

Civil War, Humanitarian Law and the United Nations

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I. Introduction

Emer de Vattel, in his classical treatise “Le Droit des Gens ou Principes de la Loi Naturelle”, introduced his observations concerning civil war with some famous remarks that urged for caution in dealing with the topic: “It is a much-discussed question whether the sovereign must observe the ordinary laws of war in dealing with rebellious subjects who have openly taken up arms against him. A flatterer at court or a cruel tyrant will immediately answer that the laws of war are not made for rebels, who deserve nothing better than death.”¹ Vattel, however, reminded his readers to “proceed more temperately” and to argue the matter upon the “incontestable principles” of reason and of natural law.

The warning against precipitate conclusions that was formulated by Vattel still has its justification, even nowadays. This is not only due to the Martens clause,² which in its modernized version in the Additional Protocols of 1977 to the Geneva Conventions of 12 August 1949 provides 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

¹ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Translation of the Edition of 1758 by C.G. Fenwick, 1916, 336 para. 287.

² Concerning the Martens Clause cf. R. G. Allen/M. Cherniack / G. J. Andreopoulos, “Refining War: Civil Wars and Humanitarian Controls”, *HRQ* 18 (1996), 747 et seq., (751–752); H. Strebcl, “Martens’ Clause”, in: R. Bernhardt (ed.), *EPIL* 3 (1982), 252–253; F. Münch, “Die Martens’sche Klausel und die Grundlagen des Völkerrechts”, *ZaöRV* 36 (1976), 347 et seq.

public conscience".³ With the introductory remarks to his Chapter XVIII, Vattel has sketched with a few words a legal problem concerning civil wars that has not lost its relevance. Just the contrary: The outlined temptation for state officials to withdraw from formal legal positions has not found a plausible answer in public international law until now. To decry civil war opponents as criminals guilty of high treason and armed rebellion in practice all too easily means denying any legal obligation towards these adversaries, and also towards the civil population mostly affected by civil war operations.⁴

Admittedly, the evolution of modern law and jurisprudence has made its own contribution to the outlined problems of how to deal legally with civil war situations.⁵ Civil war as a legal phenomenon, in contrast to inter-state wars, is linked indissolubly in a historical perspective to the rise of the modern state. Only when public authority is concentrated in the hands of the state does "international" war become conceptually separable from the forcible self-help of private persons, from feudal and internal conflict.⁶ For a social order like the system of medieval feudal entities it was difficult, if not impossible, to perceive a categorical difference between international and civil war.⁷

³ The formula cited here is taken from the preamble of Additional Protocol II (relating to the Protection of Victims of Non-International Armed Conflicts); Article 1 para.2 Additional Protocol I contains a nearly identical formula.

⁴ As an illustration of the resulting humanitarian problems (and of the ensuing inadequacy of the system of the Geneva Conventions) see the remarks of the former ICRC-delegate L. Marti, *Bonsoir mes victimes*, 1996.

⁵ The notion "civil war" is used here as a synonym for the technical term "non-international armed conflict" respectively "internal conflict". Concerning the difficult questions of differentiating between "international" and "non-international" armed conflicts see D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RdC* 163 (1979), 121 et seq.; and M.J. Mattler, "The Distinction between Civil Wars and International Wars and its Legal Implications", *N.Y.U. J. Int'l L. & Pol.* 26 (1994), 654 et seq.

⁶ On the political function of the difference between "hostis" and "rebellis" in modern state building see H.-J. Wolff, *Kriegserklärung und Kriegszustand nach Klassischem Völkerrecht. Mit einem Beitrag zu den Gründen für eine Gleichbehandlung Kriegführender*, 1990, 154 et seq.

⁷ Compare, however, the attempts of scholastic philosophers to restrict the notion of "bellum iustum" — see in that regard only F.H. Russell, *The Just War in the Middle Ages*, 1975; concerning the medieval customs of war see also M.H. Keen, *The Laws of War in the Late Middle Ages*, 1965,

The creation of a pacified, “internal” sphere and the ensuing monopolization of legitimate use of force in the hands of the state, however, had serious consequences for the legal treatment of those involved in civil wars.⁸ It became nearly impossible for the representatives of the established state organization to perceive the “other side” as an equal (and legitimate) counterpart in warfare. What had been practically self-evident for the legal understanding of medieval people — the existence of a right of resistance against an “unjust” ruler — perished more or less completely in the interest of the pacificatory mission of the state as a guarantor of law and order.⁹ The citizen taking recourse to forcible self-help against his state is reduced unavoidably to an ordinary criminal with the victory of the modern doctrine of sovereignty based on the writings of Bodin and Hobbes. The “civilian” waging armed resistance against his state became liable to serious penalties under the crimes of breach of public peace, rebellion, high treason.¹⁰ To use once again the words of Vattel: “Since nature gives men the right to use force only when it is needed for the defense and preservation of their rights, it is easy to infer that after the establishment of civil societies, a right, involving such dangers in its exercise, no longer belongs to individuals, except on those occasions when the society can not protect or assist them. Within the State itself the public authority settles all the disputes of the citizens, represses violence and self-redress.”¹¹

The prevalence of such legal construction in the forming period of modern international law had a decisive impact on the legal attitudes towards the phenomena of civil war. The thinking regarding sovereignty had by definition excluded civil war from the topics being susceptible to

and G.I.A.D. Draper, “The Interaction of Christianity and Chivalry in the Historical Development of Law of War”, *Int’l Rev. of the Red Cross* 7 (1965), 135 et seq.

⁸ For the intricate interdependence between the evolution of the modern state and the doctrinal development of the laws of war see W.H. McNeill, *The Pursuit of Power. Technology, Armed Force and Society since A.D. 1000*, 1982, 117 et seq., 158 et seq.; G. Best, *Humanity in Warfare. The Modern History of the International Law of Armed Conflicts*, 1980, 41 et seq., 59 et seq.; Wolff, see note 6, 169 et seq., 178 et seq.

⁹ For the history of the traditional concepts of a “right of resistance” see the short account given by A.V. Lombardi, *Bürgerkrieg und Völkerrecht. Die Anwendbarkeit völkerrechtlicher Normen in nicht-zwischenstaatlichen bewaffneten Konflikten*, 1976, 52 et seq.

¹⁰ See only E. Castrén, *Civil War*, 1966, 18.

¹¹ Vattel, see note 1, 235 para. 4.

international legal regulation.¹² Tumults, insurrections and “internal conflicts” prima facie constituted a question of “domaine réservé”, a problem of law enforcement against armed rebels which obviously fell under the internal affairs of a state. Sedes materiae of legal rules on how to deal with armed rebels was the internal criminal and public security legislation, not public international law. Only by some formal recognition of rebellious factions as belligerents could the conflict be brought under the customary rules of the (international) laws of war.¹³

By binding the legal status of belligerents in civil wars to the formal recognition by the relevant government, the decision on the legal transformation of the conflict was handed over to the respective state (or of the state community as an external regulator). All attempts proved futile to “objectivise” the legal qualification of the conflict by formulating an abstract rule under what conditions a civil war had to be placed under the governance of public international law. A short citation from Johann Caspar Bluntschli may suffice, as one of the last authors of the 19th century operating decisively with natural law arguments. He formulated: “An armed party which is not authorized by an existing state to use force will nevertheless be considered a belligerent to the extent it is organized as an independent belligerent power and fights not for the state but instead in good faith for public law.”¹⁴

The general shift of international legal doctrine of late 19th century away from natural law concepts to forms of a strict legal positivism in the Austinian mode caused legal doctrine to become inaccessible for reasonings of humanity like the main argument used by Bluntschli: “The interest of humanity requires” — he stated as late as 1868 — “that in case of doubt,

¹² See e.g. M.A. Akehurst, “Civil War”, in: R. Bernhardt (ed.), *EPIL* 3 (1982), 88 et seq., (92); cf. also Castrén, see note 10, 105 et seq. and O. Schachter, “International Law: The Right of States to Use Armed Force”, *Mich. L. Rev.* 82 (1984), 1620 et seq., (1641).

¹³ Concerning the traditional practice of recognition of insurgents as “belligerents” see Castrén, note 10, 135 et seq. (recognition by the lawful government) and Castrén, *ibid.*, 167 et seq. (recognition by third states). Cf. also L. Oppenheim/H. Lauterpacht, *International Law*, Vol.II- Disputes, War and Neutrality, 7th edition 1952, 249–50, and Akehurst, see note 12, 92.

¹⁴ “Eine bewaffnete Partei, welche nicht von einer bestehenden Staatsgewalt zur Gewaltübung ermächtigt worden ist, wird dennoch insofern als Kriegspartei betrachtet, als sie als selbständige Kriegsmacht organisirt ist und an States statt in gutem Glauben für öffentliches Recht streitet.” — J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 1868, 288, para.512.

a party which pursues state objectives and which is organized like a state authority should be treated more like a belligerent than as a group of criminals. Such a party has a natural right to be treated like a state army in the moment it is strong enough to hold its own as a public power analogous to the state authorities, to guarantee order through its military organization, and to demonstrate its aspirations to statehood through its political goals. In such a case" — thus went the core argument — "the dangers of the use of force will be mitigated not only for the party in question but also for its opponents. If, to the contrary, the party is simply punished under criminal law, the actual battle will degenerate accordingly and the danger exists that the two warring parties will sink into barbarity and attempt to outdo each other in the cruelty of their reprisals."¹⁵

The American Civil War had demonstrated to the contemporaries of *Bluntschli* how great the humanitarian necessity as well as the potentially civilizing result of such an approach were.¹⁶ The Civil War of 1861–1866, as the harbinger of modern "total war", had caused a higher death toll and more destruction than all the inter-state wars of 19th century. But with the so-called "Lieber-Code" of 1863, we owe to the Civil War the first attempt at codification of the hitherto purely customary laws of war.¹⁷

¹⁵ "Das Interesse der Humanität fordert, dass im Zweifel eine solche Partei eher als Kriegspartei, nicht als eine Masse von Verbrechern behandelt werde. Indem sie stark genug ist, sich als öffentliche Macht, analog der Statsmacht zu behaupten, durch ihre kriegsmässige Organisation auch Garantien der Ordnung gewährt, und durch ihre politischen Ziele ihr statliches Streben kund gibt, hat sie auch einen natürlichen Anspruch darauf, einem statlichen Heere ähnlich behandelt zu werden. Die Gefahren der Gewaltübung werden dann nicht bloss für sie selber, sondern ebenso für ihre Gegner ermässigt. Wird sie dagegen nur strafrechtlich verfolgt, so wird dadurch der thatsächliche Kampf verwildert und es ist Gefahr, daß die beiden streitenden Parteien in die Barbarei versinken und einander mit grausamen Repressalien zu überbieten suchen." — *Bluntschli*, see above, 288 para. 512, note 1.

¹⁶ See only J.M. McPherson, *Battle Cry Freedom*, 1988, in particular 774–830.

¹⁷ Concerning the Lieber Code cf. Best, see note 8, 155, 170 et seq. (with further references) and R.S. Hartigan, *Lieber's Code and the Law of War*, 1983, 48 et seq., but also R.R. Baxter, "Le premier effort moderne de codification du droit de la guerre: Francis Lieber et l'Ordonnance générale n° 100", *Rev. ICR* 45 (1963), 155 et seq., (217 et seq.): for the personality of Francis Lieber see in addition E. Nys, "Francis Lieber: His Life and his Work", *AJIL* 5 (1911), 84 et seq., (355 et seq.), and E. Root, "Francis Lieber", *AJIL* 7 (1913), 453 et seq.

The thinking in categories of sovereignty, however, which was carried to extremes in late 19th and early 20th century, made it an anathema to subject the combat against “rebels” to rules of public international law. The legal concept of recognition of belligerency became nearly totally obsolete, fell victim to “desuetudo” in state practice.¹⁸ The growing ideological nature of political conflict added a further factor of escalation (and barbarization).¹⁹ It became nearly unimaginable for state organs to accept — by recognizing rebellious factions as belligerents — at least de facto its legitimacy in the use of force.

The 20th century has delivered numerous examples of what extremes of cruelty, cynicism and barbarism “internal conflicts” can take that are left in a legal “grey zone”. The Russian Civil War, the Spanish Civil War, the civil wars in China, but also the civil war in Greece after 1945 prove strikingly the plausibility of the natural law argument that any legal approach will necessarily contribute to the degeneration of warfare which is based only on legal categories of rebellion and high treason.²⁰ In basing itself decisively on such arguments, lawyers will finally aggravate the danger “that the two warring factions will lapse into barbarity”. Not only the combatants but also the civil population linked to the opposite party or ruled by it will be perceived all too easily as being nothing but “traitors” of the “true national cause”, criminals who have forfeited any right to respect and protection and which deserve nothing but a “short process”.

II. Geneva Red Cross Conventions of 1949 and the Additional Protocols of 1977

The ICRC (International Committee of the Red Cross) after 1945 accordingly has endeavoured several times to place under the rules of the international laws of war both humanitarian law and the gravest cases of civil wars, i.e. the (qualified) civil wars that are fought between state-like entities.²¹ The reasoning for these attempts resembles the humanitarian

¹⁸ See R.W. Gomulkiewicz, “International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency”, *Wash. L.Rev.* 63 (1988), 43 et seq., (47).

¹⁹ For the links between the ideological nature of political conflict and the rise of “total war” cf. Best, see note 8, 216 et seq.

²⁰ See the case studies in R. Falk (ed.), *The International Law of Civil War*, 1971.

²¹ For the history of the various attempts undertaken by the ICRC to reform the international humanitarian laws of civil war see R. Abi-Saab, *Droit humanitaire et conflits internes. Origines et évolution de la règle-*

arguments used by natural law authors like Bluntschli. All these attempts, however, have failed disastrously. The overwhelming majority of states opposed decidedly against any such endeavour.²² Practically no state was prepared to become bound in its operations of conquering and subjecting rebels by the full application of the legal safeguards of the The Hague and Geneva Conventions. The political rationale behind this resistance is easily to discern: When the four Geneva Conventions were prepared and negotiated, at the end of the 1940s, practically all the major European powers were involved in series of colonial insurrections, in the suppression of which they sought to keep free hands.²³ In the 1970s, at the Diplomatic Conference drafting the Additional Protocols to the Geneva Conventions, the dominant majority of Third World states, for their part contained a large number of states currently or imminently threatened by civil war.²⁴ Preservation of power in these states, however, would have been endangered by too far-reaching restrictions of the use of force in internal conflicts.

When the attempts failed to declare the bulk of humanitarian law in its entirety to be applicable to internal conflicts, an alternative path had to be found to secure at least a certain minimum of international legal rules regulating the use of force in civil wars. Common Article 3 to the Geneva Conventions of 1949 was the main answer to this challenge. Instead of extending the legal rules for international armed conflict to “non-international armed conflicts”, as originally intended by the ICRC, the negotiators developed their own body of rules specifically adapted to civil war situations.²⁵ This separate body of rules took the form of a minimum standard that restricts the freedom of states to use force against civil war

mentation internationale, 1986, 30 et seq., 43 et seq., 75 et seq., 91 et seq.; G. Best, *War and Law since 1945*, 1994, 80 et seq., (168–169).

²² Concerning the history of the Geneva Diplomatic Conference of 1949 cf. Best, see above, 99 et seq., 169 et seq.; Abi-Saab, see above, 50 et seq.

²³ Best, see note 21, 89 et seq., 170 et seq.; Abi-Saab, see note 21, 52 et seq.

²⁴ On the history of the Diplomatic Conference 1974–1977 cf. Best, see note 21, 414 et seq.; S.-S. Junod, “General Introduction to Protocol II”, in: Y. Sandoz /C. Swinarski/B. Zimmermann (eds.), *ICRC-Commentary on the Additional Protocols to the Geneva Conventions*, 1987, 1326 et seq.; Abi-Saab, see note 21, 131 et seq.; M. Bothe/K.-J. Partsch/W.A. Solf, *New Rules for Victims of Armed Conflicts*, 1982, 604 et seq.; O. Kimminich, *Der Schutz der Menschen in bewaffneten Konflikten. Zur Fortentwicklung des Humanitären Völkerrechts*, 1979, 60 et seq.; M. Bothe/K. Ipsen/K.J. Partsch, “Die Konferenz über humanitäres Völkerrecht — Verlauf und Ergebnisse”, *ZaöRV* 38 (1978), 1 et seq.

²⁵ Best, see note 21, 174 et seq.; Abi-Saab, see note 21, 55 et seq.

opponents by guaranteeing a series of safeguards for wounded, prisoners and members of the civilian population.²⁶

The decisive passage of common Article 3 (para.1) reads as follows:

“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 the 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) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The cited provision bears — as a simple reading already makes obvious — to an amazing degree characteristics of a human rights provision;²⁷ it also corresponds as a complementary special rule to the emergency provisions of the human rights covenants and its laying down of an emergency-proof core of non-derogatory guarantees.²⁸ What is regulated by common Ar-

²⁶ Concerning the safeguards provided for by common Article 3 see, in particular, the commentaries to the four Geneva Conventions edited by Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, 1952-60; cf. also Best, see note 21, 174 et seq.; Abi-Saab, see note 21, 67 et seq.

²⁷ For the structural similarity between common Article 3 and the human rights instruments cf. e.g. Allen/Cherniack/Andreopoulos, see note 2, 753, but also Best, see note 21, 178.

²⁸ For the intricate relationship between humanitarian law (in particular concerning internal conflicts) and human rights law (in particular as

ticle 3 is not the behaviour of states (or contracting parties) in their reciprocal relationship, but the behaviour of states in their own sphere of jurisdiction.

It is the territorial state bound as a contracting party which is made responsible as an addressee of the provision — as it is the case with genuine human rights guarantees, the other parties to the conflict, the insurgents, are covered by common Article 3 only indirectly.²⁹ Recent developments, however, have given a slightly different accent to the question who is bound, and how, by common Article 3. In recent decisions the ICJ has declared the principles laid down in common Article 3 to be a constituent part of customary international law,³⁰ if not even part of the core of so-called “ius cogens”, one could also say: of international “ordre public”.

The safeguards of common Article 3 have been characterized as some sort of “Red Cross-Convention in miniature”, a “miniature Bill of Rights for those who are the victims of internal conflict”.³¹ There is some truth in this characterization. The provisions of common Article 3 lay down the most important fundamental principles of the laws on means and methods of warfare — principle of distinction between combatants and civilian population, prohibition of indiscriminate warfare, protection of wounded and captured enemy combatants — in a short formula adapted to civil war situations. Accordingly, it is possible to perceive the provision as an independent minimum codification of humanitarian law in internal armed conflicts.³²

concerns the non-derogable minimum guarantees) see T. Meron, *Human Rights in Internal Strife*, 1987, 14 et seq., in particular 23–26.

²⁹ On the problem whether and how the insurgents are bound by international humanitarian law see e.g. A. Mangas Martín, *Conflictos armados internos y derecho internacional humanitario*, 1990, 78 et seq.; M. Bothe, “Conflits armés internes et droit international humanitaire”, *RGDIP* 82 (1978), 82 et seq., (92–93); R.R. Baxter, “Ius in Bello Interno: The Present and Future Law”, in: J.N. Moore (ed.), *Law and Civil War in the Modern World*, 1974, 518, (527–528).

³⁰ ICJ - Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq. (114); see also the report of Walter Kälin, Special Rapporteur of the Commission on Human Rights, concerning the situation of human rights in Kuwait under Iraqi occupation, Doc. E/CN.4/1992/26 of 16 January 1992, 10/11 (paras.35–38) and S.M. Schwebel, “The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law”, *N.Y.U. J. Int'l L. & Pol.* 27 (1996), 731, (741 et seq.).

³¹ Cf. Baxter, see note 29, 520.

³² On the interesting question whether common Article 3 really corresponds in its entirety to customary law see the critical remarks of T.

One should not overlook, however, that decisive parts of the protective package are lacking in this minimum standard, parts which are constituent for the ordinary humanitarian law. There are neither any provisions on combatant status, to which the traditional immunity towards criminal prosecution for acts of participation in combat operations refers, nor any war crimes provisions on “grave breaches” contained in common Article 3.³³ What is lacking even more is any trace of an autonomous system of implementation of the guarantees enshrined in common Article 3.³⁴

This deficit has not really been changed by Additional Protocol II of 1977 relating to the protection of victims of non-international armed conflicts. After the renewed attempt of the ICRC had failed to achieve the complete application of the rules of The Hague and Geneva law for at least some specific (qualified) internal conflicts,³⁵ one had to accept at the Diplomatic Conference that only some sort of a face-saving minimum project could be the outcome of the negotiations.³⁶ If one dares to take a closer look at the result of these negotiations, i.e. Additional Protocol II, one discovers the resulting protocol to be a strange torso. What has been preserved from the initial project of the ICRC (entire application of the laws of war to certain non-international armed conflicts) is the formula defining the scope of application of Additional Protocol II. The threshold of application is much higher than that of common Article 3 — instead of a simple reference to the existence of a “non-international armed conflict”

Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, 32 et seq.; see also F. Kalshoven, “Arms, Armaments and International Law”, *RdC* 191 (1985), 183 et seq., (295–296); D. Plattner, “La Convention de 1980 sur les armes classiques et l’applicabilité de règles relatives aux moyens de combat dans un conflit armé non-international”, *Rev. ICR* 72 (1990), 605 et seq.; J.G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, 1993, 164 et seq.; R.K. Goldman, “International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts”, *Am. U.J. Int’l L. & Pol’y* 9 (1993), 49 et seq., (61–62).

³³ For the role and importance of the provisions on “grave breaches” in the system of enforcement of the Geneva Conventions, see R. Wolfrum, “Enforcement of International Humanitarian Law”, in: D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, 1995, 517 et seq., (528 et seq.); on the general extent of criminal prosecution for violations of humanitarian law cf. Best, see note 21, 393 et seq.

³⁴ On the general means of implementation of humanitarian law cf. e.g. Wolfrum, see above, 517 et seq. (with further references).

³⁵ On the initial proposal of the ICRC see Abi-Saab, see note 21, 106 et seq., and Bothe/Partsch/Solf, see note 24, 604.

³⁶ Abi-Saab, see note 21, 133–134, 138 et seq.

Article 1 of Additional Protocol II requires a conflict between state-like actors.³⁷ The formula provided for in Additional Protocol II is reminiscent of the formula used by Bluntschli (cited above) in order to delimit the degree of state-like organization of insurgents needed to place a civil war under the laws of war. Article 1 Additional Protocol II refers to armed conflicts

“...which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

In its substantive part, however, which defines the specific safeguards applicable in “non-international armed conflicts” covered by Additional Protocol II, the Protocol is extremely poor: Essentially, it is not much more than an attempt to give a bit more emphasis and differentiation to the traditional protection of civilians, wounded and captured than was afforded already by common Article 3.³⁸ Nonetheless, such a general assessment highlighting the lack of real progress aimed at the initial projects of Additional Protocol II should not be misunderstood as total disdain for Additional Protocol II. Additional Protocol II undoubtedly represents a certain, even if only very modest, progress towards the traditional state of law since it clarifies and gives precision to some elementary principles until now contained only implicitly in common Article 3.³⁹ In particular, Part IV with the provisions on the protection of the civilian population needs mentioning as an important step towards laying down detailed and precise rules which give concrete shape to the elementary “considerations of humanity” in situations of civil war.⁴⁰ Part IV of Additional Protocol II

³⁷ Abi-Saab, see note 21, 143 et seq.; cf. also the conference material exposed in H.S. Levie (ed.), *The Law of Non-International Armed Conflict. Protocol II to the 1949 Geneva Conventions*, 1987, 23 et seq. and the commentary on Article 1 Additional Protocol II offered by S.-S. Junod, in: Sandoz/Swinarski/Zimmermann, see note 24, 1350 et seq.

³⁸ Abi-Saab, see note 21, 163.

³⁹ Even the most ardent critics of the Protocol II admit that it still constitutes a relative, although minor, progress — see e.g. Abi-Saab, see note 21, 163–182, 192–93.

⁴⁰ See only S.-S. Junod, “Introduction to Part IV of Protocol II”, in: *ICRC-Commentary on the Additional Protocols to the Geneva Conventions*, 1987, 1443 et seq., and W.A. Solf, “Introduction to Part IV of Protocol II”, in: Bothe/Partsch/Solf, see note 24, 667 et seq.

contains an explicit prohibition of indiscriminate attacks in Article 13, a provision granting protection for "objects indispensable to the survival of the civilian population" in Article 14, which in consequence also outlaws starvation of the civilian population as a method of warfare (and in the final result also strategies of scorched earth),⁴¹ as well as a provision on the protection of cultural objects and places of worship in Article 16 and a provision which, in principle, prohibits forced displacements of the civilian population from its places of inhabitancy.⁴² The traditional weaknesses of the humanitarian law, for civil wars, however, have not been cured, like the striking lack of any sensible mechanism of implementation.⁴³ Indeed, some important recent conventions on humanitarian law like the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be deemed to be Excessively Injurious or to have Indiscriminate Effects (of 10 October 1980-ILM 19 (1980), 1523 et seq.) with its Protocol II concerning land mines, have altogether excluded non-international armed conflicts from its scope of application.⁴⁴ Only the most recent conference on revision of the above mentioned Weapons Convention has brought the prospect that in future internal conflicts will

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- ⁴¹ See the commentary on Article 14 Additional Protocol II by S.-S. Junod, *ibid.*, 1455 et seq.; see also W.A. Solf, "Siege", in: R. Bernhardt (ed.), *EPIL* 4 (1982), 226 et seq. (226–227), and Y. Dinstein, "Siege, Warfare and the Starvation of Civilians", in: A.J.M. Delissen/G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven*, 1991, 145 et seq.
- ⁴² In view of recent practices of "ethnic cleansing" the prohibition of forced displacements of the civilian population bears an utmost importance — see only S.-S. Junod, "Commentary to Art. 17 Protocol II", *ibid.*, 1471 et seq.; W.A. Solf, "Commentary to Art.17 Protocol II", in: Bothe/Partsch/Solf, see note 24, 689 et seq.; C. Meindersma, "Legal Issues Surrounding Population Transfers in Internal Conflict Situations", *NILR* 41 (1994), 31 et seq.; N. Lerner, "Ethnic Cleansing", *Isr. Y.B. Hum. Rts.* 24 (1994), 103 et seq.
- ⁴³ See Abi-Saab, see note 21, 182–183, and G.I.A.D. Draper, "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978", *RdC* 164 (1979), 1 et seq., (49–50).
- ⁴⁴ Concerning the 1980 Weapons Convention and its protocols see B.M. Carnahan, "The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons", *Mil. L. Rev.* 105 (1984), 73 et seq.; A.P.V. Rogers, "Mines, pièges et autres dispositifs similaires", *Rev. ICR* 72 (1990), 568 et seq.; W.J. Fenrick, "New Development in the Law Concerning the Use of Conventional Weapons in Armed Conflict", *CYIL* 19 (1981), 229 et seq.

be included in the field of application of the Weapons Convention and its Protocols.⁴⁵

III. Structural Problems: The Question of Combatant Status

If one dares to take a closer look, the current state of humanitarian law concerning the limits of the use of force in civil war thus proves to be a torso, a project of “civilizing” the use of military force that has got stuck half-way.⁴⁶ It does not take a great deal of imagination to find the reasons for such blockade. It is not only practical questions that lie behind it. Sadly enough, there exist serious structural reasons why any extension to civil wars of the whole body of rules that humanitarian law has developed for the use of belligerent force in international conflicts meets almost insurmountable obstacles.⁴⁷

The full application of the rules on combatant status and on the protection of prisoners of war is practically incompatible with the basic legal

⁴⁵ On the debates held at the Review Conference in 1995/96 see K. Dörmann, “The First Review Conference to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects — A Story of Failure?”, *HuV-I* 8 (1995), 203 et seq., and T. Küchenmeister, “Ächtung von Landminen wird eine Illusion bleiben. Zum Verlauf der UN-Landminenkonferenz”, *Friedens-Warte* 1996, 27 et seq. On the results reached in May 1996, which included i.a. an extension of the applicability of the Mine Protocol to non-international armed conflicts, see *Neue Zürcher Zeitung* of May 4/5, 1996, 2: “Zwiespältiges Ende der Genfer Minenkonferenz. Einigung auf ein Protokoll mit verschärften Bestimmungen”.

⁴⁶ As a general assessment of the current laws of internal conflict see A. Cassese, “La guerre civile et le droit international”, *RGDIP* 90 (1986), 553 et seq.; H.-P. Gasser, “Armed Conflict within the Territory of a State”, in: *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler*, 1989, 225 et seq.; R.S. Myren, “Applying International Laws of War to Non-International Armed Conflicts: Past Attempts, Future Strategies”, *NILR* 37 (1990), 347 et seq.; Mangas Martín, see note 29, 81 et seq., 103 et seq., 169 et seq.; L. Lopez, “Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts”, *N.Y.U. L.Rev.* 69 (1994), 916 et seq.

⁴⁷ See, in particular, W.A. Solf, “Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict”, *Ga. J. Int'l & Comp. L.* 13 (1983), 291 et seq.

asymmetry between state organs and insurgents which traditionally was always perceived as indispensable for the state's mission of preserving order and peace.⁴⁸ No state will easily dispense with such differentiation between public organs legally using force and "rebels" punishable for their illegal recourse to arms, if it wishes not to endanger its peace preserving function. The monopoly of legal use of force enjoyed by the state, and the ensuing criminal responsibility for any act of armed resistance against the state's law enforcement organs, is an essential of statehood, a fundamental condition of any modern legal order based on the exclusion of forcible self-help.⁴⁹

At the same time, however, the long-standing debate of international lawyers concerning the problem of "wars of national liberation"⁵⁰ points to the fact that the formal qualification of a power structure as a recognized state authority does not really answer the linked question of legitimacy of such an authority in the eyes of the people concerned.⁵¹ The world is full of dictatorial regimes the representativeness (and legitimacy) of which is more than dubious and the power of which rests more on brute force than on consent of the governed. Seen from that perspective, civil war is not necessarily only a mere disturbance of the internal order of a state; it may at the same time be some — even if rather extreme and rather bloodthirsty — form of exercising the right of self-determination, in the reshaping of the state's internal order.⁵² The prohibition of intervention and the protection of the "domaine réservé" — even in cases of civil war — thus

⁴⁸ See Best, see note 21, 172 et seq., and Baxter, see note 29, 529–531.

⁴⁹ For such classical argument, see only Max Weber with his "sociology of the state" — M. Weber, *Staatssoziologie* (ed. by J. Winckelmann), 2nd edition 1966, 27 et seq. See also Baxter, see note 29, 526 et seq.

⁵⁰ See only the extensive monographs of C. Koenig, *Der nationale Befreiungskrieg im modernen humanitären Völkerrecht*, 1988, and H.A. Wilson, *International Law and the Use of Force by National Liberation Movements*, 1988 (both with further references).

⁵¹ On the decisive role of questions of legitimacy for the international system see the brilliant book of T.M. Franck, *The Power of Legitimacy Among Nations*, 1990, in particular 14 et seq., 41 et seq., 150 et seq., 208 et seq.

⁵² A convincing argument in that sense is to be found e.g. in the seminal book of Lombardi, see note 9, 343 et seq.; as a critique of this line of argument, however, see M. Herdegen, "Der Wegfall effektiver Staatsgewalt: 'The Failed State'", in: D. Thürer/M. Herdegen/G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State'*, Reports DGVN 34 (1996), 49 et seq., (64–65).

perform an important task in international law and have a strong jurisprudential rationale.⁵³

From this basic remark follows a consequential problem: The legal consolidation of the state's monopoly of power is linked to some basic precondition, namely the existence of an effective order securing peace inside the society. If the state loses its pacificatory function in the wake of inner-societal violent conflicts and an escalation to civil war, the argued need to preserve the monopoly of power loses its convincing force. If there exist several entities organized like a state with their own zones of territorially consolidated jurisdiction, the situation changes fundamentally. Once again Vattel may be cited with a basic insight: "Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. Of necessity, therefore, these two parties must be regarded as forming thenceforth, for a time at least, two separate bodies politic, two distinct Nations. Although one of the two parties may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are none the less divided in fact."⁵⁴

A civil war which has flared up to full intensity is in itself a sign of serious deficiencies in the legitimacy of the respective state.⁵⁵ In addition, the citizens of such a state end up in the embarrassing situation that with the existence of concurring power structures they are usually forced to collaborate with the party controlling the territory on which they live, if they are not outrightly recruited by force in order to participate in the combat operations as a combatant. Threatening these people with criminal liability for its participation in the fighting becomes nearly impossible. It no longer makes sense to implement the sanctions for "rebellion" against individual fighters of adverse civil war parties. Accordingly, civil wars usually end with a far-reaching amnesty for all the people involved in the fighting — a solution which is now generally recommended to the states by Article 6 Additional Protocol II as a surrogate for the missing status of combatancy in internal armed conflicts.⁵⁶

⁵³ As to the philosophical and jurisprudential arguments for the principle of non-intervention see M. Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 1977, 86 et seq.; see also, as a classic, J. Vincent, *Non-intervention and International Order*, 1976.

⁵⁴ Vattel, see note 1, 338, para. 293.

⁵⁵ The point is convincingly made by Lombardi, see note 9, 343–344.

⁵⁶ On the role of amnesties as a means of restoring order at the end of civil wars see in particular W.M. Reisman, "Institutions and Practices for Restoring and Maintaining Public Order", *Duke J. Comp. & Int'l L.* 6

Such a solution makes a lot of sense.⁵⁷ Much more convincing under the perspective of legal policy, however, would be a general rule analogous to the principle of criminal immunity of combatants in the traditional laws of war, a rule which would exempt participants in a civil war from criminal liability for mere participation in the combat if the conflict is beyond a certain threshold of intensity.⁵⁸

IV. Structural Problems: The Deficiencies in Implementation

There is a second deficiency which carries even more weight than the failure to find a consensus on combatant immunity — the complete lack of any institutionalized form of implementation mechanism that is characteristic for the body of rules applicable to internal conflicts. None of the instruments of an independent procedure of implementation contained in the Geneva Conventions system is applicable in situations of civil war.⁵⁹ Even the very elementary — and very traditional — implementation mechanism which lies in the individual criminal responsibility of participants, in particular of responsible commanders, for “grave breaches” of the Geneva Conventions and the Additional Protocols is not applicable.⁶⁰ The states deliberately prevented these rules from being applied to civil war situations — the majority of states obviously was afraid of such a system of individual responsibility of soldiers and politicians. As an

(1995), 175 et seq., 178 et seq.

⁵⁷ For an analysis of amnesties as a technique for restoring internal public order see e.g. Reisman, see above, 178–179; see also F. Domb, “Treatment of War Crimes in Peace Settlements — Prosecution or Amnesty?”, *Isr. Y.B. Hum. Rts.* 24 (1994), 253 et seq.

⁵⁸ For the traditional arguments against such a solution, however, see Baxter, see note 29, 526–527.

⁵⁹ On the weakness of the implementation mechanisms linked to the international legal regime of internal conflict see Mangas Martín, see note 29, 158 et seq., and Draper, see note 43, 25–28, 49–50.

⁶⁰ As to the system of repression of “grave breaches” under the Geneva Conventions and its Additional Protocol I see J.J.E. Schutte, “The system of repression of breaches of Additional Protocol I”, in: *Essays in Honour of Frits Kalshoven*, see note 41, 177 et seq.; C. van den Wyngaert, “The suppression of war crimes under Additional Protocol I”, *ibid.*, 197 et seq.; W. Solf/E.R. Cumming, “A Survey of Penal Sanctions under Protocol I to the Geneva Convention of August 12, 1949”, *Case W. Res. J. Int’l L.* 9 (1977), 205 et seq.

illustration from recent practice of such an in-built resistance, the special agreements according to common Article 3 para.3 of the Geneva Conventions might be cited, which were concluded — with the help of the ICRC as an intermediary — between the different parties to the conflict in Bosnia and Herzegovina.⁶¹ The parties to the conflict explicitly obliged themselves in these agreements to abide by the rules of the Geneva Conventions — except the rules on individual criminal responsibility of soldiers and commanders which were deliberately excluded from the agreement. In the light of what we have learnt in the meantime on the tragic events in Bosnia and Herzegovina,⁶² it is not difficult to grasp the motives which lay behind the omission for which in particular the Serbian side had so decidedly fought.

It is more than doubtful, however, whether the fact that in the regulatory framework of common Article 3 and Additional Protocol II there are no specific provisions on criminal responsibility for “grave breaches”, i.e. war crimes, really means that there is no criminal responsibility for any respective atrocities.⁶³ According to all the national criminal codes cases of arbitrary killings, of torture, rape and wanton destruction of civilian property are criminal acts anyway, even if such criminal responsibility

⁶¹ See in detail Y. Sandoz, “Réflexions sur la mise en oeuvre du droit international humanitaire et sur la rôle du Comité international de la Croix-Rouge en ex-Yougoslavie”, *SZIER/RSDIE* 3 (1993), 461 et seq., (468 et seq.); on the disputed qualification of the conflict — whether it is of an international or non-international character — see also A. Tanca, “Sulla qualificazione del conflitto nella ex Iugoslavia”, *Riv. Dir. Int.* 76 (1993), 37 et seq.; C.L. Nier III, “The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World”, *Dick. J. Int’l L.* 10 (1992), 303 et seq.; S. Oeter, “Kriegsverbrechen in den Konflikten um das Erbe Jugoslawiens. Ein Beitrag zu den Fragen der kollektiven und individuellen Verantwortlichkeit für Verletzungen des Humanitären Völkerrechts”, *ZaöRV* 53 (1993), 1 et seq., (6 et seq., 17 et seq.).

⁶² The literature on the war crimes committed in ex-Yugoslavia is extremely rich; the author would like to refer to his previous study on the question, see above, 2 et seq., which contains a series of further references; in addition, see the extensive Helsinki Watch Report “*War Crimes in Bosnia-Herzegovina*”, 1992.

⁶³ See — as the traditional viewpoint on the question — D. Plattner, “La répression pénale des violations du droit international humanitaire applicable aux conflits armés non internationaux”, *Rev. ICR* 72 (1990), 443 et seq., and Oeter, see note 61, 30 et seq.: see also, however, M. Bothe, “War Crimes in Non-International Armed Conflicts”, *Isr. Y.B. Hum. Rts.* 24 (1994), 241 et seq.

usually will not become practicable as long as the regime prevailing in a country that had at least favoured such atrocities has not changed. But the mainly theoretical criminal responsibility under national criminal law clarifies at least one point: in principle it is beyond doubt that atrocities, acts of wanton violence in civil war are abhorred by the international community and deserve penalties.⁶⁴

Under public international law it remained disputed for a long time whether atrocities in internal conflicts, disregarding the "elementary considerations of humanity" laid down in common Article 3, could be brought under concepts of international criminal responsibility (with the ensuing international competence to initiate criminal proceedings outside national jurisdiction).⁶⁵ The statute of the International Criminal Tribunal for the former Yugoslavia handed down by the Security Council,⁶⁶ and even more clearly the parallel statute of the Rwanda-Tribunal,⁶⁷ now obviously depart from the presumption that such an international criminal responsibility exists.⁶⁸ Where such individual responsibility could be

⁶⁴ See T. Meron, "International Criminalization of Internal Atrocities", *AJIL* 89 (1995), 554 et seq., (561-565).

⁶⁵ But see now the brilliant analysis of the problem delivered by T. Meron, see above, 554 et seq., and also Bothe, see note 63, at 246 et seq.

⁶⁶ Concerning the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia" see S/RES/808 (1993) of 22 February 1993 and the Report of the Secretary-General pursuant to Paragraph 2 of S/RES/ 808, Doc. S/25704 of 3 May 1993, as well as S/RES/827 (1993) of 25 May 1993, which adopted the statute of the Tribunal.

⁶⁷ Concerning the Tribunal for Rwanda see S/RES/955 (1994) of 8 November 1994.

⁶⁸ See J.C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *AJIL* 87 (1993), 639 et seq., (647), and T. Meron, "War Crimes in Yugoslavia and the Development of International Law", *AJIL* 88 (1994), 78 et seq., (82-83). On the differences in legal qualification of the conflicts in former Yugoslavia see also J. Paust, "Applicability of International Criminal Laws to Events in the Former Yugoslavia", *Am. U. J. Int'l L. & Pol'y* 9 (1994), 499 et seq.; R. Wedgwood, "War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal", *Va. J. Int'l L.* 34 (1994), 267 et seq.; A. Pellet, "Le Tribunal criminel international pour l'ex-Yougoslavie", *RGDIP* 98 (1994), 7 et seq.; C.C. Joyner, "Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal", *Den. J. Int'l L. & Pol'y* 22 (1994), 235 et seq.; D. Shraga/R. Zacklin, "The International Criminal Tribunal for the Former

legally anchored, it must be admitted, is not easily to discern. Either the traditional legal institute of "war crimes" must be detached from its classical foundation, the international armed conflict, and be extended to civil wars.⁶⁹ It is extremely difficult, if not impossible, however, to furnish evidence "de lege artis" that such an extension of the institute of war crimes to civil war has taken place in state practice; there is an evident lack of relevant precedents, which would justify the claim that there has developed a body of respective customary law. The ILC has suggested such an extension of "war crimes" at least "de lege ferenda" in its projects on a "Draft Code of Crimes Against the Peace and Security of Mankind."⁷⁰ But alternatively one could consider a criminal responsibility for "grave

Yugoslavia", *EJIL* 5 (1994), 360 et seq.; B. Broms, "The Establishment of an International Criminal Court", *Isr. Y.B. Hum. Rts.* 24 (1994), 135 et seq.

⁶⁹ Meron, see note 64, 559 et seq., 574 et seq., and C. Meindersma, "Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War Under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia", *NILR* 42 (1995), 375 et seq. In the same direction goes the decision on jurisdiction of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia of 2 October 1995 in the Tadic case, see Prosecutor v. Tadic, Case IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), 53-71, paras. 96-136; see also the critical remarks concerning this decision made by G.H. Aldrich, "Jurisdiction of the International Criminal Tribunal for Former Yugoslavia", *AJIL* 90 (1996), 64 et seq., (67-68), and the interesting comments on the legal basis of the Prosecutor's indictments by W.J. Fenrick, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia", *Duke J. Comp. & Int'l L.* 6 (1995), 103, (104 et seq.).

⁷⁰ See Report of the ILC on the work of the forty-third session, GAOR 46th Sess., Suppl. 10, Doc. A/46/10 (1991), 238 et seq. For an account of the earlier work on these issues, see Report of the ILC on the work of its forty-second session, GAOR 45th Sess., Suppl. No. 10, Doc. A/45/10, paras. 93-157. Compare also the most recent Report, Doc. A/51/332 of 30 July 1996. See also C. Bassiouni, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 1993; L.C. Green, "Crimes under the I.L.C. 1991 Draft Code", *Isr. Y.B. Hum. Rts.* 24 (1994), 19 et seq.; J. Crawford, "The ILC Adopts a Statute for an International Criminal Court", *AJIL* 89 (1995), 404 et seq.; C. Tomuschat, "Zum Entwurf des Statuts eines ständigen Internationalen Strafgerichtshofs (Draft Statute for an International Criminal Court)", *Friedens-Warte* 70 (1995), 99 et seq.; T.L.H. McCormack/G.J. Simpson, "A New International Criminal Law Regime?", *NILR* 42 (1995), 177 et seq.

breaches” of humanitarian law in internal conflicts derived from “crimes against humanity.”⁷¹

One may ask why the problem of implementation is placed so much in the foreground in these considerations. The answer is simple: Questions of implementation prove to be of utmost importance for the problems dealt with here, because the trend to an essential convergence between rules of humanitarian law and the safeguards of human rights law has detached the laws of war more and more from its traditional mechanisms of implementation. Initially the laws of war had developed as a system of consolidating expectations of reciprocity, as some sort of an institutionalized attitude of the military profession, how an honourable soldier would behave in a certain situation.⁷² Its obliging force the “customs of war” grew from a fear of losing honour which became linked to the development of a fixed code of honour, but also from a banal anticipation of reciprocity which caused soldiers to expect a loss of their own protection in case of disregard for the protection afforded to the enemy by the laws of war. Even in World War II military lawyers could prevent some violations of the laws and customs of war on the basis of such simple, sometimes rather crude expectations of reciprocity. This is demonstrated by the files of the legal counsel to the German Supreme Command, which have been published (at least partially) in the meantime.⁷³

Modern humanitarian law has thrust into the background the reciprocal character of the regulatory framework of the laws of war.⁷⁴ The impetus for such move is primarily due to humanitarian considerations. The

⁷¹ Concerning the applicability of “crimes against humanity” in internal armed conflicts see C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, 257 et seq.; O’Brien, see note 68, 649–650; Meron, see note 68, 85–87; C. Bassiouni, “Crimes Against Humanity: The Need for a Specialized Convention”, *Colum. J. Transnat’l L.* 31 (1994), 457 et seq. See also the UN Secretary-General’s report pursuant to Paragraph 2 of S/RES/808, Doc. S/25704, para.47.

⁷² See only W.G. Grewe, *Epochen der Völkerrechtsgeschichte*, 1984, 141 et seq., and G.I.A.D. Draper, “Le développement du droit international humanitaire”, in: UNESCO/Institut Henri Dunant (eds.), *Les dimensions internationales du droit humanitaire*, 1986, 89 et seq.

⁷³ See e.g. the documents published by G. van Roon (ed.), *Helmuth James Graf von Moltke. Völkerrecht im Dienste des Menschen*, 1986, 213 et seq., 249 et seq., (253, 269–270).

⁷⁴ See F. Kalshoven, *Belligerent Reprisals*, 1971, 5 et seq., 263 et seq., and R. Bierzanek, “Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law”, in: A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, 1979, 232, at 241 et seq.

prohibitions of reprisals codified in the Geneva Conventions and in particular in the Additional Protocol I have not left much from the old reciprocity.⁷⁵ From a purely humanitarian perspective such an evolution undoubtedly has to be welcomed, since the traditional law of reprisals always gave rise to serious abuses, with terrible consequences for the people concerned, in particular the civilian population.⁷⁶

The consequences of such a human rights oriented transformation of the laws of war are grave, however.⁷⁷ The more direct expectations of reciprocity recede into the background, the more humanitarian law becomes dependent on specific mechanisms of implementation, on an institutionalized capacity of the international community⁷⁸ to act, which could offer the basis for attempts to enforce compliance with the minimum standards of humanitarian law.⁷⁹ This is particularly true for norms intended from the beginning for situations of an extreme asymmetry of power, like human rights — and also the rules of humanitarian law for internal conflicts, which are construed to a large degree like human rights safeguards.⁸⁰

⁷⁵ This constitutes one of the most criticized moves of Additional Protocol I, see the critique expressed by C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", *NYIL* 20 (1989), 35 et seq.; F.J. Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions 1949", *ICLQ* 37 (1988), 818 et seq.; G.B. Roberts, "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I", *Va. J. Int'l L.* 26 (1985), 109, (143–44); as a (convincing) response to this criticism see Kalshoven, "Belligerent Reprisals Revisited", *NYIL* 21 (1990), 43, at 53 et seq.

⁷⁶ Kalshoven, see note 74, 367 et seq.; Bierzanek, see note 74, 237 et seq.; Kalshoven, see note 75, 45 et seq.

⁷⁷ See only G. Best, see note 21, 392–393 (with further references), and Draper, see note 43, at 35.

⁷⁸ For a careful analysis of the sociological and legal meaning of the term "international community" see C. Tomuschat, "Obligations Arising for States without or against their Will", *RdC* 241 (1993), 195 et seq., (216 et seq.).

⁷⁹ For the problems of implementation of humanitarian law see M. Bothe, "National Implementation of International Humanitarian Law — Basic Issues", in: M. Bothe/P. Macalister-Smith/T. Kurzidem (eds.), *National Implementation of International Humanitarian Law*, 1990, 261 et seq.

⁸⁰ Adam Roberts in a recent contribution rightly speaks of the "merging" of human rights law with the laws of war as "one of the most significant developments in this field in recent decades" — A. Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts", *Duke J. of Comp. & Int'l L.* 6 (1995), 11 et seq., (15).

The international community has, unfortunately, proven deficient in the formation of an implementing mechanism which really could function. This is true for the regulation of the use of force in cases of civil war, but it is also true still for the regulatory framework of the classical case of international armed conflicts.⁸¹ Accordingly, humanitarian law threatens to become a collection of merely symbolic norms. To complain about this danger should not be seen as misjudging the value of symbolic rules: in the consolidation and reaffirmation of legal conscience such norms play an important role. If public international lawyers, however, take seriously international law's demand of preserving order in the world community, they must set limits on the use of military force in wars as well as in civil wars, and not only on a symbolic level, but also on a practical level. International law must endeavour to implement and enforce these rules, if it wants to be taken seriously as a discipline of law, and may not restrict itself to merely symbolic or programmatic rhetoric.

V. United Nations Forces and Humanitarian Law

Intervention in civil wars by the United Nations might seem to look like a solution to the problem of implementation described above. Activities to end civil wars have been developed by the organization for decades.⁸² For a long time restricted to "peace-keeping" in the traditional sense, i.e. "blue helmets" operating as a neutral buffer force with the consent of the parties concerned, the United Nations nevertheless managed to build up a significant role in ending civil wars by negotiated peace accords, by securing armistice agreements and implementing the details of complicated peace plans like the one in El Salvador⁸³. With the end of the Cold War and the significant shift in state practice which occurred in the aftermath, even "peace enforcement" in situations of civil war has become imaginable.⁸⁴ Somalia, Cambodia, Mozambique, Angola and, last but not least,

⁸¹ See only Roberts, see above, 11 et seq., in particular 70 et seq., and Draper, see note 43, at 51–52.

⁸² See D. Wipman, "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict", *Colum. Hum. Rts. L. Rev.* 27 (1996), 435, at 460 et seq., and, as an analysis of UN actions since its foundations, A. Parsons, *From Cold War to Hot Peace. UN Interventions 1947–1995*, 1995.

⁸³ On the peace plan successfully implemented in El Salvador see D. Holiday/W. Stanley, "Building the Peace: Preliminary Lessons from El Salvador", *J. Int'l Aff.* 46 (1993), 415 et seq.

⁸⁴ For the categorical differences between "peace-keeping" and "peace-en-

Bosnia and Herzegovina have been the most remarkable experiments in that regard.

Peace enforcement under the cover of an authorizing Security Council resolution under Chapter VII brings the activities of United Nations forces in civil war situations near to some sort of a police action.⁸⁵ The troops under United Nations control or at least mandated by the United Nations act — as Jost Delbrück has formulated — as “agents of the community of states in the ‘public interest’.”⁸⁶ They can easily be perceived as law enforcement organs of the international community preserving the community’s basic values, which undoubtedly comprise basic rights of the human person as protected by the minimum rules of common Article 3. Accordingly, there is an inherent temptation to assess the status of United Nations forces in parallelism to domestic law enforcement organs, arguing with some sort of a domestic law analogy: United Nations forces in such a situation thus would be the bearers of a monopoly of legitimate use of force; all the armed groups resisting the forces of the “international community” accordingly would be qualified as “rebels”, as criminals illegally exercising armed force against the law enforcement organs. United Nations organs, according to this approach, enjoy legal immunity against violence, notwithstanding the legal qualification of the relevant activity.

Such a legal argument, however, risks trapping the United Nations (and the international community) in the usual civil war dilemma of a law enforcement/rebel dichotomy. With the traditional peace-keeping forces, it is still easy to convey the legitimacy of the proclaimed immunity for United Nations military personnel. But peace-keeping forces in essence do not exercise functions of law enforcement. The ensuing thesis that “blue helmets” in peace-keeping operations are covered by the rules on “experts on mission” of the United Nations, makes sense. These forces do not use weapons — except in circumstances of personal self-defence — and they act mainly as a sort of (neutral) military observer and buffer force.⁸⁷

forcement” see the Secretary-General’s “Agenda for Peace”, Doc. A/47/277 = S/24111 of 17 June 1992, paras.15, 34–45.

⁸⁵ See for the “theory of global police action” T.M. Franck/F. Patel, “UN Police Action in Lieu of War: ‘The Old Order Changeth’”, *AJIL* 85 (1991), 63 et seq.

⁸⁶ J. Delbrück, “The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order”, in: J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System*, 1995, 135, (154).

⁸⁷ See H.-P. Gasser, “Humanitäres Völkerrecht und militärische Operationen der Vereinten Nationen zur Sicherung oder Schaffung des Frie-

Accordingly, peace-keeping personnel should be entitled to some special legal status under which, for example, any attack on them could be classified an offence against international law.⁸⁸ The Security Council has consistently reaffirmed such an approach by passing resolutions that require belligerents to respect the special status of UN peace-keeping forces.⁸⁹

In December 1994, the United Nations General Assembly approved the text of a Draft Convention on the Safety of United Nations and Associated Personnel that would explicitly extend the privileges and immunities of United Nations personnel to peace-keeping forces.⁹⁰ "Blue helmets" may not be made the object of an attack and may not be taken hostage. Violations of these immunities, according to the Draft Convention, should be prosecuted as offences by the states concerned⁹¹ and, even further, should be subject to an "extradite or prosecute" rule if the home state of the soldiers concerned wants to take over criminal prosecution.⁹²

The Draft Convention itself makes clear that it excludes military personnel engaged in operations of peace-enforcement. Its Article 2 para.2,

dens", *HuV-I* 8 (1995), 72 et seq., (73).

⁸⁸ See A. Roberts, see note 80, at 62.

⁸⁹ See, e.g., S/RES/758 (1992) of 8 June 1992, S/RES/764 (1992) of 13 July 1992, S/RES/770 (1992) of 13 August 1992.

⁹⁰ Published in: ILM 34 (1995), 484 et seq. As an analysis of the Draft Convention see also P. Kirsch, "The Convention on the Safety of United Nations and Associated Personnel", *Int'l Peacekeeping* 2 (1995), 102 et seq.; E.T. Bloom, "Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", *AJIL* 89 (1995), 621 et seq.; A. Bouvier, "Convention sur la sécurité du personnel des Nations Unies et du personnel associé: présentation et analyse", *Rev. ICR* 77 (1995), 695 et seq.; C. Emanuelli, "La Convention sur la sécurité du personnel des Nations Unies et du personnel associé: des rayons et des ombres", *RGDIP* 99 (1995), 849 et seq.

⁹¹ See Article 9 of the Draft Convention. According to Article 10, some states have an obligation to establish jurisdiction over those acts (when committed in their territory or by their nationals), others may establish jurisdiction if they so wish. Any state party must establish jurisdiction when the offender is present in its territory, if it chooses not to extradite such person.

⁹² See the Draft Convention's Arts. 10 (obligation to establish jurisdiction over alleged offenders), 11 (prevention of crimes against United Nations and associated personnel), 12 (communication of information), 13 (measures to ensure prosecution or extradition), 14 (prosecution of alleged offenders), 15 (extradition of alleged offenders), 16 (mutual assistance in criminal matters).

on scope of application, provides: "This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." The text obviously is a compromise formula which hides a lot of disagreement, in particular concerning the question when exactly United Nations forces engage as combatants in an operation to which the law of international armed conflict applies.⁹³ If construed sensibly, the provision makes sense, however, and demonstrates that the Convention itself departs from the assumption that the general law of international armed conflict applies as soon as United Nations forces use armed force in an enforcement action under Chapter VII — a point of departure that would correspond to the general doctrine in international legal literature concerning United Nations forces and humanitarian law.⁹⁴

Nevertheless, there obviously exists a temptation to extend the concept of immunity of United Nations personnel to enforcement actions.⁹⁵ Some states have claimed in recent cases of interventions into civil war situations

⁹³ As to the negotiating history of the formula and its resulting ambiguities, see Kirsch, see note 90, (105), Bouvier, see note 90, (715–721), and Emanuelli, see note 90, (868–869), (872–874).

⁹⁴ As a survey of legal doctrine see, e.g., D. Schindler, "United Nations Forces and International Humanitarian Law", in: *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, 521 et seq. (with further references). See also F. Seyersted, *United Nations Forces in the Law of Peace and War*, 1966; M. Bothe, *Le droit de la guerre et les Nations Unies*, 1967; Y. Sandoz, "L'application du droit international humanitaire par les forces armées de l'Organisation des Nations Unies", *Rev. ICR* 60 (1978), 274 et seq.; H. Risse, *Der Einsatz militärischer Kräfte durch die Vereinten Nationen und das Kriegsvölkerrecht*, 1988; O. Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations", in: L.F. Damrosch (ed.), *Law and Force in the New International Order*, 1991, 65, (75); U. Palwankar, "Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces", *Int'l Rev. of the Red Cross*, 1993, 227 et seq.; H.-P. Gasser, "Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen", *SZIER/RSDIE* 4 (1994), 443 et seq.; C. Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, 1995; R.D. Glick, "Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces", *Mich. J. Int'l L.* 17 (1995), 53 et seq.

⁹⁵ As a discussion of these tendencies, cf. Glick, see above, at 59 et seq., 68 et seq., and Emanuelli, see above, at 30 et seq.

that their troops, since they take part in a "police operation", should be legally immune from violence by the civil war factions.⁹⁶ Such a claim refers to the general doctrine of United Nations peace-enforcement as some sort of a "police action". But it takes recourse also to some domestic analogy: Because the United Nations forces operate instead of the state armed forces in order to restore peace and security, they should enjoy the same rights and privileges as the law enforcement organs of the state in suppressing banditry and insurgency, could be assumed as the inherent logic of the argument.

At first sight, the position might sound logical. If the legal monopoly of armed force has broken down in a situation of civil war, with the United Nations entering the conflict in order to restore law and order, the organization, as an agent of the international community, acts as a surrogate of the "failed state,"⁹⁷ the organs of which it replaces. Like the law enforcement organs of the state in a comparable situation, it should not be subject to the usual rules of the laws of international armed conflict, with the ensuing immunity of combatants for acts of violence against enemy combatants and military objects, but should be subject to the usual national rules for police actions against law-breakers.⁹⁸ The forces intervening with a mandate of the United Nations accordingly would be justified in using armed force against rebel forces and insurgents. The insurgents, however, would commit a punishable offence (or crime) when

⁹⁶ The position of the US administration concerning Somalia seems to have been like that, but also the official position of the United Nations Secretariat, see only Glick, see note 94, (73 et seq.), in particular 76 footnote 79, and 81 et seq., in particular 82 footnote 101. In the same direction goes the legal position taken by the German Defence Ministry, as that of some other European defence ministries, concerning the UN-mandated operations in former Yugoslavia. With regard to the official German position, however, one should not overlook the delicate internal policy issues related with United Nations operations involving Germany, which creates some "taboo" concerning potential combatancy of German troops.

⁹⁷ As to the concept of "failed state", see e.g. H.J. Richardson, "Failed States', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations", *Temple Int'l & Comp. L.J.* 10 (1996), 1 et seq.; D. Thürer, "Der Wegfall effektiver Staatsgewalt: 'The Failed State'", in: D. Thürer/M. Herdegen/G. Hohloch, *Der Wegfall effektiver Staatsgewalt: "The Failed State"*, Reports DGVR 34 (1996), 9 et seq.; Herdegen, see note 52, 49 et seq.

⁹⁸ See J.F. van Hegelsom, "UN Forces and Humanitarian law. Use of Force and Humanity in Action", *Rev. Dr. Mil. Dr. Guerre* 28 (1989), 473, (483 et seq.), but see also Glick see note 94, (81 et seq.).

using armed force against United Nations personnel engaged in enforcement operations, and would be subject to criminal punishment when captured.

But is this really useful, when seen in the light of the stated inadequacies of humanitarian law of internal armed conflict? One should doubt that. A simple consideration suffices to illustrate these doubts. One should imagine an individual fighter of an insurgent movement, perhaps even drafted by force himself, who stands in front of a United Nations “peace enforcer”. If the opposite soldier, whether he be part of an enforcement operation mandated by the United Nations or member of a national expedition force intervening unilaterally, points a gun at him in the process of using armed force in order to overcome his resistance, the imagined soldier of a civil war army will perceive his opposite side as an enemy combatant going to kill him, and will probably shoot himself. Probably it would not help very much if one would try to explain to this poor soldier that the opposite soldier is an organ of the international community enforcing “the law”, not to speak of any attempt to convince him that the other side is an “expert on mission” that may not be hindered in fulfilling his mission, and that may be the mission of killing him.⁹⁹

The practical absurdity of such a legal position illustrates the shortcomings of any attempt to draw direct conclusions for the legal status of individual combatants from the proclaimed “police action” character of United Nations operations. Such an attempt neglects the very basis of modern international law — the distinction between “*ius ad bellum*” and “*ius in bello*”. It is dangerous to draw any conclusion for the rules of combat and the legal status of persons participating in combat from the purported character of “peace enforcement” as a “police action”, as it is illicit to draw any conclusion concerning the laws of war from the assessment whether the party in the conflict acts in aggression or in legitimate self-defence.¹⁰⁰ With the act of intervening in a civil war, the international community (or the states acting as an agent of the international community) transforms the legal status of the conflict. It does not matter whether the conflict was of an international or a non-international character before; with the intervention of third states the conflict becomes “internationalized”, and in the relation between the intervening third states and the armed organizations participating in the civil war the entire complex of the laws of international armed conflict becomes applicable.¹⁰¹ Since the

⁹⁹ This is an example of what Thomas M. Franck has called the “laughter test”.

¹⁰⁰ See also Glick, see note 94, (61–63).

¹⁰¹ As to the concept of “internationalized” civil war, see D. Schindler, “International Humanitarian Law and Internationalized Internal Armed

states operating under a mandate of the Security Council according to Chapter VII remain responsible for the actions of its troops,¹⁰² the conflict is an “internationalized non-international armed conflict” for them concerning the applicability of humanitarian law, notwithstanding the legal character of the operation as an enforcement action under the UN Charter. They are bound not only to common Article 3, but to the entire body of humanitarian law applicable to international armed conflicts, including the rules on “combatant’s privilege” and prisoner of war status concerning its opponents.¹⁰³ Any other construction of the law would repeat the mistake of bringing civil war into the legal realm of law enforcement. It would not help to solve the problem of humanitarian law in internal armed conflict, but would aggrandize and deepen the existing deficiencies of international regulation of civil war.

VI. Perspectives

The perspectives for desirable further development of humanitarian law are clear, if one tries to draw a conclusion from the foregoing considerations. A normative torso like the existing regulatory framework is not justifiable in the long run, does more damage to the legal conscience of mankind than it helps in “banning the scourge of civil war”. In the further development it will not so much be important to perfect the substantive rules, even if these still need a lot of improvement; but for the most important questions the existing body of law already contains much more convincing answers than one might presume at first glance.¹⁰⁴ What will be decisive is the question of implementation: The international community will have to achieve a significantly improved system of implementation of humanitarian law, or the whole concept of humanitarian law will be treated with contempt by non-specialists.¹⁰⁵

Conflicts”, *Int’l Rev. of the Red Cross*, 1982, 255 et seq.; H.-P. Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon”, *Am. U. L. Rev.* 33 (1983), 145 et seq.; M. Hess, *Die Anwendbarkeit des humanitären Völkerrechts, insbesondere in gemischten Konflikten*, 1985, 143 et seq., 193 et seq., 279 et seq.

¹⁰² Cf. Gasser, see note 94, (456–457), but see also Glick, see note 94, (96–99).

¹⁰³ See Gasser, see note 94, 465 et seq.; Glick, see note 94, 89 et seq.; Emanuelli, see note 94, (33 et seq.).

¹⁰⁴ See also Allen/Cherniack/Andreopoulos, see note 2, 762.

¹⁰⁵ See already T. Meron, “On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument”, *AJIL* 77 (1983),

Improved implementation means, however, in light of the structural peculiarities of modern humanitarian law, which has become more and more a sort of special human rights instrument, that the international community needs an improved capacity to act. What is required are specific procedures for the control of compliance and for bringing about effective individual criminal responsibility in cases of “grave breaches” of humanitarian law, but also mechanisms of an effective sanctioning of violations by states.¹⁰⁶

The international community needs an effective monitoring system with a high level of professionalism.¹⁰⁷ There is already usually a large amount of information available. International organizations with an extended network of field workers at the “hot spots”, like the UNHCR or the ICRC, possess an in-depth knowledge of what is going on at the sites of internal conflict. Also the breadth of United Nations observer missions in dozens of conflict-ridden places all over the world gives the international community (and the United Nations in particular) an institutionalized capability of on site-collection of data. In addition, the information compiled by non-governmental humanitarian and human rights organizations like Amnesty International and Médecins sans Frontières deliver an interesting pool of knowledge on the background, the practices and actors of internal conflicts. In general, one could presume, there is no lack of information. But all the existing information is dispersed over dozens of organizations, and there is no mechanism of how to collect and combine all the relevant sources, not to speak of an institutionalized agency evaluating and processing these data for the purposes of political decision-making at UN level.¹⁰⁸

Detailed data are relevant, in particular, if the international community wants to implement individual criminal responsibility of military commanders and political leaders that are responsible for war crimes and crimes against humanity in civil wars.¹⁰⁹ Individual members of both official and insurgent militaries may, in fact, be responsible for atrocities

589 et seq., but also Roberts, see note 80, 11 et seq., (15, 77).

¹⁰⁶ That this might mean that the international community may have to confront, sooner or later, the normative and operational challenges associated with humanitarian intervention, is pointed out clearly by Allen/Cherniak/Andreopoulos, see note 2, 766.

¹⁰⁷ On the existing mechanisms of monitoring, see Roberts, see note 80, 11 et seq., (33–35).

¹⁰⁸ For the problems of information-gathering and compliance-monitoring, see Allen/Cherniak/Andreopoulos, see note 2, 772 et seq.

¹⁰⁹ Cf. in that regard Allen/Cherniak/Andreopoulos, see note 2, 774–775.

without the direct knowledge of senior officers or government officials.¹¹⁰ But most often the supreme command will be genuinely responsible for such acts, by tolerating, if not by inciting, to serious violations of humanitarian law. In order to gain clarity on the responsible level of command one needs detailed and reliable information not only on the acts committed, but also on the command and control structures of the armed organizations involved.¹¹¹ The attempt with establishing a Commission of Experts which was undertaken by the Security Council when becoming aware of the acts of genocide committed in former Yugoslavia and Rwanda is a promising step in that direction. If such an investigatory commission is established early enough in the evolution of a conflict, it may not only deliver an important contribution towards preserving the necessary means of proof in order to establish individual responsibility before criminal courts later, but it even may deter those involved, up to a certain extent, from committing wanton acts of violence.

As a further, and decisive step, the international community needs a framework of international criminal adjudication which enables it to implement individual responsibility in criminal proceedings before an international criminal court.¹¹² The traditional system of decentralized, national jurisdiction, albeit with a structure of universal jurisdiction for certain extremely heinous crimes, has proven to be largely ineffective.¹¹³ National jurisdictions will rarely manage to arrest and prosecute war criminals from a geographically distant war theatre. And the territorial jurisdictions of the states involved, if willing at all to prosecute war crimes and crimes against humanity, will inevitably be partial and will infect the idea of retributive justice with a smell of "victor's justice". Only genuinely international courts can ever gain the effectiveness and the image of impartiality and fairness that is needed in order to provide the concept of individual criminal responsibility with some basic legitimacy.

But one must draw a further lesson from current experience: The best system of international criminal adjudication does not help very much, even if its expansion represents an important step in itself, if the means are lacking which are needed to implement the presumed penal authority of

¹¹⁰ As to the doctrine of command responsibility, see Fenrick, see note 69, 110 et seq.

¹¹¹ Allen/Cherniack/Andreopoulos, see note 2, 774.

¹¹² See, however, the sceptical remarks on the role of such a court in improving the implementation of humanitarian law made by Roberts, see note 80, 11 et seq., (73–74), and C. Tomuschat, "Von Nürnberg nach Den Haag", *Friedens-Warte* 70 (1995), 143 et seq., (163 et seq.).

¹¹³ See e.g. Roberts, see note 80, 11 et seq., (35–38).

the international community.¹¹⁴ The problems of the Tribunal for the Former Yugoslavia are symptomatic in that regard. An effective international criminal jurisdiction requires an apparatus of bringing responsible leaders physically before the court and of executing the sentences — and must finally, be capable of militarily enforcing the international communities' verdicts over resisting local power structures. The arrest of the accused, his or her surrender, pre-trial detention and punitive confinement will have to rely on states as law enforcement agents even in future;¹¹⁵ but states will have to create a workable set-up of inter-state cooperation in order to provide the concept of international criminal jurisdiction with an effective means of decentralized enforcement.

Thus, one returns back to the problem of humanitarian intervention, be it under the legal cover of an enforcement action under Chapter VII of the Charter, or be it in form of a unilateral intervention.¹¹⁶ Unfortunately,

¹¹⁴ For the problems of effectively prosecuting international crimes see e.g. M. Schrag, "The Yugoslav Crimes Tribunal: A Prosecutor's View", *Duke J. Comp. & Int'l L.* 6 (1995), 187 et seq., and C. Joyner, "Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia", *ibid.*, 79 et seq., (93 et seq.); see also Roberts, see note 80, 11 et seq., (51–52, 58–59).

¹¹⁵ T. Stein, "Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent", in: J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System*, 1995, 107, at 110.

¹¹⁶ As exemplary contributions to the heated debate on humanitarian intervention see U. Beyerlin, "Humanitarian Intervention", in: R. Bernhardt (ed.), *EPIL* 3 (1982), 211 et seq.; W.D. Verwey, "Humanitarian Intervention", in: A. Cassese (ed.), *Current Legal Regulation of the Use of Force*, 1986, 57 et seq.; M.J. Bazzyler, "Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia", *Stanford J. Int'l. L.* 2 (1987), 547 et seq.; F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 1988, 186 et seq.; L.A. Sicilianos, *Les réactions décentralisées à l'illicite*, 1990, 475 et seq.; T.J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention", in: L.F. Damrosch (ed.), *Law and Force in the New International Order*, 1991, (186–188); N.S. Rodley, "Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework", in: N.S. Rodley (ed.), *To Loose the Bands of Wickedness*, 1992, 14 et seq.; P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, 1993, 26 et seq.; A. Roberts, "Humanitarian War: Military Intervention and Human Rights", *Int'l Aff.* 69 (1993), 429 et seq.; T.J. Farer, "A Paradigm of Legitimate Intervention", in: L. Fidler Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 1993, 316 et seq.; W.M. Reisman, "Humanitarian Intervention and Fledgling Democra-

it is more than doubtful whether third states are prepared to enforce criminal prosecution — purely in the interest of enforcing the humanitarian standards. But without such a will to enforce humanitarian law by ending the violations and by bringing the responsible leaders before an international criminal jurisdiction the noble principles are condemned to remain mostly dead letters;¹¹⁷ the evolution of real scenarios of armed conflict points more to an open “barbarization” of the participants — cases like Afghanistan, Somalia, Liberia, Rwanda, and Bosnia may be recalled here — than could nourish any hope for moderation in the way conflicts are fought.¹¹⁸

Perhaps an improved respect for the minimum standards of humanitarian law, as an obligatory “code of conduct” for participants in civil wars, would already constitute the utmost which external intervention can sensibly be expected to achieve. In this perspective, the Security Council would be well advised to pay constant attention to serious violations of humanitarian law in civil wars: The occurrence of a pattern of widespread and systematic violations of humanitarian law reflects, as an external symptom, that a state authority is losing its legitimacy and is in danger of “going wild”. Serious violations of humanitarian law accordingly could serve as a sort of trip wire indicating where an existing state structure loses, together with its internal legitimacy, its external protection under Article 2 para.7 of the Charter.

A state authority ruthlessly killing its population under gross violation of humanitarian rules no longer deserves the protective shield of Article 2 para.7 of the Charter.¹¹⁹ It is disregarding basic values of the international community that are commonly regarded as part of “ius cogens” with an

cies”, *Fordham Int’l L.J.* 18 (1995), 794 et seq.; F. Tesón, “Collective Humanitarian Intervention”, *Mich. J. Int’l L.* 17 (1996), 323 et seq.; R. Falk, “The Complexities of Humanitarian Intervention: A New World Order Challenge”, *Mich. J. Int’l L.* 17 (1996), 491 et seq.

¹¹⁷ The dilemma is aptly formulated by A. Roberts: “The former Yugoslavia exemplifies the lesson that if outside powers seriously seek to change the practices of belligerents and to stop atrocities, they may have to be prepared to intervene militarily. In so doing they may find themselves working with dubious belligerents, and they may have to be prepared to exert serious pressure on co-belligerents as well as on more open adversaries” — Roberts, see note 80, at 63.

¹¹⁸ See also T.G. Weiss, “The United Nations and Civil Wars at the Dawn of the Twenty-First Century”, in: T.G. Weiss (ed.), *The United Nations and Civil Wars*, 1994, 193, (195 et seq.).

¹¹⁹ See the argument made in that sense by Tesón, see note 116, at 82–83, and W.M. Reisman, “Sovereignty and Human Rights in Contemporary International Law”, *AJIL* 84 (1990), 866 et seq., (870–871).

“erga omnes” character.¹²⁰ It has rightly been argued in international legal doctrine that it would be advisable for the Security Council to adopt a dynamic concept of peace and threats thereto by limiting it to the very values that the notions of “ius cogens” and obligations “erga omnes” consecrate in a legal form.¹²¹ In consequence, it would make sense that, in addition to the prohibition of aggression, further obligations “erga omnes” could in future be enforced under the umbrella of Chapter VII.¹²²

The international concern with preserving essential values of the international community that are embodied in the (“ius cogens”) minimum standards of common Article 3 clearly outweighs the interests of sovereignty and self-determination that are protected by the principle of non-intervention.¹²³ In that perspective, one can only welcome the fact that in recent Security Council practice the limits of what constitutes a “threat to international peace and security” have been extended so as to include situations of civil war.¹²⁴ The usual reasonings given for such an extension, that are commonly based on external symptoms like the phenomena of mass flights linked to civil wars, are not really convincing if one wants to

¹²⁰ See e.g. Mangas Martín, see note 29, 147–148, 150–151.

¹²¹ B. Simma, “Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?”, in: J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios — New Law. Proceedings of an International Symposium of the Kiel Institute of International Law, March 25 to 27, 1992, 1993*, 125 et seq., (143); cf. also Stein, see note 115, 118.

¹²² Simma, see above, 143; Stein, see note 115, 119.

¹²³ G.M. Lyons and M. Mastanduno wrote of “the emergence and recognition of a legitimate right to intervene in the domestic affairs of member states in the name of community norms, values, or interests” — G.M. Lyons/M. Mastanduno, “Introduction: International Intervention, State Sovereignty, and the Future of International Society”, in: G.M. Lyons/M. Mastanduno (eds.), *Beyond Westphalia*, 1995, 1, (3).

¹²⁴ See only J.A.Frowein, “On Article 39”, 605 et seq., Mn.17 et seq., in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994; R.B. Lillich, “Humanitarian Intervention through the United Nations: Towards the Development of Criteria”, *ZaöRV* 53 (1993), 557 et seq.; R. Gordon, “United Nations Interventions in Internal Conflicts: Iraq, Somalia, and Beyond”, *Mich. Int’l L.J.* 15 (1994), 519 et seq.; P.C. Szasz, “Centralized and Decentralized Law Enforcement: The Security Council and the General Assembly Acting under Chapters VII and VIII”, in: Delbrück, see note 115, 17 et seq., (22 et seq.), also J. Delbrück, “The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order”, *ibid.*, 135 et seq., (155–156), and Wippman, see note 82, 460 et seq.

create a new borderline which could delimit "internal affairs" from problems that are legitimately perceived as being of an international concern. The very values consecrated in the legal concepts of "ius cogens" and obligations "erga omnes",¹²⁵ under them the established standards of humanitarian law, could deliver a convincing answer to that dilemma. A government which tries to quell an insurrection, while respecting the humanitarian law in its counter-insurgency campaign, undoubtedly deserves protection against foreign interference. A state authority, however, which has declared entire parts of its own population to be its enemy and which persecutes people with wanton violence in disrespect of the basic humanitarian rules qualified as "ius cogens" norms, should have forfeited the right to invoke respect of its "sovereignty".¹²⁶ An important deterrent effect would be the result if the international community threatened to withdraw from such a government its external legitimacy as a representative of the relevant people and state, in addition to its losing the internal legitimacy as a responsible government.¹²⁷ The Security Council has already undertaken first steps in that direction by openly ascribing its legal qualification to certain recent conflicts, which in the consequence led the Security Council into demanding strict adherence to all the rules of general humanitarian law even in conflicts the character of which had been in dispute.¹²⁸

¹²⁵ On the disputed and complicated relationship between obligations "erga omnes" and "ius cogens" see J.A. Frowein, "Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung", in: R. Bernhardt et al. (ed.), *Völkerrecht als Rechtsordnung. Festschrift für Hermann Mosler*, 1983, 241.

¹²⁶ As to the new role of forcible intervention by the international community, specifically the United Nations, see K. Dicke, "Intervention zur Durchsetzung internationalen Ordnungsrechts", in: *Jahrbuch für Politik*, 1993, 260 et seq., with further references; in addition, see J. Delbrück, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations", *Ind. L.J.* 67 (1992), 887 et seq., as well as M.E. O'Connor, "Continuing Limits on UN Intervention in Civil War", *Ind. L.J.* 67 (1992), 909 et seq.

¹²⁷ For such interdependence between internal legitimacy and external authority cf. Wippman, see note 82, at 440 et seq., and A. Tanca, *Foreign Armed Intervention in Internal Conflict*, 1993, 23.

¹²⁸ Most notable in that regard are the resolutions concerning the Iran-Iraq War, the invasion of Kuwait, the civil war in Somalia and, in particular, the conflicts in former Yugoslavia. See the survey of recent Security Council practice given by Schwebel, see note 30, 753 et seq., but cf. also Roberts, see note 80, 42 et seq.

If the Security Council really would take over the responsibility of judging the legality of a certain government's military actions, with a threat to deligitimize governments internationally in cases of ongoing and systematic violations of basic humanitarian norms, and eventually even intervening militarily in order to stop the violations, ousting the government from power and prosecuting the responsible political leaders, political regimes involved in civil wars would think twice before giving the orders for massacres, "ethnic cleansing" and genocide.¹²⁹ What more could be expected from current international law than such a deterrent effect? United Nations, however, and the states and armed forces mandated by the organization, should keep to these same rules of humanitarian law, if the whole enterprise of measuring states by their loyalty to the basic values of the international community shall not run the risk of becoming an exercise in hypocrisy. The fundamental distinction between "ius ad bellum" and "ius in bello" is too valuable a distinction to sacrifice it on the altar of a presumed role of the United Nations as a "world police". Transplanting the usual civil war legal asymmetry between law enforcement organs and "rebels", i.e. criminals, to the level of United Nations peace-enforcement activities would infect the law of United Nations operations with the same fallacy that already plagues the legal regime of civil wars. The sad experiences of a century of bloody civil wars should have demonstrated more than sufficiently that the traditional legal approach, based on an exaggerated notion of sovereignty, is more an obstacle than a help in overcoming the "scourge of civil war". There is something to learn from past experiences, as this article has tried to demonstrate. The victims of civil war would deserve a better goal than the traditional priority of sovereignty; they are in urgent need of a renewed attempt of enforcing the respect of human dignity that underlies modern humanitarian law.

¹²⁹ See also Roberts, see note 80, 77.