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The Historical Background of Common Article 3 of The Geneva Convention of 1949

by David A. Elder*

Internal turmoil, awakened by the desire for self-determination of member groups of national communities, reflects much of the upheaval in the Third World today. Nations within the international community are bound to norms of conduct during times of internal conflict by Common Article 3 of the Geneva Convention of 1949. But the legislative process of international regulation of internal conflict is opposed by States' assertions of sovereignty and the national perception of the illegality of civil revolutionary actions. This article explores the intent of the drafters of Common Article 3 and seeks to develop its applicability to civil strife in a historical context.

In this article the author will delineate the conditions of applicability and substantive content of Common Article 3 of the Geneva Conventions of 1949 in the context of the prevailing socio-cultural and legal milieu and the expressed intentions of its framers. Preeminent reliance will be placed on the travaux préparatoires of the Diplomatic Conference and the resultant official Commentaries of the International Committee of the Red Cross (ICRC). Occasional references will be made to other, more recent sources (including the proposed addendum, Protocol II). However, no attempt will be made to elucidate all the problems and difficulties not envisioned in 1949.

The Geneva Conventions of 1949 were promulgated against a backdrop of Nazi Germany and the non-compliance with the traditional law in some respects by both sides. Such non-compliance was attributable in part to the ambiguity of the classical law of war, general evidence of non-compliance by the opposition (for example, many aerial bombardment and submarine tactical practices), and the legal argument of desuetude. The International Committee of the Red Cross, in light of the widespread revulsion emanating from the contemporaneous major international and national war crimes trials, endeavored to solicit support for rectification of some of the deficiencies of humanitarian legal protection evidenced by the Second World

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War and its equally violent and bloodletting precursors, especially the Spanish Civil War. Its idealistic proposition succeeded, in many respects, far beyond the reasonable expectations of the progenitor. This is especially true in the case of Common Article 3, the "convention in miniature" applicable to "non-international" strife, an almost miraculous self-imposed entrenchment on deeply felt concerns regarding incursions on sovereignty and the innate, peremptory need of self-preservation.

The adopted provision dealing with internal strife is a highly significant and innovative, though limited, protection for many of the victims of internecine disorder, the omnipresent, indeed, most common form of modern warfare, often directly fomented by or indirectly involving major powers' interests and concerns. It is interesting to note the tactical legal positions of the latter with respect to international regulation of internal strife within the context of their perceptions of national security and political necessities, and contrast their expressed concerns with the final product. It may be, as cynics would opine, that this limited innovation placed few, if any, significant practical strictures on internal inhumane policies. But this is belied by the travaux préparatoires themselves, which suggest an emergent consensus, throughout the series of meetings, sessions and multiple drafts of the necessity of at least a modicum of protection for internecine warfare victims.

I. THE APPLICABILITY OF THE LAW OF WAR TO CIVIL WAR

A. The Morass of the Traditional Law

Under traditional international law, only sovereign States, and not half-or part-sovereign entities, could legally wage war. There came an awareness early in the development of international law, however, that non-qualifying entities did in fact have the power and authority to wage war in the technical or material sense, as recognized by the United States Supreme Court in the cases arising from the Presidential Proclamation of blockade issued prior to declaration of war by Congress. Recognizing the de facto ability of such entities to wage war, an attempt was made to reconcile existing theory with the imposition of the obligations of the law of the war. The result was the development

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2 The Prize Cases, 67 U. S. (2 Black) 635 (1862).
of a practice of recognition of beligerency whereby, once certain conditions were met, the parent state as well as other states were permitted to acknowledge the *de facto* ability of the opposition by recognizing their legal status as belligerents.

The stringent, cumulative conditions for such recognition are summarized succinctly by a strong proponent of the traditional theory as follows:

[\text{T}]he existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; the practical necessity for Third States to define their attitude to the civil war.\footnote{3}

This expert goes on to declare that without this latter requirement, the concept would be open to abuse by "a gratuitous manifestation of sympathy with the cause of the insurgents,"\footnote{4} a policy not unknown in past or present history. If a status of belligerency is bestowed,\footnote{5} then the full panoply of international rules applicable to international strife enter into effect and each of the parties to the conflict has the right to exercise belligerent rights: search of ships on the high seas, seizure of contraband, and confiscation of ships running an effective blockage.\footnote{6}

However, if such status is recognized prematurely, prior to the fulfillment of the aforementioned exacting conditions, then the recognizing third states are guilty of an international offense of impermissible interference in the internal affairs of the State in question. The pre-eminent, and then less controversial presumption was the necessity and viability of upholding the general norm of non-interference in such affairs. The experience of the Spanish Civil War aptly demonstrated that uncritical acceptance of the doctrine of non-intervention, in the face of flagrant nullification by other third parties, is not a workable doctrine in the modern age. The solidification of


\footnote{4}L. Oppenheim, *supra* note 3, at 250.

\footnote{5}The nature of belligerency as a legal concept, whether mandatory or discretionary, is a matter of dispute. Probably, the majority view, and that in accord with modern international practice, is that recognition of belligerency is an act of unfettered political discretion. *Id*.

power bases or the achievement of partial detente have resulted in
great power confrontations by proxy or by indirect involvement in civil
war.\(^7\)

The traditional law, though there is less consensus on its content or
effects, included a doctrine of "recognition of insurgency," whereby
the recognizing state could deal with the insurgents in practical mat-
ters of mutual importance, while not recognizing their legal status as
belligerent or as the *de jure* government. One eminent authority has
concluded that this doctrine has no invariable definitional content and
is solely dependent on why, how, and when the intention of the
recognizing state is manifested. He has projected quite recently that
the doctrine retains its viability in modern times, especially in light of
the apparent desuetude of the belligerency concept.\(^8\)

The writer is of the opinion that both the doctrines of belligerency
and insurgency, despite recent scholarly criticisms of why and how they
were not applied in a particular conflict,\(^9\) are, for the most part,
useless. These doctrines derail intelligent commentators and statesmen
from the more productive pursuit of a genuine consensus on minimal
humanitarian principles applicable in such domestic settings.\(^10\)
Numerous trenchant discussions of the multiple and terminal defects
of these doctrines have recently been published and need not be
reiterated here.\(^11\) It is sufficient to say that any pretense that either of

\(^7\) For less critical analysis of non-intervention in the Spanish Civil War, see
Thomas, *The Spanish Civil War*, in *THE INTERNATIONAL RECOGNITION OF CIVIL WAR*
26-36 (E. Luard ed. 1972). It is interesting to note that the Spanish Civil War, Great
Britain refused to recognize the belligerent status of the Franco regime despite its ap-
parent fulfillment of the above criteria and the necessity of regulating the internal con-
flict. *See* Thomas & Thomas, *International Legal Aspects of the Civil War in Spain*
1936-39, in *INTERNATIONAL LAW OF CIVIL WAR* 126-34 (R. Falk ed. 1971). Relying,
in an advanced stage of the conflict, on the violation of the dogma of non-
interference, Great Britain felt no need to apply the belligerency doctrine. *See* L. Op-
penheim, *supra* note 3, at 251. Great Britain did not follow through on the logical
consequences of its internationalization conclusion. It is doubtful that the adoption of
this position would have had any significant impact, especially in light of French inac-
tion and American isolation.

\(^8\) A case in point is the British dealings with Franco vis-à-vis British nationals
and their property in territory under the latter's control. Castrén, *Recognition of In-

\(^9\) *Id.*

\(^10\) *Id.* at 454.

\(^11\) Falk, *note* 6 *supra*. *See also* Falk, *Janus Tormented*, in *INTERNATIONAL
ASPECTS OF CIVIL STRIFE* 185 (J. Rosenau ed. 1964). It is conceivable that such
recognition of belligerency in a true civil war of the magnitude of the American Civil
the above have mandatory status would be treated in international legal circles with some amusement and dismay. Though the terms are used by statesmen and scholars as political negotiating tools and weapons, as are the concepts of recognition of states and governments, there is little self-deception as to the consequences and raison d'être of these components of a state's diplomatic arsenal.

B. The Tortuous History of Article 3

The initial ICRC attempt to introduce a draft convention on the role of the Red Cross during civil conflict met with a frigid reception by the 1912 Conference, which refused to even consider it. This refusal reflected the contemporaneous consensus that any aid given by the Red Cross to the opposition was inadmissible interference in domestic affairs of the state, i.e., "aiding and abetting" common criminals and traitors under the domestic law. Undaunted and encouraged by the limited results of its humanitarian endeavors in the interim, the issue was placed on the agenda of the Tenth Conference in 1921, which passed a resolution affirming the rights of all victims of civil wars or social or revolutionary disturbances to humanitarian relief. This resolution conformed to the general principles of the Red Cross, and minutely specified the duties of the National Red Cross Society. In at least two instances, the Civil War at the time of the Upper Silesia Plebiscite in 1921, and the Spanish Civil War, the non-binding resolution offered an efficacious framework for inducing the parties to respect, in part, the principles of the existing Geneva Conventions of 1929.

In light of these beneficient results, the Sixteenth Conference passed the following supplementary resolution in London in 1938:

[The] . . . XVIth International Red Cross Conference . . . requests

War, the Spanish Civil War, or the recent internecine strife in Biafra, might arguably facilitate limitation of the number of parties involved or encourage the application of a greater part of the law of war than contained in Common Article 3, though this author is pessimistic concerning the utility of this limited function of the traditional concepts.

12 For a discussion on the Yemen application of these doctrines, see Boals, The Relevance of International Law to the Internal War in Yemen, in INTERNATIONAL LAW OF CIVIL WAR 305-47 (R. Falk ed. 1971).

13 III Commentary, GENEVA CONVENTION 28-29 (J. Pictet ed. 1960) [hereinafter cited as III Commentary]. This commentary is a translation from Siordet, 40 REV. INT. DE LA CROIX ROUGE 635-53 (1958).
the International Committee and the National Red Cross Societies to endeavor to obtain:
(a) the application of the humanitarian principles which were formulated in the Geneva Conventions of 1929 and the Tenth Hague Convention of 1907, especially as regards the treatment of the wounded, the sick, and prisoners of war, and the safety of medical personnel and medical stores;
(b) humane treatment for all political prisoners, their exchange and, so far as possible, their release;
(c) respect for the life and liberty of non-combatants;
(d) facilities for the transmission of news of a personal nature and for the reunion of families;
(e) effective measures for the protection of children. . . .

The ICRC, in order to institutionalize the aforesaid limited practice, proposed at the Preliminary Conference of the National Red Cross Societies in 1946 that the parties to the internal conflict be invited to expressly declare their willingness, on a basis of reciprocity, to apply the principles of the Conventions. It was assumed that world public opinion would make refusal unlikely. The Preliminary Conference rejected this modest proposal in favor of a then radically innovative article to the effect that "[i]n the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary."

The initial projections and misgivings of the ICRC concerning the reactions of the Conference of Government Experts were unduly pessimistic. They recommended at least a partial application of the principles of the proposed Conventions in instances of internal conflict, substantially limiting the grandiose and idealistic proposals of the preliminary conference. Taking into account the various views expressed, the ICRC submitted the following as the final paragraph of Common Article 2, to the Seventeenth International Red Cross Conference in Stockholm:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The ap-

14 *III Commentary, supra* note 13, at 29-30.
15 *Id.* at 30.
plication of the Convention in these circumstances shall in no way de-
pend on the legal status of the Parties to the conflict and shall have
no effect on that status. This “Stockholm Proposal,” as it perhaps erroneously came to be
known, omitted the renunciation provision of the Preliminary Con-
ference draft, while adopting the experts’ suggestion regarding the
status of the parties to the conflict. The ICRC attempted to diffuse the
foreseeable objection of the legally constituted government, that
application of the Convention would amount to tacit admission to the op-
position of an objective status as “insurgents” or “belligerents.” Fur-
ther, the ICRC meant to eliminate the eventuality of that same
authority justifying the non-applicability of the conventional provisions
by reference to non-fulfillment of the traditional preconditions of such
recognition. The official Red Cross Commentaries erroneously state
that the above provision, minus the specific itemization—civil war, col-
onial conflicts, and wars of religion, was submitted, including a provi-
sion basing applicability on reciprocity in the “Prisoner of War” and
“Civilians” drafts, to the Diplomatic Conference of 1949. In fact, a
slight but eminently important change was made; the term “prin-
ciples” was replaced with “provisions,” which marked a return to the
initial proposal of the Preliminary Conference of National Red Cross
Societies.

From the very beginnings of the Diplomatic Conference, the reluc-
tance of the delegates to envisage application in toto of the draft con-
ventions was apparent. Even the advocates of the Stockholm Proposal

16 Id. at 31 (emphasis added).
17 Id.
18 I Final Record of the Diplomatic Conference of Geneva of 1949 (1951)
[hereinafter cited as I Final Record]. Some writers appear not to have caught this er-
ror. See Farer, Humanitarian Law and Armed Conflict: Toward the Definition of In-
ternational Armed Conflict, 7 Rev. Belge of De Droit Int. 20, 31 (1971).
19 Succinctly summarized, the major objections were that: the Stockholm Proposal
sacrificed State’s rights in favor of individual rights; the exclusion of the aforemen-
tioned specific types of internal conflicts widened the field of applicability of “conflict
not of an international character” to arguably include “forms of disorder, anarchy or
brigandage”, claiming protection under a mask of politics of any other pretext. The
application of conventional norms to the opposition would give a belligerent status to
them in fact despite express stipulation to the contrary in the instrument; extend inter-
national legal regulation to situations therefore solely subject to the sovereign discretion
of the State, an injudicious incursion endangered national and international security;
the Conventions were in part inherently unsuited for internal application (for example,
the provisions on “protecting powers, pay and allowances, liberation of prisoners of
had similarly diverse reasons for supporting it. Among the reasons given were that: the cruelty of civil war often transcends international wars in scope; the absurdity of branding all violent dissidence as common criminality, when, frequently disaffected were striving for goals sanctioned by the international community such as self-determination, human rights, and economic development; the actual behavior in the field of the opposition would demonstrate an entitlement to protection (violation of humanitarian standards would justify their punishment for war crimes); the adoption of the proposal would not limit the legitimate measures necessary for repression of acts considered by the legal government to be illegal and dangerous to state order and security.

Faced with these and other objections and numerous proposed amendments, the problem was referred to a small committee which was to integrate them into a viable and acceptable scheme. A general pre-occupation of several of the committee members was the inclusion of formal and/or factual criteria to be met before the Conventions would be applicable. These proposals emphasized one or more of the traditional criteria delineated in the previous section. A French proposal would have limited their application to instances where the opposition possessed an organized military force, i.e., an authority responsible for its acts acting within a determinate territory and having the means of ensuring respect for the Convention. The Spanish proposal was less restrictive: the utilization of regular military forces against insurgents organized as militia and in possession of a part of the national patrimony would be sufficient. The United States proposal was the most specific of those emphasizing factual elements. Its essential ingredients were that the insurgents must have an organization "purporting to have the characteristics of a State," the insurgent civil authority must exercise de facto authority over persons within a deter-

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20 III Commentary, supra note 13, at 33.
minate territory, the armed forces must act under the direction of the organized civil authority and must be prepared to observe the ordinary laws of war, and the insurgent civil authority must agree to be bound by the provisions of the Convention.21

The Australian proposal, by comparison, emphasized formal criteria whose fulfillment would result in the application of the conventional provisions: the de jure government's recognition of the insurgents as belligerents, the claim of the rights of belligerency for itself, bestowal of limited recognition of belligerency for the humanitarian purposes of the Convention only, or admission of the dispute to the agenda of the Security Council or General Assembly of the United Nations as a threat to international peace. The latter's departure from the traditional discretionary nature of recognition and its move toward a quasi-collective legitimization of the qualitative nature of internal conflict would escape, as a matter of procedure, the Great Power veto. The reaction of the United States to this proposition was negative in tone, adamantly refusing to give to any international organization the decision-making power governing the Convention's applicability. The United States would agree, however, to the utilization of fact-finding commissions to determine whether specified criteria were met.22

Departing from the emphasis on civil wars, resembling international war,23 the two remaining proposals discussed were to form the basis of Common Article 3. The Hungarian proposal would standardize the proposals by eliminating the condition of reciprocity from the Prisoners of War and Civilian drafts. The important Italian proposal would apply the humanitarian principles of the Preamble of the Civilians draft to all conflicts not resembling international wars. The Italian Proposal is worth quoting in its entirety.

The High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of war, undertake to respect the principles of human rights which constitute the safeguard of civilization and, in particular, to apply, at any time and in all places, the rules given hereunder:

(1) Individuals shall be protected against any violation to their life and limb.

21 II B Final Record, supra note 19, at 121.
22 Id. at 14.
23 Id. at 44. The Uruguayan delegate noted this would be useless in the changing, often violent, milieu of Latin America.
(2) The taking of hostages is prohibited.

(3) Executions may be carried out only if prior judgment has been passed by a regularly constituted court, furnished with the judicial safeguards that civilized peoples recognize to be indispensable.

(4) Torture of any kind is strictly prohibited.

These rules, which constitute the basis of universal humanitarian law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favour of protected persons.24

The importance of this restatement of the principles of universal humanitarian law is that non-dependence on fulfillment of any formal and/or factual criteria as a pre-condition of application, that is, "at any time and in all places" would appear to reflect the proponent's intention to ensure minimal humanitarian protection in any internal conflict regardless of the degree of severity. This proposal not only carried the obvious defect of referring to the Preamble of a draft Convention not yet in effect, and, as several delegates rightly observed, merely reiterated the basic guarantees applied to the most despicable of common criminals by domestic penal law, but it was also a minority proposal among those strictly limiting the internal conflicts to which extensive rights and obligations would be extended.25

The special committee reflected its basic views by rejecting proposals including any application of the Conventions to non-international conflicts and the Stockholm Proposals by identical ten-to-one margins. Having agreed on the extension, in some form, of the Conventions to such conflicts, two options were open: limit the cases of conflicts not of an international character to which the Conventions would apply, or, restrict the provisions of the Conventions which should be applied in conflicts not of an international character. A Working Party, consisting of Australia, the United States, France, Norway and Switzerland, devised a draft incorporating generally the factual/formal criteria of the aforementioned French, Australian and United States drafts and excluding the provisions providing for protecting powers, except in the case of special agreements. The Working Party agreed that in cases of conflicts not meeting the strict criteria, the parties to the conflict "should endeavor" to specifically agree to bring the Conventions into force or, "in all circumstances to act in ac-

24 I Final Record, supra note 18, at 113 (emphasis added).
25 II B Final Record, supra note 19, at 121.
cordance with the underlying humanitarian principles of the present Convention." An important innovation, intended to remove the taint of impermissible intervention from humanitarian efforts of the ICRC in international conflicts, permitted the ICRC to proffer its services in lieu of the excluded protecting powers. The all-important non-effect provision of the Stockholm Proposal was wisely retained. The draft left unanswered, however, the question of reciprocity upon which the Stockholm Conference itself had come to varied conclusions.\(^{26}\)

After inconclusive debate, this draft was again referred to the Working Party which devised its second draft comprised of different provisions for the Civilians Convention. In conflicts not of an international character, it proffered that the parties should endeavor to bring into force by special agreements all or part of the provisions of the present Convention, "and in all circumstances shall act in accordance with the underlying humanitarian principles of the present Convention."\(^{27}\)

As regards the other three conventions, the general outlines of the first Working Party drafts were followed: The recognition of the two types of internal conflicts which should be regulated by international law, the conflict "resembling" international war (to which the three Conventions sans the "protecting powers" provision would be applicable) and the armed conflict not fulfilling these formal/factual criteria (with the "should endeavor" and "in all circumstances" provisions excerpted verbatim from the previous draft). In this respect, as previously stated, the drafters were reiterating the widely held opinion that in the former type of conflict all of the customary norms of international law came into force. They presupposed, in the words of the second draft, "that the adverse party must likewise recognizes its obligation, in the conflict in question to respect with the Convention and the other laws and customs of war."\(^{28}\) The "non-effect" provisions were likewise retained in the common provision for the three Conventions. This was in contrast to the article for the Civilians Convention, which implied that such fundamental humanitarian considerations were so basic to civilized society that no one would challenge their applicability, or argue that compliance with them by the legally constituted government would legally justify recognition of belligerency by third parties or would constitute a tacit recognition of belligerency by the government itself.\(^{29}\)

\(^{16}\) \textit{Id.} at 122.

\(^{17}\) \textit{IV Commentary}, \textit{Geneva Convention} 25 (J. Pictet 1958) [hereinafter cited as \textit{IV Commentary}].

\(^{18}\) \textit{II B Final Record}, supra note 19, at 122.

\(^{19}\) \textit{Id.}
To this Working Party's second draft there were several important amendments introduced. An Italian amendment would require not mere recognition by the party adverse to the legally constituted government but *de facto* respect of the Convention.\(^{30}\) The United Kingdom amendment likewise would have limited the application of the Conventions to conflicts of the first type, and only after the conflict had endured for six months would it become operational, with the International Court of Justice having the authority to determine the existence of the conditions governing application of the three Conventions. A French amendment adopted the earlier Italian suggestion that in "armed conflict not of an international character" each party shall apply the provisions of the Preamble to the yet inoperative Civilians Convention, with the inclusion of the aforesaid "should endeavor" and "non-effect" provisions.\(^{31}\) Indeed, there was an increasing awareness of the non-feasibility of basing application of basic principles of humanitarian law on the traditional formal/factual criteria.\(^{32}\) There was no impartial decision-making forum to decide whether the conflict belonged to one or the other, with the consequence that "in reality such a decision was left to the discretion of the *de jure* government."\(^{33}\) In any case, such conditions were unlikely to be fulfilled within the context of the post-war emphasis on non-conventional warfare. Furthermore, such formal/factual criteria were unlikely to be adopted due to the affirmative and optimistic response which the French rejuvenation of the Italian preamble provision received. The latter, the only alternative with a nucleus of support, was referred to a Second Working Party composed of France, Italy, Monaco, the United Kingdom, and the Soviet Union, which devised a draft article with a few minor revi-

\(^{30}\) No mention was made of the duration of such respect required to be met prior to the Convention going into effect nor the means of ascertainment of such compliance.

\(^{31}\) *II B Final Record, supra* note 19, at 123. Neither the Italian nor the United Kingdom proposed amendments, which emphasized limitative applications of the Conventions (by proposing criteria which were difficult of fulfillment or which left the legally constituted government in a position to maintain such had not in fact been fulfilled) gained any substantial support in the Working Party.

\(^{32}\) This is evidenced by the negative ground swell against the Working Party second draft. The dichotomy of types of civil conflicts provided for in the draft would result in interminable discussions at the genesis at each conflict as to whether it belonged to one or the other category.

\(^{33}\) *IV Commentary, supra* note 27, at 31. The idea of entrustment to the Security Council or the International Court of Justice generally met with a frigid response.
sions, and was later adopted by the Diplomatic Conference. In the case of armed conflict "not of an international character," each party to the conflict was bound to apply, as a minimum, certain express humanitarian proscriptions. The humanitarian initiatives of the ICRC or any other impartial humanitarian entity were safeguarded. The taint of impermissible interference within the domestic affairs of the state by merely proferring aid was thereby removed. However, the right of initiative was just that. It did not expressly impose a correlative duty of acceptance of such services.34

The draft of the Second Working Party was the subject of vociferous criticism by many who favored application of more pervasive humanitarian provisions. The foremost challenge to the viability of the new proposal was the Soviet series of alternatives. With respect to the Wounded and Sick and Maritime Conventions in armed conflict not of an international character, all the provisions of the Convention guaranteeing humane and nondiscriminatory treatment were obligatory. A similar proposal was applicable to the Prisoners of War Convention with a single addition: Mandatory compliance with all established rules connected with the prisoners of war regime. The Civilians Convention would have guaranteed, in addition to humane and non-discriminatory treatment, "prohibition on the territory occupied by the armed forces of either of the parties, of reprisals against the civilian population, the taking of hostages, the destruction and damaging of (sic) property which are not justified by the necessities of war.35 The Russian proposals introduced a series of concepts which, unfortunately, were lost with the rejection by the Second Working Party (by a vote of nine to one) of this alternative. The consensus seemed to be that such a guarantee was none at all, lacking even the minimal specificity of proscriptions contained in the Second Working Party draft, which accorded the legally constituted government maximum discretion in deciding which Conventional provisions fulfilled the aforementioned general criteria.36

The Second Working Party draft, with the minor revisions previously referred to, was rejected by a five to five vote, Colonel Blanco,
the Uruguayan delegate and presiding officer of the special committee, abstained because of the silence of the rules as to whether he should vote in case of a tie, though formally declaring his concurrence with the Second Working Party draft. The Committee then reverted to the initial Working Party proposal. The Italian amendment of the Working Party's second draft, requiring *respect in fact* as a precondition to application of the Conventions was rejected seven to zero, with three abstentions. The United Kingdom's "six-months" provision was withdrawn subject to possible future submissions to the Joint Committee. The second draft of the Working Party was finally rejected, seven to four.\(^{37}\)

The inconclusiveness of previous preliminary debates resulted in a rehashing of previous issues before the Joint Committee of the Diplomatic Conference, the decision-making forum. Numerous points of interest were developed in the Joint Committee debates which are useful in interpreting present Article 3. Of special importance is the near unanimous reluctance to tie the hands of the legally constituted government to the detailed and complex provisions of the drafts proposed by the ICRC. The Soviet Union, endeavoring to dissipate the omnipresent bugbear, domestic jurisdiction, argued that *civil war* was already under international supervision in theory because of the duty of the United Nations *via* the medium of the Security Council to oversee threats to and breaches of international peace and security. Consequently, the draft Conventions merely amplify existing international obligations under international law. The Soviet Union, questioning the good faith of the Burmese self-styled Asian representative, vehemently rejected the Burmese thesis—that no nation can or will be inhumane toward its own nationals; that inclusion of the "non-effect" provision was bait to the *de jure* government to adhere to an agreement giving objectively a status as high as the legal status denied the insurgents, and hence, the purported regulation of internal conflict was both entirely unnecessary and a flagrant encouragement and incentive to insurgency. The Soviet Union ridiculed the opponents of its proposal to apply all the humanitarian provisions of the draft Conventions. The reasons for opposition, that the selective and exceptional provisions such as the penal sanctions and the presumption of continued functioning of the civil courts were non-viable, were felt by the Soviets to be pretexts. The Soviet Union cited several examples of pro-

\(^{37}\) *Id.* at 123.
visions that must be included in any regulation of civil conflict: Immunity of civilian hospitals; women and children “shall enjoy particular respect;” “unrestricted transport and distribution” of medicines and medical equipment “shall be respected.” The proposal concluded, “[t]here can be no question that all these humanitarian provisions must be implemented in all cases of armed conflict, whatever their character may be.”

However, the Soviet Union tacitly appeared to admit the relevance of the chief Burmese complaint that adherence to such an accord might give objective international status to the dregs of international society, to individual uprisings, foreign-fomented ideological terrorism, and common criminality, a view mentioned by numerous other delegations. The Burmese delegate had even gone so far as to suggest that such minimal humanitarian regulation would impliedly recognize “belligerency” under traditional law, justifying the assumption and utilization of the rights of search and seizure of enemy ships and goods on the high seas by the opposition. Albeit overstated and filled with emotion, the Burmese delegate’s fear reflected the majority sentiment that “armed conflict not of an international character” was vague, ambiguous and at least arguably susceptible of application in such situations.

The Swiss representative, emphasizing the compromise nature of the progenitor of Common Article 3 (Article 2A) and its sensitive equilibrium between the realism of the Burmese view and the idealism of the Stockholm Proposal, reiterated the comments of the Venezuelan and Mexican representatives to the effect that the succinct summary of humanitarian principles and proscriptions based on the Franco-Italian preamble suggestion could not encourage such wild and disorganized forms of violent dissent because, “armed conflict not of an international character” did not on its face apply to all forms of internal uprisings. Emphasizing the preferability of the above phrase instead of an intermixture of formal/factual criteria, the Swiss representative rejected the Burmese apprehensions as unfounded:

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38 Id. at 325-26 (emphasis added).
39 Id. at 327-30.
40 The ICRC admitted it had no chance of passing and was merely a tactical negotiating maneuver.
41 It was contended that it would eliminate the necessity of judicial fact finding or arbitral tribunal to decide whether the criteria have been satisfied, or in the absence of such, eliminate the “possibly interminable negotiations between the parties con-
These provisions are applicable in the event of an armed conflict; in other words, an armed conflict must actually be going on. But outbreaks of individual banditism, or even movements of the kind, complicated or aggravated by the existence of a conspiracy, do not really constitute an armed conflict in the proper sense of the term. Nor does a mere riot constitute an armed conflict. An armed conflict, as understood in this provision, implies some form of organization among the Parties to the conflict. Such organization will, of course, generally be found on the governmental side; but there must also be some degree of organization among the insurgents.\(^4\)

The position of the ICRC in its official Commentaries on the four Geneva Conventions of 1949 is ambiguous as to which gradations of internal conflict call Common Article 3 into play. Although the Common Article is not dependent on reciprocity, it is hardly automatic as the ICRC suggests. Its statement that, "observance does not depend upon preliminary discussions on the nature of the conflict"\(^4\) as reflecting the consensus in the Diplomatic Conference Joint Committee, was a gross misinterpretation, as subsequent practice aptly demonstrates.\(^4\) The Commentaries themselves imply that Common Article 3 does not automatically apply, by suggesting convenient, non-obligatory criteria which would be helpful in analyzing whether it is applicable. The first factor considered is whether traditional factual criteria for the recognition of belligerency were fulfilled. This would consist of possession by the party in revolt against the de jure government, of an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. A second point to be considered is whether the legally constituted government has been compelled to have recourse to the regular armed forces against insurgents organized as a militia and in possession of a part of the national territory. The third
criterion examines whether the *de jure* government has recognized the insurgents as belligerents or claimed for itself the rights of a belligerent, or has granted the insurgents such recognition solely for the purposes of the present Convention, or whether the dispute has been submitted to the Security Council or General Assembly agenda as being a threat to international peace, breach of the peace or an act of aggression. The final factor is whether the insurgents have an organization purporting to have the characteristics of a state with the civil authority therein exercising *de facto* authority over the population within a determinate portion of the national territory, the armed forces act under the direction of an organized authority and prepared to observe the ordinary laws of war, and the insurgent civil authority agree to be bound by the provisions of the Convention. As one who has perused the *travaux préparatoires* can readily discern, these are a verbatim listing of several minority proposals discussed during the preliminary sessions.

The Commentaries append a caveat to the listing of the above criteria: Non-fulfillment of any of the aforementioned criteria would not necessarily result in the irrelevance of Article 3 and "the scope of the article must be as wide as possible." Lest its support for liberal interpretation be mistaken for a suggestion of the Article's applicability to mere riots or disguised common criminality, the ICRC states that it is only applicable to substantial endemic disorders: "[I]t must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." In conclusion, there emerged during the long and often heated discussions of the various drafts, a consensus that, at a minimum, fundamental humanitarian norms would be binding in armed conflict not of an international character which surpassed in severity and organization mere rioting or terrorism but which are not in all respects analogous to an international war within the confines of a single State. In such cases, as in the classical examples of the American and Spanish Civil Wars, there remained persuasive sentiment among the draftsmen for the application of the law of war (at least that which has become binding custom) in its entirety. The ICRC Commentary,

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45 *III Commentary, supra* note 13, at 37.
46 *IV Commentary, supra* note 27, at 36.
47 *III Commentary, supra* note 13, at 36-37 (emphasis added).
reflecting the apprehensions expressed during the debates, recognized
that the phrase in question could give rise to disputes. The ICRC ob-
vously concluded that no State would risk international opprobrium
by delineating subtle or metaphysical distinctions in order to justify
ruthless, sanguinary bloodletting in repressing that which the legally
constituted government could always denominate a riot or foreign-
fomented subversion. Even in those situations which could legitimately
be described as mere acts of banditry, the ICRC poses the following
rhetorical question: What government would dare claim before the in-
ternational community the right to leave the wounded uncared for, to
torture and mutilate prisoners and take hostages? "No Government can
object to observing, in its dealings with enemies, whatever the nature
of the conflict between it and them, a few essential rules which it in
fact observes daily, under its own laws, when dealing with common
criminals." 48

II. THE SUBSTANTIVE PROVISIONS OF ARTICLE 3

A. General

As characterized by one delegate, Article 3 is like a "Convention in
miniature." 49 The Article subsumes the basic principles of
humanitarian law which have been defined with greater specificity in
the text of the full Conventions. It is the maximum regulation of civil
conflict practicably achievable in the prevailing milieu. Indeed, the
ICRC has declared that it was an almost unhoped-for extension of Ar-
ticle 2, which provided for the application of the Conventions in case
of international wars. 50 No other Article expressly applies, absent the
conclusion of special agreements extending the full Conventions in
whole or in part.

As previously mentioned, the phrase "each party" had evoked ob-
jections and suggestions of substitution by a variety of other similarly
pregnant wordings. 51 Though identical with the phrase used in the rest
of the full Convention, "each party" was there used in the context of
an international war, the duplication of terminology posing no in-
superable problems. The core of the controversy enveloping the phrase

48 Id. at 28.
49 IV Commentary, supra note 27, at 34.
50 Id. at 26.
51 Note especially the guerulous preoccupation of the British delegate with pros-
elytizing about the virtues of the traditional phrase "belligerent".
in question was the jurisprudential basis for the imposition of duties or assumptions of rights by a non-State although no problem arose as to the obligations of the legally constituted government. Could insurgents be bound by an accord to which they have not agreed? The theory the ICRC Commentaries rely on is not totally convincing. This theory states that if the "responsible authority" heading the insurgents in fact exercises "effective sovereignty," it thus binds its underlings by the very fact that it claims to represent the State or part thereof. The Greek delegate gave a more responsive answer based on what is known in American law as the principle of legislative jurisdiction (the competence of the legally-constituted and recognized government to legislate for all of the nationals of that State). Such is the substratum of the consensus that Article 3 in no way prohibits the application of the domestic penal law to those violently opposing the legitimate authority. Consequently, since all insurgents would be nationals of some State and nearly universal ratification or accession was projected (a projection which has been realized in fact), non-adherence was not an insurmountable obstacle. Refusal to abide by these fundamental norms would merely demonstrate that the allegation of "mere banditry" was in fact apt.

The final general comments address questions concerning the very nature of Common Article 3. Does Article 3 merely reiterate existing principles of international law, form a complement to human rights within a corpus of "humanitarian law," or is it "law-creating," with the arguable possibility that it contemporaneously reflects emergent or emerging customary international law? The travaux préparatoires reflect a general sentiment among the representatives at the Diplomatic Conference that, absent the recognition of belligerency, there was a vacuum of international law regarding civil wars. Several delegates stated that all the humanitarian provisions of the full Conventions, especially the more limited proscriptions of Article 3, were no

52 Pinto, L'Article 3 des Conventions de Geneva de 1949, I REC DES COURS 524, 528 (1965), concurs with ICRC justification.
54 Unlike the "hardly sufficient" number of ratifications and accessions of the Geneva Convention of 1958 on the Continental shelf, the Geneva Convention of 1949 have received near universal ratification or accession (though sometimes it appears States in question hardly understand the obligations undertaken). On the question of a conventional norm developing into a customary norm, see North Sea Continental Shelf Cases, [1969] I.C.J. 3, reprinted in 8 INT'L LEGAL MATERIALS 340 (1969).
more restrictive of government effectuation of internal security than their States' own constitutions. This theory met little or no contradiction in the lengthy discussions, the further point being made that such were reflective of general principles of law recognized by civilized nations.55

Recent trends in international law dealing with human rights and the law of war evidence some gradual coalescence of the two fields, with the "human rights regime" being the normal state of affairs and the law of war representing the extraordinary legal framework temporarily necessitated by the value disintegration resulting from armed conflict.56 The heralded genesis of the international regulation of human rights, the United Nations Charter and, more specifically the Universal Declaration of Human Rights in the 1945-48 period, seemingly should have been a source of substantive provisions and legal justification in the development of a humanitarian regime applicable to internal armed conflict. However, this writer in his perusal of the travaux préparatoires did not see a single specific reference by name to that "common standard of achievement for all peoples and all nations"57 except in the concluding remarks at the signing of the final instrument. In the sensitive environment of the Diplomatic Conference, where any proposal to limit the ability of the government to maintain law and order would be viewed with disfavor, mere reference to the Declaration, with its plethora of detailed socio-political rights, might have obstructed the production of the half-a-loaf compromise.58 Of course, any suggestion that the Declaration was a binding instrument of international law, a view stated ambiguously in the "Proclamation of Teheran"59 in 1968, would have been met with looks of in-

55 This assumes that said provisions are an accepted source of international law and not merely a gap-filling reservoir which the International Court of Justice can draw upon, thereby binding States in those cases where, by special agreement, the States have resorted to that tribunal, and consequently, binding on States even in the absence of conventional inclusion. II B Final Record, supra note 19, at 94.


58 II B Final Record, supra note 19, at 335. The description is that of the Swiss delegate.

credulous surprise. The ICRC representative at the concluding ceremony, however, incisively defined the interrelationship between the Declaration and the laws of war created and developed by the Geneva Conventions:

[The laws of war are] based on certain of the fundamental rights proclaimed in it [Declaration]—respect for the human person, protection against torture and against cruel, inhuman or degrading punishments or treatment. Those rights find their legal expression in the contractual engagements which your Governments have today agreed to undertake.

The Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal, which humanity pursues increasingly in spite of passions and political strife and which it must not despair of attaining—namely, that of freeing human beings and nations from the suffering of which they are often at once the authors and the victims.60

The repudiation of the suggestion that the Declaration contained binding substantive provisions applicable without conventional inclusion is reinforced by a comparison of the preamble proposal and the final Article. Notable deletions include the "obligation" of the High Contracting Parties to "come to an agreement in order to protect civilian populations from the horrors of war" by undertaking to respect the principles of human rights, and the characterization of the listed proscriptions as constituting the "basis of universal human law."61

B. Persons Covered by Article 3

Who is covered by the phrase, "[p]ersons 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 by any other cause?" The clause covers, of course, those persons protected by the full Conventions containing the common Article: The wounded and sick in the armed forces in the field, the

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60 The "Proclamation of Teheran" (International Conference on Human Rights) states: "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members . . . at the international community." Id. at 4. Later, however, there is a statement that the laws of each country should grant to each individual certain rights listed in the Declaration. Id.

61 I Final Record, supra note 18, at 113 (emphasis added).
wounded, sick and shipwrecked members of armed forces at sea, prisoners of war, and the civilian population. Indeed the Article was generally considered to apply to all persons of the State in which the internal armed conflict was unfolding, "except combatants at the time engaged in fighting."**62** An eviscerating amendment proposed by Great Britain which would have pre-conditioned Article 3 protection on fulfillment of the aforementioned conditions by the unit, or the totality of the armed forces (the proposal does not make it clear which), and not merely by the individual concerned, was rejected. Thus, an individual who capitulates or is otherwise placed hors de combat is guaranteed humane treatment regardless of his compatriots' status. The solitary condition to be fulfilled is that the individual will take no further part in the fighting.**63** Although at least one delegate had some semantic difficulties with the terminology "laid down" in so far as it did not cover those who had fallen into the power of the enemy, the wording of the final draft accepted by the Diplomatic Conference ("and those placed hors de combat by sickness, wounds, detention, or any other cause"**64**) would appear to cover those inadvertently or involuntarily coming under the control of opposition forces. One question which presents some difficulties concerns the allowable means which can be used against an opposition combatant who fruitlessly resists capture: May he be merciless killed, even though less drastic measures would disarm him, thereby putting him hors de combat by "any other cause"? Does the least resistance by an enemy soldier, e.g., attempting flight when surrounded by the opposition, remove his from the protection of the Article? Neither the travaux préparatoires nor the official Commentaries seem to have foreseen these problems, but it would appear that the spirit of the Article would proscribe such inhumane incursions on its protection.**65** A few representatives did suggest that the conference should discuss the application of the Convention's humanitarian principles to combatants. Citing the Geneva "Gas" Protocol of 1925, the United States representative, Yingling, asserted that logically, there should be no internal versus international distinction in this context.**66** The Czechoslovakian representative, Winkler,

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**62** II B Final Record, supra note 19, at 84 (emphasis added).
**63** Id. at 100.
**64** IV Commentary, supra note 27, at 25.
**65** The Commentaries emphasize a liberal interpretation of Article 3 in order to achieve its intended humanitarian objections. III Commentary, supra note 13, at 38-39.
**66** II B Final Record, supra note 19, at 90.
utilizing a contrario reasoning argued that, in the absence of express application of humanitarian norms to combatants, they would be left to the unfettered and possibly inhumane discretion of the opposing forces. Yet, despite this unpalatable prospect, no amendments rectifying the vacuum were proffered. Does this mean there is an absolute dearth of humanitarian regulations concerning combatants? One should consider in this respect the famous Martens clause prefacing Hague Convention No. IV of 1907 Concerning the Laws and Customs of War on Land. This clause provides that:

In cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples from the laws of humanity, and the dictates of the public conscience.

Despite its couching in hortatory language, its moralistic flavor, and its inclusion in a preface to a convention regulating international strife, there is some judicial support for the proposition that substantive obligations result therefrom.

C. Humane Treatment

With the exception of the Burmese delegate's denial that any State could or would treat its nationals inhumanely, and isolated reaffirmations that the duty of humane treatment was the vital substratum of Article 3, the travaux préparatoires provide precious little assistance in deciphering its definitional content. As noted previously, the Soviet

67 Id. at 334.
68 The Martens clause is contained in, Appendix, Reaffirmation and Developments of the Laws and Customs Applicable in Armed Conflicts 4 (1969).
69 The national war crimes decisions which conclude that the Martens clause is a source of binding norms are briefly discussed in Roling, The Law of War and The National Jurisdiction since 1945, II REC DES COURS 350-51 (1960). It should be noted that those cases arose in the context of international wars and not non-international conflict, consequently their precedential value regarding the latter may be doubtful. Contrast the statement in the preamble to, "[R]ecalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 1977 [hereinafter cited as Protocol II]. This language substantially reiterates that of the Martens clause.
delegate excoriated his associates for using pretexts in failing to apply all the humanitarian provisions of the Conventions to civil war. He enumerated specific fundamental necessities which were not covered by Article 3, including immunity of civilian hospitals from attack, unrestricted transportation and distribution of medicines and medical equipment, and special protection of women and minor children. This is the single brief discussion discovered by this writer of what was defined by Article 3. Quite probably the lack of discussion was precipitated by the unwillingness to specify examples other than those delineated in the brief list of universally condemned proscriptions, for fear that a contrario reasoning might result in justification of all actions not proscribed. For instance, the noxious Nazi biological experiments on incarcerated civilians and prisoners is cited by the ICRC in its Commentaries as one obviously inhumane activity covered by Article 3, but its non-inclusion was considered sage since:

[I]t is always dangerous to try to go into too much detail—especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. 70

Additionally, such experiments were expressly covered by (1)(a) of Article 3.

Obviously what is humane, that which is minimally necessary for the normal maintenance of mental and physical health and well-being of a human being, is not necessarily an objective, immutable standard. The standard will vary according to the socio-economic background of both the victims and the vanquishers. For example, it would be surrealistic to maintain that the former were to be accorded minimal daily rations of scarce meat and vegetables, when the latter are subsisting on apportionments of rice. Additional factors necessitating consideration in delineation of a doctrine of "humaneness" are the mobile, surprise, tactical processes commonly followed by challengers of the status quo and the impact of upgrading the milieu of detainees on the civilian population generally. The feasibility, taking into consideration the mobile, surprise, and tactical processes commonly followed by challengers of the status quo, of attempting to upgrade the milieu of those detained or of the civilian population generally is a mitigating

70 IV Commentary, supra note 27, at 39.
consideration. It would seem undeniable that indiscriminate starvation of the opposition by economic blockage is per se proscribed, at least as applied to the innocent victims of internecine strife. This latter example illustrates the essential defect of the humane treatment obligation. Without a substantial degree of sophistication concerning fundamental values among the followers of the competing factions, this obligation is scarcely, as the ICRC maintains, precise. Its approved flexibility, given the admitted differences of opinion on fundamental values, leaves too much latitude to the parties themselves. The partial solution for this quagmire might be a more inclusive, non-exhaustive enumeration of prohibited practices.\(^7\)

The linkage of the humane treatment obligation to the non-discrimination provision also reflects the frustrations engendered among humanitarians during the Second World War. However, this provision, "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria,"\(^7\) raises several controversial points.\(^7\) First, what of nationality? Is this an acceptable basis for discriminating against, or in favor of, foreign nationals participating in internal strife or otherwise present in the location of the conflict? Despite the ICRC's proposal to include the term expressly in the cited provision, others objected. The United States representative, Yingling, pointed out that "nationality" was a word of art which would necessitate an examination of the domestic law of the countries concerned and consequently should not be inserted. Lamarle, the French delegate, stated unambiguously that this was a permissible basis for discriminatory treatment, because it might be perfectly legal for a government to treat insurgents who were its own nationals differently than foreigners taking part in a civil war. The latter might be regarded as more guilty than nationals of the country concerned or they might, on the other hand, be treated less

\(^7\) For a general discussion of what might additionally be proscribed by an additional protocol bond, see Note, Protection of Non-Combatants in Guerilla Wars, 12 WM. & MARY L. REV. 787 (1971); Protocol II, supra note 69, at arts. 4, 5, 7, 8, 15, 16, 17. With regard to the use of starvation as a military technique, see Protocol II, supra note 69, at art. 15: "Starvation of civilians as a method of combat is prohibited."

\(^7\) IV Commentary, supra note 27, at 25.

\(^7\) There has developed considerable international institutional consensus on what racial discrimination does and does not mean. See H. SANTA CRUZ, RACIAL DISCRIMINATION (1971).
severely or merely regarded as subject to deportation. The ICRC indicates that nationality is a reasonable distinction, but one without exceptional importance. In light of the affirmative obligation of humane treatment and the “any other similar criteria” phrase, this provision must be interpreted to mean that “nationality” could allow the imposition of more or less severe humane punishment on foreign nationals who participate in the conflict.74

The second issue concerns the nature of an “adverse distinction.” Assuredly, segregation of male and female prisoners to prevent assaults or other abuse would be permissible. What of segregation in detention facilities on the basis of race purportedly in the name of maintaining law and order or facilitating the achievement of the “cultural identity” of that group? What of some other commonly cited practices characterized by their proponents as serving the best interests of the victims? In this regard “adverse distinction” as to race has slowly evolved a stable definitional content and does not, for example, proscribe any measures taken to ameliorate the effects of post discrimination by affirmation action projects.

The enumerated examples of barbaric acts which “are and shall be prohibited at any time and in any place whatsoever with respect to the above mentioned persons”75 are for the most part self-explanatory and were hardly mentioned in the discussions at the Diplomatic Conference. The terms “are and shall” in the preceding sentence should be interpreted as eliminating any loopholes and disallowing in advance any excuses or attenuating circumstances,76 not as implying that they reflect previously binding obligations applicable in internal armed conflict. The ICRC Commentaries briefly recite the rationale for their recital in article 3: (a) violence to life and person, in particular murder of all kinds (this writer, concurring with the query of the Burmese delegate wonders just how many kinds of murder there are). One possible explanation, consistent with the French text, “le meurtre sous toutes ses formes,” is that it is intended to cover all forms of wilful murder, mutilation, cruel treatment and torture and (c)

74 III Commentary, supra note 13, at 41. Note the more definitive listing of “adverse distinctions” in article 2 of Protocol II, including “national or social origin.”
75 IV Commentary, supra note 27, at 25.
76 III Commentary, supra note 15, at 39. The effect of Common Article 3 on reprisals, which are neither an excuse nor a mitigating circumstance but a legal mechanism in the arsenal of belligerents which they can use to justify otherwise illegal acts, is unclear. One noted expert has concluded that it is quite doubtful that Article 3 outlawed reprisals. See P. KALSHOVEN, BELLIGERENT REPRISALS 267-70 (1971).
outrages upon personal dignity, in particular humiliating and degrading treatment are acts which the public opinion of the world finds "particularly revolting," acts which were omnipresent during the Second World War. Undoubtedly, few would contradict the malevolence of (a) and the necessity of its repudiation. However, (c) seems, upon superficial analysis, to be an anachronism of chivalry, somewhat out of place in a listing of proscribed inhumane activities. These acts do not endanger the physical or mental health of prisoners. Furthermore, they may not be practicably capable of regulation. But is it not somewhat anomalous to proscribe such treatment while allowing the death penalty, if not capriciously executed? The obvious, though not totally satisfactory response, is that international treaty-making is undoubtedly a product of the international political system with its emphasis upon the feasible and practicable. Consequently, any limits imposed on the activities of belligerents resulting in curtailment of the innate propensities of strife, whether international or non-international, are to be encouraged as within the compass of general humanitarian objectives.

The ICRC in its Commentaries admits that the "taking of hostages," with "passing of sentences and 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," are fairly general in wartime, and probably legal under existing interpretations of internal law, but are nevertheless shocking to the civilized mind. It is noteworthy that there are no express prohibitions of reprisals or collective penalties, often the hand-maidens of "taking of hostages." The ICRC concludes: "The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime," as both are directed at people innocent of the crime which it is intended to punish or prevent.

77 IV Commentary, supra note 27, at 25, 38-40. For an example of how domestic and international public opinion can restrict, albeit only slowly, inhumane actions, see Greenberg, Law and Conduct of the Algerian Revolution, 11 Harv. Int'l L.J. 37, 54 (1970).
78 Article 13, paragraph 2 of the Geneva Convention on Prisoners of War clearly prohibits humiliating treatment in international war situations, such as parading American airmen through the streets of Hanoi.
79 III Commentary, supra note 13, at 39.
80 IV Commentary, supra note 27, at 39.
such reprisals and collective penalties, because they are "contrary to the modern idea of justice" subsumed under other proscribed activities? This writer would assert that "judicial guarantees which are recognized as indispensible by civilized nations," qualifying as it does "passing of sentences and carrying out of executions without previous judgment" refers to what might be termed international procedural due process and not substantive due process. Consequently, the passing of sentences and the carrying out of executions, as described above, would require research into what is covered by the latter phrase of Article 3. Applying by analogy the "sources" provision of the Statute of the International Court of Justice, article 38(1)(c), or "the general principles of law recognized by civilized nations," and the consensus that it does not necessitate an examination of the legal systems of all States but only that a principle be representative of the major legal systems, one could suggest certain procedural safeguards which would be arguably included thereunder: The right of an informal hearing in one's presence before the accuser; the right to call witnesses in one's behalf if reasonably available; the right of an impartial fact finder and decision-maker, either a single judge or a board with the express duty to decide on the facts as presented (the jury system, not generally accepted outside the common law countries, would not be required); and the right to have a personal representative state one's position to the court and translate if the proceedings are in a language other than one's own if one has no understanding of the language or is otherwise incapable of asserting his rights. What, however, would be the evidentiary criteria to be fulfilled? Should it be beyond a reasonable doubt, or beyond a reasonable doubt only in cases where the death penalty might be imposed? It would seem reasonable that non-capital humane punishments could be imposed on a lesser evidentiary finding than in capital cases. It is doubtful whether non-punitive detention for national security reasons in a humane manner and facility is itself condemned by Article 3, as such is not, in theory, a "passing of sentence." Indeed, such detention is expressly permitted by article 5 of the Civilians Convention of 1949. It is similarly suggested that there be, in any future amendment to or revision of the latter, a specific non-

81 This is necessary as there is no listing of minimal procedural rights. The advice of the American representative, of a specific enumeration of specific guarantees, was rejected.
exhaustive enumeration of specific guarantees accorded the individuals protected by Article 3.82

Presuming a judgment by a tribunal fulfilling the international procedural due process criteria, what are the permissible punishments that may be meted out: Are there any substantive criteria contained in the aforesaid general language of Article 3? Is the death penalty prohibited either during or at the cessation of hostilities? Despite some support for the Castberg Norweigan Proposal, that rebels could not be prosecuted but presumably could be held in preventative detention until the end of hostilities, and then not for mere participation as the sole grounds,83 the aforementioned Burmese rebuttal of "assumption of risk" reflected the consensual sentiment at the Diplomatic Conference. It is extremely doubtful that inclusion of any provisions concerning "armed conflict not of an international character" would have been approved had it resulted in restricting the punitive measures which could have been taken against traitors. As the ICRC Commentaries have succinctly declared:

[It is only] summary justice which it is intended to prohibit. No sort of immunity is given anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.84

Note in this regard the rejection of the ICRC preambular proposal which would have anathematized any discrimination based on political opinion.85

D. Remaining Provisions

The first sentence of paragraph 2 of Article 3, "The wounded and sick shall be collected and cared for," reflects the essence of the continuing humanitarian concern of the ICRC since its origin.86 This provi-

82 Note that Protocol II, note 69 supra, includes specific procedural and substantive guarantees. A persuasive argument could be made that the guarantees are subsumed under the "recognized as indispensible by civilized nations" rubric. That is the essence of the incorporation dilemma in that there is no authoritative decision maker endowed with the right to make clear and binding interpretations.

83 II B Final Record, supra note 19, at 49 (emphasis added).
84 III Commentary, supra note 13, at 40.
85 IV Commentary, supra note 27, at 14.
86 Id. at 25.
sion, because of its fundamentally non-controversial nature, received little attention at the Conference. The ICRC Commentaries characterize it as complementary to the preceding paragraphs but expressing a "categorical imperative" which cannot be restricted and needs no explanation. Though different from the wording of article 12 of Geneva Convention I, the ICRC attributes this parsimony of wording of the statement of principle to a desire to find a "minimum acceptable to all."

It was therefore necessary to avoid using an expression about whose meaning there might be some doubt, particularly as it was not in any way essential. A formal order allows of no freedom which conflicts with it. . . . (S)ince the obligation to collect and care for the wounded and sick is absolute and unconditional, any act incompatible with the duty imposed by that obligation is prohibited.9

Moreover, this obligation is reinforced by the general affirmative obligation of humane treatment and the enumerated prohibitions. Hence, Article 3 certainly accords the wounded and sick the "respect and protection" envisaged by article 12.

The right of "humanitarian initiative" was the minimal official recognition which the ICRC thought would effectuate the purpose of humanitarian regulation of internal conflict. Though its representatives had initially strived to include the intervention of the "protecting powers" among the provisions applicable in internal conflict, believing that the "value of the Conventions depends largely upon the means of controlling their application," it was content with the "may offer" phraseology of the approved draft.

What is the nature of this official recognition which the Swiss delegate considered to be of prime importance, and absent which, ICRC tendering of services would have ordinarily met with a categorical refusal? It is really in no different position than any individual or any other organization. Its offer of assistance is not

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97 II B Final Record, supra note 19, at 133.
98 I Commentary, GENEVA CONVENTION 57 (J. Pictet ed. 1952). Protocol II, note 69 supra, places emphasis on the protection of medical personnel, medical units, transports and insignia, and gives limited protection to concepts of medical ethics and confidentiality.
99 II B Final Record, supra note 19, at 47.
90 I Commentary, supra note 88, at 58. In fact, it rejected various proposals which would have superficially strenthened the ICRC position, but which might have undermined its independence, thereby actually weakening its efforts.
obligatory on the proposed recipient. The ICRC, endeavoring to meet the view that its position is merely decorative, states that it is of "great moral and practical value," simple of application and adequate to meet the ICRC's purposes. Reflecting on past experiences where the mere offer of services was regarded as an unfriendly act and doors were closed to it, it concludes that the new provision has put it on a more viable plane. It is now legally entitled to offer, as are all other impartial humanitarian bodies, its assistance with, of course, the concomitant right of the parties to reject it. Such permissible intervention is, however, at best supplementary to the implementation of the Article by the parties themselves, and to the extent permitted, by the National Red Cross Society of the country concerned. If any country dares reject all these sources of humanitarian assistance, it will bear a heavy "moral responsibility," but will not be guilty of any legal delict merely for its refusal of assistance. Needless to say, any offer of non-impartial services or services by a non-impartial entity need not be accepted and there should be no reprobation for a good faith refusal.91

There are two final provisions which need only briefly be discussed again. The first, that the parties to the conflict "should endeavor" to bring into force, by means of special agreements, all or part of the full Conventions, reflects the prevailing consensus that the parties may ignore the rest of the Conventions. Despite affirming this conclusion, the ICRC ambiguously stated that, when the armed conflict has grown to such an extent as to surpass these unilateral obligations, they are under an "obligation" to try in good faith to bring about a fuller application of the Conventions by mutual accord. Curiously, the "obligation" is merely to negotiate in good faith. It remains free to refrain from signing any special agreement extending additional humanitarian provisions or to make such an agreement contingent on a declaration of "non-effect" of the juridical status of the parties. The ICRC position previously mentioned does not reflect the intentions of the framers. The Czechoslovakian representative, Winkler, undoubtedly stated the sentiments of the Article's progenitors thusly: "'Should endeavor' means 'merely an appeal' and not a straight obligation, so there is no duty whatever to comply with the provisions of the Conventions."92 Is there nonetheless an obligation to negotiate in good faith toward such a goal? It is clear from the tenor of the statements that any endeavor

91 Id. at 58-59 (emphasis added).
92 II B Final Record, supra note 19, at 334.
to include such a provision should have been met with, at best, little enthusiasm, and most probably would have been soundly defeated.

The final sentence in the Article, the "non-effect" clause, was inserted early in the drafting stage to mollify those fearing the legitimization of the insurgents' status by application of any conventional norms: indeed, it was the *sine qua non* of any reference to non-international conflicts in the Geneva Conventions. The "non-effect" clause makes it absolutely clear that only humanitarian and not political considerations are contemplated by the promulgation of these fundamental norms of civilized peoples, in other words, the internal affairs of states are otherwise unaffected. To ensure that this "non-effect" provision fulfilled its object, the delegates approved the following brief Resolution No. 10: "The Conference consider that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions."

### III. CONCLUSION

No attempt will be made to summarize the findings of the author expressed in detail herein. It is sufficient to conclude that Article 3, a "Convention in miniature," is an initial but very important first step and that post-1949 practice has strongly evidenced its deficiencies and infirmities. This writer had earnestly hoped that the delegates to the Diplomatic Conferences would come forth with a protocol expanding upon and curing the gaps in Common Article 3. However, the proposed addendum, Protocol II, appears to resurrect the substance of the factual criteria, the inclusion of which was repudiated by the adoption of Common Article 3. Such a conservative shift to these more demanding criteria for application of the more expansive protection of Pro-

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93 *III Commentary, supra* note 13, at 43. Contrast the provisions of *Protocol II, supra* note 69, at art. 6, para. 5: "At the end of hostilities, the authorities in power shall endeavor to grant the greatest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are intended or detained."

94 *I Final Record, supra* note 18, at 362.

95 *See Protocol II, supra* note 69, at art. 1: This Protocol . . . shall apply to all armed conflicts [not international in nature] which take place in the territory at a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part
Protocol II reflects the significant victory achieved by third world forces in the inclusion of so-called "wars of national liberation" within the definition of "international strife" under Protocol I. These two developments, the resurrection of factual criteria and the re-definition of "international" war, suggest that due and careful consideration be given to these protocols before adoption. Even if generally adopted, Common Article 3 will remain as a separate source of legal obligations. Protocol II develops and supplements the latter without modifying its existing conditions of application and only applies where the factual criteria are met. In those instances of "non-international conflict" not resembling a traditional or "true" civil war but surpassing "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,"96 Common Article 3 remains the sole source of humanitarian regulation of internecine strife.

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96 Such language, taken from Protocol II, supra note 69, at art. 1, para. 2, reflects the historical consensus concerning the non-application of Common Article 3 to such minimal levels of violence.