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Humanitarian Law, El Salvador, and Protocol II: Do These Equal Substantive International Law

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Humanitarian Law, El Salvador, and Protocol II: Do These Equal Substantive International Law?

One possible perception of today's world is that it is inhabited by ranks of sadistic, slavering government enforcers living only for the day they can run amok in the streets, breaking the bones of small children and old men. This perception is bolstered by daily news reports depicting the often arbitrary and excessive use of force against civilians suspected of supporting insurgent forces in countries such as Ethiopia, Nicaragua, Sudan, El Salvador and Israel's Occupied Territories. Scenes of the murder and rapine inflicted on the residents of villages became familiar to American television viewers during the Vietnam war. The generation that has grown to adulthood since that time is no less familiar with similar images generated by modern day conflicts.

Another subject often mentioned in news reports is the humanitarian work done during periods of large-scale, politically-motivated violence by various groups and individuals, such as the International Organization of the Red Cross and Red Crescent ("IRC"). The IRC and like groups provide food, shelter, and medical aid to noncombatants and encourage compliance with the ideals of humanitarian law. Individuals from these groups have gone into areas of conflict, administering medical care and rebuilding civilian homes and villages. Some of these people act in order to directly support insurgent forces. Others have conditioned their aid to the noncombatant population on their ability to remain neutral.

Violence against non-combatants in an international armed conflict


2 Veuthey, supra note 1, at 84, 93; Moreillon, Humanitarian Law, the ICRC and Promoting the Geneva Conventions, 31 AM. U.L. REV. 819, 822 (1982).

3 See generally C. Clements, Witness To War (1984) (for a journal of a doctor in the Salvadoran countryside who refused to compromise his neutrality).
is forbidden by several international agreements, and violence by a state against its own nationals during an internal armed conflict is specifically circumscribed by Protocols I and II. The prohibition against attack on civilian targets during state-to-state wars has, to a large extent, been complied with by the opposing governments. However, the 1977 Protocols have not proved to be as successful in protecting noncombatants from harm during civil wars.

The apparent conflict between state behavior and Protocols I and II indicates: 1) states believe these agreements do not apply in their particular circumstances; 2) states agree as to the general applicability of the relevant agreement, but do not agree as to the interpretation of specific articles; or 3) states agree as to the interpretation and applicability of the agreements, but consider it impractical to abide by them. This Note will focus on a relatively recent humanitarian law agreement, Protocol II, and its application to the civil war in El Salvador in an effort to determine the answer to two questions. First, why is there an apparent conflict between agreement and practice; and second, is resolution of this conflict and the subsequent strengthening of international law being furthered by the interplay between the Salvadoran Government and the opposing rebels?

I. THE DEVELOPMENT OF HUMANITARIAN LAW

Humanitarian law experts have estimated that since World War II civil wars have claimed four times more victims than international armed conflicts. Put another way, "non-international wars account for approximately eighty percent of the victims" of armed conflicts during the same period. This is a startling fact, until one recalls that before the 1977 Protocols no specific rules were in effect to govern non-international conflicts. Before 1977, state and rebel forces essentially had an internationally granted carte blanche when it came to dealing with armed opposition and its civilian supporters. These conflicts were considered strictly domestic issues. However, the wanton destruction and the increasing

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See generally Geneva Conventions, supra note 1 (addressing the rights of noncombatants in an international armed conflict, except for common article 3, which refers to internal armed conflicts).

See generally Protocols Additional to the Geneva Conventions of 1949 (Protocols I and II), Dec. 12, 1977, reprinted in 16 I.L.M. 1391, 1442 [hereinafter Protocols I or II]. Protocol I governs "armed conflicts in which people are fighting against colonial domination . . . alien occupation and against racist regimes in the exercise of the right of self-determination . . ." Id. art. 1, para. 4. Protocol II applies "to all armed conflicts which are not covered by Article 1 [of Protocol I]. . . ." Id. art. 1, para. 1. This is a generic reference to civil wars based on political differences.


awareness of the world as a global community persuaded state governments that the quality of life enjoyed by all individuals should not be beyond their concern.

Humanitarian law is an outgrowth of the law of war and the law of human rights.\(^8\) While it shares certain ideas and values with these two areas, humanitarian law has distinct features justifying its classification as a separate body of law. To understand these features, first it is important to appreciate the genealogy of humanitarian laws.

A. The Law of War

After much development through custom and scholarly writing, the concept of the law of war is fairly well established in international law.\(^9\) The bulk of the law was codified in the late 19th century, in the Hague Conventions.\(^10\) In addition to the fact that Hague Conventions provide for individual\(^11\) as well as state responsibility for violations of the law of war they also regulate such matters as the weapons to be used, the restraints or conditions on the use of weapons, the targets that may legitimately be attacked, the duration and amount of force that may be applied, the conditions under which reprisals and other specific kinds of force can be instituted, the rights of military personnel under combat conditions, and the complicated questions associated with the defense of superior orders.\(^12\)

While the Hague Conventions "civilized" war, they were seen as applying only to hostilities between sovereign states\(^13\) and were only incidentally concerned with the protection of civilians.\(^14\)

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\(^9\) Id.


\(^11\) An example of this individual responsibility is demonstrated by Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

\(^12\) Almond, The Teaching and Dissemination of the Geneva Conventions and International Humanitarian Law in the United States, 31 AM. U.L. REV. 981, 991 (1982). The rule of thumb used by today's war makers is called "military necessity." Only the minimum force needed to achieve a military objective should be used, thus only legitimate military targets (armories, military bases) rather than random civilian ones should be attacked. Id. at 992.

\(^13\) The Geneva Conventions have historically been considered a part of the law of war and consequently may be applied only to acts of belligerency among sovereign states. See infra note 21 and accompanying text. This is reflected in art. 2: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between . . . the High Contracting Parties . . . ." Geneva Conventions, supra note 1, art. 2 (emphasis added). See also Draper, Humanitarian Law and Internal Armed Conflicts, 13 GA. J. INT'L & COMP. L. 253, 268-69 (1982).

\(^14\) See Almond, supra note 12, at 991.
B. International Human Rights Law

The concept of international human rights is a recent phenomenon that did not develop outside the domestic law of individual states until the end of World War II.\textsuperscript{15} Various international human rights agreements deal with subjects ranging from the general\textsuperscript{16} to the specific;\textsuperscript{17} from the basic\textsuperscript{18} to the esoteric.\textsuperscript{19} All of the agreements have two clauses in common. First, they grant states the right to derogate a majority of their obligations during times of public emergency or war.\textsuperscript{20} Consequently, these agreements provide little restraint on a state during an armed conflict. Second, allegations of violations may be heard before an international tribunal when filed by a Contracting Party or by an individual once that individual has exhausted available domestic remedies.\textsuperscript{21} Unfortunately, this enforcement mechanism is flawed in that war victims are ill-equipped to seek domestic remedies should any be offered.\textsuperscript{22}

C. Humanitarian Law

Humanitarian law, compared to the law of war and the principles of international human rights, is new to international law. While the humanitarian efforts of the IRC for the protection of prisoners of war were first mentioned in the 1920 Geneva Conventions,\textsuperscript{23} the expression "humanitarian law" was not used to describe the ideals of the Geneva Conventions until the 1950s.\textsuperscript{24} Before that, the Geneva Conventions were

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\textsuperscript{15} Schindler, supra note 8, at 936. Human rights, such as the abolition of slavery and freedom of speech, "primarily concern relations between states and their own nationals . . . ." Id.


\textsuperscript{17} See generally Kartashkin, Economic, Social and Cultural Rights, in I THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 111-34 (P. Alston ed. 1982)(this provides a description of ten very specific rights considered in various human rights agreements, including the rights to an adequate standard of living, and trade union rights).

\textsuperscript{18} See generally Partsch, Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination, in I THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 61-86 (P. Alston ed. 1982)(the rights discussed here are considered the underpinnings of the observations of human rights in any society).

\textsuperscript{19} See generally Kartashkin, supra note 17, at 127-29 (for a discussion of cultural rights).


\textsuperscript{21} Schindler, supra note 8, at 941.

\textsuperscript{22} Id. First, a government is very unlikely to provide the mechanisms for prosecution of its own representatives. Second, even if the procedures for prosecution are available, civilians under siege have neither the financial nor the legal resources to pursue their rights. Id.

\textsuperscript{23} Moreillon, supra note 2, at 819.

\textsuperscript{24} Schindler, supra note 8, at 935.
considered a part of the law of war. The startling loss of civilian life in armed conflicts in the 1960s, as seen in the Nigeria-Biafra, Vietnam and India-Pakistan conflicts, indicated to the world’s governments that clear, strong rules were needed to govern the use of force against noncombatants. As a result, Protocols I and II were negotiated and opened for signature in 1977.

While human rights law theoretically applies in both peace and war time, humanitarian law is engineered to meet the specific problems presented in an armed conflict. Also, it is arguable that the obligations to which a state is subject may not be derogated, since there is no specific provision granting derogations.

Humanitarian law is like the law of war in that it holds individuals as well as states responsible for force used against noncombatants, but it increases the effectiveness of enforcement. First, agreements provide for a rudimentary monitoring system by the IRC. Furthermore, humanitarian law protects noncombatants caught up in an internal armed conflict.

**II. PROTOCOL II**

**A. Why Protocol II Developed**

Common article 3 of the four Geneva Conventions extends some protection to noncombatants in an internal conflict, but critics assert that it harbors four major weaknesses. First, victims of internal armed conflicts are not extended the same level of protection as victims of interna-

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25 Id.
27 Schindler, *supra* note 8, at 938. 
28 There is no express counterpart to the derogation clauses found in human rights conventions. See *infra* note 47-63 and accompanying text for the assertion that there is at least an implied derogation clause in Protocol II.
29 See supra notes 9-14 and accompanying text.
31 Geneva Conventions, *supra* note 1, art. 3(2); Protocol I, *supra* note 5, art. 81; Protocol II, *supra* note 5, art. 18.
32 Compare Geneva Conventions, *supra* note 1, art. 3 with Protocol I, *supra* note 5, art. 1 (the Protocols address only internal armed conflict).
33 Common article 3 refers to article 3 which is found in all four Geneva Conventions. It contains the following provisions:
tional armed conflicts. The lack of provisions for providing aid and specific minimum standards for the treatment of detainees makes the stated principles easy to circumvent. Second, the procedure for enforcement is unclear. This is primarily because common article 2 "defines the scope of the Conventions in a way that does not include non-international armed conflicts." Given this, it would appear that article 3 needs to set up a separate enforcement provision in order to provide any remedy for violation of the rights it professes to grant. Unfortunately, this is not done. Next, it is argued, there is no definition of "internal armed conflict" to indicate when the article can be invoked. Finally, protection is provided for those already victims of a conflict, rather than preventing noncombatants from becoming victims.

Protocol II was initially drafted by the IRC in an effort to address

In the case of armed conflict not of an international character... 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... shall in all circumstances be treated humanely...

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever...

(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...

(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.

Geneva Conventions, supra note 1, art. 3.

35 Id.
36 Lysaght, supra note 30, at 12.
37 Id.
38 See id.
39 Id. at 14 (stating "[t]he article itself attempts no definition in terms of levels of force or of rebel control of territory ..."). Contra Junod, supra note 34, at 30 (stating "the concept of armed conflict is generally recognized as... open, armed confrontation between relatively organized armed forces or armed groups."). However, if this notion were so recognized, it is doubtful the drafters of Protocol II would have expressed so, particularly the conditions precedent to its invocation: there must be a conflict between the armed forces of a Contracting Party and dissident armed forces, and the dissent forces must be "under responsible command, and exercise such control over a part of its territory as to enable them to carry out sustained and concentrated military operations and to implement this Protocol." Protocol II, supra note 5, art. 1(1). The drafters added a clarification, expressing that internal disturbances like riots or "isolated and sporadic acts of violence" are not considered armed conflicts. Id. art. 1(2). The present day conflicts in the Occupied Territories would appear not to be covered by Protocol II because the Palestinians do not have that element of organized resistance needed. In contrast, the Eritrean rebellion in Ethiopia has an organization and maintains control of large amounts of territory and so would be covered by Protocol II.
40 Lysaght, supra note 30, at 14.
these weaknesses and to expand the application of common article 3 in particular to civil wars. It was opened for signature in 1977 after four years of negotiations by over 100 countries. As of December 31, 1986, sixty states had become parties. Opinions of the finished document have varied. It has been said that "the mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lack racial or religious motives." In contrast, the text has been decried as being "a statement of good intentions devoid of any real humanitarian substance and of any mandatory character." While these statements appear to be irreconcilable, they are both true.

B. Textual Weaknesses in Protocol II

Under Protocol II the mass killing of civilians has been outlawed. Unfortunately, the very text of the Protocol makes compliance completely discretionary and unenforceable, thus providing the potential for a state to strip the document of any substantive impact within its borders. This potentially fatal weakness becomes apparent in an examination of Protocol II, article 3, paragraphs 1 and 2.

The discretionary portion of the text is found in article 3, entitled Non-intervention states: "1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order . . . or to defend the national unity and territorial integrity of the State." The purpose of this clause was to encourage states to become parties to the agreement, since it was felt that no state would willingly apply the Protocol if application meant the possibility that its sovereignty would be diminished. Unfortunately, this clause provides

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41 See Junod, supra note 34, at 31.
42 See supra note 39.
46 Lysaght, supra note 30, at 10 (quoting the delegate of the Holy See).
47 Nelson, supra note 45 (President Reagan offered no definition of "mass murder").
48 Protocol II, supra note 5, art. 3, para. 1.
49 See Lysaght, supra note 30, at 21.

Each party to . . . a conflict, but especially the legal government, usually considers itself as having sole jurisdiction over the territory of the State. Acceptance of the applicability of the Geneva Conventions may imply recognition of the other party as sovereign, having
wording much like the derogation clauses of human rights agreements.\footnote{See supra note 20 and accompanying text.} This language, by itself, causes potential problems in applying Protocol II to internal armed conflicts, much like those encountered in human rights agreements.\footnote{See supra notes 20, 28 and accompanying text.} Fortunately, the superior quasi-law-of-war enforcement mechanisms\footnote{See supra text accompanying notes 30-32,} are left untouched by paragraph 1; the issue is one of interpretation through interchange among the parties to define terms such as “by all legitimate means”\footnote{This phrase is not defined in the Protocol. However, it has been suggested that should the standards of permissible conduct under Protocol II for any reason not apply, the standards of conduct under common article 3 would remain. See Junod, supra note 34, at 35.} and “re-establish law and order.”\footnote{See Almond, supra note 12, at 986-87. See also R. Wallace, INTERNATIONAL LAW 3 (1986).} This interchange can take many forms, ranging from diplomatic notes passed by ambassadors, to statements to the media by “high-ranking government officials,” or even to actual challenges in the International Court of Justice. Whatever its form, the purposes of these actions are twofold for the states: 1) to characterize its conduct as lawful under international law; and 2) to mold international public opinion so that it is favorable to the issuing state’s position.\footnote{This is an incredibly broad directive with no guidance given in the Protocol.}

However, the second paragraph of article 2 makes the above-mentioned interchange virtually impossible among states and, consequently, the Protocol internationally unenforceable. It states that “[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal . . . affairs of the . . . Party . . . .”\footnote{Protocol II, supra note 5, art. 3, para. 2.} The inclusion of this paragraph could mean that should a state decide that Protocol II, as a whole or in part, does not apply in its situation, no other state may enter into a dialogue with that state concerning the legitimacy of its actions. This kind of interaction could easily be called indirect intervention, thus inappropriate under article 3, paragraph 2. This assertion is based on the fact that “intervention” is not defined in Protocol II, and naturally any state will press for the interpretation most favorable to its position if challenged.\footnote{See Matheson, Practical Considerations for the Development of Legal Standards for Intervention, 13 GA. J. INT’L & COMP. L. 205, 206 (1982).}

It is possible that Protocol II could, ultimately, be a strong, effective document. Under traditional international law, once there is a signed and effective agreement between two or more states, international law jurisdiction over the territory under its control. This is a position which the incumbent legal government can almost never accept.

Fleiner-Gerster & Meyer, supra note 10, at 270.

\footnote{See supra note 10, at 270.}
concerning the substance of that agreement is established. While in principle there are formal processes that can establish procedures and institutions for interpreting and applying an agreement, the reality is that agreements are skeletal in nature and devoid of substance and meaning until implemented as part of the policies of a state. Even those states that profess the nonapplicability of an agreement may give tacit acceptance to its provisions. By giving acceptance, the state is aiding in the formation of substantive international law. Regardless of the posturing by states concerning the nonapplicability of an agreement, it is the actual interrelationship of policy and action that makes codified international law more than illusory.

What makes Protocol II particularly interesting is that it shifts the dialogue from a state-to-state to a state-to-insurgent conflict. The nature of humanitarian law and Protocol II requires the international community to consider not only how other states react to the besieged state's acts, but also to analyze the ability and the willingness of the parties to a civil war to abide by humanitarian standards. Therein lies the hope for effective humanitarian law through Protocol II. The non-intervention clause has only the strength that states give it. Likewise, other provisions may gain in legal significance through compliance by the government and rebel forces, and what is written as discretionary in the agreement may evolve into a legal obligation.

III. HUMANITARIAN LAW IN EL SALVADOR

El Salvador’s political history has long been one of coups and revolution, both peaceful and violent. A bloodless coup on October 15, 1979 began a series of events that even today are subject to much speculation and analysis.

Following the October 15 coup, a five member council of two military officers and three civilians was put into a ruling position in the country. Immediately, this council was politically attacked by both left-wing (“FMLN”) and right-wing National Republican Alliance...
extremists. The FMLN has as its ultimate goal the establishment of a better way of life for the peasants who make up 94% of El Salvador's population. While the ideal economic system, capitalist or socialist, is still being debated, the FMLN espouses land reform and redistribution, and a democratic political system. The FMLN has adopted an aggressive guerrilla warfare approach to affect the changes its members seek. To date, they have refused to participate in the national elections unless certain demands modifying the electoral system are met. The elections are not considered democratic by the FMLN since all eligible voters must have their identity cards stamped to show they voted or face harsh consequences, and every vote is traceable back to the individual who cast it.

The ARENA forces are utilizing a combination of government infiltration and paramilitary "death squads." ARENA willingly participates in the national elections and consequently has a number of its members in high government positions. Major Roberto D'Aubuisson, a recent president of the Constituent Assembly, is a member of ARENA and at times has been its leader. He has also been recognized as a di-
rector of the death squads. These squads routinely terrorize the civilian population in an effort to reduce the logistical support given to the FMLN by the people in the countryside.

The Salvadoran Government has taken the position that the rebel force within the country is the FMLN, not the paramilitary groups. This is due both to the FMLN’s objective of overthrowing the established Government and its potential ability to do so. The end result of the 1979 “bloodless coup d’etat” was that the nine year old civil war in El Salvador claimed an estimated 61,000 lives. Human rights groups estimate that 80% of those killed were civilians slain by the paramilitary groups. This casualty rate is astonishing considering the country’s small size and population level.

El Salvador is a party to Protocol II, but the Government has refused to apply its provisions to the civil war. The basis for this refusal seems to be ignorance of the protection that article 3 gives to sovereign states. The Government’s refusal is allegedly based on its fear that applying these provisions to the civil war “would increase the international status of . . . [the rebels], implying the rebels have rights as ‘belligerents’ . . . .” A statement of this kind is based on the historic law of war idea that only sovereign states can be considered belligerents. This is plainly at odds with the provisions of Protocol II, articles 1 and 3. Together, these articles extend the rights and obligations of the Protocol to both

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76 Clements, supra note 3, at 92, 261; see also Digion, Salvador 18 (1983)(quoting a Jan. 15, 1982 memo from the U.S. Embassy in El Salvador to the U.S. State Department).
77 Dep’t St. Bull., supra note 64, at 1.
79 Dep’t St. Bull., supra note 64, at 7.
81 Allen, Associate Press, Dec. 7, 1982 (Nexis). It has been estimated that 80% of casualties in all armed conflicts since 1980 . . . were civilians.” Harper’s Magazine, reprinted in The Plain Dealer (Cleveland), May 1, 1988 at C3.
82 El Salvador has approximately the same area as Massachusetts, with a population that equals Chicago’s, approximately 3.4 million people. Webster’s New World Dictionary 454, 872, 246 (2d ed. 1980).
83 International Committee of the Red Cross, supra note 44, at 558. See also Junod, supra note 34, at 39. To date, there has been no formal announcement recognizing the applicability of Protocol II.
84 See supra note 48 and accompanying text.
86 “This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a
rebel and government forces without causing any limitation on the sovereignty of the recognized government.

Why has El Salvador's government chosen to ignore article 3, paragraph 1? The rebels fulfill the requirements of article 1, paragraph 1; the FMLN holds up to 20% of the country's territory under such control; they have long-term bases; and they are capable of keeping prisoners.

The internal conflict is not excludable under article 1, paragraph 2, as no one has suggested that the civil war is a sporadic event. Thus, the general applicability of the Protocol is not in question. Additionally, there has been no question raised by El Salvador as to the interpretation of any of the provisions. The complete discounting of article 3, paragraph 1 is not an interpretative issue, but simply reflects a state decision not to apply the Protocol.

It is the practicality of the Protocol with which the Government has problems. It is apparent that by not extending the rights and obligations of the Protocol to the civil war, the government is in a superior position to put down the rebellion. This is because if Protocol II is not applied, the government is constrained in its actions only by international human rights that are so fundamental they cannot be derogated; unfortunately, the human rights enforcement mechanism is then the only civilian relief in place. Government policies for battling the rebels reflect this realization. The government of El Salvador has nothing to lose domestically or internationally by following these policies. Domestically, they are in an effective position to weaken civilian support for the FMLN. Internationally, there is an obligation in article 3, paragraph 1 to apply the Protocol, but El Salvador is insulated from international censure by article 3, paragraph 2.

The FMLN, on the other hand, has claimed it seeks to invoke the

... Party between its armed forces and ... organized armed groups ... " Protocol II, supra note 5, art. 1, para. 1.

87 "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State ... " Id. art. 3, para. 1.

88 DOMINGUEZ & LINDENBERG, supra note 68, at 26.

89 Dinges, supra note 85; Belthran, Rebels Charge U.S. Chopper Attacked Village, United Press Int'l, Feb. 21, 1987; De Arellano, supra note 80.

90 "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II, supra note 5, art. 1, para. 2.

91 These include the right to life, and freedom from torture and slavery. Lysaght, supra not 30, at 15-16, 19. The Government's policy of not taking prisoners prompted a threat of withdrawal by the IRC and warnings by the U.S. Government. The Salvadoran Government changed its policy and undertook to re-educate its military. Salvadoran Army Reportedly Improving Handling of Prisoners, Associated Press, July 5, 1982 [hereinafter, Salvadoran Army].

92 See supra not 57 and accompanying text.
rights and obligations of Protocol II.\textsuperscript{93} The rebels are in a position where they have nothing to lose by claiming to follow its provisions.\textsuperscript{94} As mentioned before, state to state "interaction" is proscribed in article 3, paragraph 2, but there is no proscription on interaction between the rebels and the government. This indicates that a situation could develop whereby the FMLN, professing to undertake obligations under the Protocol, could force the state to respond and define how it perceives the provisions to be applicable.\textsuperscript{95}

\section{A. The Treatment of POWs}

The government presently classifies captured rebels as political detainees rather than POWs\textsuperscript{96}—when they bother to accept their surrender rather than kill them.\textsuperscript{97} The rights of political detainees are few\textsuperscript{98} under both Salvadoran and international law, and monitoring visits by the IRC are completely at the whim of the government.\textsuperscript{99} A political detainee will receive none of the privileges that a POW will receive regarding insulation from prosecution for acts committed in "battle." A POW is not prosecuted for exercising, prior to capture, his or her "license to kill, maim, or kidnap enemy combatants; destroy military objectives; and cause unavoidable civilian casualties."\textsuperscript{100} Political detainees, however, can be tried on charges ranging from high treason to disorderly conduct. If the Protocol was applied, POW status would be granted to captured rebels\textsuperscript{101} and visits by the IRC would be guaranteed under the Geneva Conventions.\textsuperscript{102} In addition, living conditions, medical care and other aspects of detention and interrogation would be required to meet interna-

\begin{itemize}
  \item \textsuperscript{93} Goldman, \textit{supra} note 78, at 550.
  \item \textsuperscript{94} A rebel force has a political motivation for following the Protocol as it adds legitimacy to their efforts. They may also gain support from the civilian population and "army troops will [become] more likely to surrender than fight... some [will] join[] the rebels and others [are] simply disarmed and released." \textit{Salvadoran Army}, \textit{supra} note 91 and accompanying text.
  \item \textsuperscript{95} While the Protocol provides no legal forum other than that by which crimes of war may be prosecuted, the Government might react to assertions by the FMLN in order to 1) justify policy decisions to the Salvadoran people, and 2) influence world public opinion and persuade other states that its actions are legitimate under international law. \textit{See supra} note 55.
  \item \textsuperscript{96} Sciolino, \textit{The War Behind the Lines in Iran and Iraq}, \textit{N.Y Times}, Mar. 3, 1985, at 14 at 22, col.1.
  \item \textsuperscript{97} CLEMENTS, \textit{supra} note 3, at 163.
  \item \textsuperscript{98} These have traditionally been considered an issue of state domestic law, and so are insulated from international censure, other than a theoretical international minimum standard of fairness in judicial proceedings.
  \item \textsuperscript{99} Sciolino, \textit{supra} note 96.
  \item \textsuperscript{100} Goldman, \textit{supra} note 78, at 545.
  \item \textsuperscript{101} Once a conflict falls within the protocol, the Geneva Conventions will automatically apply. \textit{See Draper, supra} note 13, at 273.
  \item \textsuperscript{102} \textit{See generally} Geneva Conventions, \textit{supra} note 1 (The right to ICRC monitoring of internment conditions is just one of many rights a prisoner of war has).  
\end{itemize}
In contrast, the FMLN generally grants captured Government soldiers POW status.103 POWs are usually given the choice of joining the rebels or being turned over to the IRC.104 The FMLN has asked the IRC to participate in repatriation of these prisoners to the government.105 The IRC has agreed, but the government has often refused to accept the soldiers, asserting that the FMLN does not have the legal ability under international law to grant POW status.106 The government also considers these POWs deserters and they are punished upon their return.107 This refusal to accept the soldiers, coupled with the fact that the government refuses to apply the Protocol, indicates a governmental belief that the Protocol would legitimize the FMLN as belligerants.

B. The Treatment of Civilians

Morazan, one of the country's most embattled areas, was the scene of another armed forces operation in December . . . 1981 . . . . The hamlet of Mozote was completely wiped out . . . . The apparent sole survivor . . . escaped by hiding behind trees near the house where she and the other woman had been imprisoned. She has testified that on Friday, December 11, troops arrived and began taking people from their homes at about 5 in the morning . . . . At noon, the men were blindfolded and killed in the town's center. Among them was [her] husband, who was nearly blind. In the early afternoon the young women were taken to the hill nearby, where they were raped, then killed and burned. The old women were taken next and shot . . . . From her hiding place, [she] heard soldiers discuss choking the children to death; subsequently she heard the children calling for help, but not shots. Among the children murdered were three of [hers], all under ten years of age . . . .108

In the absence of Protocol II protection, the civilian population is unprotected.109 As of 1983, it has been government policy to force supporters of the insurgents to undergo relocation into refugee camps.110 Forced relocation is addressed and forbidden by the Protocol.111 Other

103 Id.; Protocol II, supra note 5, arts. 4-7.
104 Sciolino, supra note 96.
105 CLEMENTS, supra note 3, at 93, 164.
106 See id.
107 See Salvadoran Army, supra note 91. The position of the Government is grounded in its belief that Protocol II does not apply to its internal conflict.
108 CLEMENTS, supra note 3, at 164 (Some returned soldiers have even been killed for allegedly being cowards).
109 DIDION, supra note 76, at 37, 38.
110 Protocol II, supra note 5, arts. 13-17.
112 "The displacement of the civilian population shall not be ordered for reasons relating to the
government policies that would be prohibited by the Protocol include crop destruction,\textsuperscript{113} emptying villages,\textsuperscript{114} and "disappearances."\textsuperscript{115} These policies are followed because they deprive the guerrilla forces of food and terrorize the citizenry into refusing the FMLN shelter or aid.\textsuperscript{116}

The rebels, on the other hand, believe themselves to have an obligation to safeguard non-combatants. This is seen in their cooperation with the IRC in a national vaccination campaign for children\textsuperscript{117} and their policy of not recruiting children under fifteen years of age.\textsuperscript{118} Negotiations between the government and rebel forces produced a cease-fire on the vaccination dates\textsuperscript{119} and safe passage into the rebel-held areas for health workers.\textsuperscript{120} It should be noted, however, that at times the government only waited until the IRC doctors had left the medical centers before attacking all those still present; the village women and children.\textsuperscript{121}

Another aspect of the safeguarding obligation is that the FMLN provides protection for civilians from abuse by the government forces and death squads.\textsuperscript{122} They have gone to great efforts to establish schools and medical clinics in the territories they control.\textsuperscript{123} These rebel acts have forced the government into setting forth a policy for when it is permissible to fire on civilians. This policy is basically \textit{if you can see a weapon, shoot them.}\textsuperscript{124} This is also the basic rule separating combatants and noncombatants under the Protocol.\textsuperscript{125}

The FMLN's actions and the government's responses provide for conflict unless the security of the civilians involved or imperative military reasons so demand." Protocol II, \textit{supra} note 5, art. 17, para. 1.

\textsuperscript{113} Chavez, \textit{supra} note 111, (describing the destruction of corn fields by the army). "It is... prohibited to... destroy... objects indispensable to the survival of the civilian population such as... crops." Protocol II, \textit{supra} note 5, art. 14. While in an industrialized country, an ordinary corn crop may not be vital to survival, but El Salvador's economy and the general population rely heavily on its crop production. Agricultural workers comprise 47% of the labor force and coffee crops alone account for 15% of GNP. \textit{Dep't St. Bull., supra} note 64, at 8.

\textsuperscript{114} Chavez, \textit{supra} note 11. Protocol II, \textit{supra} note 5, art. 17.


\textsuperscript{116} The rebels receive their basic logistical support from friendly civilians. Chavez, \textit{supra} note 111, at A1, col. 5.

\textsuperscript{117} De Arellano, \textit{supra} note 80.

\textsuperscript{118} Allen, \textit{supra} note 81 and accompanying text.

\textsuperscript{119} De Arellano, \textit{supra} note 80.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{See Clements, supra} note 3, at 218-19.

\textsuperscript{122} Chavez, \textit{supra} note 3, at A1, col. 5.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{See Salvadoran Army, supra} note 91.

\textsuperscript{125} Rebels are obligated to openly carry arms preceding a military attack. This is the only way a guerilla fighter is obligated to distinguish him or herself from the civilian population. Gasser, \textit{supra} note 26, at 527 (interpreting what a combatant must do, under the Protocols, to set or herself apart from the civilian population).
the protection of noncombatants in a civil war. As seen by the preceding analysis, it is apparent that the agreement can be easily circumvented. Normally this would mean an end to the document as any basis for international law, since its provisions would never be implemented as interaction of policy and behavior in a civil war. However, due to the novel nature of humanitarian law, a dialogue can develop that has never been seen in international law before; not state to state, but rather combatting force to combatting force.

The civil war in El Salvador provides an example without precedent. The government is officially a Party to the Protocol, and the rebel forces meet the threshold requirements. The government asserts the Protocol does not apply. The rebels impliedly assert that it does, and that they will uphold the values enunciated in it. While there have been episodes of demand-response behavior an actual integration of policy and action that reflects true adherence to the Protocol has not been achieved.

This is more than merely unfortunate. It means that innocent non-combatants are suffering loss of property, liberty and life at a rate that would be totally impermissible if the combatants were two states. It also means that a new aspect of international law, humanitarian law, will remain ineffectual and weak.

There is, however, one good aspect to this situation. The interaction precedent, even though shallow, is a breakthrough in the development of international law. It may be limited to humanitarian law because of its peculiar domestic attributes, but these attributes may also mandate a totally new approach to the formation of international law. The world can only wait to find out if this new approach is successful in future internal conflicts.

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