Cf. F. Kalshoven, Applicability of Customary International Law in Non-International Armed Conflicts, in: A. Cassese (ed.), Current Problems of International Law (1975), 267–285.

[82] ICJ (International Court of Justice)-Reports 1986, 113 para.218.

[83] Ibid., 114 para.218.

[84] Cf. Pictet (note 65), 42–43; Draper (note 72), 96; Schindler (note 9), 151.

[85] Cf. Abi-Saab (note 64), 75–104.

[86] For the original draft cf. Abi-Saab, ibid., 106–129.

"Protocol II received the full but brief attention of the Conference in its closing stages. It very nearly failed to be established. In a hurried, almost frenzied, effort to secure its survival by consensus, the Protocol suffered drastic reduction in volume of content. At the same time, the already heightened 'threshold' was left undisturbed"[87].

By means of this heightened "threshold" the ICRC had hoped to build a consensus for merging the rules on "civil wars" with the laws of war. The ambit was thus restricted to situations of a "civil war" in a narrow sense where both parties exercise control over parts of the national territory (a condition generally not fulfilled in guerilla wars)[88]. But this careful approach was not rewarded; States showed themselves extremely unwilling to accept a status of combatancy for members of rebel groups[89]. Such a status of combatancy was seen as an unacceptable restriction of sovereignty. Freedom to punish members of rebel movements was seen as essential, particularly by most Third World States[90].

While the limited ambit of the Protocol remained unchanged, nearly all the substantive improvements which were contained in the original draft were eliminated from the final version. In the resulting instrument only some special provisions on the protection of medical personnel were left[91]. Apart from these special rules, Additional Protocol II mainly specifies and clarifies the general principles contained in common Art.3. This clarification, however, is not without importance. Particularly helpful will be the provision of Art.13 on the principle of discriminatory warfare. Art.13 (1) on the protection of the civilian population states the broad principle that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". Art.13 (2) so-

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[87] Draper (note 62), 274.

[88] Cf. Art.1 (1) of Add. Prot.II: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

[89] Cf. Abi-Saab (note 64), 138 *et seq.*, 156–159; W. Solf, Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict, Ga.J.Int'l & Comp.L. vol.13 (1983), 291–301 (291).

[90] Cf. Abi-Saab, ibid., 159–162; Solf, ibid., 292.

[91] For the dramatic history of the negotiations cf. Abi-Saab (note 64), 162–182 (especially 177–179).

lidifies this principle in the form of a more specific rule: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

In consequence of its limited ambit and content, Additional Protocol II will not play an important role on its own in humanitarian law. Its restricted scope of application and the limited substantive contribution compared to common Art.3 will relegate Additional Protocol II to a mere supplementary role[92]. However, since common Art.3 has been left unchanged in its applicability[93], Protocol II could eventually gain a considerable importance in clarifying some ambiguous parts of common Art.3.

4. Conclusion

Despite many efforts to create a combatant status for members of armed groups in civil wars, the law of non-international armed conflicts still does not recognize the institution of combatancy. Governments have thus preserved their prerogative to prosecute and punish members of rebel movements for any of their hostile acts against the State's police and armed forces, as well as for crimes like "treason" or "rebellion". Related to this lack of a clear legal status for participants in internal armed conflicts, the existing instruments are also characterized by a failure to develop provisions on the repression of breaches and on cooperation in extradition matters.

IV. Additional Protocol I and "Wars of National Liberation"

1. Legal Significance of Art.1 (4) of Add. Prot. I

The comparison drawn between the different legal régimes of international and non-international armed conflicts will prove helpful in an attempt to analyze the legal significance of the disputed principle laid down in Art.1 (4) of Add. Prot. I. As already mentioned, this norm provides that

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92 Cf. Abi-Saab, ibid., 192–193.

93 See Art.1 (1) of Add.Prot.II: "This Protocol, which develops and supplements Art.3 common ... without modifying its existing conditions of application ...". See also the modernized version of the "Martens clause" in the preamble of Add.Prot.II: "Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience".

all "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" should be included in the category of "armed conflicts" in the sense of the Geneva Conventions and Additional Protocol I. The whole system of the Conventions will consequently apply also to these "wars of national liberation", provided the Protocol has been ratified by all affected States Parties. Conflicts which were regarded up to now under the dominant legal doctrine as "non-international armed conflicts" are to be considered in consequence of the Protocol as international conflicts for which the complete system of the humanitarian laws of war will be applicable. The change implicit in this legal fiction is radical. Whereas so-called "liberation fighters" were traditionally treated as common "rebels" subject to punishment under common criminal law for their acts of "rebellion", the members of "liberation movements" which fall under Art.1 (4) of Add. Prot. I now have, in principle, a right to be classified as lawful combatants entitled to treatment of prisoners of war.

A remarkable feature of the new rule is the limited ambit given to Art.1 (4). The paragraph's wording is relatively restrictive, even if the excessive use of ideologically charged formulae seems to indicate the contrary. Only situations involving colonial domination (which after decades of "decolonization" have become rather rare), alien occupation (which is restricted to forms of occupation exercised by foreign States) and racist régimes (an abstract formula meant to cover only the case of South Africa) have been recognized as legitimate targets of such a "liberation struggle"[94]. The reference to the right of self-determination as enshrined in the "Friendly Relations Declaration" provides a further clarification; normal civil wars, separatist movements or rebellions against oppressive and "unrepresentative" governments are not covered by this formula[95]. The Third World States have thus succeeded in creating a particular régime for "anti-imperialist" liberation struggles while at the same time preventing the improvement of the international rules on "normal" internal armed conflicts which they thought to be potentially dangerous for themselves.

The contemporary Third World concept of self-determination – amalgamating that concept with the *uti possidetis* principle – offered a basis for this distinction. The rationale of the distinction is not difficult to understand. Restricting the scope of the new rule to a very narrow field of

[94] Cf. Schindler (note 9), 137; Bothe/*Partsch*/Solf (note 43), 50–52; Zimmermann (note 43), paras.107–113.

[95] Cf. Schindler, ibid., 137–138; Bothe/*Partsch*/Solf, ibid., 48–50.

application was in the interest of the same "progressive" States that argued for a "legalization" of "wars of national liberation"[96].

The significance of Art.1 (4), however, should not be underestimated. Through this provision all relevant factions of States have found a consensus, albeit a limited one, on the legal status of "wars of national liberation", the liberation movements and their members. The hypothesis long propagated by most Third World countries and an important group of scholars, namely that the use of force by peoples fighting "against colonial domination, alien occupation and against racist régimes" is legitimate (and legal) under international law[97], has found a certain confirmation, or better, acknowledgment in Additional Protocol I. This claim, even though endorsed in numerous UN General Assembly Resolutions, had never been accepted by most Western States[98]. In Art.1 (4) it was consented to for the first time by practically all States of the world.

This consent, however, is a very limited one. Art.1 (4) cannot be read as confirming the extreme position that the "legalization" of "wars of national liberation" has already become part of existing customary law[99] and that the Geneva Conventions are applicable for such conflicts even without the explicit regulation of Additional Protocol I. The concept of "legalization" has only found limited consent as a claim *de lege ferenda* in a conventional framework. Art.1 (4) thus must be seen as a constitutive norm which created a specific legal status for "national liberation movements" rather than as a declaratory norm which confirms existing customary law[100].

Consensus is limited also in another sense. Not all "liberation struggles" have been sanctioned, but only some very specific categories of national liberation in the exercise of the right of self-determination. Situations of "colonial domination" and "racist régimes" are the exception at present, as already indicated[101]. It may be clearly deduced from the history of the Diplomatic Conference that the third category of "alien occupation" was

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[96] For the history of Art.1 (4) cf. Bothe/*Partsch*/Solf (note 43), 37–43; Zimmermann (note 43), paras.88–94; cf. also Aldrich (note 48), 702.

[97] Cf. the authors listed above in note 8; cf. also the bibliography in: Schindler (note 9), 161–162.

[98] Cf. the above references in note 9.

[99] For a criticism of this position cf. Schindler (note 9), 135–136 and Tomuschat (note 9), 346–347.

[100] Cf. the contrary position taken by Abi-Saab (note 5), 433; A. Cassese, Wars of National Liberation and Humanitarian Law, in: Studies and Essays in Honor of Jean Pictet (1984), 313 (332).

[101] Cf. also Bothe/*Partsch*/Solf (note 43), 50–51.

mainly targeted against Israel[102]. However, it is clearly untrue that Art.1 (4) is a single issue norm covering only the cases of Israel and South Africa, as has been pretended by some authors[103]. Situations of "alien occupation" can be found aside from the case of the "Occupied Territories" of Palestine[104]. Probably, the formula "alien occupation" covers the only really important group of cases of "national liberation" referred to in Art.1 (4), the two others (except for the South African "apartheid régime") being merely of historical interest[105]. The category of "alien occupation", however, would presumably cover such cases as Moroccan occupied Western Sahara[106], Indonesian occupied East Timor[107], Soviet intervention in Afghanistan[108], Vietnamese intervention in Cambodia and perhaps also Ethiopean annexation of Eritrea[109].

The practicability of the special legal régime provided for in Art.1 (4), however, is more than dubious. Obviously the States directly targeted in a political sense, Israel and South Africa, will not ratify Additional Protocol I. Additional Protocol I, in consequence, will never be applicable in the cases directly envisaged by Art.1 (4). In the other cases of "alien occupation" where Additional Protocol I could hypothetically be applicable, the States accused of "alien occupation" will always dispute this classification. They will claim the territory occupied by them either as an "integral part of their national territory" as is done by Morocco, Indonesia and Ethiopia, or they will justify their intervention as "fraternal assistance"

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[102] Cf. Schindler (note 9), 138.

[103] Cf. F. Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977, in: Netherland Yearbook of International Law, vol.8 (1977), 107–135 (122); Hailbronner (note 3), 169–198 (179).

[104] Cf. Schindler (note 9), 138: "The authors of this rule had primarily in mind the occupation of Palestinian territory by Israel. Yet this can hardly be the only case which the rule is meant to cover".

[105] Ibid.; cf. also Solf (note 13), 281.

[106] In this sense cf. Schindler (note 9), 138; on the problem of the Western Sahara and its right of self-determination cf. in detail S. Oeter, Die Entwicklung der Westsahara-Frage unter besonderer Berücksichtigung der völkerrechtlichen Anerkennung, ZaöRV vol.46 (1986), 48–74.

[107] For analysis of the case of East Timor cf. S.K.N. Blay, Self-Determination versus Territorial Integrity in Decolonization, New York University Journal of International Law and Politics, vol.18 (1986), 441–472 (455–458).

[108] For a legal evaluation of the Afghan situation cf. W.M. Reisman, The Resistance in Afghanistan is Engaged in a War of National Liberation, AJIL vol.81 (1987), 906–909; W.M. Reisman / J. Silk, Which Law Applies to the Afghan Conflict?, AJIL vol.82 (1988), 459–486.

[109] For a short discussion of this problematic case cf. Blay (note 107), 468–469.

asked for by the "recognized government" created in the course of the intervention. It is thus extremely improbable that the applicability of Art.1 (4) in a particular case will be recognized by all parties involved[110]. Whether real "liberation fighters" have been done a favour by this provision is open to doubts; it is likely that Art.1 (4) will have nothing more than political and ideological importance.

2. Obligations of "National Liberation Movements"

The ideological importance of Art.1 (4), however, should not be neglected, for in this respect Additional Protocol I will not remain without impact. Since States which ratify Protocol I thereby implicitly recognize a certain legitimacy and legality of "wars of national liberation" under international law, the provision will reinforce in a political sense the position of "liberation movements". An increasing pressure on the States involved in conflicts of "national liberation" to apply the system of the Geneva Conventions probably will be the result[111].

Nevertheless, the ideological and political repercussions of Art.1 (4) are not limited to this one effect, seen as negative by most Western States; on the contrary, the provision attacked as "pro-terrorist" will prove to be rather ambivalent in its results. The privileged position granted by Art.1 (4) has a reverse side, since no privileged position is normally given without imposing certain duties unseparable from the special status. As far as "wars of national liberation" are brought by Art.1 (4) under the rules for "international armed conflicts" and the members of the "liberation movements" are thus given the status of combatants, the "liberation movements" and their members are now clearly obliged to comply with the laws of war. Transforming these movements into partial subjects of international law implies, in consequence, that they are also bound by international law.

Art.96 (3) of Add. Prot. I, which regulates the procedure by which "liberation movements" can render applicable the Protocol and the Geneva Conventions in Art.1 (4) situations elucidates this point in plain words:

> "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1 paragraph 4, may

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[110] Cf. Schindler (note 9), 141, 144; cf. also Solf (note 13), 281, who states: "... on further consideration it began to dawn on these concerned that the provision would have no practical effect".

[111] Cf. Schindler, ibid., 144.

undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in the relation to that conflict the following effects:

(a) the Convention and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict".

Additional Protocol I thus achieves a decisive clarification, indicating that "wars of national liberation", if they shall be recognized as "international armed conflicts", must be fought according to the laws of war. This basic assumption, which seems to sound rather banal, involves a delicate consequence for the "liberation movements": Systematic use of "terrorist tactics" is legally incompatible with a declaration under Art.96 (3). If a "liberation movement" endorses such a declaration, it is bound to respect all the rules of the Geneva Conventions and the Protocol, in particular the provisions on the distinction between combatants and civilians. By systematically violating these rules in the form of terrorist attacks on the civilian population, not only would the individuals involved in these acts commit "grave breaches", prosecutable and punishable as war crimes, but the movement itself could lose its status under Arts.1 (4) and 96 (3), as the condition set up by Art.96 (3) – "may undertake to apply the Conventions and this Protocol" – would be put into doubt by this *venire contra factum proprium*[112].

It may be argued, nevertheless, that this reasoning is naive. Since the Protocol and the Conventions will legally nearly never be applicable, the legal effects hypothesized above – so could be argued – will not cause "liberation movements" too much concern. The same is true with regard to the possibility of prosecuting "grave breaches" as war crimes; as long as the Additional Protocol is not applicable, its system of repression of breaches will not function. The "liberation movements" will thus tend to exploit politically their implicit recognition without bearing the legal consequences, as the recent declaration of the ANC "deposited" with the ICRC illustrates[113].

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[112] Cf. Aldrich (note 48), 702.

[113] Ibid., 703.

3. Territorial Limits on the Applicability of the Laws of War

A further remark is necessary on a related point. The application of the Geneva Convention system according to Arts.1 (4) and 96 (3) does not only require that the relevant "liberation movements" undertake to apply humanitarian law. A basic precondition of Art.1 (4) is the existence of an "armed conflict". As was established above, not every use of physical violence constitutes an "armed conflict". An organized and sustained use of violence, which is typical for the "terrorist strategies" of political underground movements, is not sufficient in this context. Inherent in the notion of "armed conflict" is the military character of the violence. Not every political conflict which is fought by means of violence is an "armed conflict", but only the conflict fought by the use of armed force against the "armed forces" of the adversary. Only a conflict involving violence which has gained such an intensity and organization that it becomes directed in general against military objectives can be an "armed conflict" in the sense of humanitarian law[114].

Only acts of combatancy are "legitimate" forms of violence under the laws of war. Thus, "wars of national liberation" can only be legitimated under international law if fought mainly by military means, i. e. by acts of combatancy against military targets belonging to an enemy's armed forces. The basic assumption expressed in Additional Protocol I, in consequence, draws a clear borderline between hostile acts "legalized" under the laws of war and violent acts outlawed by international law. This distinction must be considered on three different levels.

1) The first level had already been dealt with in the preceding paragraphs. It concerns the distinction between militarily targeted violence, which constitutes an "armed conflict", and non-discriminatory violence exercised against the whole population. Conflicts fought only by "political" violence against civilian objectives alone can never constitute an "armed conflict" in the sense of the Geneva Conventions and the Additional Protocols. Such hostilities may be called "terrorism" with respect to

[114] See the British declaration made at the signature of Add.Prot.I which states that: "in relation to Article 1, the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than required for the application of Protocol II, by virtue of Article 1 of that protocol, to internal armed conflicts". – Cf. also Schindler (note 9), 139–140; but cf. the different attitude taken by Zimmermann (note 43), para.115.

underground movements and they form clear human rights violations if committed by government forces, but they always lack the military character inherent in the traditional concept of "armed conflict".

2) If an "armed conflict" exists, military operations governed by the laws of war must, moreover, be distinguished from other violent acts falling outside the scope of the laws of war. This is not a very new problem, although under the traditional laws of war it was covered by the rigid definition of the combatant status. Practically every armed conflict has seen covert operations by intelligence services conducted under civilian camouflage. The status of the intelligence agents captured by the adversary created no legal problem under the traditional rules. These agents were not considered combatants; they had no privileged position under the laws of war but were treated as common criminals under ordinary municipal criminal law or martial law[115]. The treatment reserved for intelligence officers participating in covert hostile acts was in principle always the same, as far as the international law rules on it were concerned. Whether they at least had acted in peacetime, during the course of an armed conflict in the combat zone or the belligerent "hinterland", or during an armed conflict in the territory of a third party, intelligence officers enjoyed what may be denoted with the placative term "non-status"[116].

The differentiation between the status of combatancy and the status of prisoner of war introduced by Arts.43 and 44 of the Additional Protocol has changed this régime. Three different cases must now be distinguished. Two of them have an obvious legal solution. Covert operations using violence in peacetime clearly fall outside the scope of the laws of war, even if members of regular armed forces are involved; they constitute a phenomenon which undoubtedly could be called "State terrorism", as far as State agents commit terrorist acts in foreign territories[117].

Covert operations in the course of an "armed conflict" constitute hostile acts governed by the laws of war if carried out within the territorial scope of the theatre of war, which today tends to cover all the territories controlled by the parties involved. According to Art.43 of Add.Prot.I, all members of the armed forces of the parties involved in an armed conflict enjoy the status of combatants. Even if they lose their right to be prisoners

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[115] Cf. Baxter (note 21), 338–342.

[116] Cf. the U.S. Supreme Court decision in the case *Ex parte Quirin*, 317 U.S. Supreme Court Reporter 1, and the criticism of this decision in: Baxter, ibid., 338–341.

[117] Examples for the phenomenon of plain "State terrorism" are the bomb attempts on ANC representatives in Paris and Brussels in 1987, probably committed by South African intelligence officers, cf. Neue Zürcher Zeitung No.76 of April 1, 1988, p.3.

of war under Art.44 (4) for failure to distinguish themselves from the civilian population[118], members of armed forces are accorded a special treatment assimilated to prisoner of war status, at least when acting in a situation covered by Art.44 (3)[119].

The third case, however, creates some difficulties in legal construction. What is the legal status of members of armed forces who participate in covert operations on Third State territory while their State is involved in an armed conflict? Are they entitled to claim combatant status according to Art.43? They are "members of the armed forces of a Party to a conflict" who are declared to be combatants by Art.43 (1). The claim for combatant status, nevertheless, is absurd. Art.43 of Add. Prot. I does not itself convincingly explain why. The decisive explanation must be deduced from the general system of the laws of war. One of the essential limitations of the legal régime of the laws of war arises under the rules on the spatial application concerning the territories and the parties involved[120]. The laws of war apply only to the "Parties to a conflict", i. e. the entities participating in a conflict. Members of the armed forces may legitimately use violence (on the level of individual responsibility) only in relation to the parties against whom the armed conflict is waged. Hostile acts on Third Party territory may, if carried out in the course of an overt military intervention, constitute an armed conflict in relation to the Third State. If carried out under civilian camouflage in the course of a small-scale covert operation, the laws of war are not applicable in relation to the Third State[121].

A glance at State practice corroborates this conclusion. If an army officer working for an intelligence service carries out a "terrorist offence" in a Third State, where for example the officer kills an official of the adversary

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[118] Some types of special troops like the Soviet "Spetsnaz" are most likely to fall under this category. The status of these troops will create a lot of problems for ratification of Add.Prot.I which probably are occupying already legal services of the Defense Ministries in preparation of a future ratification.

[119] Whether combatants not covered by the exception under Art.44 (3), sentence 2 – cf. the aforementioned "Spetsnaz" – also enjoy the benefits of Art.44 (4), is doubtful. de Preux (note 48), para.1719, seems to suppose this, whereas Bothe / Partsch / *Solf* (note 43), 255, probably takes the opposite position. The present author assumes that Art.44 (4) must be read as a special clause annexed to Art.44 (3), sentence 2, thus excluding cases not covered by the latter clause.

[120] For the limits of spatial application cf. Schwarzenberger (note 30), 67–70; I. Detter DeLupis, Law of War (1987), 138 *et seq.*

[121] A striking observation derived from a survey of the existing literature on the laws of war is the fact that this question is never treated in detail, although its importance for the topic analyzed here is considerable.

government with a bomb, a claim for combatant status and treatment as prisoner of war would be considered as grotesque by the territorial State arresting the officer. According to established practice in the "grey zone" of intelligence operations, such an officer would always be treated as a common criminal who has committed a crime of murder. To conclude that States wanted to change this established practice under Additional Protocol I departs from any reasonable interpretation.

The same basic principle is also applicable to the operations of "liberation movements". As far as their position is assimilated to the position of States under the laws of war, the actions of these movements are governed by the rules stated in the preceding paragraph. Their operations can only be classified as military operations governed by the laws of war as long as they are carried out against the adversary armed forces on the territory controlled by the enemy. "Covert operations" on neutral territory using "terrorist strategies" can be prosecuted as criminal acts by the territorial State concerned regardless of whether committed by secret service personnel of a recognized State or by "intelligence agents" or members of the "terrorist arm" of a "liberation movement".

3) The third level of distinction drawn by the laws of war is that between lawful acts of combatancy and illegal "grave breaches" of the humanitarian law. Such breaches are subject to the system of prosecution and punishment applicable to war crimes[122]. However, as long as the laws of war apply, even the most heinous "terrorist acts" do not affect the status of the combatants, who are entitled to prisoner of war status or at least to privileged treatment according to Art.44 (4) of Add. Prot. I.

In consequence, Additional Protocol I has established a clear boundary between "acts of war" in "wars of national liberation" which are "legalized" under certain conditions and "terrorist acts" which are, under all circumstances, outlawed by the legal framework of humanitarian law. The latter acts are never justifiable.

An attempt to analyze this legal distinction from an empirical and phenomenological perspective would strikingly reveal that the distinction made by the law corresponds in nearly all respects to the factual differentiation between the phenomena of guerilla war and of "terrorism"[123].

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[122] See Art.146 of the Fourth Geneva Convention and Art.85 of Add.Prot.I.

[123] For analysis of this phenomenological distinction which has its basis in two quite different theoretical concepts – the classical strategy of the guerilla developed by Mao and Che Guevara and the current concepts of the "urban guerilla" or terrorism advocated for example by the German »Rote Armee Fraktion« – cf. H. Münkler, Guerillakrieg und Terrorismus, in: Neue Politische Literatur, vol.25 (1980), 299–326.

"Guerrilla" warfare makes use of "hit and run" tactics against the enemy's armed forces trying to control the territory and people of a particular "nation" in order to weaken the military capacity of the authority combatted as "oppressive". "Terrorism", on the other hand, makes use of indiscriminate violence against civilian persons and objects in order to spread terror and to destabilize an existing order[124]. "Terrorism" in the sense used here is clearly outlawed by the laws of war, as indicated throughout this analysis. Admissible are only – even if the laws of war are applicable in a "war of national liberation" – guerrilla tactics targeted on military objectives[125].

4. Evaluation of the New Régime

The distinction just described constitutes an essential basis of any attempt to find a compromise on a clear differentiation between legally acceptable "wars of national liberation" and "acts of terrorism", the latter to be outlawed in the future. The consensus *in nuce*, derived in the preceding section from the rules of Additional Protocol I which were consented to by nearly all States of the world, is predestined to form the basis of any future "consensus building". This basis should be valued as a formidable asset. Neither of the two extreme positions, either totally outlawing all "wars of national liberation" or "legalizing" the use of all possible means in the service of such a "just cause", is suited to establishing a future consensus on "liberation struggles" and "terrorism". Only the compromise formula found in Additional Protocol I allows for a growing consensus. To discredit the results achieved in this way through accusations of a "pro-terrorist" one-sidedness would be a regrettable and short-sighted act of ignorance[126].

It is submitted, at the risk of sounding cynical, that from the perspective

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[124] Cf. Veuthey (note 24), 134–159.

[125] The PLO recently seems to have become aware of this distinction when it renounced any future "acts of terrorism" while reserving its liberty to attack "military objectives" – cf. Le Monde of December 20, 1988, p.3.

[126] George H. Aldrich, chairman of the U.S. delegation at the Diplomatic Conference in 1974–1977, remarked: "Furthermore, these provisions were carefully drafted so as to be consistent with our military needs in the judgment of the Department of Defense in the years during which they were negotiated and the Protocol was concluded. If that Department's views have changed, I assume this is not because it no longer wishes to improve the protection of civilians, but rather because it no longer understands the provisions and, perhaps, assumes that its representatives a decade ago did not know what they were doing. In any case, it is simply irresponsible to characterize those protections ... as a 'backward

of the repression of terrorism, acceptance of Additional Protocol I does not represent an excessive cost for the Western States that are normally the victims of international terrorism. According to the legal position taken by these States, Art.1 (4) in connection with Art.96 (3) will practically never be applicable; it constitutes a mere "face saving" formula for the "progressive" States. According to the opposite legal position, Art.1 (4) and Art.96 (3) are merely declaratory and have little legal significance, since humanitarian law is applicable to "wars of national liberation" anyway. No faction has given up any ground with the formula compromise in Art.1 (4). In a political sense, Arts.1 (4) and 96 (3) could be interpreted as a legitimation of "wars of national liberation". But at the same time, they can be used by the States that are urging effective combat against terrorism as an "offensive concept" directed at the States that protect terrorist offenders. The latter States tend to use the concept of "wars of national liberation" to shield all movements sympathetic to them against measures to repress terrorism. These States, however, agreed to the distinction between legitimate acts of combatancy in "wars of national liberation" and illegal forms of violence constituting "terrorism" in signing Additional Protocol I. This – at least political – consent should be used in order to undermine the ideological defense normally asserted to cover these States' reluctance to support an effective repression of international terrorism.

The assessment according to which Additional Protocol I should be considered as "irreconcilably flawed" has no basis in reality. To the contrary, a careful analysis proves that the rules developed for "wars of national liberation" are – at least from the perspective of the repression of terrorism – a sound compromise which forms a valuable basis for further developments.

V. Question of General Applicability of the Laws of War

1. Proposal: Application of the Laws of War to All Phenomena Constituting Terrorism

The consensus which has been demonstrated to underlie all rules of the laws of war on matters of "terrorist acts" has proved to be tempting. Once a regulatory consensus has been achieved for a limited field, lawyers often

step in the effort to protect noncombatants and limit destruction during armed conflicts'". – *idem* (note 48), 699–700.

like to generalize the solution; this is especially true if the principle laid down in the special rules is seen as generally desirable.

This temptation has left its marks on the discussion on terrorism and the laws of war. Some scholars have argued that a general analogy to the laws of war – what is meant is a general application of the provisions on the repression of breaches in the Geneva Convention system – could provide a much better framework for effective combat against terrorism than the traditional rules of extradition which are weakened by the "political offense exception"[127]. In applying by analogy the laws of war to "terrorist acts", it would be possible to exclude in principle the "political offense exception" for terrorist offences. Since most acts of "terrorism" are characterized by the use of indiscriminate violence against civilians, and this "non-discriminatory" form of violence is prohibited by the laws of war in all circumstances, nearly all States of the world have agreed that these acts are repressible as war crimes.

This view gained some prominence through the 1982 report of the ILA Committee on International Terrorism[128], which, under the chairmanship of one of the main advocates of the "laws of war approach", A.P. Rubin, adopted a position closely linked to that propagated by J.J. Paust and Rubin. The report stated "that there is an anomaly in the existence of a pattern of legal obligations that requires more or less strict enforcement of rules forbidding individuals or groups to exceed their privileges as combatants in an international armed conflict while allowing political asylum for individuals or groups performing the same acts not in an international armed conflict"[129]. From this observation, the Committee went on to conclude as follows:

> "20. It thus appears that general international law already contains rules which fix a limit to politically motivated behaviour by authorized public officials, including soldiers, reflected but not necessarily fully codified in the positive law relating to 'grave breaches' already adhered to by nearly all members of the international community. No reason is perceived why other equally well-

[127] Cf. J.J. Paust, Terrorism and the International Law of War, in Military Law Review, vol.64 (1974), 1–36; P.A. Tharp, The Laws of War as a Potential Legal Régime for the Control of Terrorist Activities, in Journal of International Affairs, vol.32 (1978), 91–100 (97); A.P. Rubin, Terrorism and the Laws of War, in Denver Journal of International Law and Policy, vol.12 (1983), 219–235; *idem*, Should the Laws of War Apply to Terrorists?, in: ASIL Proc. 79th Meeting 1985, 109–112.

[128] International Law Association, Report of the 59th Conference, Montreal 1982, 349–354.

[129] ILA Report Montreal 1982, para.16.

motivated individuals or groups should be legally insulated by their political ideals from the punishments to which officials or soldiers are subjected for the same atrocities. Surely, the humanitarian law requiring states to cooperate in the suppression of war crimes should apply with regard to acts outside of the armed conflict classification and by persons not entitled to soldiers' privileges.

21. It would seem to follow from this that any formulation of law dealing with international terrorism should accept as a premise that: 'No person shall be permitted to escape trial or extradition on the ground of his political motivation who, if he performed the same act as a soldier engaged in an international armed conflict, would be subject to trial or extradition'"[130].

2. Criticism of the Approach

The approach chosen by the majority of the ILA Committee on International Terrorism encountered strong criticism in the Committee itself and was abandoned by the Committee's majority in its later work[131]. Two of the Committee members, L.C. Green from Canada and J. Lador-Lederer from Israel, delivered a forceful dissenting statement in which they summarized their critical arguments in the following words: "We agree that acts of terrorism should be suppressed and punished, but we are of opinion that the attempt to compare such acts with those forbidden during armed conflict is unwarranted and confusing"[132].

Most scholars and practitioners concerned with the laws of war would probably subscribe to this critique. The approach of applying the laws of war comprises decisive weaknesses, if not mistakes. If seen on a pragmatic level, this approach is completely illusory in terms of its chances of finding the consensus necessary to become a basis for further treaty making. The experiences of the Diplomatic Conference in 1974–1977 are telling in this respect. In the negotiations concerning Additional Protocol II, States proved to be extremely unwilling to accept a combatant status for rebel forces even in classical civil war situations, since they feared that such a device could confer a degree of legitimacy on armed opposition movements[133].

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[130] Ibid., paras.20–21.

[131] Cf. the Committee Reports of Paris 1984, ILA Report 61st Conference Paris 1984, 313; Seoul 1986, ILA Report 62nd Conference Seoul 1986, 559 and Warsaw 1988, Committee Report paras.1–3.

[132] ILA Report Montreal 1982, 354–357 (356 para.12).

[133] Cf. Abi-Saab (note 64), 138 *et seq.*, 156–159; Solf (note 89), 291–293; cf. also the remarks made by W.J. Fenrick, ASIL Proc. 79th Meeting 1985, 112.

However, the application of the laws of war, even by analogy, without conceding terrorists a combatant status is impossible. The entire system of the laws of war is founded on the basic principles of distinction between combatants and civilians, between (lawful) acts of combatancy and (punishable) war crimes. Without accepting these basic categories, the whole system and, *inter alia*, the provisions on "grave breaches", become unworkable; the essence of the concept of "war crime" is its opposition to the concept of the permitted act of "combatancy".

States, however, can never accept an approach declaring the use of violence against State organs to be legally justified in peacetime situations, and they have good reasons for not doing so. In principle, accepting such an approach would mean abandoning the State's fundamental "monopoly of power". The reservation to the State and its organs of the legitimate use of organized violence was (and is) essential for realization of the modern State's peace-keeping functions. As was stated by a military official with a clear view regarding realities in a recent discussion held by the American Society of International Law on the topic whether the laws of war should apply to terrorists[134], "premature application of the laws of war may result in a net increase in human suffering because the laws of war permit violence prohibited by domestic criminal law".

VI. Conclusion

There is no possibility to evade the crucial problem in international cooperation on the repression of terrorism which could be defined as building a consensus to restrict the "political offense exception". Such a consensus may be achieved by singling out, on a case-by-case basis, offenses seen as such heinous that they should be punished in all circumstances. The process necessary to achieve this purpose, however, has been considerably promoted by the laws of war, particularly the recent codifications of humanitarian law. Regrettably, this fact has been misjudged by some authors not familiar with the complicated system of the laws of war. Had the Additional Protocol I with its rules on "wars of national liberation" gained universal acceptance, "liberation movements" would have found themselves at a real crossroad, faced with having to make a delicate choice.

On the one hand, Additional Protocol I would allow these movements the possibility to become accepted as a sort of belligerent party with a certain legal personality under the rules of international law. This option

[134] Remark by Fenrick, ibid.

granted by Arts.1 (4) and 96 (3) of Add. Prot. I has often been misconceived as a "pro-terrorist" solution. But, as W.J. Fenrick, Director of Law/ Training, Canadian Forces, has put it: "Art.1 (4) may be viewed by some as granting a degree of legal status to terrorist organizations. I suggest, however, that if the organizations and their members accept and apply the laws of armed conflict, they cannot be referred to as 'terrorist organizations' in any legal sense. Compliance with the law brings respectability in its train"[135]. This respectability is the reverse side of the decision to comply with the laws of war, of the obligations deriving from the status created according to Art.96 (3) of Add. Prot. I. By issuing an Art.96 (3) declaration, the "terrorists" submit themselves to the system of repression of breaches.

On the other hand, "liberation movements" would have the possibility to continue their terrorist operations, thus denying application of the laws of war. But in doing so, they would lose the umbrella of the "legitimate" liberation war, which is now often used to protect them, as they would thereby have opted clearly against "legalization".

What else can be the task of law in such a difficult and controversial area than to put actors in a clear situation of choice between "legality" and crime? A precise distinction between legal "armed conflict" and criminal "liberation by terrorism" would further prevent States from using legal loopholes to protect terrorist operations.

Should the compromise laid down in Additional Protocol I gain universal acceptance, it will be easier to solve the problem arising from the exemption of "wars of national liberation" in antiterrorism conventions through a formula like Art.12 of the Convention Against the Taking of Hostages[136]. However, as long as Additional Protocol I has not been ratified by all States concerned, the "ideal solution" of Art.12 of the Hostages Convention continues to leave loopholes. As long as a State may claim that an act was committed in a situation referred to in Art.1 (4) of

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[135] ASIL Proc. 79th Meeting 1985, 113.

[136] "International Convention Against the Taking of Hostages" of 17 December 1979, reprinted in 18 ILM 1457 (1979). Art.12 reads as follows: "In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation ...".

Add. Prot. I which in its opinion renders applicable under customary law at least the provisions of the Geneva Conventions, while another State takes the position that for lack of the necessary ratifications of Additional Protocol I the provision of Art.1 (4) is not applicable, there remains a major legal dispute which can obstruct effective international cooperation against terrorism[137].

Even without universal acceptance, however, Additional Protocol I represents a considerable achievement. The general principles codified in the protocol have put a guideline at the disposal of diplomats which should prove helpful in building a future consensus on matters of terrorism. With respect to the humanitarian laws of war, international diplomacy has succeeded in reaching an agreement that violent acts directed against civilians are to be outlawed and prosecuted as crimes.

If such a consensus is possible regarding situations where hostile acts in general are seen as justified, it should be possible to reach a corresponding consensus that similar acts in peacetime are as heinous as war crimes and should likewise be prosecuted as criminal acts. Following this conclusion, certain acts of violence directed against civilian targets should be codified in special treaties as "acts of terrorism" punishable under all cirumstances and excluded in principle from the political offense exception.

The consensus advocated in this paper, however, will have its limits. As long as tyranny, political oppression and gross human rights violations exist in the world, States will be reluctant (with good reason, it is admitted) to abandon escape clauses such as the political offense exception. Violence towards "oppressive" governments' organs will remain the subject of controversial judgments. As long as divergence exists with regard to the legitimacy of such violence, an exception clause comparable to the political offense exception will continue to be a necessary institution. The best example of the difficulties which arise in this context may be seen in connection with civil war "combatants". States have proved incapable of agreeing on a combatant status for this group of armed force members. Participants in an internal armed conflict are thus always threatened by severe punishment for the mere act of participation. As long as the legitimacy of numerous "rebellions" continues to be

[137] As an attempt to resolve this difficulty cf. the interpretation given to Art.12 by the Austrian government in its Explanatory Memorandum attached to the Convention when submitted to the Austrian parliament, reprinted in Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, vol.37 (1987), 412–413.

disputed, States will feel a necessity to use an exception clause in order to shield the "rebels" to whom they want to grant a refuge.

The task of the future will be to find an equilibrium between the felt necessity to improve international cooperation in the repression of terrorism and the still remaining need to grant protection to the victims of oppression by the means of a clause like the political offense exception. "Progressive" ideologists will have to accept that certain forms of violence are so heinous that they are to be condemned as "acts of terrorism" in all circumstances, notwithstanding any claimed "legitimacy" based on the alleged causes of these acts. Anti-terrorist ideologists will have to learn that, as long as oppression exists, there is an urgent need for an institution functionally comparable in some respect to the "political offense exception" in order to provide a shelter to the victims of tyranny. But the political offense exception is expected to become restricted to the "hard core" cases of real humanitarian need, i. e. the cases where criminal prosecution and extradition is likely to be used as a means of "political persecution"[138]. "Political persecution", however, is not limited to peaceful political dissidents and intellectuals; civil war adversaries, often designated by States as "terrorists", can also be victims of political persecution if the State singles out its opponents arbitrarily in order to extinguish its adversaries[139]. Thus, a sound sense of proportion will be needed to distinguish "terrorists" from victims of political persecution.

[138] A good argument in this sense is made by K. Hailbronner / V. Olbrich, Internationaler Terrorismus und Auslieferungsrecht, in: Archiv des Völkerrechts, vol.24 (1986), 434–467 (465 *et seq.*).

[139] The same point has been made already by the author in the context of the German law of asylum – cf. S. Oeter, Flüchtlinge aus Bürgerkriegssituationen – ein ungelöstes Problem des Asylrechts, ZaöRV vol.47 (1987), 559–580.