1972

Revolutionary War, Guerilla Warfare, and International Law

Charles R. King

Follow this and additional works at: http://scholarlycommons.law.case.edu/jil
Part of the International Law Commons

Recommended Citation
Charles R. King, Revolutionary War, Guerilla Warfare, and International Law, 4 Case W. Res. J. Int'l L. 91 (1972) Available at: http://scholarlycommons.law.case.edu/jil/vol4/iss2/2
Revolutionary War, Guerrilla Warfare, and International Law

Charles R. King*

I. INTRODUCTION

There is almost universal agreement among international jurists that international law is woefully inadequate in dealing with modern conditions of warfare. As one distinguished writer has pointed out:

For the laws of war to command respect and obedience they must be adequate for their function. It is essential that these rules should be applicable to the circumstances of modern warfare and clearly and closely defined in their application.

This article will focus on some of the present inadequacies of the rules of warfare as they relate to guerrilla warfare and revolutionary war. Particular attention will be paid to those rules dealing with the status and treatment of captured combatants. However, as will become apparent, most of these inadequacies stem as much from an unwillingness on the part of the parties involved to give the rules adequate application as from any glaring substantive defects in the rules themselves. Realizing that it is much easier to criticize than to affirmatively propose, this article will advance some modest suggestions for change.

At the outset, it should be noted that any prospects for change in this area must be evaluated in light of the realities of world politics and of the goals which international law can reasonably be expected to attain. Judge Phillip Jessup has said that "[t]he rules governing the treatment of prisoners of war . . . rest on self-interest,  

* The author would like to express a special thanks to Professor William Bishop of the University of Michigan Law School for his counsel in the preparation of this article.


2 M. Greenspan, supra note 1, at 20.
although the movement . . . had a humanitarian motivation." In a world torn asunder by ideological conflicts, it would thus appear that a universal consensus on the rules of warfare and their proper application is an impossibility.

This realization has led some to denigrate the role of international law in relation to the control of war. According to these individuals, the principles of international law have failed miserably in their primary responsibility of restraining the behavior of States. It is submitted, however, that those who take such a position are unrealistic in their expectations. As several writers have pointed out, in a conflict between perceived national self-interest and international law, the former will invariably win out.

Perhaps a more realistic appraisal of international law in this area will reveal it to be a means "to stake out minimal areas of mutually perceived overlap in the self-interest of states and to try to minimize in specific cases idiosyncratic deviations from the mutually established, normative patterns of conduct." To support this notion, an effort will be made to identify those considerations of a self-interest nature which indicate that an expansion of the protections of the Geneva Conventions would benefit all parties concerned. Such considerations include the likelihood that humane prisoner treatment will result in reciprocal concessions, the possibility that enemy troops will surrender rather than fight to the death when guaranteed humane treatment, and the certainty that world public opinion will react strongly to any suffering inflicted on helpless captives.

International law will exercise an indirect restraining influence to the extent that it can provide a more precise medium for a communication of these interests, and can establish a more realistic

---

8 Jessup, Political and Humanitarian Approaches to Limitation of Warfare, 51 AM. J. INT'L L. 757, 761 (1957).


5 Id. at 684.

standard by which to judge deviations of state conduct. Consequently, several proposals will be advanced for achieving this objective.

The first part of this article is devoted to a discussion of the major characteristics of contemporary revolutionary war and guerrilla warfare. A basic understanding of the nature of both is believed to be indispensable to a proper appreciation of the problems one encounters in attempting to apply traditional notions of international law.

The second section will focus on Article 3 of the Geneva Conventions which contains the only international provisions for the regulation of internal wars. Since such conflicts have become the most prevalent and threatening form of international violence, particular attention will be paid to the problems that have been encountered in invoking its protections. In this respect, several proposals are advanced for making its protections more meaningful. For example, since too much discretion is left to the parties in determining the existence of an "armed conflict not of an international character" for purposes of the Article's application, an attempt will be made to define more closely the circumstances in which its rules should come into play. In addition, a number of considerations of national and personal self-interest will be put forward which, in conjunction with humanitarian principles, indicate that the parties should seek maximum application of the Article's protections.

In the final section of this article, the issue of whether a guerrilla fighter in an international war falls within the coverage of the Geneva Convention Relative to the Treatment of Prisoners of War will be explored. The ultimate resolution of this question will depend on how strictly the conditions of Article 4 of this convention are to be construed. This writer contends that there is nothing in the nature of guerrilla warfare which per se places the guerrilla combatant outside of the protections of international law. As in every form of armed conflict, much will depend on the circumstances of the particular case.

II. GUERRILLA WARFARE AND REVOLUTIONARY WAR

There is a tendency among scholars and laymen alike to make guerrilla warfare synonymous with revolutionary war. This is un-

7 Richard Falk views this communication process as a central function of international law. See Falk, The International Law of Internal War, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 211 (J. Rosenau ed. 1964).
8 Geneva Convention Relative To the Treatment of Prisoners of War, supra note 6.
derstandable since the increased interest in guerrilla warfare can be attributed to the birth of numerous revolutionary movements since World War II, all of which have employed, in various forms, the strategies and tactics of guerrilla warfare. However, for purposes of applying international law, it is crucial to understand the distinction between the two.

Two writers, Andrew C. Janos and Samuel P. Huntington, make a clear distinction between guerrilla warfare as a form of unconventional combat and revolutionary war as a type of war, which can be fought either conventionally or unconventionally. As Janos notes:

Unconventional tactics, however, are not coterminous with revolutionary warfare. As the balance of relative capabilities between opponents changes, revolutionary warfare passes from "lower" to "higher," from unconventional to conventional phases.

The term "unconventional warfare," like "guerrilla war," is not a particularly apt term from the standpoint of international law. As Morris Greenspan has cautioned, the word "unconventional" could be misconstrued to imply a type of warfare inconsistent with the international conventions which are a principal source of the laws of war. It should be obvious, however, that this expression is meant only to describe unusual or unorthodox methods of fighting an enemy. In no way should it imply the repudiation of international law in the conduct of those hostilities.

As with all forms of unconventional combat, guerrilla warfare is fought from a position of military inferiority and, therefore, is predicated on certain conditions. In the chapter of On War, entitled "Arming the Nation," von Clausewitz lists five general conditions that he considers essential for the successful pursuit of guerrilla warfare:

1) The war must be carried on in the interior of the country; 2) the war cannot hinge on a single battle; 3) the theatre of war must extend over a considerable area; 4) the national character must support the war; and 5) the country must be irregular, difficult, inaccessible.

---


12 Id.

13 C. von Clausewitz, ON WAR 343 (1961).
Due to the condition of military weakness, the guerrillas' first ground rule is the avoidance of decisive strategic encounters. Von Clausewitz writes that, "They must not attempt to crack the nut; they must only gnaw at the surface and the borders," while Mao Tse-Tung advances his famous formula: "The enemy advances, we retreat; the enemy camps, we harass; the enemy tires, we attack; the enemy retreats, we pursue."

Thus, in guerrilla warfare, "the weaker party is strategically on the defensive, yet tactically always on the offensive in order to maintain the military and psychological advantages of attack and surprise." This leads Huntington to define guerrilla warfare, "as a form of [unconventional] warfare by which the strategically weaker side assumes the tactical offensive in selected forms, times and places."

As stated previously, there is a danger in equating guerrilla warfare with revolutionary war. Referring to the strategic principles of fighting a superior opponent, the former is as old as warfare itself, while the social and political objectives implied by the latter are relatively new. As Huntington again points out:

Guerrilla warfare may be employed in other types of war than revolutionary war, and a successful revolutionary war requires other types of struggle than guerrilla warfare. All of this is made very plain in the writings of the principal theorist of revolutionary war Mao Tse-Tung. The key problem in revolutionary war is to calculate the timing and the means for the shift from guerrilla warfare to regular warfare. Too early a shift invites defeat; too late a shift postpones victory.

Peter Paret and John W. Shy come to grips with this distinction by noting the historical functions of the guerrilla fighter. The first function of the guerrilla appearing in history was a defensive one. In fact, it was the Spanish resistance to Napoleonic invasion that first put the word "guerrilla" into use. However, as Paret and Shy point out, civilians taking up arms and fighting as irregulars are as old as war itself. It was the use of guerrilla combat during the Second World War by resistance movements against an occupying force which led to the introduction of a special Article

---

14 Id. at 344.
16 Janos, supra note 9, at 643.
17 Huntington, supra note 9, at xvi.
18 Id. at xviii.
20 Id. at 6.
when the Geneva Conventions were revised in 1949. This provision recognizes the status of war prisoner for members of "resistance" movements fulfilling the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

A further condition imposed by Article 4 is that these movements must belong to one of the Parties to the conflict. More will be said about the viability of these conditions under the circumstances of guerrilla warfare in a later section of this article. For present purposes, it should be noted that at least one writer has asked whether these conditions, stipulated in the context of the Second World War when guerrilla warfare had been the form assumed by resistance movements against the occupying power, "might not nowadays be of a negative order, by placing completely outside the law and consequently outside any protection, guerrilla movements failing to satisfy these conditions." Indirectly, this writer is making reference to the new use to which guerrilla warfare has been put since the end of the Second World War, and the problems which it has created for international jurists. Guerrilla action has now become systematized as a weapon of the disaffected for the seizure of power. It has thus assumed an offensive function to be used in advancing revolutionary wars. As such, it plays more of a preliminary role, for to become successful revolutionary war must, as a rule, proceed from the unconventional to the conventional. Mao wrote in 1936:

This guerrilla character is precisely our distinguishing feature. But someday this character will definitely become a thing to be ashamed of and therefore to be discarded.

---

21 Geneva Convention Relative To the Treatment of Prisoners of War Art. 4A (2), note 96 infra.
22 Id.
23 Id. For clarification of the term "Parties to the conflict", see text accompanying note 58 infra.
25 P. PARET & J. SHY, supra note 19, at 28.
Thus, once the stage of strategic stalemate has passed, the strategy of deep retreats and "trading numbers for space" should be avoided as dangerous adventurism. In its final phase, revolutionary war becomes like a "war between one state and another, between one great army and another." 27

Many of the writers on revolutionary war view it in terms of stages or phases during which guerrilla warfare assumes varying importance. One revolutionary war model that is very prevalent in the literature is exemplified by Brian Crozier. 28 Crozier postulates guerrilla terrorism as the first stage of a three-step development, which then progresses onward through guerrilla warfare to conventional warfare. These stages were reached successfully, for example, during the war in French Indochina. 29

Samuel Huntington, Andrew Janos, Klaus Knorr, and Thomas Thornton likewise detect this same pattern of violence. 30 However, all of these writers caution that such a developmental construct of revolutionary war can be accepted only with certain qualifications. As Knorr, Thornton, and Crozier point out, all three stages need not be utilized. For example, a movement with widespread popular support and at least a minimum military base can begin directly with guerrilla warfare operations, thus bypassing phase one. This apparently was the case with the Chinese Communists' movement where terrorism seems to have played a minor role. 31

This developmental scheme of revolutionary war presents acute problems for the application of international law. In a recent report submitted by the International Committee of the Red Cross (ICRC), it was noted that:

According to the experts, its indefinable and elusive character makes it difficult for jurists to discuss this type of warfare, which is made up of a series of completely different stages in which the laws and customs of war are not always equally applicable. In the first stage, for example, one expert pointed out, where, still being weak, the movement will be tempted to resort to extremist methods, humanitarian norms will perhaps be more difficult to apply than in the second stage, where having assumed shape and also perhaps

27 Id.
29 Id. at 129.
31 Thornton, supra note 30, at 90.
developed a greater sense of responsibility, the laws and customs of war should be applied as widely as possible.\textsuperscript{32}

The use of terrorism by guerrillas was one of the problems discussed by a group of experts convened by the ICRC to study the application of the Geneva Conventions to guerrillas.\textsuperscript{33} One expert argued that, especially at the beginning of the struggle, terrorism is perhaps the only tactic available to guerrillas attempting to combat a government which prevents them from employing other methods. According to this expert, to condemn terrorism without appeal would be tantamount to depriving guerrillas of their only means of combat, and would therefore lack realism. It was the opinion of the majority of the experts, however, that terrorism in the sense of indiscriminate attacks against the civilian population, should be condemned and that guerrilla forces engaging in such activities should be outlawed.\textsuperscript{34}

This certainly seems to be a reasonable position to take. From the standpoint of the guerrilla, it may even be self-serving to heed such a warning. As Chalmers Johnson has concluded, "There are, to my knowledge, no cases in which guerrilla operations have been successfully based solely on intimidation of the population."\textsuperscript{35} Che Guevara himself has expressed the opinion that terrorism ... is a negative weapon which produces in no way the desired effects, which can turn a people against a given revolutionary movement, and which brings with it a loss of lives among those taking part that is much greater than the return.\textsuperscript{36}

If the use of terror by guerrillas is ever to be successful, it must be used discriminately to minimize the risk of alienating the population.

In the service of revolutionary war, guerrilla warfare must be conducted to give maximum support to what is predominantly a political objective. The guerrilla in a revolutionary war thus must be a political fighter \textit{par excellence}. As Mao Tse-Tung notes:

What is the relationship of guerrilla warfare to the people? Without a political goal, guerrilla warfare must fail, as it must if its political objectives do not coincide with the aspirations of the

\textsuperscript{32} ICRC \textit{Report}, \textit{supra} note 24, at 115.

\textsuperscript{33} \textit{Id.} at 115.

\textsuperscript{34} \textit{Id.} at 120-21.


\textsuperscript{36} Quoted in P. \textit{Paret} & J. \textit{Shy}, \textit{supra} note 19, at 33-35.
people and their sympathy, cooperation, and assistance cannot be gained.\textsuperscript{37}

The support of the population is the \textit{sine qua non} of a successful guerrilla movement.\textsuperscript{38} The guerrilla fighter must rely on the population for logistic support and supplies. It is the population that provides him with shelter in retreat and intelligence in attack.\textsuperscript{39} Mao demonstrates his concern for popular support when he urges guerrilla fighters to observe the Three Rules and Eight Remarks of the Eighth Route Army.\textsuperscript{40}

This image of the guerrilla fighter contrasts sharply with traditional notions concerning him. The tendency of legal scholars has been to charge all guerrillas with acting in violation of international law. As Richard Baxter has noted:

> It has been said that such armed bands carry on "irregular war" because they are normally self-constituted, lack permanency, do not wear uniforms, carry on pillage and destruction, and are disposed to take few prisoners and to deny quarter. The principal accusation which has been made against them is that they eventually degenerate into bandits, engaging in murder and robbery in hope of gain. As a consequence, the texts of the 19th and 20th centuries are disposed to stigmatize guerrilla warfare and any private hostilities in arms as "war crimes."\textsuperscript{41}

In decrying this attitude, Professor Baxter points out that "Patriotism, nationalism, allegiance to some sort of political authority have replaced the desire for loot, which has traditionally been attributed

\textsuperscript{37} \textit{M. Tse-Tung, On Guerrilla Warfare} 43 (1961).

\textsuperscript{38} \textit{Khan, Guerrilla Warfare and International Law}, 9 \textit{INT'L STUDIES} 103, 109 (1967).

\textsuperscript{39} \textit{Janos, supra note} 9, at 643.

\textsuperscript{40} \textit{Khan, supra note} 38, at 109-10.

Mao's Three Rules and Eight Remarks of the Eighth Route Army are:

**Rules:**

1. All actions are subject to command.
2. Do not steal from the people.
3. Be neither selfish nor unjust.

**Remarks:**

1. Replace the door when you leave the house.
2. Roll up the bedding on which you have slept.
3. Be courteous.
4. Be honest in your transactions.
5. Return what you borrow.
7. Do not bathe in the presence of women.
8. Do not without authority search those you arrest.

\textsuperscript{41} \textit{Baxter, supra note} 1, at 333.
to the guerrilla, in motivating civilians to take an active part in warfare.”

As already mentioned, some writers have doubted the ability of guerrillas to observe the laws and customs of war, except perhaps during the second phase of the conflict when they have secured control of certain territory. It has been suggested that at this point the guerrillas should make an explicit and official declaration that they agree to apply all the laws and customs of war. In any event, there is general agreement that the guerrillas should be required to follow certain humanitarian principles at all times, especially those concerning the respect to be accorded prisoners-of-war and the prohibition against their ill-treatment or execution.

The ICRC suggests that when it is materially impossible for the guerrillas to care for their prisoners, they should disarm and release them, or if possible, turn them over to a neutral state. Guerrillas fighting in a revolutionary war might advance their own cause by observing such humanitarian rules. Mao himself forbids captors from taking clothing from their prisoners. As he has observed:

We further our mission of destroying the enemy by propagandizing his troops, by treating his captured soldiers with consideration, and by caring for those of his wounded who fall into our hands.

In his writings, Che Guevara even advocates freedom for prisoners after a verbal scolding—“obviously to sow demoralization in the enemy ranks and to show the ‘moral superiority’ of the guerrilla.”

Before proceeding any further, it should be noted that up to this point it has been more or less tacitly assumed that revolutionary war is usually of an international character and that the legal status of the guerrilla fighter in its service would necessarily be measured by international rules of warfare. The text of the ICRC report dealing with the status of guerrilla movements under international law is prefaced by the observation that “guerrilla warfare is far from being confined to classical international conflicts and is equally to be found in internal conflicts . . . .” Having pointed this out, it then limits the scope of its consideration to guerrilla warfare only as

---

42 Id. at 335.
43 ICRC REPORT, supra note 24, at 119.
44 Id. at 119.
45 Quoted in Khan, supra note 38, at 110.
46 Id.
47 ICRC REPORT, supra note 24, at 112.
waged in international conflicts. This, of course, is a significant limitation to impose especially in light of the fact that most of the conflicts since the Second World War have usually been labeled "internal," even by the participants themselves.

By limiting any discussion of guerrilla warfare and revolutionary war to those conflicts unmistakably international in character, one obviously avoids such thorny areas of international law as belligerency, insurgency, and recognition. Moreover, there may even be justifications for considering guerrilla warfare only in such terms. As Richard Falk has pointed out:

In fact, warfare between states now most frequently takes place within a single national society. . . . Significant multinational participation transforms an internal war into a species of international war. And, in fact, as a result of the inhibiting impact of nuclear weaponry upon recourse to direct forms of aggression, it becomes increasingly evident that the politics of expansion are now mainly concerned with the struggle to help sympathetic elites gain control of the apparatus of government in foreign societies. . . .

It is this realization which leads Professor Falk to argue that the traditional criteria utilized for recognition of belligerent status are inadequate for modern needs. Under the old rules, the status of belligerency arose when the insurgents controlled territory, established an administering government that seemed effective, demonstrated a willingness to be bound by the laws of war, and impinged upon maritime or other international interests. As Falk contends, "Today, however, it is essential that substantial participation in the internal war by private or public groups external to the society experiencing violence serve as a basis for internationalizing civil strife."48

Universal acceptance of this point of view would undoubtedly help bring international law into closer touch with the realities of world politics. One of the characteristics of modern revolutionary war is the apparent need of all guerrilla movements for at least some foreign assistance to provide them with the necessary armaments to effect the transition from guerrilla to conventional warfare. As Paret and Shy point out, "There is little historical evidence to support the proposition that without outside help, guerrillas can win against an incumbent who is politically and militarily strong . . . ."50 As the ICRC has also noted:

48 Falk, supra note 7, at 218-19.
49 Id. at 223.
50 P. PARET & J. SHY, supra note 19, at 37. David Galula uses the Philippines and
Foreign intervention has occurred in various forms, including even full military intervention, in several armed conflicts of a non-international character in the sense of Article 3. When there is foreign military intervention on the insurgents side, there would seem no doubt that the laws and customs considered should be applied as a whole to the conflict, which thus becomes of an international nature.\(^{51}\)

The group of experts convened by the ICRC to study such issues endorsed this position, admitting that foreign military intervention, on the side of either party, transformed a noninternational conflict into an international one.\(^{52}\) It is not clear, however, whether the ICRC is referring to direct military intervention in the sense of foreign troops or whether, and to what extent, military assistance in terms of supplies and armaments will suffice to so alter the status of the conflict. Presumably, the military assistance involved would have to be of a substantial character. It should also be pointed out that in some revolutionary wars, due to the peculiar idiosyncrasies of world politics, a belligerent will refuse to admit that it is a party to the conflict and the other side will use this as a pretext for refusing to recognize that the guerrilla movement satisfies the condition of Article 4(2) of "belonging to a Party to the conflict" necessary for the operation of the Conventions.\(^{53}\)

Another characteristic of revolutionary war frequently mentioned by authorities on the subject is the necessity to establish liberated base areas. As the war progresses, these base areas become the principal means by which the guerrilla movement expands its strength and authority. Andrew Janos graphically describes the process by which they become the nucleus of the revolutionary state:

The "base area" is a variant form of dual authority and its establishment enables the insurgent to harness sectors of the population to his war effort; over and above that, it enables him to assume the prerogatives of the national government after the incumbent has been overthrown by force. The ever-expanding revolutionary base is an instrument to prevent chaos and forestall rivals from taking

---

\(^{51}\) ICRC Report, supra note 24, at 100.

\(^{52}\) Id. at 101.

\(^{53}\) Id. at 115.
power after guerrilla successes have created a political vacuum in society. The constructive aspects of revolutionary welfare, like its destructive aspects, pass through several phases, or as Mao Tse-Tung writes, 'from the non-possession of political power to the seizure of it, from the absence of the Red Army to its creation, and from the absence of revolutionary base areas to their establishment.' At the time when revolutionary warfare embarks upon a "conventional" course and large-scale military operations take the place of ambushes and guerrilla operations, a civil bureaucracy arises, taxes are levied, and conscript soldiers take the place of part-time irregulars.\textsuperscript{55}

Even in terms of the traditional criteria used to support the recognition of belligerent status previously criticized by Professor Falk as inadequate for modern needs,\textsuperscript{56} the existence of such base areas could obviously have important international legal implications. Moreover, to the extent the guerrillas have succeeded in exercising control over large areas of the country and are calling themselves its lawful government, more can certainly be expected of them in terms of obeying the rules and customs of warfare. It seems only reasonable that if they are claiming the status of a government, they should attempt to assume the responsibilities of protecting all persons who may come within their control. Finally, as will be shown in the next section of this article, the guerrillas' success, or even attempts, at establishing such base areas may be one indicator that the war has reached such dimensions as to fall at least within the purview of Article 3 of the Geneva Conventions.

III. WAR NOT OF AN INTERNATIONAL CHARACTER AND ARTICLE 3

Generally, international law has not been concerned with internal or civil wars until they have assumed an international character, that is, until the insurgents have received recognition as a belligerent. Until such time as this status has been accorded, these wars have been considered to be a domestic matter for the States where they are being fought. Contemporary revolutionary wars have tended to internationalize civil war, producing suffering and destruction comparable to any international war. Yet, only the latter has been governed by elaborate rules of conduct. As a consequence, international law has failed to provide adequate protection for the countless number of victims of such "noninternational" conflicts.\textsuperscript{57}
With the realization of the need for at least a minimum of humanitarian rules to govern the conduct of any internal war, the delegates to the Diplomatic Conference of Geneva of 1949 introduced provisions into each of the four Geneva conventions designed to protect victims of such internal wars. These rules are contained in Article 3 of all four conventions and are applicable regardless of whether the insurgents have attained belligerent status. While Article 3 represents a tremendous step forward in international law, in practice it has revealed serious inadequacies.

By its terms, Article 3 applies only to "armed conflict not of an international character." Its scope and purpose, as intended by its drafters, was stated at the conference as follows:

The provisions embodied in Article [3] are intended to constitute a complete and exhaustive code of the obligations assumed by the Contracting States in the event of non-international conflicts; apart from this text, no other Article of the four Conventions applies to civil wars. Where the term 'Parties to the conflict' is used in other Articles of the Convention, it should always be understood as referring to Parties to an international conflict. Where it refers to Parties to a non-international conflict, Article [3] enumerates

---

57 See Conventions, note 6 supra. Article 3 says:

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

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

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

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

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.
the only obligations by which they are bound, and by which states
which are not Parties to the conflict are also bound.

The question of belligerency is completely outside the scope
of the provisions and of the solutions proposed in the four Conven-
tions.\textsuperscript{68}

As this last sentence indicates, the provisions laid down by Article
3 apply to all cases of civil war where the insurgents have not yet
been accorded belligerent status. Furthermore, as is made very
clear by the last sentence of Article 3,\textsuperscript{69} the application of its rules
to a conflict will not confer belligerent status on the parties to the
conflict.

Thus, irrespective of the legal label affixed to a conflict, non-
combatants, prisoners, wounded, and sick, regardless of race, color,
creed, sex, or social standing, must be treated humanely in all cir-
cumstances. Their murder, mutilation, cruel treatment, and torture
are strictly forbidden. The taking of hostages, outrages on per-
sonal dignity, and sentencing and executions without previous judg-
ment by regularly constituted courts affording all the judicial guar-
antees recognized as essential by civilized peoples, are likewise for-
bidden.

Article 3 also provides that "an impartial humanitarian body
. . . may offer its services to the Parties to the conflict," but it does
not place any obligation upon any party to accept such services. It
also recommends that the parties to the conflict enter into agreements
for the application of "all or part of the other provisions" of the
Conventions.

While Article 3 undoubtedly has been applicable to almost all
of the armed conflicts in recent years, there have been numerous
indications that even this minimum code is often not being fol-
lowed.\textsuperscript{60} The refusal to adhere to the commands of Article 3 has
been made by many of those States which have bound themselves to
carry it out as parties to the Geneva Conventions.

It is difficult to understand the reluctance of States to live up to
such basic humanitarian principles. The Article merely delineates
those rules of conduct which civilized states would be expected to
follow anyway. Jean Pictet notes that:

As for the de jure Government, the effect on it of applying Ar-
ticle 3 cannot be in any way prejudicial; for no government can
possibly claim that it is entitled to make use of torture and other

\textsuperscript{68} Quoted in M. GREENSPAN, supra note 1, at 622.
\textsuperscript{69} See note 57 supra, for full text of Article 3.
\textsuperscript{60} Greenspan, supra note 11, at 40. See also Bartelle, supra note 56, at 270-71.
inhuman acts prohibited by the convention, as a means of combatting its enemies.\textsuperscript{61}

Traditionally, such reluctance arose from a fear on the part of many States that to apply Article 3 would restrict the government in employing municipal law to suppress a revolt and would strengthen the legal position of the insurgency by giving it the status of a belligerency. However, as already mentioned, the express terms of the Article guarantee that its application to a conflict will not confer belligerent status on any of the parties.

\textquotedblleft[T]he fact of applying Article 3 does not in itself constitute any recognition by the \textit{de jure} Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means — including arms — provided by its own laws; nor does it in any way affect that government's right to prosecute, try and sentence its adversaries, according to its own laws.\textsuperscript{62}\textsuperscript{,d.}

There are numerous practical considerations, as well as humanitarian ones, for observing the protections of Article 3. As William V. O'Brien has observed, \textquoteleft\. . . harsh treatment of large numbers of obviously politically motivated rebels will usually bring down considerable world-wide criticism, regardless of the subtleties of domestic and international law.\textquoteright\textsuperscript{63} To be sure, no government, communist or noncommunist, is completely immune from the pressures of world opinion. The North Vietnamese, for example, desisted from trying captured American pilots as war criminals in response to the world public outcry against such action.

For the incumbent government, there are even more compelling considerations. If a government shows little mercy in its conduct toward captured rebels, it can most assuredly anticipate like treatment in the event the rebels are ultimately victorious. Of course, in this regard, the willingness of the parties to apply humane rules of warfare may depend on the uncertainty of the conflict's outcome. But the outcome of most revolutionary wars is seldom a foregone conclusion, and the incumbent government would do well to keep this in mind.

Torture, summary trials, and executions may serve some deterrent function in the early stages of the conflict, but any possible

\textsuperscript{61} J. Pictet, \textbf{Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War} 38 (1960).

\textsuperscript{62} \textit{Id.} at 43.

\textsuperscript{63} W. O'Brien, \textit{War and/or Survival} 222 (1969).
deterrent effect is more than outweighed by the bitterness added to the fighting. The guerrilla's resolve is undoubtedly strengthened by any inhumane treatment inflicted on his captured compatriots, and he is more apt to fight to the death rather than allow himself to be captured. The psychological principles underlying Mao's command to treat captured soldiers humanely, namely that of propagandizing them and showing the moral superiority of the guerrilla, apply with equal force to the troops of the incumbent. The guerrilla fighter who by his very nature is fighting under the most adverse conditions will succumb to his "fate" sooner when he can anticipate a warm meal and place to sleep rather than a firing squad.

In conjunction with considerations of world public opinion, the incumbent government should also be aware of the right of humanitarian intervention by third states in a civil war where cruelties, not permitted by the laws of international warfare, are practiced in a systematic manner. There have been, for example, interventions by Great Britain, France, and Austria in 1832, to protest Russian atrocities in suppressing the Polish uprising, and the United States intervention in Cuba in 1898, against Spain, "to put an end to the shocking treatment which the military authorities were inflicting upon the non-combatant population in their futile efforts to suppress the insurrection."64

While direct intervention by a third State may not be an immediate threat, or given the reality of the international situation even a potential threat, the specter of inhumane acts perpetrated by one incumbent government on captured rebels may help persuade some foreign governments to pin their hopes for the country on the insurgents. In some instances, this may result in eventual indirect aid to the insurgents or at least the withholding of aid by such foreign governments to the incumbent.65

Consequently, there are many cogent justifications for a liberal application by the incumbent authority of the basic protections of Article 3. The question still remains, however, as to when an

---

64 M. Greenspan, supra note 1, at 623 n. 17.
65 The question of whether or not such external military aid to the Government or the rebels in a civil strife is permitted under international law is another matter. See W. Bishop, International Law 907-09 (3rd ed. 1970); 1 C. Hyde, International Law 245-318 (2d. Ed. 1945); 6 J. Moore, International Law 1-367 (1906). See also Fenwick, Intervention: Individual and Collective, 39 AM. J. INT'L L. 649 (1945); Franck & Rodley, supra note 4, at 688. The latter authors argue that "One advantage of legitimating what is in any event happening — the general intervention of third states in civil wars — is that it permits international law to regulate the nature and scope of these interventions on the basis of reciprocal principles." Id.
established government is bound to apply the provisions of this Article. The answer to this question will necessitate a brief discussion of some of those factors which may indicate the existence of a noninternational conflict of the kind envisioned by the drafters of Article 3.

A. When Article 3 Applies

There was a great deal of controversy during the Conference surrounding the expression "armed conflict not of an international character" which was "so vague, that many of the delegates feared that it might be taken to cover any act committed by force of arms —any form of anarchy, rebellion, or even plain banditry." How-

ever, it is apparent that commonplace police actions against criminals, public demonstrations against the government, or isolated riots do not amount to "armed conflict not of an international character."

As has been observed by one writer, since the object of the entire four Conventions, of which Article 3 is but a small part, is the protection of victims of war, Article 3 would appear to apply only to those cases which have all the characteristics of war and produce similar suffering. It is his conclusion, as well as that of Pictet, "that the delegates to the Conference had in mind non-international conflicts presenting certain analogies to war, and not the type (sic) police action which happens almost daily in most metropolitan areas." While this proposition is undoubtedly correct, it offers little in the way of precise criteria for determining the existence of such a conflict. Obviously, there is a great gulf between the two extremes mentioned, and it is within this gray area that the most troublesome problems arise concerning the applications of Article 3.

One of the reasons that the ICRC convened its group of experts on the rules of warfare was to discuss this very issue. Specifically, these experts were asked whether or not improvements could be made and in particular more objective criteria established for defining those cases to which Article 3 applied. At the outset, the experts as a whole expressed regret at the absence of a definition of the noninternational conflict adapted to the conditions and requirements of modern warfare. What they finally settled on as an

---

66 J. PICTET, supra note 61, at 35.
67 Bartelle, supra note 56, at 273-74.
68 Id. See also J. PICTET, supra note 61, at 37.
69 ICRC REPORT, supra note 24, at 99.
acceptable set of criteria was based on the definition of noninternational conflicts proposed by a committee of experts which had met in 1962 in Geneva to study the question of assistance to the victims of internal conflicts.

In the opinion of that committee, "the existence of an armed conflict is undeniable, in the sense of Article 3, when hostile action against the lawful government assumes a collective character and a minimum of organization."70 Among other things, such factors as the duration of the conflict, the number and leadership of rebel groups, their installation or action in parts of the territory, the degree of insecurity, the existence of victims, and the means adopted by the lawful government to reestablish order, all have to be considered. In adopting these criteria the experts expressly cautioned that the conditions to be fulfilled by a noninternational conflict under Article 3 should not be too restrictive.71

The application of such criteria would certainly include within the coverage of Article 3 such armed conflicts as the British operations in Malaya, the Hungarian Revolt in 1956, the Mau-Mau Movement in Kenya, the Katanga Rebellion, the Algerian Revolt, and the 1964 Rebellion in the Congo.72 In addition, it would also seem to include lesser conflicts where 1) groups of insurgents, out of political considerations, have organized to oppose the established government; 2) the established government in turn is being forced to take counter measures of a somewhat significant nature; 3) over a fairly protracted period, some casualties are being inflicted on both sides; and 4) the country, or parts of it, is temporarily insecure. However, it would not be necessary that the established government be placed in any real danger of collapse, or that there be any significant likelihood of the ultimate success of the guerrillas.

In terms of the characteristics of revolutionary war noted earlier in this article, a conflict would most likely reach Article 3 dimensions in the early phases of the second stage of a revolutionary war when guerrilla warfare begins to be widespread in appearance. Its existence would be indisputable when the guerrillas begin to successfully establish liberated base areas.

70 Id.
71 Id. at 100.
B. *Who is bound*

Article 3 expressly binds each party of an armed noninternational conflict to apply its provisions, where the conflict occurs in the territory of one of the parties to the Conventions. Since this obligation is based on humanitarian grounds, each party is so bound irrespective of reciprocity on the part of the adversary. The legal efficacy of this commitment may be doubted since it is legally difficult to bind, by an international convention, any party who was not a signatory and in fact was not even in existence when the government accepted its obligations in the name of the state.\(^73\)

Nevertheless, there are several grounds upon which to base the insurgents' obligation to observe Article 3. It can be argued, for example, that they are bound because the original adherence of the legitimate government to the Convention binds all of its subjects, despite the fact that some of them later rebel against that government. It is not unrealistic to expect the insurgents to assume at least some of the responsibilities of the government which they are seeking to replace, especially those concerning the humanitarian treatment of people within their control. It can also be contended that the Article sets forth established law independently of contractual obligation. This contention has some support in light of the fact that sixty-one states have signed one or more of the Conventions.\(^74\) Of course, apart from any question of obligation, the insurgents could voluntarily announce their intention to abide by the Article. Such adherence by the insurgents would give credence to their claims of legitimacy and would help distinguish them from mere criminals.\(^75\)

It should be noted that an insurgent force has no authority under international law to convene courts to try captives or Convention violators. Thus, it is powerless to comply with the dictates of Article 3(1) (d) which prohibits the passing of sentences and the carrying out of executions without a trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."\(^76\)

It has been suggested that perhaps the insurgent group, by an accession to the Convention, might thereby acquire the necessary

---

\(^73\) J. PICTET, *supra* note 61, at 37; Bartelle, *supra* note 56, at 274.


\(^75\) Bartelle, *supra* note 56, at 275.

authority under international law to establish a court for the purposes of Convention violations only. However, as has been pointed out, it is extremely doubtful that the Convention ever intended to confer such jurisdiction in a signing group.\textsuperscript{77} This is certainly the implication of the last paragraph of the Article which states that its application shall not affect the legal status of the parties to the conflict.

C. \textit{Proposals for Change}

1. Supervision by an Impartial International Body

Several writers have suggested that the humanitarian protections of all the Conventions might best be guaranteed by the establishment of more effective legal machinery on an international level.\textsuperscript{78} Presently, there is no international body which possesses sufficient authority to deal with any violations of the right to humane treatment.\textsuperscript{79} Nor is there such an authority for determining when a conflict has acquired an "international character" in terms of the criteria presented earlier in this article.

One suggestion that has been made calls for the establishment of an international court of criminal justice, which would have jurisdiction over all crimes under the laws of warfare, and not just those enumerated by the Convention.\textsuperscript{80} Such a tribunal would have authority to try the leaders of insurgent groups for such crimes, just as heads of established governments are held responsible for orders to their troops which are in contravention of international law. An argument, of course, can be made for according insurgents recognition at international law for such purposes by the fact that the Convention itself has referred to them as "parties" for the purposes of Articles 3.\textsuperscript{81}

On a more specific level, one authority has proposed the estab-

\textsuperscript{77} Geneva Convention's Application to the Vietnamese Conflict, supra note 72, at 253.

\textsuperscript{78} \textit{See e.g.,} M. McDougal & F. Feliciano, \textit{Law and Minimum World Public Order} 731 (1961); Geneva Convention's Application to the Vietnamese Conflict, supra note 72, at 264; Kutner, "International" Due Process for Prisoners of War: The Need for a Special Tribunal of World Habeas Corpus, 21 U. MIAMI L. REV. 721 (1967).

\textsuperscript{79} Geneva Convention's Application to the Vietnamese Conflict, supra note 72, at 260; Kutner, supra, note 78, at 743.


\textsuperscript{81} Geneva Convention's Application to the Vietnamese Conflict, supra note 72, at 264.
lishment of an International Court of Habeas Corpus empowered to hear the writs of individual prisoners. Under this plan, if the writ is granted, “the Detaining Power would produce the prisoner before the regional court of World Habeas Corpus, and the court would then proceed to determine whether the prisoner’s detention involved conditions contrary to the provisions of the Geneva Convention or shocking to the conscience of mankind.”82 Also, an individual who is detained during an armed conflict and is denied prisoner of war treatment under Article 4 of the Geneva Convention83 would be able to petition the Court by Writ of World Habeas Corpus to determine his status. In making this determination, the court would probably have to consider such questions as whether a state of war actually exists and, conceivably, whether or not a state is acting in violation of international law.84

While such plans would eliminate the bias that might be expected from a national court deciding such issues, they offer little chance of successful adoption. In light of the present realities of international relations, it is doubtful that states will confer such authority on an international tribunal.

Article 3, paragraph 2, provides that “an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.” It is true that this contingency has enabled the ICRC to intervene in numerous cases, with the agreement of the parties to the struggle.85 However, the parties are under no obligation to accept the services of the Committee.

This fact has lead a group of experts to conclude that it would be highly desirable to vest the ICRC with internationally recognized functions of supervision, “in order that it should be binding on the governments to accept its assistance for the application of humanitarian rules.”86 Obviously, as both a humanitarian and impartial organization, the ICRC would be in a strong position to command respect from all parties to a conflict.

It has been stated, however, that the impartiality necessary for performing all of its humanitarian functions would preclude the

---

82 Kutner, supra note 78, at 749.
83 See note 96 infra.
84 Kutner, supra note 78, at 746.
85 ICRC REPORT, supra note 24, at 107.
86 Id.
ICRC from serving in any capacity as a fact finding body.\textsuperscript{87} Such a criticism is really not pertinent to the question of mandatory acceptance of the Red Cross's help in caring for the victims of an internal conflict. Since the weight of world opinion stands behind the humanitarian principles of Article 3, there would seem to be little justification for such a refusal. In addition, in terms of the international organizations now in existence, the ICRC is probably the most capable of rendering an impartial opinion as to whether a conflict, according to the criteria advanced earlier, comes within the purview of Article 3.

It may well be, as Professor Falk contends, that "the future of the international legal order depends upon the emergence of effective supranational management on a regional and universal basis of external participation in internal wars."\textsuperscript{88} In this regard, he cites as encouraging signs, the Congo operation and the resolutions of the General Assembly concerning Rhodesia, South Africa, and Angola. Indeed, the United Nations General Assembly could serve a useful function in securing observance of the Geneva Conventions, as evidenced by a series of resolutions in which it requested the status of prisoners-of-war for combatants fighting against the authorities in Southern Africa.\textsuperscript{89}

2. Enforcement of the Other Provisions of the Geneva Conventions

According to the terms of Article 3, paragraph 3, "the Parties should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." This provision does more than merely offer a convenient possibility. It "points out a moral duty."\textsuperscript{90} Unfortunately, to date, there have been no conflicts falling within the coverage of Article 3 where the parties have agreed between themselves to bring into effect more of the Convention's provisions.

Of course, it is to be expected that there will be grave difficulties in reaching such agreements in a revolutionary war where one party is totally dedicated to the overthrow of the other. The incumbent government for its part will fear an increase in the international prestige of the insurgents should it be forced to conclude

\textsuperscript{87} Geneva Convention's Application to the Vietnamese Conflict, supra note 72, at 262.

\textsuperscript{88} Falk, supra note 7, at 234.

\textsuperscript{89} ICRC REPORT, supra note 24, at 101.

\textsuperscript{90} J. PICTET, supra note 61, at 42.
an agreement with them to secure better treatment for its own soldiers. However, Article 3, by express terms, states that the application of its provisions will in no way affect the legal status of the parties. Moreover, the established government is free to make express stipulations that the conclusion of such an agreement in no way confers the status of a belligerent on the insurgent group.\footnote{1}{Id. at 43.}

It should be apparent that the adoption of such agreements will in practice depend on the exigencies of the particular case. As Pictet has observed, they will usually only be negotiated because of an existing situation which neither party is able to deny.\footnote{2}{Id.} In light of this fact, the proposal of the ICRC to draw up a model agreement which it would systematically propose for application by the Parties to a conflict, seems to offer a modest and practical approach. As the experts pointed out, while it would be sufficiently flexible to be adapted to the particular nature of each internal conflict, it would also possess the advantage of enabling the ICRC to automatically attempt to obtain the widest possible application of the Geneva Conventions in each case.\footnote{3}{ICRC REPORT, supra note 24, at 107-08.}

In the final analysis, it may well be that the real hope for progress in this area rests with an enlightened change in attitude on the part of all interested parties. There are many compelling reasons, some of a self-interest nature, which call for the greatest possible observance of Article 3 and for an extension of the other protections of the Conventions. This change of attitude can not help but be facilitated by the maximum circulation and acceptance of the criteria posited earlier for determining the existence of a noninternational conflict. When the weight of world public opinion acknowledges the existence of such a conflict, it will be more difficult for the parties to shirk their international obligations.

IV. GUERRILLA WARFARE AND ARTICLE 4

According to traditional principles of international law, international war occurs between sovereign states or in the case of a revolutionary war, where the insurgents have attained belligerent status. As a practical matter, this means that in a noninternational conflict, a captured insurgent, even if he were in uniform, carried his arms openly, and belonged to an organized unit, would still be sub-
bject to the penal sanctions of domestic law, provided he receives the basic humanitarian protections of Article 3.  

On the other hand, in a war clearly recognized to be international, between states that have bound themselves to apply the Geneva Conventions, a captured combatant is immune from punishment for any acts of legitimate warfare that he has committed against enemy troops during the hostilities. He is thus entitled to the full benefits of the Geneva Convention Relative to the Treatment of Prisoners of War.  

As will soon become apparent, the legal status of a guerrilla fighter under this convention is far from clear. Indeed, there is considerable disagreement as to whether he is entitled to prisoner-of-war treatment upon capture. Any solution to this question will necessitate a close examination of the conditions for such treatment listed in Article 4A(2) of the Convention.  

To qualify as a lawful combatant, a guerrilla fighter must meet four conditions: (1) he must be commanded by a person respon-

---

94 Bartelle, supra note 56, at 273.
95 Id. at 272.
96 Geneva Convention Relative to the Treatment of Prisoners of War, supra note 6. Article 4 of this Convention states in part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of 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 militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

97 Those that would accord him legal status under Article 4 include G. Von Glahn, supra note 1, at 51; Kahn, supra note 38, at 112; Tranin, Questions of Guerrilla Warfare in the Law of War, 40 AM. J. INT'L. L. 534 (1946). While Baxter argues that a guerrilla should not be considered an international criminal, he still assumes that the guerrilla will not be able to meet the conditions of Article 4. "The word 'guerrilla' is most usefully applied in a legal context to armed hostilities by private persons or groups of persons who do not meet the qualifications established in Article 4 of the Geneva Prisoners of War Convention of 1949 or corresponding provisions of the earlier Conventions." Baxter, supra note 1, at 333. He thus places the guerrilla in a special classification which he labels "unprivileged belligerency."

98 See note 96 supra.
sible for his subordinates, (2) he must wear a fixed distinctive sign recognizable at a distance, (3) he must carry his arms openly, (4) and he must conduct his operations in accordance with the laws and customs of war. As stated earlier, some writers have doubted whether these conditions, stipulated in the context of the Second World War to take account of resistance movements, are realistic in the circumstances of modern warfare.

It is true that this provision was specifically inserted in response to the controversies that had arisen surrounding the activities of resistance guerrillas and questions of their legal status that had developed in the War Crimes Trials following the War. While reference is specifically made to resistance movements, it is obvious, however, that this term also embraces all guerrilla fighters, regardless of whether they are fighting a defensive or offensive war. A guerrilla will employ the same basic tactics of fighting in either case. Of course, in a revolutionary war, the guerrilla may be tempted to employ certain methods, such as the indiscriminate use of terror, which may take him out of the Article's protection. At any rate, these conditions in their present form are not per se unrealistic, and conversely, there is nothing in the nature of guerrilla warfare which per se places guerrilla fighters beyond the coverage of Article 4.

A. Viability of the Conditions Imposed by Article 4A(2)

1. Requirements of organization

Before discussing the viability of these four conditions in terms of guerrilla warfare, an initial observation is in order. For a resistance movement to be accorded legal status, there is an additional requirement that it be "organized." While this term is undefined by Convention, it obviously implies some sort of central direction of the movement to which separate groups composing it are subordinated and responsive. This would thus seem to place those groups that acknowledge no superior authority and those individual guerrillas operating without affiliation outside of the coverage of the provision.

This requirement presents some problems of qualification for

---

100 Greenspan, supra note 11, at 33.
101 Id. at 34.
102 Id.
guerrilla fighters, especially in the early stages of the revolutionary war where, because of their weakness, they are by necessity widely dispersed. If they are to survive, they must depend on swiftness and flexibility, merging and dispersing as the situation so demands. It is for this reason that Morris Greenspan argues that "the requirement of organization should not be construed too strictly."\(^\text{103}\)

On the other hand, in almost every revolutionary war, the guerrilla movement, no matter how small and dispersed, will display great discipline and will almost always have some hierarchy of command. Such discipline and delegation of command is crucial to the survival of the movement. Indeed, in a revolutionary war where political considerations impinge even on the battlefield, some higher authority must exist to coordinate the military and political efforts of the guerrillas. Thus, this requirement will not impose insurmountable obstacles for the legal qualification of the guerrilla. It is true that in some revolutionary wars, one party will refuse to admit its involvement in the conflict, and the other side will use this as a pretext for refusing to grant prisoner-of-war status to its combatants. It would seem that the requirement of belonging to a party to the conflict should not be construed too strictly. As Greenspan points out, the Geneva Conventions do not require that these forces actually be authorized by their own government. It should be sufficient if they do in fact belong to that particular side.\(^\text{104}\)

Another writer points out that: "The underlying idea in prescribing the additional requirement that guerrillas must represent a de facto or de jure government is that war is a state or condition of governments contending by force. It is futile and unrealistic to conceive the institution of war that way in modern international society."\(^\text{105}\)

2. Requirement of being commanded by a person responsible for his subordinates.

Most guerrilla movements will easily satisfy the condition of being commanded by a person responsible for his subordinates since strong leadership of the movement is essential to its success. This condition requires that such a leader exercise effective control over his subordinates or suffer the consequences under international

\(^{103}\) Id.

\(^{104}\) Id. at 35.

\(^{105}\) Khan, supra note 38, at 118.
By establishing a minimum guarantee of discipline, this provision also provides some assurance that the other conditions will be observed. It is for this reason that a group of experts, convened to study the present day realism of the requirements of Article 4 to the circumstances of modern guerrilla warfare, concluded that a certain degree of organization and responsible leadership were essential.

3. Requirement of Having a Fixed Distinctive Sign

The requirement of having a fixed distinctive sign recognizable at a distance appears to present some problems for the adequate functioning of the guerrilla. The group of experts who were asked by the ICRC to study the problem concluded that such a condition would be difficult in practice for guerrillas to fulfill. Other authorities have reached the same conclusion.

There can be little doubt of the rationale behind this requirement. In any war, combatants must be distinguishable at a distance from non-combatants. Of course, in a revolutionary war where the civilian population plays such a key role in the guerrilla’s strategy for victory, the problem of keeping the two distinct is indeed great. One of the advantages of guerrilla fighting has always been the ability of the guerrilla to submerge himself in the general population. Nevertheless, unless this condition is interpreted strictly to require full uniform and insignia, it does not automatically place a guerrilla fighter outside of the Article’s coverage.

There seems to be general agreement among the experts that this condition does not require that the guerrilla be garbed in a complete uniform. However, the guerrilla must at least have some fixed distinctive sign which will distinguish him from the civilian population when he is engaged in hostile activity. The World Federations Association has thus interpreted the condition to mean that, “This sign should be distinctive to enable identification in relation to the peaceful population, . . . fixed in the sense that the resistant should wear it throughout the operation in which he is taking part and . . . recognizable at a distance by analogy with

---

106 Greenspan, supra note 11, at 35.
107 ICRC REPORT, supra note 24, at 116.
108 Id.
109 See, e.g., G. VON GLAHN, supra note 1, at 51; Baxter, supra note 1, at 336-337.
110 Greenspan, supra note 11, at 35.
111 See, e.g., Greenspan, supra note 11, at 35; Khan, supra note 38, at 120.
uniforms of the regular Army."\textsuperscript{112} According to Greenspan, an armlet sewn on the sleeve of a civilian jacket would satisfy the requirements of this provision.\textsuperscript{113}

While Professor Baxter and others\textsuperscript{114} feel that the secret nature of guerrilla warfare may preclude the guerrilla from even complying with this limited restriction, it is submitted that the guerrilla fighter can satisfy this requirement and still maintain his effectiveness. Nothing in this restriction really prevents the guerrilla from taking measures to conceal his identity both in approaching the enemy and in making good his escape. Of course, should he attack in civilian clothes, then he could be treated as an unlawful combatant upon capture. In short, the rationale behind this condition is to enable the enemy to distinguish the combatant from the non-combatant when they are engaged in battle.

4. Requirements of carrying arms openly and fighting in accordance with the laws and customs of war

Like the previous condition, the requirement that the combatant carry his arms openly has the rationale of identification underlying it. It is thus necessary for the guerrilla to comply with this provision only in the theater of war where the actual fighting takes place. It would seem then that as with the other conditions, there is nothing ipso facto in the nature of guerrilla warfare that would place the guerrilla in contravention of this requirement. As one writer has pointed out:

\begin{quote}
There is nothing at the theoretical level, in Mao's code which suggests that the guerrilla hides his weapons. He hides himself. He attacks suddenly. He runs when overwhelmed. He certainly does not go disguised to civilians or soldiers, discuss weather, and suddenly pull out a gun from his \textit{firin} and fire. If he does so, he is a bad guerrilla, a criminal liable for prosecution on charges of war crimes.\textsuperscript{115}
\end{quote}

In order to be accorded legal status, guerrillas must also conduct

\textsuperscript{112} Quoted in ICRC REPORT, supra note 24, at 116-17.
\textsuperscript{113} Greenspan, supra note 11, at 35.
\textsuperscript{114} Professor Baxter notes, "But because guerrilla warfare is in essence secret warfare, it is improbable that the majority of guerrillas will comply with these conditions, particularly those which relate to the wearing of distinctive insignia and the open carrying of arms." Baxter, supra note 1, at 336. In arguing for their legality, Von Glahn likewise points out, "No open identification with the regular armed forces or open display of arms can be expected on the part of men and women whose very survival depends on their ability to disappear in the face of pursuit or defeat." G. VON GLAHN, supra note 1, at 51-52.

\textsuperscript{115} Khan, supra note 38, at 120.
their operations in accordance with the laws and customs of war. They must refrain from using "treachery, denial of quarter, maltreatment of prisoners of war, wounded, and dead, improper conduct toward flags of truce, pillage, and unnecessary violence and destruction." Under no circumstances must prisoners be killed even where it is a material impossibility for the guerrillas to take proper charge of them. Finally, the prohibition against the killing and wounding by treachery also applies to acts of assassination.

However, the ability and willingness of the revolutionary guerrilla to observe all of the requirements of Article 4 may vary with the stage at which the war is being fought. With this in mind, some experts have suggested that the special conditions of guerrilla warfare should be taken into consideration and that guerrillas should be treated as prisoners-of-war under Article 4 even if they have failed to observe the laws and customs of war. However, if such violations are meant to include acts of treachery, the indiscriminate use of terror, or the murder of captured soldiers even out of reasons of necessity, this position is untenable. To condone such conduct would effectively obliterate the humanitarian principles that are the very foundation of all rules of warfare. Moreover, as already indicated, the theory of revolutionary guerrilla warfare itself does not sanction such behavior.

B. A Suggestion for A Change in Attitude Concerning the Scope of Article 4

It is thus the contention of this article that guerrillas, fighting in a revolutionary war, do not ipso facto fall outside of the coverage of Article 4. Therefore, it does not advocate any basic changes in the Article's provisions. The real problem rests with the inability or unwillingness of many to accept the notion that these provisions can be logically interpreted to encompass guerrilla fighters. However, the more realistic viewpoint is reflected in the conclusion of the ICRC that:

The conditions laid down in Article 4 of the IIIrd Geneva Convention in order that a guerrilla may be considered as a prisoner of war in case of capture, should be interpreted as broadly as possible

---

117 Id.
118 ICRC REPORT, supra note 24, at 119.
119 See note 114 supra.
when the guerrillas respect fundamental humanitarian principles in combat.\textsuperscript{120}

One of the reasons advanced for refusing to accord the protections of prisoner of war status to guerrilla fighters is the immense threat they represent to the enemy. Thus, deterrence is seen as a major motivating factor behind the refusal to consider the guerrilla as a lawful combatant.\textsuperscript{121} However, the logic underlying this belief is highly questionable. It is probable that the guerrilla’s resistance is stiffened by an awareness that he will only be treated harshly upon capture. Moreover, he is surely more apt to observe the rules of warfare himself when he knows he will receive reciprocal treatment. Consequently, reasons of self-interest alone should dictate a liberal application of Article 4 by all belligerents. This especially seems so in light of the humanitarian principles underlying the entire Convention.

For their part, the guerrillas should also endeavor to meet in some way the minimal conditions set forth in Article 4. They should also announce to the world their intention to fulfill the obligations imposed on them by the Convention. If they are unable to properly care for captured soldiers in their custody because of the exigencies of the situation, the prisoners should either be turned over to a neutral country or released. Such benevolence toward enemy soldiers can be highly beneficial to the guerrilla’s cause.

V. Conclusion

The prevalent character of revolutionary wars on the contemporary international scene makes it imperative that nations utilize every available means to mitigate their excesses. This is especially true in light of the fact that these wars have exhibited a potential for savagery and human suffering unparalleled in the history of mankind. It is unfortunate that the participants in many of these wars have demonstrated an unwillingness to avail themselves of the international mechanisms that could easily have alleviated much of this suffering. This intransigence assumes an even more tragic character when one realizes that it is attributable in part to a misguided perception of self interest.

This article has presented a number of considerations which indicate that it is in the best interests of all parties concerned to adhere to those rules of war which command humane treatment for

\textsuperscript{120} ICRC REPORT, supra note 24, at 121.
\textsuperscript{121} Baxter, supra note 1, at 343.
captured combatants. As was stressed repeatedly, the incumbent government in an internal war will compromise very little by the observance of the minimal guarantees of Article 3. To the contrary, it was demonstrated that far more would be gained by their application. It was also argued that the insurgents would benefit by an observance and respect for those same rules. If they wish to be treated as their country's lawful government, then it is not too much to expect them to assume some of the responsibilities of that government, especially those of such a fundamental and humanitarian nature.

Unfortunately, recent history militates against too sanguine expectations of the parties' willingness to liberally apply the safeguards of Article 3. Perhaps the ultimate solution of this problem, as well as the others discussed in this article, must await the final demise of traditional concepts of international law now out of step with reality. The problem with traditional classifications like that of belligerency and insurgency has always been the absence of an international body with sufficient authority to apply such labels to a given conflict. As with the granting of recognition, this function has been, and still remains, a cherished right of the Nation State. It is possible that the emergence of supranational institutions may provide the means for an eventual shift in this locus of competence.122

In the meantime, there may be sufficient international machinery to capitalize on the tendency of states to follow what they perceive to be their own self-interests, or perhaps more accurately, what they can be persuaded to perceive as such interests. In this respect, both the International Red Cross and the United Nation's General Assembly are in a unique position to play an active part as builders of world consensus concerning the humane treatment to be accorded captured combatants. Since a great deal is left to the discretion of the parties as to when Article 3 comes into operation, a set of criteria has been suggested which would help put this determination on a more objective basis. While it is probably unrealistic to believe that such criteria could ever be incorporated into Article 3 via amendment, it may be enough to assure their publication and wide distribution, especially since they enjoy the support of the International Red Cross. While the parties could still refuse to acknowl-

---

122 This is the hope voiced by Richard Falk. See Falk, supra note 7, at 227.
edge the existence of such a conflict, they would come under the
closer scrutiny of world opinion.\textsuperscript{123}

Several other proposals of a similar nature have been advanced
which seem to offer some chance of approval, such as mandatory
acceptance of the help of the Red Cross and the preparation of
model agreements to facilitate the negotiations to include more of
the Conventions’ protections. An even more ambitious role of the
United Nation’s General Assembly is embodied in this suggestion
by Professor Baxter:

A declaration could be adopted by the General Assembly — it
would be hoped by a unanimous vote — that certain principles of
the law of war, notably of the Geneva Conventions of 1949, are of
universal applicability without regard to the nature of the conflict
or to the specific treaty obligations which the parties might have
assumed. A declaration of this sort would resemble the declara-
tions on human rights, on permanent sovereignty over natural re-
sources, on colonialism, and on the legal principles governing the
use of outer space which have already been adopted.\textsuperscript{124}

In the last analysis, it would seem that international law and
the international institutions currently in existence are capable of
providing a medium of communication through which the nations
of the world can come to perceive their own self interests in the
proper development and application of the rules of warfare. It is
no longer possible for States to refuse to recognize that the world
has a stake in the revolutionary wars being waged within their
boundaries. External participation in these “internal” wars is now
the rule rather than the exception, and the threat of escalation to
heights of nuclear holocaust is a living nightmare. A realization
that there is a universal concern for the humane treatment of cap-
tives which transcends all national boundaries will help bring these
wars back to a level of sanity.

\textsuperscript{123} It has been suggested by several writers that in order to make world public
opinion effective, it is first necessary to assure a wide distribution of those facts which
will form the basis of that opinion in any particular instance. See, e.g., Smith, \textit{The

\textsuperscript{124} Baxter, \textit{Forces for Compliance with the Law of War}, \textsc{am. soCy int’l l.} 82,
87-88 (1964) (proceedings).