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PROTECTION OF NON-COMBATANTS IN GUERRILLA WARS

JAMES E. BOND*

One of the few beneficial consequences of war is law reform. It was Henry Dunant, who, observing the battlefield horrors at Solferino in 1859, first proposed an international convention to protect the sick and wounded.¹ Between 1864 and the First World War, members of the international community agreed to a series of treaties formulating and codifying the law of war.² Experience in World War I proved these rules inadequate, and in 1929 a new set of Geneva Conventions was adopted.³ These in turn seemed inadequate to those who survived

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1. During the fifteen hour battle 38,000 men were killed or wounded. J. DUNANT, *A MEMORY OF SOLFERINO* (1961). Two centuries earlier Jean Jacques Rousseau had written in his *Social Contract*:

The object of war being the destruction of the enemy State, one has the right to kill its defenders only when they have weapons in their hands; but immediately they put them down and surrender, thus ceasing to be enemies or agents of the enemy, they once more become ordinary men and one no longer has any right to their life.

I J. ROUSSEAU, *SOCIAL CONTRACT* 177 (Oxford U. Press ed. 1962).

2. E.g., The Convention for the Amelioration of the Condition of Soldiers Wounded in Armed Forces in the Field of 1864, 22 Stat. 940 (1883), T.S. No. 377; the 1899 Hague Conventions, 32 Stat. 1779 (1903), T.S. No. 392; and the 1907 Hague Conventions, of which the most important is Convention No. IV, Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (1911), T.S. No. 403, and the Annex thereto embodying Regulations respecting the laws and customs of war on land, 36 Stat. 2295 (1911).

3. The Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021 (1933), T.S. No. 846, 118 L.N.T.S. 343, like the Hague Relations of 1907, has now become customary international law. Inter-war efforts to reduce the incidences and ravages of war were not limited to work on these two conventions. In 1925, all the major countries except Japan and the United States signed the Geneva Gas Protocol, in III M. HUDSON, *INTERNATIONAL LEGISLATION* 1670 (1931), which forbids use of "asphyxiating, poisonous or other gases." In 1928, the major powers agreed to the Treaty for the Renunciation of War (sometimes called the Pact of Paris or the Kellogg-Briand Pact), 46 Stat. 2343 (1931), T.S. No. 797. The new international organizations also began promoting codification of the law of war, e.g., the 1924 Protocol for the Pacific Settlement of International Disputes, in II M. HUDSON, *INTERNATIONAL LEGISLATION* 1378 (1931), sponsored by the League of Nations.

World War II, and in 1949 the four Geneva Conventions were signed. In large part, they govern the treatment of non-combatants today.⁴ Recent guerrilla conflicts⁵—and, particularly, the Vietnam war—have shown how gossamer-like the present protections are. Already one hears the cries for reform,⁶ and it may be predicted that once the guns have fallen silent men will again begin revising present laws to prevent the all too frequent excesses which have characterized the war in South-east Asia. The purpose of this article is twofold: first, some of the gaps in Convention protections of non-combatants will be identified; and second, possible remedies will be offered.

The alleged atrocities at My Lai have exposed one major gap in Convention protection, although surprisingly few popular or scholarly commentators have mentioned or discussed it.⁷ The Geneva Civilian Convention does not protect the nationals of a co-belligerent state from the depredations of an ally. Article 4, which defines "protected persons,"

4. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as GPW]; the Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as GPW (Sea)]; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as POW]; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The historical background of the 1949 Geneva Conventions is traced in G. DRAPER, *THE RED CROSS CONVENTIONS* (1958).

5. The phrase "guerrilla conflicts" may appear misleading or inaccurate. Technically, guerrilla warfare refers to the type of military tactics employed rather than to the nature of the conflict itself. Scholars have traditionally distinguished between international and internal conflict, and within the latter more particularly between insurgency and belligerency. Guerrilla tactics, although by no means new, are now pervasively employed in all conflicts, tradition aside, and the law of war must be revised accordingly. See generally D. BINDSCHEDLER-ROBERT, *THE LAW OF ARMED CONFLICT* 38-45 (1971).

6. In 1957 the International Committee of the Red Cross submitted to the XIXth International Conference of the Red Cross a series of *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*. The ICRC has shown great interest in the problems of non-combatants in non-international conflicts. It has convened three private meetings of experts: *Aid to Political Detainees* (1953); *Applicability of Humanitarian Principles in Cases of Internal Disturbances* (1955); and *Aid to Victims of Internal Disturbances* (1962). See generally REPORT OF THE SECRETARY-GENERAL, *RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICT*, U.N. Doc. A/8052 (1970).

7. Professor Rubin discusses the problem but blandly assumes *arguendo* "that the substantive terms of the Civilian Convention apply to the inhabitants of My Lai to protect them from the United States." Rubin, *Legal Aspects of the My Lai Incident*, 49 ORE. L. REV. 260, 264 (1970).

provides that “. . . nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

The draftsmen intended to protect only those persons of enemy nationality living in the territory of a belligerent state and most inhabitants of occupied territories. The peasants of My Lai can hardly be characterized as living in occupied or belligerent territory; but even if they were, the fact remains that these civilians are excluded from the protective ambit of the Civilian Convention because of their status as nationals of a co-belligerent state. Ever Dr. Jean Pictet, although he speaks rather carelessly of the “whole population” of occupied territories enjoying a protected status, concludes that nationals of a co-belligerent state receive no protection from the Convention.⁸

The draftsmen understandably did not see why such nationals needed any protection. Soldiers do not usually pillage, rape, maim and murder the nationals of their allies. Reflecting on their experience in World War II, the delegates saw no reason to draft a law, for example, which would have protected British nationals from American troops. Particularly, they saw no need to protect the nationals of an allied country with whom their state maintained normal diplomatic relations. In such circumstances—and it is difficult to imagine allies who do not maintain normal diplomatic relations with each other⁹—the state whose nationals were aggrieved could be expected to press its claim through diplomatic representatives under the traditional law of state responsibility. Israel's prompt payment of full compensation for damages and loss of life resulting from the accidental strafing of the *U.S.S. Liberty* during the June War demonstrates that this remedy may be extremely effective.

In the context of guerrilla wars, however, the citizens of a co-belligerent state may need protection. In the first place, they may be or appear to be the “enemy.” Indeed, some may be dubbed “sunshine patriots”—loyal citizens by day but rebels during the hours of darkness. Understandably, the soldier who has reason to believe that a wide-eyed child may be carrying a grenade, or who suspects that an old woman sitting on the stoop makes bombs, does not think of these people as allied nationals, let alone as innocent civilians, although most are. The difficulty

8. IV J. PICTET, COMMENTARY, GENEVA CONVENTION 48-9 (1958). Pictet's four volume commentary is the standard reference work on the 1949 Geneva Conventions.

9. Italy, when it joined the Allied side after Mussolini's fall, did not, however, have “normal diplomatic representation” with its new co-belligerents.

is that friend and foe look alike to the soldier, who, in the absence of effective legal restraints, is not apt to ponder long their innocence or guilt. After all, soldiers survive by getting the enemy before the enemy gets him. Thus, in guerrilla wars the natural circumstances do not exist which in more conventional conflicts would restrain the soldier from attacking allied nationals. Moreover, civilians caught up in a guerrilla war cannot always depend upon their government to intercede on their behalf and insist upon their proper treatment by allied soldiers. Many governments show little sympathy for the political and civil rights of their citizens in peacetime and even less when they are attempting to suppress a rebellion. Under such circumstances, the government usually imposes martial law.¹⁰ One cannot discount the fact that certain cultures place a lower value on human life than others. Likewise, the host government may not wish to embarrass or offend an ally whose money and men constitute its lifeline.

The gap in protection, however, may not be so large as it first appears. Article 3, which is common to all four Geneva Conventions, broadly states that "persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely. . . ." ¹¹ The language

10. See J. KELLY & G. PELLETIER, *LEGAL CONTROL OF THE POPULACE IN SUBVERSIVE WARFARE* 31-287 (1966) for a review of state practice on fighting rebels in Algeria, Vietnam, the Philippines, Thailand, and Malaya. Cf. Ford, *Resistance Movements and International Law*, 7 INT'L REV. OF THE RED CROSS 579 (1967).

11. Article 3 has been called a "miniature convention" because it sets out a legal regime for treatment of non-combatants in internal conflicts. It provides:

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

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

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

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court

is sweeping and apparently embraces all non-combatants regardless of their status as citizens of a co-belligerent. Article 3 applies, however, only to "armed conflict not of an international nature." It would, therefore, give no protection to the co-belligerent citizens caught up in an international conflict. Curiously enough, Article 3 was thought to embody only certain minimum humanitarian principles extracted from the broader coverage of the entire Conventions which apply to international conflicts.¹² It did not occur to the draftsmen that Article 3 might provide greater protection than the whole of the Convention; yet in the context of the problem we are discussing—protection of the citizens of a co-belligerent—Article 3 extends protections not found in the other provisions of the Convention.

It may be argued that even Article 3 was never intended to cover the citizens of a co-belligerent because the latter would never be involved in "a conflict not of an international nature." When one thinks of co-belligerents in a war similar to the Second World War, which was the paradigm in the minds of the draftsmen, that conclusion does follow. Conventional wars are not, however, the model for present day conflicts. Moreover, there is no litmus paper test by which an internal war can be distinguished from an international war. It is possible to have an internal conflict in which foreign troops from a country friendly to the government participate, but participation by foreign combat troops in a conflict between internal groups competing for control does not necessarily transform an internal conflict into an international one.¹³ In such a case Article 3 would protect the nationals of co-belligerents.

affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

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

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

12. According to Pictet, the draftsmen had two alternatives. They could have extended all the Convention provisions to a narrowly defined range of internal conflicts or they could select and apply a few humanitarian rules to a broader range of internal conflicts. The Conference adopted the latter approach. IV J. PICTET, *supra* note 8, at 30-34.

13. The obvious examples are regional police actions in which the predominant area power intervenes in an internal conflict to prevent a party it finds distasteful from coming to power.

Article 3 is not the only section of the Civilian Convention which contains language sweeping enough to remove the distinctions set out in Article 4. Article 13, which introduces Part II, General Protection of Populations Against Certain Consequences of War, states: "The provisions of Part II cover the whole of the populations of the countries in conflict without any adverse distinction based, in particular, on race, nationality, religion, or political opinion, and are intended to alleviate the sufferings caused by war." Undoubtedly, the succeeding thirteen articles, which comprise Part II, apply to the nationals of a co-belligerent. As Pictet observes in his commentary: "The provisions in Part II . . . apply not only to protected persons, *i.e.*, to enemy or other aliens and to neutrals, as defined in Article 4, but also to the belligerent's own nationals; it is that which makes these provisions exceptional in character" ¹⁴ Article 4 itself contains a clause which states that "the provisions of Part II are . . . wider in application . . ." than other Convention provisions, limited as they are by the otherwise applicable Article 4 definitions.

An analysis of Part II shows, however, that while the scope of its application is wide, its substantive coverage is narrow. The majority of the provisions deal with the establishment, operation, and protection of hospital, safety, and neutral zones. Only Article 16 offers a solid base upon which to build a legal argument for the protection of co-belligerents.

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

There are two defects in this article, at least as a source of broad protections for the citizens of a co-belligerent. The first is that it enumerates those entitled to "protection and respect" and, as a consequence, arguably excludes all others from its protection. The wounded and sick, the infirm, and expectant mothers are not likely to constitute the bulk of any civilian co-belligerent population.¹⁵ Secondly, the phrase

14. IV J. PICTET, *supra* note 8, at 118.

15. Pictet correctly observes in his *Commentary* "that the special respect due to wounded, sick, and infirm persons and expectant mothers cannot be considered under

"and other persons exposed to grave danger" is couched in a restrictive context. Though the phrase could be interpreted to cover all of the civilian population and thereby eliminate the exclusions implied in the enumeration contained in the preceding paragraph, it is set out in a section which does not impose an absolute obligation. The state need act "only so far as military considerations allow," a reservation not found in its predecessor articles in the first and second Geneva Conventions, and one broad enough to swallow up the rule itself. Article 16, like Article 3, is too slender a thread with which to alleviate the shortcomings of Article 4 in its failure to protect co-belligerent citizens.

Fortunately, today there is widespread agreement on the general principle that "the protection of civilian populations is one of the essential obligations of the parties" to any conflict.¹⁶ Of course, the difficulty is, as the President of the International Red Cross has pointed out, to make the principle "fully operative" by developing it "in an adequate instrument of international law."¹⁷ There is also another seldom recognized difficulty. In a guerrilla war there is no sharp distinction between those taking part in the hostilities and members of the civilian population, and a convention which premises its provisions on the viability of such a distinction will inevitably leave gaps of the kind previously discussed. The challenge is to revise the law of war to insure that all non-combatants, not just the citizens of a co-belligerent, are henceforth protected. The problem of reform is especially pressing in guerrilla conflicts which may also be characterized as internal wars because only the general provisions of Article 3 presently apply to such struggles.

Several fundamental problems are not unique to international conflicts. Even in guerrilla wars, for example, one must continue to distinguish between what a soldier can do to the enemy firing an AK-47 at him, and what he can do to an old man plowing a rice paddy. The customary distinction between combatants and non-combatants remains valid because it is functional: it defines the attitude and the action of one party to the other at the moment of contact. For instance, if

any circumstances or in any manner whatsoever to free the belligerents from their obligation to give the civilian population as a whole the respect and protection to which they are entitled." *Id.* at 135. But he neglects to discuss what respect and protection a co-belligerent must accord the remainder of the civilian population.

16. Resolution I adopted by the Institute of International Law at the Session at Edinburgh, Institute of International Law 1-3 (1969).

17. Gonard, *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, 7 INT'L REV. OF THE RED CROSS 301 (1967).

"Charlie" is firing at an American soldier, he's a combatant; if he's waving a white flag, he's a non-combatant. The cruel battlefield reality of self-defense and survival dictates that a soldier act differently toward a combatant than toward a non-combatant. But no reason requires that the soldier initially treat one non-combatant differently from another. The non-combatant poses no immediate threat. He has surrendered or is offering no resistance or, to use the quaint language of the Geneva Conventions, is in "the hands of" the soldier. What action the soldier may take against a non-combatant during the conduct of military operations should depend on a balancing of military necessity against the human rights of the individual—and not be dependent upon an individual's status as a citizen, enemy alien, guerrilla sympathizer, or loyal supporter.

These differences are relevant in determining the *subsequent* treatment to which the non-combatant is entitled. A government fighting for its survival may legitimately distinguish between those among its citizens who support it and those who oppose it by according civil and political rights.¹⁸ It may punish the latter swiftly and severely, so long as it does so in accordance with minimum legal standards of justice. It may intern them, confiscate their property, and deprive them of their right to vote. It may, as all governments do, try, convict, and jail or execute those who violate its laws. Even in peacetime, governments distinguish between citizens and aliens; a fortiori, a government may greatly curtail the civil and political rights of aliens in wartime. But while governments may accord different types of non-combatants different civil and political rights, they cannot authorize their soldiers to accord different treatment to different categories of non-combatants during the conduct of tactical military operations.

In the first place, the category into which the non-combatant fits usually is not readily apparent. Peasants, for example, do not wear placards identifying themselves as "VC sympathizers" or "government supporters." To repeat a point made earlier, they look discouragingly alike. In such circumstances, classification becomes a complex political-

18. Note 9 *supra*. One need not completely subscribe to the thesis that democracy is the child of peace and cannot survive apart from its mother to believe that nations may take extraordinary measures to insure their survival during war. We would do well to remember that it was Mr. Lincoln who established the first modern precedent for suspending democratic guarantees during a civil war. And before criticizing such Vietnamese programs as pacification and relocation, we should reflect upon what we believed to be the necessity of relocating our citizens of Japanese descent during World War II.

legal judgment, which the average soldier is ill-equipped to make. Quite aside from the fact that he is not trained to interrogate or classify, he will rarely have the time to question extensively; nor will he have access to other information which would enable him to evaluate responses accurately. The soldier will have accomplished his mission if he relinquishes the non-combatant to qualified officials for proper classification.¹⁹ International law, then, if it is to be responsive to the realities of modern day guerrilla conflicts, must provide uniform rules for the treatment of all non-combatants during the conduct of military operations, and it must provide rules for the non-combatants' subsequent classification and treatment.

The first objective poses fewer difficulties since there is wide agreement on two principles. First, non-combatants should be spared, as much as possible, the sufferings of war, and, secondly, the launching of attacks against them should be prohibited.²⁰ Spelling out these principles in detail is no easy task (and is beyond the scope of the present article), but the major pit-fall has been the failure of international conventions to insure their application to all non-combatants,

19. The necessity of evacuating all captured personnel to the rear for classification is a basic point stressed in all army instructional programs. The recently revised Army Subject Schedule 27-1, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, states that "[c]ombat soldiers do not determine the status of any captured person. All persons captured or detained should be evacuated to the detainee collecting point where proper authorities can classify them."

20. [T]he United Nations itself—and, consequently, the member states—has repeatedly expressed the idea that the civilian population is not a lawful objective. Three important resolutions must be mentioned here: Resolution 1653 (XVI) of 24 November 1961 on the legality of the use of nuclear weapons, which in its preamble deduces the illegality of these weapons from the prohibition against unnecessary human suffering and from the fact that these weapons cause indiscriminate suffering and destruction to mankind; Resolution 2162 B (XXI) of 5 December 1966 on chemical and bacteriological weapons (the question of the Geneva Protocol), which states in its preamble that weapons of mass destruction are "incompatible with the accepted norms of civilisation" and asserts "that the strict observance of the rules of international law on the conduct of warfare is in the interest of maintaining these standards of civilisation"; and finally, Resolution 2444 (XXIII) of 19 December 1968 with respect to human rights in armed conflicts, which "adopts as its own" resolution XXVIII adopted by the XXth Conference of the Red Cross (Vienna, 1965) and which reiterates the following principles: the choice of means for injuring the enemy is not unlimited, attacks against the civilian population as such are prohibited, and a distinction must be made at all times between combatants and the civilian population. . . .

D. BINDSCHEDLER-ROBERT, *supra* note 5, at 19.

wherever situated. This defect could be remedied by adding a paragraph to common Article 3 specifying:

These minimum standards of humanity must also be observed in armed conflicts of an international nature, and those taking no active part in the hostilities shall enjoy these protections except where other provisions of the Conventions or international law provide greater protection.

There are several advantages to this remedial approach. The most practical advantage should be the acceptability of the proposal to most nations. Nations are naturally cautious about accepting limitations on their sovereignty. The suggested revision does not impose new restraints on their right to deal with citizens and others; instead it extends already existing protections to all those similarly situated. By incorporating a body of law already agreed upon, one avoids arguing anew the question of how parties engaged in armed conflict should treat non-combatants. Moreover, the Article 3 limitations do not preclude effective government action against dissident groups, the chief reason the Article was originally accepted. Although hardly self-defining, the Article strikes an equitable balance between the right of a government to maintain its own existence and the human rights of its citizens, including those who violently oppose it.

The second objective—to provide rules for the classification and subsequent treatment of non-combatants—represents a far more difficult problem. Article 3 places all non-combatants into the one category, “persons taking no active part in the hostilities.” Such a broad classification is sufficient for determining their rights during the conduct of military operations; but it does not provide any guidance for determining who among them may be interned, tried, punished, or freed, nor does it specify procedures for making such determinations.

Taken together, the Geneva Conventions do establish a classification scheme that determines the status and rights of the individual. A prisoner of war, for example, does not enjoy all the rights of a retained person. Generally, however, these different statuses reflect the differences one would expect among participants in a conventional war. For example, the belief that an individual is either a member of the military or a member of the civilian population is a major premise. Also, the conception of how an army looks, smells, and acts reflects traditional ideas.

Nowhere is this more apparent than in POW Convention, Article 4,

which also illustrates the irrelevance of the present Geneva classifications to guerrilla warfare. Basically, Article 4 defines a prisoner of war as a member of a national armed force or any other group that fulfills the following four conditions:

- (a) is commanded by a person responsible for his subordinates;
- (b) has a fixed distinctive sign recognizable at a distance;
- (c) carries arms openly;
- (d) conducts operations in accordance with the laws and customs of war.

No guerrilla is likely to qualify for POW status under such conditions. While the guerrilla force will probably have a hierarchical command, its members are not likely to wear a "fixed distinctive sign recognizable at a distance," nor will they always bear arms openly. The final requirement, that they conduct their operations in accordance with the law of war, is a curious one. Desirable as it might be for all parties to a conflict to obey the laws and customs of war,²¹ why should one's failure to do so affect his status or even his subsequent treatment (other than the severity of punishment should he be prosecuted for violating the law of war)? In our criminal law a man charged with the most reprehensible crime is still submitted to the reasoned judgment of the law. Article 3 imposes an absolute obligation on the government to treat all non-combatants humanely, regardless of whether they adhere to its provisions.²²

The absurdity of the last of the four conditions is not the chief point at issue, however. What is at issue is the irrelevance of the whole classification scheme to guerrilla conflicts. Participants in these wars simply do not fall into the neat categories set out in the Geneva Conventions. Into what categories do they fall? A classification scheme must be chosen which reflects the functional necessity and wisdom of treating one kind of participant differently from another.

21. The theoretical difficulty of making international law binding on guerrillas and other insurgent groups is explored in Note, *The Geneva Conventions and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851 (1967). Among recent rebel groups, only the Algerians claimed to follow the law of war. The Viet Cong, for example, rejected the idea that it was bound "by the international treaties to which others besides itself subscribed." 5 INT'L REV. OF THE RED CROSS 636 (1965).

22. III J. PICTET, COMMENTARY 35 (1958); Draper, *The Geneva Conventions of 1949*, 114 HAGUE RECUEIL DES COURS 59, 96 (1965). But see Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 BOSTON U. L. REV. 324 (1968).

The little-known classification procedures presently used by Allied forces in Vietnam provide a good starting point for discussion of alternative schemes.²³ Generally, the aim in Vietnam is to separate those

23. ANNEX A—MILITARY ASSISTANCE COMMAND, VIETNAM DIRECTIVE 381-46, MILITARY INTELLIGENCE COMBINED SCREENING OF DETAINEES, (Dec. 27, 1967):

CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. *PURPOSE.* To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. *DEFINITIONS.*

a. *Detainees.* Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions.

b. *Classification.* The systematic assignment of a detainee in either the PW or Non-Prisoner of War category.

c. *Prisoners of War.* All detainees who qualify in accordance with paragraph 4a, below.

d. *Non-Prisoners of War.* All detainees who qualify in accordance with paragraph 4b, below.

3. *CATEGORIES OF FORCES.*

a. *Viet Cong (VC) Main Force (MF).* Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.

b. *Viet Cong (VC) Local Force (LF).* Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specific VC province or district.

c. *North Vietnamese Army (NVA) Unit.* A unit formed, trained and designated by North Vietnam as an NVA unit, and composed completely or primarily of North Vietnamese.

d. *Irregulars.* Organized forces composed of guerilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

(1) *Guerrillas.* Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

(2) *Self-Defense Force.* A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not have their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

(3) *Secret Self-Defense Force.* A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. *CLASSIFICATION OF DETAINEES.*

foreign soldiers and domestic citizens who have taken up arms against the government from all others. The former are treated as POW's, although many cannot meet the Geneva Convention criteria for the POW status. "All others" are further subdivided into three groups: civil defendants, returnees, and innocent civilians. Those classified as innocent civilians are promptly released and returned to their homes. Returnees, those previously disaffected who now agree to support the

a. Detainees will be *classified PW's when determined to be qualified under one of the following categories:*

(1) A member of one of the units listed in paragraph 3a, b, or c, above.

(2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.

(3) A member of one of the units listed in paragraph 3d, above, who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b. Detainees will be *classified as Non-Prisoners of War when determined to be one of the following categories:*

(1) *Civil Defendants.*

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.

(c) A detainee who is suspected of being a spy, saboteur or terrorist.

(2) *Returnees (Hoi Chanb).* All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.

(3) *Innocent Civilians.* Persons not members of any units listed in paragraph 3, above, and not suspected of being civil defendants.

5. *DISPOSITION OF CLASSIFIED DETAINEES.*

a. Detainees who have been classified will be processed as follows:

(1) *US captured PW's* and those PW's turned over to the US by FWMAF will be retained in US Military channels until *transferred to the ARVN PW Camp.*

(2) *Non-Prisoners of War* who are *suspected as civil defendants* will be released to the appropriate GVN civil authorities.

(3) *Non-Prisoners of War* who qualify as *returnees* will be transferred to the appropriate Chieu Hoi Center.

(4) *Non-Prisoners of War* determined to be *innocent civilians* will be released and returned to the place of capture.

b. Responsibilities and procedures for evacuation and accounting for PW's are prescribed in MACV Directive 190-3 and USARV Regulation 190-2.

government, are sent to Chieu Hoi centers where they are rehabilitated. Finally, civil defendants are prosecuted in the local Vietnamese courts for whatever crimes they allegedly have committed.

These categories reflect a balance between governmental needs and individual rights. The government has an obvious interest in separating innocent civilians caught in its nets and returning them to their homes. On the other hand, a brief detention and interrogation, while an inconvenience to the citizen, is not an unreasonable infringement of his rights. It is difficult to see how the government could ascertain the status of the non-combatant with less interference.

At the other extreme, it is easy to understand why foreign soldiers are treated as POW's. They, of all participants in guerrilla conflicts, fit most neatly into the regular Geneva Convention categories. Arguably, while the government could treat them as spies and saboteurs, policy reasons dictate extending POW status to them. Trying and executing foreign nationals unnecessarily inflames passions and may frustrate the possibility of a negotiated settlement. Thus, the North Vietnamese government, for example, prudently dropped its plans to try American airmen as war criminals when the United States and other countries raised strenuous protests.

The reasonableness of classifying a country's own nationals as POW's is less obvious. In most cases those who have taken up arms against their government will have violated its criminal laws and, therefore, could be tried as common criminals. Most states have adopted such a policy, particularly in the initial stages of insurgency.²⁴ There is, however, one advantage to treating captured rebels as POW'S: a POW may be interned for the duration of the conflict. An individual tried in a civil court must be released after serving his sentence, and he may then return to the streets or countryside to continue the revolution.²⁵ Conversely, treating all rebel citizens as POW's would arguably preclude efforts like the Chieu Hoi program, since participation in such a program might constitute a renunciation of rights by the prisoner of war which is not permitted by the Geneva Convention.²⁶ As long as the

24. Note 9 *supra*.

25. Consequently, the South Vietnamese review all defendants immediately prior to their release and may extend their confinement. T. Mien, Vietnam: National Security Needs in a Constitutional Government, Feb. 5, 1971 (unpublished thesis, The Judge Advocate General's School) at 16. This procedure, which may strike some as extraordinary and only justified in wartime, is apparently standard practice in Portugal. Cf. *Changes are Urged in British Prisons*, New York Times, Feb. 7, 1971, at 3, col. 4.

26. Article 7 of the GPW Convention provides that "[p]risoners of war may in no

government is dealing with its own citizens rather than with POW's, the Chieu Hoi program may be defended as an act of amnesty or pardon, powers traditionally held by all governments.

The government should be permitted discretion in choosing between these alternate methods of handling its dissident citizens, so long as it treats all of them humanely. It cannot be scored for enforcing its criminal laws against those it calls citizens. The citizen-turned-rebel can little complain if his former government takes him at his word, accepts his renunciation of allegiance, and treats him as it would a foreign enemy. Furthermore, there is no reason why the government must treat all citizens either as POW's or as civil defendants, so long as it uses a rational basis for distinguishing those it subjects to the normal criminal process from those it interns as POW's. It is important that the government retain its flexibility in dealing with rebels; yet it is also essential that it act within the law. ". . . [A] firm yet flexible system of law is required so as to permit the government to act effectively to meet this threat while at the same time establishing limits and protections for the nationals of the country to insure their individual rights."²⁷

Thus, the Conventions should require that the government treat all foreign soldiers as POW's, whether the conflict be internal or international. Further, the Conventions should obligate any government which elects to treat its own citizens as POW's to make status determinations before a civil, military, or mixed judicial body. In such a hearing the individual should have the right to appear and contest the government's determination. The decision to deprive a citizen of his right to trial in a regularly constituted court and to confine him without a judicial determination of guilt for an indefinite period is so extraordinary that it should only be made by a judicial forum.

Again, allied practice in Vietnam is instructive. When the status of a detainee is doubtful, his case is referred to a tribunal²⁸ which consists

circumstances renounce in part or in entirety the rights secured to them by the present Conventions, and by the special agreements referred to in the foregoing Article, if such there be." Since Article 118 specifies that "prisoners of war shall be released and repatriated", one could argue that a Chieu Hoi program violated the obligation to repatriate. Pictet offers an interesting, if inconclusive, discussion of the legislative history of Article 118 and the Korean experience with the repatriation problem in his *Commentary, GPW Conventions* 541-49 (1960).

27. Kelly & Pelletier, *Legal Control of Populations in Subversive Warfare*, 5 VA. J. INT'L L. 174 (1965).

28. The United States and South Vietnam are obligated by their view that the con-

of three or more officers who, where practicable, should be judge advocates or other military lawyers familiar with the Hague and Geneva Conventions.²⁹ An army directive establishes very specific procedures for the hearings.³⁰ It specifies, for instance, that the individual has a right to an interpreter and to counsel who may be present at all open sessions of the court.³¹ Counsel must be informed of the tribunal procedures and be given free access to his client. He can call, examine, and cross-examine witnesses.³² While the tribunal is not bound by the Uniform Code of Military Justice rules of evidence, it must follow specified procedures³³ to insure that the defendant has his day in court. While it is not necessary—and would probably be unwise—to set out in the Conventions such a detailed tribunal procedure, it should be required that the classification decision be made before a judicial tribunal. While its procedures would probably differ from those for trial of defendants in regular courts, outlined below, the minimum standards discussed therein would be applicable to tribunal decisions as well.

Provisions requiring classification of non-combatants, similar to those we have discussed, should be added to the present Geneva Conventions. While countries may voluntarily adopt classification schemes, such as the United States and her allies have done, nothing in international law presently insures their adoption. Moreover, a state may adopt a classification scheme considerably less rational and just than minimum standards of humanity would dictate. While sovereign states should retain considerable discretion in dealing with their domestic and foreign enemies, international law must circumscribe their exercise of an otherwise unfettered discretion.

This is particularly true in the areas of detention, trial, and punishment of those rebels the government seeks to prosecute in its regular courts. Article 3 prohibits "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which

flict is an international one to which all the Geneva Conventions apply to determine the status of persons before "a competent tribunal." Article 5, GPW Convention. Nothing in Article 3, if it alone were applicable, requires a government to submit doubtful cases of status to any tribunal. This is a major gap in Convention protection.

29. Inspections and Investigations of Prisoners of War—Determination of Eligibility, MACV Dir. 20-5, (March 15, 1968).

30. *Id.*, ¶ 7, (tribunal procedures).

31. *Id.* ¶ 9.

32. *Id.* ¶ 11.

33. *Id.* ¶ 14.

are recognized as indispensable by civilized peoples." Some may find this an adequate standard for the conduct of trials, but the phrase "all the judicial guarantees which are recognized as indispensable by civilized peoples" is unnecessarily vague. Today, there is a consensus that certain specific rights are fundamental. Among these are prompt notice of charges, adequate time and facilities to prepare a defense, right to counsel, and the assistance of an interpreter. This list of rights appears in such diverse agreements as the GPW Convention, the Civilian Convention, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁴ The right to a speedy trial and the right to appeal are also important although they are less universally conceded. These specific rights should be enumerated within the appropriate section of Article 3 as examples of judicial guarantees. Retaining the general phrase allows the expansion of these rights as the international consensus on "judicial guarantees" evolves, while listing the specific rights insures present adherence to minimum standards of justice.

Article 3 does not specifically advert to the problems of detention and punishment, however; although it does impose the general requirement of humane treatment. It is desirable to spell out in some detail the means by which the general principle of humanity requires a state to detain and punish those prosecuted in civilian courts. The recently publicized conditions in the South Vietnamese prison on Con Son Island illustrate the timeliness of this problem.³⁵ If the press descriptions of the "tiger cages" were accurate, the conditions there violated humanity's fundamental sense of fairness and justice.

It is easier to deplore the occasional outrage than to suggest appropriate minimum standards. One cannot impose unrealistically high standards. Outside of Western Europe and the United States, prison facilities are generally poor, and even in those countries they are often inadequate. One can hardly expect a small, underdeveloped country whose govern-

34. Nov. 4, 1950, 213 U.N.T.S. 221. It may not be entirely accurate to suggest that this recital of parallel provisions validates the proposition that all these rights should be extended to defendants in emergency situations. Article 15 of the European Convention, for example, explicitly states that "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention" Under the Article 15 exception, the European Court of Human Rights has upheld detention without trial by the Republic of Ireland in its suppression of the outlawed Irish Republic Army. "Lawless" Case, Europ. Court of Human Rights (1961), 4 YB. EUROP. CONVENTION ON HUMAN RIGHTS 438, 474.

35. *House Panel Urges U.S. to Investigate "Tiger Cage" Cells*, New York Times, July 14, 1970, at 1, col. 7.

ment is fighting for its existence to devote a substantial amount of its precious resources to building and maintaining model penal colonies. Nevertheless humanity may demand that it house prisoners in facilities which are sanitary and afford protection to the prisoners from the elements. Furthermore, a requirement may be established that the prisoners be served an adequate minimum diet. Finally, the Conventions should require that males and females be housed separately, and that all receive periodic medical examinations and basic medical care when needed.

These are indeed minimum standards, but they do not go nearly as far as the Geneva Prisoner of War Convention. Moreover, the standards are general ones, and while that may permit the rationalization of inadequate treatment which could be precluded by more detailed provisions, the broad language allows the continual raising of the standards as the conscience of mankind demands and the expanding resources of the nation permits. The basic protections we have suggested will prohibit the most reprehensible treatment of prisoners while providing a sound basis for the expansion of their rights. It is imperative that the Conventions obligate the parties to permit neutral inspection of detention and prison facilities. The bright light of publicity, which pressured the Vietnamese government into rectifying conditions at Con Son, cannot illuminate areas hidden from public view.

Future historians are not likely to characterize ours as the Age of Aquarius—"when peace will guide the planets and love shall steer the stars." However much we may yearn for universal peace, the past 4000 years of history justify Plato's observation that only the dead have seen the last of war. But we can, like civilized men in all ages, seek to preserve and strengthen those qualities of reason and charity which led Camus to conclude that in times of pestilence we learn that there is more to praise in men than to despise. Strengthening the protections extended non-combatants in guerrilla wars is an act of reason and charity in a time of pestilence.