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International Humanitarian Law’s Applicability to Armed Non-State Actors

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Summary

Whilst the aim of this paper is to investigate the international humanitarian law provisions which are applicable to armed non-state actors, in particular national liberation movements, it was significant to examine the applicability of the law to their violent acts. The main conclusion which will be drawn from this investigation is that despite the various provisions which could, in theory, apply to armed non-state actors and the armed conflicts in which they are involved, the reality sees only little application of the formal framework of international humanitarian law to these types of conflict. While some States concede to apply international humanitarian law measures in such armed conflicts which became widespread and frequent, this application is seen as a mere concession out of humanitarian concern on behalf of States and not as a legal obligation. Additionally, this concession usually only occurs after various attempts on behalf of governments to quell the rebellion by means of repressive measures have failed. Armed non-state actors, such as National liberation movements, seem to be more willing to apply and abide by international humanitarian law than States as it is seen as a means of legitimising and gaining more support for their cause in the international community. Ultimately, this paper would appear to illustrate the failure of the international community to properly implement the formal framework of international humanitarian law in armed conflicts.
Preface

I hope that writing this paper should bring enlightenment and be of assistance to those who share my interest in international law that attempts to contain the violence which has been and always will be a terrible feature of international society. I hope it will contribute to the debate on the issue of the new extensive right to self-determination and the need for an International law that can cope with these changes.

I want to take advantage of this opportunity to thank my husband and children, without whose much appreciated love, help and enormous patience throughout the years this paper would never have been finished.
## Abbreviations

<table>
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ANC</td>
<td>African National Congress (South Africa)</td>
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<tr>
<td>ANCN</td>
<td>African National Council of Zimbabwe</td>
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<td>ANSA</td>
<td>Armed non-state Actors</td>
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<td>FLN</td>
<td>National Liberation Front of Algeria</td>
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<td>FNLA</td>
<td>Angola National Liberation Front</td>
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<tr>
<td>FRELIMO</td>
<td>Mozambique Liberation Front</td>
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<td>HR</td>
<td>Human Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>GC I</td>
<td>The first Geneva Convention of 1949</td>
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<td>GC II</td>
<td>The second Geneva Convention of 1949</td>
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<td>GC III</td>
<td>The third (POW) Geneva Conventions of 1949</td>
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<td>GC IV</td>
<td>The Fourth Geneva conventions of 1949</td>
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<td>MPLA</td>
<td>People's Movement for the Liberation of Angola</td>
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<td>NLM</td>
<td>National liberation movement</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
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<tr>
<td>PAC</td>
<td>Panafricanist Congress (South Africa)</td>
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<td>PFLP</td>
<td>Popular Front for the Liberation of Palestine</td>
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<td>PLO</td>
<td>Palestine Liberation Organisation</td>
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<td>POW</td>
<td>Prisoner of War</td>
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<td>Res</td>
<td>Resolution</td>
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<td>SPUP</td>
<td>Seychelles People’s United Party</td>
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<td>SWAPO</td>
<td>South West Africa People’s Organisation</td>
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<tr>
<td>UNC</td>
<td>United Nations charter</td>
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<td>UK</td>
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<td>US</td>
<td>United States</td>
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<td>ZANU</td>
<td>Zimbabwe African National Union</td>
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<td>ZAPU</td>
<td>Zimbabwe African People’s Union</td>
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Introduction

1. The subject

The majority of armed conflicts[^1] clashed in the latter half of the twentieth century, and the beginning of the twenty-first, some of which are still going on, involve in one way or another armed non-state actors (ANSAs), outside the control of states or governments recognized by the United Nations (UN). State-on-state conflict is no longer the primary approach to war for a long time now. The decolonization period and the subsequent recognition of a people’s right to self-determination changed the constitution of armed conflicts and our belief in what entities in the international arena that can trigger such conflicts. Even the mode of warfare has changed; despite the spectacular combat technology, most armed conflicts are fought on foot using low technology methods of guerrilla warfare. This resulted in the conclusion that civil wars are the concern of both international community and international law.[^2] Contemporary conflicts usually involve ANSAs who act autonomously from their or any other recognized government. They have simply become economically self-sufficient. This fact makes these groups and the armed conflicts in which they are involved dangerous, especially when many states are unwilling to apply the international humanitarian law to this kind of warfare.

The traditional instruments, stipulated in the Geneva Conventions of 1949 (the Conventions) and the Two additional Protocols of 1977 (the Protocols) to protect Human Rights (HR) and restrain humanitarian abuses, were developed to be applicable only to States.[^3] Since only States can have diplomatic relations with other states, sign treaties and be parties to international institutions, ANSAs were usually not expected to meet the same standard as states. Their acts of violence were seen as a domestic problem of the state concerned, to be dealt with through legal, political, or military means.

The increased attention due to the recent events[^4] made the world change their framework of ANSAs. They came to be fairly recognized as the key players in armed conflicts. The international community are going ahead on holding ANSAs responsible for their actions based on international humanitarian law (IHL). They had to realize that if IHL is not applicable, the humanitarian protection it offers is not available and the consequences of that are and will be horrifying.

Internal conflicts constitute a unique form of conflict, involving both guerrilla and regular army forces that produce many difficult questions and legal problems. The first question to consider is

[^1]: In fact between the end of the Cold War in 1989 and the dawn of the twenty first century (2003), 116 active armed conflicts in the world. Of these, only seven involved interstate conflict in some form. The other 109 were intrastate conflicts.
[^3]: Gasser 2002, p.359
[^4]: Rwanda, Darfur, Afghanistan, Lebanon etc.
whether IHL is applicable to ANSAs and armed conflicts in which they are parties. However to answer that, I feel the need to address numerous other questions. What are ANSAs? And how does international law recognize them? Regardless of whether these ANSAs are engaged in armed conflicts of an international or non-international character, how does IHL view them? And are individuals involved in or supportive of these armed groups to be regarded as criminals, lawful or unlawful combatants? How can or how do these ANSAs adhere to or abide by the norms of IHL?

2. Purpose

The purpose of this paper is to examine the applicability of IHL (The Hague Convention of 1899 and 1907, the Conventions of 1949, and the Protocols of 1977) to ANSAs and the armed conflicts in which they are involved. Included in this category are rebel groups, irregular armed groups, warlords, insurgents, dissident armed forces, armed opposition groups, guerrillas, militias, liberation movements, resistant movements, freedom fighters and de facto territorial governing bodies. However, due to the limited space I have to discuss this subject, I had to limit this rather broad issue. I deliberately left questions of terrorist groups out of the study. I also avoided addressing the issue of private military forces (mercenaries), especially since international law regards mercenaries as totally illegal; there was no point here to take up the debate. Although even here there are international rules that applies irrespective of the legality of the group.

I have omitted these questions not because I do not find them significant, as it is manifest that they are questions of the greatest importance, but simply because each requires a detailed study which cannot be undertaken here. I have therefore focused on the main question whether IHL is applicable on ANSAs or not. In the process I had to review the relevant provisions of IHL which are applicable to the armed conflicts of such actors in a manner that makes the law clear and readily accessible and to discuss the protection offered thereby to both civilians and combatants.

In the process, I avoided diving in the history of IHL and drowning in too many details as I assumed that my readers have a fair portion of knowledge on the law and its sources, i.e. treaties and customary International law.

3. Scope

The central hypothesis of this paper is that these ANSAs, in particular national liberation movements (NLMS), abide by the same international law as states do. This paper will attempt to find out how these ANSAs been looked upon. In order to do that, I would have to examine the status of ANSAs in international law. First of all I will examine the scope of the first additional protocol and thereby the applicability of the Conventions and the first additional protocol of 1977 (Protocol I) to wars of national liberation and to analyse the application, or lack thereof, of these provisions to conflicts of this kind. Second of all I will examine the scope of a famous provision in

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the Conventions and the second additional protocol of 1977 (Protocol II) to other internal conflicts. The key question is whether IHL is applicable to ANSAs and all their acts of violence. The main purpose of this study is to bring the applicable instrument under the light and to make an attempt to explain some of the reasons behind the failure of the law’s applicability in theory and practice.

4. Method

The working method chosen was more of a qualitative approach in order to reach an understanding of the current position of ANSAs and of the rules applied to their violent activities. This allowed me to draw my own conclusion based on the written material at the end of this paper. A survey of international documents through the years concerning the subject helped in understanding the conceptualization contours and development of these instruments. This paper is based on scholarly and UN sources on international law, HR law, IHL and internal conflicts. The enormous amount of documents on ICRC’s database and other electronic sources were very useful. In this paper I have generally used the term “International humanitarian law” which has become more accepted and frequently used by academics and politicians than either “the law of war” or “the law of armed conflict”.

5. Outline

The paper outlines the debate over the applicability of these instruments, sets forth the relevant provisions, and reviews the positions of the different parties involved on these issues. To do so, I will have to briefly examine their status in international law.

Chapter one begins with a review of the traditional international law approach to ANSAs and their involvement in armed conflicts, focusing on both their status and the protection it offers to those involved in such conflicts. It shows the traditional law’s negligence of NLMS which later received both international and observer status. They can even be included under the “power” notion under the conventions.

Chapter two discusses the development of the provisions applicable to ANSAs, beginning with the adoption of the Conventions in 1949 to the adoption of the Protocols in 1977. While an in-depth analysis of the concept of self-determination is beyond the scope of this paper, some discussion of this topic is necessary for a full understanding of the evolutionary process undergone by IHL relating to wars of national liberation. It will also observe the difference between international and non-international conflicts and the recent developments in customary law.

Chapter three examines Protocol I in relation to wars of national liberation currently regarded as an international armed conflict. It highlights the exclusion of many wars of national liberation because they do not fit under the definition of struggle for self-determination. It also examines the protection afforded for members of NLMs.
Chapter four concentrates on Internal conflicts of a non-international character. It examines the applicability of Article 3 common to the Conventions (Common Article 3) and Protocol II to situations of conflict between ANSAs and regular forces of an established government. I would also examine the protection provided by these instruments to unrecognized ANSAs.

Last but not least I would give you a very brief summary in the last chapter. I would also seize the opportunity to highlight the problems and prospects that these instruments provide together with the current development of IHL. Reflecting over the past, present and future, I would leave you with some questions to be answered hopefully in the near future.
Chapter I. Armed non-state actors

1. Traditional view

The idea that International Law is exclusively concerned with the rights and duties of States has dominated the international scene for more than three centuries with States being at the core of the international legal system since the Westphalia peace treaties of 1648. But this does not necessarily mean that IHL applies only to States. However in order for an ANSA to even become a party to a conflict, recognition granted by the State they were fighting against or by a third State was required. Traditional international law only recognizes three different categories of ANSAs that posed a challenge to the established Government. These challenges along a range of ascending intensity are: rebellion, insurgency and belligerency. An analysis of these different categories and the basic conditions required before they can be categorized as such are of a great significance, since, the rights and obligations of parties to an armed conflict are decided upon the status accorded on these parties. When failed to achieve recognition as belligerents, customary international law had no application to the conduct of the parties of an internal armed conflict.

These categories and the traditional view of them are further important to have in mind when reading the next chapters. Although these recognitions procedures were later abandoned, ANSAs are still categorized under the following labels.

1.1 Rebels

Rebels are individuals that are typically involved in purely sporadic and isolated acts of violence and hostilities against the established government. Rebels had never been considered to have any international rights or obligations. Their acts of violence were susceptible to standard containment procedures of internal security. Upon capture, these rebels were treated as criminals under domestic law. States had a recognized right to crush rebellion as a part of its inherent sovereignty and in order to preserve its territorial integrity. Indeed, the domestic law of every State prohibited rebellion and applied the most severe penalties to the rebels. The only way for the rebel’s legal status to change was to be graduated to insurgents.

The adoption of the Conventions in 1949 did not alter the traditional view and treatment of rebels. Nevertheless they started to welcome international recognition for the designation of their hostilities as armed conflicts. Since such a designation would trigger the application of the very

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6 Holmqvist 2005, p.49
7 Otleai 2004, p.2
8 Draper in Meyer & McCoubrey 1998, p.107
9 See next chapter
10 Clapham 2006, p.492
12 Ibid, pp.136, 182
13 Bugnon 2004, p.3-4
14 Clapham 2006, p.492
famous Common Article 3 on the armed conflict in which they are involved - internal armed conflicts - even when the threshold for this provisions applicability is not reached.15

1.2 Insurgents

Insurgents constitute armed groups that become involved in civil disturbances and riots. These hostilities are usually restricted to a limited area of the States territory. Therefore the international rights and obligations they obtain are also limited to the same territory and still fall within the remit of domestic law. Insurgent’s violent acts are viewed as means of revenge against the State in an attempt to draw attention to their situation and to conflicts in their countries in order to address and redress the difficulties and problems of their countries.16

There is a lot of confusion and divergence in opinions and schools surrounding this category, since traditional international law does not provide an explicit definition of insurgency.17 Nevertheless, the recognition of insurgency does bring the insurgents out of the domestic sphere and into the international sphere giving them a quasi- international law status.18 Since insurgents are for the most time organized, they have even been allowed to enter into general agreements and arrange for humanitarian protection through the international Committee of the Red Cross (ICRC). 19

Recognition of insurgents has later for the most part been replaced by Common Article 3 and in some cases by some ICRC requested unilateral declarations of parties to a conflict.20 Insurgents might even realize an international legal significance through the effective control of territory and population, i.e. the recognition of an artificial statehood. This recognition is considered as the key factor in determining the formal status of insurgents. Nonetheless, it is questionable whether such recognition on its own is sufficient.21 Clearly, however, recognition of belligerency would assimilate the insurgents to state actors.22

1.3 Belligerents

Belligerents are the most organized of them all. The act of belligerency is clearly defined in international law pointing out certain material conditions to be fulfilled first in order for a case of belligerency to be present; (1) the existence of an armed conflict; (2) occupation by the insurgents of a significant part of the national territory; (3) an internal organization exercising sovereignty on that part of territory; (4) the same organization is keen on conducting the armed conflict in

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15 Ibid, p.496
16 Higgins 2004, p.7-8
17 Wilson 1988, p. 25-27. To make it even more confusing, there are also two opposite schools of thought regarding the recognition of insurgency and its effects in international law. On the one hand, there are scholars such as Higgins and Greenspan, who are of the opinion that the recognition of insurgency will bring the insurgents out of the domestic sphere and onto international law round-table. On the other hand, there are scholars such as Castren, who are of the opposite opinion that the recognition will not change their legal status. They will still be the subject of domestic criminal law. ICRC seems to be of the first opinion as they have requested such recognition in many cases, in order to be able to apply, at least a fraction of the humanitarian law to specific conflicts. This happened in Algeria (1955-1962), in the Congo (1962-1964), in the Yemen (1962-1967), and in Nigeria (1967-1970).
18 Rosenau 1964, p.199
19 Wilson 1988, p.25
20 Higgins 2004, p.8 See even Ewumbue-Monono 2006, p.907
21 Arts 2001, p. 67
22 Clapham 2006, p.492
accordance with IHL; and (5) circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.23

Recognition of belligerency confers international rights and obligations on belligerents analogous to those of States.24 This was comprehensible considering the fact that belligerents are more organized than both rebels and insurgents and as a result belligerency is of a more serious nature. And since a state of belligerency can only be recognized if the conflict takes on the characteristics of war, such recognition means simply the recognition of the existence of a war.25 However, recognition of belligerency rarely took place.26

2. National liberation movements

An additional category of ANSAs to be considered in this context is NLMs which in contradiction to the categories described under 1.1-1.3, have as their main objective to replace the existing State or form their own state. The essential difference may even lie in NLMs ability to claim international rights, and be subject to international obligations, even in the absence of control of a territory or expressed recognition by the established Government.27

Traditional international law lacked recognition for this specific category. Members of NLMs were recognized as rebels and were treated as criminals under domestic law. Although NLMs fulfilled the requirements for belligerency, recognition of such a state has never been made in a war of national liberation.28 One of the reasons behind such failure is that States often are unwilling to admit that they have a serious conflict over which they have no control is occurring within its borders.29 Another reason may be State´s reluctance to do anything that might legitimize NLMs position and cause.

Many States opt to recognize NLMs, allowing them to establish official representation in their territory, providing them with moral and material assistance as well.30 Many States also concede to treating captives in an internal armed conflict as prisoners of war (POW), even when they do not recognize them as such. However, this was simply viewed as a matter of courtesy, not a legal obligation on the States part. Accordingly it was not always bestowed.31 In some cases, governments moderated their positions, when they realized that the armed conflict is stretched over a long period of time, with the intention to merely provide some protection or basic needs to both civilians caught up in the conflict.32

23 A proper analysis of these requirements would take into consideration both the territory in which belligerents succeed in controlling, and those which they succeed in extracting from the control of the adversary. It would also be very rational to conclude that, though belligerents in some cases do not exercise complete or continuous control over part of the territory, they are being objectively considered as a belligerent community on the international level, when undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, congregate a degree of effectiveness satisfactory for them. See Olalia 2004, p. 2-3
25 Menon 1994, p. 110
26Belligerency was primarily recognized in maritime situations. See Moir 1998, 342
27 Clapham 2006, p 494
28 Wilson 1988, p. 37-8
29 Higgins 2004, p.13
30 Abi-Saab 1979, pp. 373-4
31 Wilson 1988, p. 41
32 Ibid., p. 37-38
Still, NLMs have the special undertaking to represent the territory under their control and the people whose right to self-determination is being denied. This representative character of NLMs came to be recognized in Article 96 of Protocol I, wherein it refers to NLMs as the authority representing a people engaged against a State Party to Protocol I in a war of national liberation. Nevertheless, already in the Conventions, articles are found prepared to recognize other forms of power than the State. The first provision is found in the articles regarding the accession to the Conventions. These provide that the Conventions shall be open to any “Power” to accede to this Convention. The second provision is Common Article 2 (3) to the Conventions. This article states:

Although one of the powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Although the term ‘Power’ usually signifies a State, it has occasionally been used in broader sense to include other entities; such as de facto and interims governments. Accordingly, this could be liberally interpreted to include even NLMs.

2.1 The Power notion

Using the term “power” instead of “State” indicates the recognition of other powers and that these can be granted accession to the Conventions. This could mean that NLMs that exercise power over a certain territory can without any difficulties prove itself to be an authority or a ‘Power’ within the meaning of the provisions of the Conventions. This could also mean that NLMs compliance to, or their acceptance to be bound by the Conventions will render the entire corpus of the law to be applicable to wars of national liberation. But in order for that to come about, this particular NLM would have to enjoy considerable recognition and the support of the civilian population. Obviously such an interpretation of the provisions would have made the conflicts international and brought them within the scope of the Conventions already in 1949. Undoubtedly, however, such interpretation would have been very compatible with the humanitarian ambition and the purpose and spirit of the Conventions.

Unfortunately when the PLO communicated to the Swiss Federal Political Department in 1969 that they were willing to accede to the Conventions on condition of reciprocity, they were not taken seriously. The Swiss failed to even consider bringing this offer to the State Parties knowledge because they believed that the PLO cannot be viewed as a power and thereby a party, as it did not control its own territory, and had not yet formed its own ad hoc government.

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33 The right to self-determination is protected in the United Nations Charter in Article 1 and 55, and is recognized as part of customary international law. See Olalla 2004, p. 3-10
34 This is further discussed in chapter II
35 See Article 1(4) and Article 96 of Protocol I
36 See Article 60 GC I, Article 59 GC II, Article 139 GC III, Article 155 GC IV.
37 Abi-saab 1979, p. 400
38 The draftors of the Conventions considered wars of national liberation as non-international law. In addition, the territory of the colonies was regarded as a part of the territory of the colonization power country - See Higgins 2004, p. 18
39 Schindler 1979, p.135
40 See Common Article 3
41 Schindler 1979, p. 136
42 See Article 51 of the Vienna Convention on the Law of Treaties of 1969 which states that a treaty shall be understood with regard to the general meaning presented on its terms in their context and according to its intention and purpose - United Nations Treaty Series, Volume 1155, p. 331
2.2 Observer Status

However, NLMs are entitled to represent their people at an international level. This privilege is granted even when they are not yet in control of the territory they claim to represent. They are then only recognized as representatives of their people. Therefore, they are being accorded the status of ‘observer’ and thereby acquiring international legal personality through the international acknowledgment of their political aspiration of liberation from colonial domination. This can be demonstrated by the cases of PLO and SWAPO that have been permitted to represent their people at an international level, thereby appointed the status of “observer” although it was neither in control of the territory nor the sole representative of their people. This indicates that the legal international personality is not based on a single set of objective or subjective criteria. While the PLO was not allowed to accede to the Conventions, they were accorded an observer status.

2.3 Transnationality

The globalized world with the increase of cross-border flows of capital, services, people and information, helped ANSAs to extend their control outside the former limited territory and their mother State. Nevertheless a large group of ANSAs, in particular NLMs receive transnational support and aid and therefore can also be recognized as transnational. But not quite because transnational ANSAs differ from NLMs since they do not pursue international recognition and aim only to displace their mother State. This group although mentioned under this chapter, will not be further discussed.

3. Conclusion

Rebels, insurgents and belligerents were the main categories of ANSAs under traditional international law. These groups were positioned on a sliding scale according to degrees of control over territory and recognition by States. Rebels were considered to have rights and obligations under international law, only once they upgrade to insurgency. Insurgents were considered to have international rights and obligations with regard to those States that recognize them as having such a status. However even insurgent’s legal status were followed by a lot of confusion as there were still great differences in opinions and a lack of an exact definition in international law. Only when insurgents were recognized by the State which they were fighting against expressly as belligerents, did they become assimilated to a State actor with all the granted rights and obligations. Such recognition almost never occurred. So traditional international law was left incapable of dealing with ANSAs and conflicts in which they were involved.

44 Arts 2001, p.67
46 Transnationality, war and the law, pp. 8-11 In our days, Al Qaeda is the only genuine transnational NSA operating with an extremely wide geographical reach. However unfortunately, there is no universal treaty that prohibits terrorism and applies in all circumstances. The only attempt to craft such a treaty resulted in the Convention for the Prevention and Punishment of Terrorism drafted in 1937 by the League of Nations, which never entered into force. See also Gasser 2002, p.550.
NLMs, however, were totally ignored by traditional international law leaving their members to be dealt with, under domestic criminal law. Later, they would also come very close to being conceived as a power, providing that they represented the people whose self-determination right has been denied and exercised control over a certain territory. They were granted observer status, although they failed to control their territory, on the premise that they represented their people. These developments bit by bit internationalized wars of national liberation and brought the whole *jus in bello* to apply. Before 1949, in the absence of recognized belligerency accorded to ANSAs, IHL had no application to internal armed conflicts.
Chapter II. International Development

1. The adoption of the Geneva Conventions

Before the introduction of the term "armed conflict" to include all spectrums of violence and with the absence of recognized belligerency, internal armed conflicts were outside the scope of IHL; not even the customary law was applicable. Rebellion could not even be considered a violation of IHL, as it fell completely under domestic jurisdiction. The adoption of the Conventions in 1949 and more importantly Common Article 3 altered the way internal armed conflicts were viewed and dealt with. By this provision, recognition of an armed conflict by the established government or a third State is no longer necessary for the applicability of IHL. These recognition procedures (mentioned in the previous Chapter) have been abandoned and replaced by compulsory rules of IHL that start applying as soon as the hostilities reach certain thresholds and the conditions for IHL's applicability have been fulfilled. IHL's application is compulsory irrespective of which party took the decision to resort to force. The Conventions confirmed the distinction and the autonomy of jus in bello with regard to jus ad bellum. This change in international law came about mainly because the old procedures allowed the State to deny ANSAs recognition and prevent the law's application. Indeed this has been the case and recognition according to the old rules has hardly occurred since World War I.

Already in Common Article 1, the Signatory Parties agree to respect and ensure respect for the instruments established by the Conventions in all circumstances. The adoption of this provision stripped the States of the possibility of using arguments based on the legality of the use of force in order to be released from their obligations under the Conventions. Moreover, Common Article 2 specifies that the Conventions apply to all cases of declared war or of any other armed conflict between two or more of the Signatory Parties. The provision prohibits States from using arguments as being a victim of aggression to justify its refusal to apply IHL to armed conflicts in which ANSAs are involved.

A debate around the Convention's application to internal conflicts where the people are struggling for their self-determination (wars of national liberation) was virtually absent, during the drafting

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47 See Common Article 2and 3 of the Geneva Conventions 1949; Article 1 of Additional Protocol I; Article 1 Additional Protocol II
48 Draper in Meyer & McCoubrey 1998, p. 107
49 See Common Article 2 (1)
50 "...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." See Article 2 common to the four Geneva Conventions of 1949. See also Stewart 2003, p. 317
51 Clapham 2006, p. 492
52 Bugnion 2004, p. 39
53 Bugnion 2004, p. 8
54 Clapham 2006, p. 492
55 Article 1 common to the Conventions
56 Bugnion, 2004, p. 8
period of the Conventions. So any suggestions to apply the provisions of the Conventions regarding international conflicts to wars of national liberation was viewed as a liberal approach, and was left to be merely an option that could be considered by both States and ANSAs.\textsuperscript{57} For instance, Portugal refused even to apply Common Article 3 to the internal conflicts taking place on its territories of Guinea-Bissau, Angola and Mozambique and they implemented only domestic criminal law to try to quell the conflicts.\textsuperscript{58} Still many internal armed conflicts had been of such an intense character that States felt compelled to apply IHL. But States were well determined to make sure that this “act of humanitarianism” is not mistakenly looked onto as a legal obligation on their behalf. NLMs, on the other hand, have been principally more willing to apply and to declare their intention to apply the Conventions than States in an effort to internationalise and legitimise their struggle and their cause. They hoped that their adhesion to IHL would be reciprocated by the States.\textsuperscript{59}

In 1956 and 1958, FLN declared its intention to apply the POW Convention to French Prisoners and gave orders to its members to comply with IHL. The French government recognized the applicability of Common Article 3 to the Algerian War already in 1956.\textsuperscript{60} However, the French recognition may have taken place partially because the FLN threatened reprisals if executions of captured FLN members continued.\textsuperscript{61}

2. The Development of the protocols

Under the decolonization period, new developments in wars of national liberation proved the insufficiency of Common Article 3 in dealing with this particular kind of conflicts. During this period the international community supported these conflicts through various resolutions.\textsuperscript{62} At this point the international community realized the need to develop IHL to improve the way it dealt with this particular kind of armed conflicts. While treaties are the principal instruments of IHL in which States formally establish binding rules, a new treaty which the international community could agree upon was required.\textsuperscript{63} ICRC presented a report on the subject of the development of IHL to the 21st International Red Cross Conference in Istanbul in 1969. In 1970 a declaration regarding self-determination was made.\textsuperscript{64}

2.1 The Conferences of Government Experts of 1971-1972

Due to these developments, ICRC organized two Conferences of Government Experts in 1971 and in 1972 both of which were welcomed by the international community as major events. ICRC sought to update and supplement the Conventions so it proposed that they would formulate an

\textsuperscript{57} Wilson 1988, p. 51
\textsuperscript{58} Ibid, p.151
\textsuperscript{59} Ibid, p. 51
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid, p.153
\textsuperscript{63} http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57je3k/?opendocument
\textsuperscript{64} The Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations
Additional Protocol on Guerrilla Warfare. The protocol would be composed of 5 main principles. The first concerned the status of combatants and POWs following from Article 4 A (2) of the POW Convention. The second principle dealt with the controversial issue of international versus non-international conflicts. The third principle concerned the civilian population and its protection which emphasised the idea of distinction. The fourth principle concerned methods and means of warfare, with the recognition that the right to inflict injury on the enemy is not unlimited, and the reaffirmation of the principles of the 4th Hague Convention. The fifth principle, regarded the important issue of implementation. Furthermore, ICRC demanded to be certified to offer certain support to victims and that both parties to the conflict should allow international observers to confirm alleged violations of the rules.

Regarding the second principle, the Experts proposed the drafting of standard minimum rules which would apply to all armed conflicts but which would have no bearing on the categorisation of the conflict as international or non-international or on the legal status of the parties to the conflict. The rules would be the subject of undertakings by both belligerent parties which would then be made known to the ICRC who would in turn notify the parties to the conflict and also the other signatories of the Conventions.

However, these proposals proved to be too radical for the Conference of Experts which was not willing to allow for a separate Protocol on guerrilla warfare. Most experts did not agree however that there was a need to treat guerrilla warfare in such a specialised manner as to devote a specific protocol to it and believed that the issue of guerrilla warfare would be better dealt with in the context of other forms of armed conflict. The Norwegian Experts, however, proposed that the adoption of one uniform Additional Protocol that would be applicable to conflicts of either an international or a non-international character. They believed that one protocol was the logical approach from the point of view of the victims who suffer equally in international and non-international conflicts. In their opinion, a distinction in the protection afforded to victims of international and non-international conflicts would result in “selective humanitarianism”. This proposal did not appeal to the participant States. On the one hand, they were eager to maintain the current structure of the world which in their eyes required keeping a distinction between international and non-international armed conflicts. They were not prepared to deal with ANSAs within their territory as equals to the regular armed forces of enemy States especially when they strive to maintain their sovereignty. So they argued that a uniform protocol would inevitably reduce the level of IHL for international conflicts to that of non-international conflicts.

Evidently, the first Conference declared all these proposals as unacceptable. Two additional protocols were then drafted to be discussed at the next Conference of Experts in 1972. Experts from 77 States were present at this conference. The first draft Protocol concerned international armed conflicts and dealt with aspects of both Geneva and Hague law. The second draft Protocol

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65 Suter 1984, p. 110
66 Suter 1984, pp. 111 - 2
67 Ibid, pp. 113 - 4
68 Schindler 1979, p. 155
69 Suter 1984, p. 117
developed and supplemented Common Article 3 regarding non-international conflicts. However it did not make Common Article 3 excessive for reasons I would explain later in this paper. 70

In addition to the two protocol drafts, a draft Declaration on the Application of IHL in Armed Struggles for Self-determination was presented, but did not manage to gain any approval. The Declaration sought to have the Conference assert that the Conventions, Protocol I and other rules of armed conflicts should be applied to wars of national liberation. In other cases both Common Article 3 and Protocol II should be applied or other rules that ICRC would later formulate and accompany the Declaration. Various experts condemned the whole principle of giving any ANSA a special status; others believed that the legal protection offered was insufficient. 71

2.2 The Diplomatic Conferences for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974 – 197772

The Diplomatic Conference in 1974 was set to gain final political endorsement from 126 governments of the protocol drafts which were already formulated and discussed at the Expert Conferences, when a major issue emerged concerning procedural matters, as to whether or not to invite NLMs recognised by either the OAU or the League of Arab States to the Conference. Eventually, it was decided that NLMs would be invited but they would have no voting power.73 The other major issue was the status of wars of national liberation and the question of whether they ought to be regarded as international conflicts and thus come within the scope of Protocol I or if they should be treated as non-international and be dealt with by Protocol II. Conflicting ideas regarding the application of IHL to non-international conflicts as well as the status of wars of national liberation was manifested in bitter disagreement and spitefulness at the Conference.74

The scope of Protocol I was addressed in Article 1:

The present Protocol, which supplements the Geneva Conventions of 12 August 1949, for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to the conventions.

These situations referred to in Article 2 are:

...all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them.

Third World Governments proposed an addition to the above-quoted draft paragraph:

...the situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

However, the amendment was not accepted by Western States, especially former colonial States and various objections were made to it. However, they reached an understanding that there was

70 Draper in Meyer & McCoubrey 1998, p. 146
71 Suter 1984, p. 123
72 Verhoeven 2007, p. 10
73 These liberation movements were: ANC, ANCZ, FNLA, FRELIMO, PLO, PAC, MPLA, SPUP, SWAPO, ZANU and ZAPU. Higgins 2004, pp. 37-38 See also Conference Res 3(1) adopting draft Res CDDH / 22.
74 Suter 1984, pp. 128-9
not a customary rule of international law granting international status to wars of national liberation. Still, the international community had already recognised the international character of wars of national liberation with the adoption of the 1970 UN Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. Hence, another amendment was submitted as an alternative to the first one and proposed adding two paragraphs to draft Article 1. The first one reaffirmed Common Article 1 and the second restated the Martens clause which called to include situations of wars of national liberation. This amendment was approved of by most of the delegates.

This clause stated:

In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience.

However, the Martens clause did not solve the dilemma of wars of national liberation because it simply reserves the application of pre-existing customary law and principles of humanity to victims of armed conflict falling outside the scope of the conventional apparatus.

The first session of the Conference did not offer any progress regarding Article 1. The second session of the Diplomatic Conference took place in Geneva, 1975. Even this time the national liberation movements recognised by the Organization of African Unity (OAU) and the League of Arab Nations were invited. While this session was much more productive than the first with a lot more constructive work taking place, not enough progress was made and it was decided to convene a third session of the Conference in 1976 and a fourth and final session in 1977, during which the Protocols as amended, were adopted. At the last session of the Conference in 1977, the Protocol which emerged from the Committee stage had been actually more detailed than the ICRC draft, following the template of Protocol I. Thus, national liberation movements had gained an important victory in international political and legal terms by finally gaining recognition under IHL of wars of national liberation as international conflicts.

3. Recent developments and Customary Law

Recent developments in practice and legal opinion signify the blurring of the distinction between international and non-international armed conflicts and the rules applicable to each. A large number of customary rules are always applicable regardless of the label of the armed conflict. So while the current situation remains, that a more comprehensive body of law regulates international conflict, the bedrock of principles and rules contained in customary international law applies

75 Higgins 2004, p. 46 See also CCDH / 1 / 11.
76 Res 2625 (XXV) of 1970
77 At first the Martens Clause was considered a bypass of the disagreements between the delegates at the Hague Conferences regarding the situation of NLMS in the occupied territories. But after reconsideration it is founded applicable to the whole body of IHL. It has been acknowledged in the main juridical instruments on the subject. Moreover, it has been applied by international judicial tribunals and accepted as a customary norm in international judicial doctrine that considers it a synopsis of the entire philosophy of IHL. See Fleck 1995, p. 29
78 The delegates voted 70 to 21 in favour of the amendment with 13 abstentions.
79 Ibid, p. 161
80 Ibid, p. 152
81 Green 2000, p. 63
82 Suter 1984, p. 145 – 6 See also Article 96 (3) Protocol I.
83 According to a study carried out by ICRC in order to identify, and consequently facilitate the application of existing rules of customary international humanitarian law. This study was requested on the 26th International Conference of the Red Cross and Red Crescent, December 1995.
regardless of the nature of the conflict.\textsuperscript{84} States acknowledgment that treaties and customary international law as sources of IHL are binding is laid down in the Statute of the International Court of Justice (ICJ).\textsuperscript{85} IHL continuous development through the process of State practice and political interactions is unstoppable.\textsuperscript{86}

The latest study on customary international law done by ICRC showed that a lot of customary rules corresponded with provisions in Protocol I such as the principle of distinction between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transports, humanitarian relief personnel and objects, and civilian journalists; the obligation to protect medical duties; the prohibition of attacks on non defended localities and demilitarized zones; the obligation to provide quarter and to safeguard an enemy \textit{hors de combat}; the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the prohibition of improper use of emblems and perfidy; the obligation to respect the fundamental guarantees of civilians and persons \textit{hors de combat}; the obligation to account for missing persons; and the specific protections afforded to women and children.\textsuperscript{87}

The study even showed that there are customary rules corresponding with provisions in Protocol II such as the prohibition of attacks on civilians; the obligation to respect and protect medical and religious personnel, medical units and transports; the obligation to protect medical duties; the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the obligation to respect the fundamental guarantees of civilians and persons \textit{hors de combat}; the obligation to search for and respect and protect the wounded, sick and shipwrecked; the obligation to search for and protect the dead; the obligation to protect persons deprived of their liberty; the prohibition of forced movement of civilians; and the specific protections afforded to women and children.\textsuperscript{88}

4. Conclusion

Following the adoption of the Conventions, wars of national liberation increased in number and the international community recognized the need for improvement and development of the only provision applicable to internal conflicts, as it only provided minimum protection and the death and destruction caused by these conflicts called for a wider instrument. The legal quandaries that determined a legal framework for these conflicts caused at the Diplomatic Conferences of 1974-77 are very evident in the products of these conferences; Additional protocol I applicable to internal conflict of an international character and Additional Protocol II applicable to internal conflicts of

\textsuperscript{84} Verdirame 2001, p. 5
\textsuperscript{85} Statute of the International Court of Justice, Article 38(1)(b).
\textsuperscript{86} Henckaerts 2005, p. 182
\textsuperscript{87} See Customary International Humanitarian Law List, Rules 1, 7, 11-32, 34, 36-37, 46-48, 53-54, and 57-65.
non-international character. The achievement of an international legal status by wars of national liberation brings about the application of the whole *jus in bello* to such conflicts. During recent years a process of delimitation between international and non-international armed conflicts and the rules applicable to each has begun. ICJ concluded that treaties and customary international law are binding sources of IHL. However, IHL continues to develop through State practice.
Chapter III. National Liberation Movements

1. International Armed Conflicts

Traditionally international armed conflicts are defined as those in which at least two States are involved. Therefore this type of conflict is the most regulated in IHL. Indeed, it is subjected to a wide range of rules. However, in the latter half of the twentieth century armed conflicts based on the legal right to self-determination (wars of national liberation) were included in this category in contrast to the period before World War II where this distinct type of conflict was regarded as purely non-international. The reason behind the need to regulate these conflicts was that these conflicts rapidly increased in number around the decolonization period. At that time many third world States argued that wars of national liberation should be covered by the whole *jus in bello* and be treated as international armed conflicts. They even suggested that ANSAs could receive benefits, if agreed to abide by the Conventions, though very strictly and under specific conditions. This, as anticipated, was one of the most controversial issues to be dealt with at the 1949 Diplomatic Conference whose main objective was to modify the Conventions. A 4th paragraph was added to Common Article 2 and it states:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.

Despite the explicit denunciation of any effect of this provision’s application to the legal status of the parties to the conflict, it faced a lot of resistance from western countries because they feared such an outcome anyway.

1.1 Definition of Wars of National Liberation

There are various forms of armed conflicts to which the term "wars of national liberation" has been employed. However four of them are recognized as such; (1) those struggles of peoples fighting a foreign invader or occupant; (2) those that have evolved within the UN and identified from the practice of States and international organizations, namely colonial and alien domination and racist regimes; (3) rebellious movements which take up arms to bring down the government and the
social order it stands for\textsuperscript{97}; and (4) armed struggle of rebellious movements representing a component people within a plural State.\textsuperscript{98}

2. Additional Protocol I

Already the Preamble\textsuperscript{99} to Protocol I reaffirms the established\textsuperscript{100} autonomy of \textit{jus in bello} with regard to \textit{jus ad bellum}. State parties found it necessary to express in that same Preamble their conviction that nothing in Protocol I or in the Conventions can be interpreted as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the UN Charter. They even went on expressing their belief that it is crucial to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.\textsuperscript{101} However, although the primary purpose of Protocol I will always be to protect civilians from the effects of hostilities\textsuperscript{102}, it does not mean that Protocol I does not offer a fair share of protection to members of NLMS as well.\textsuperscript{103}

Under the negotiation of Protocol I at the Diplomatic Conference, delegates had to find solutions for two controversial issues, namely, the status of wars of national liberation and the drafted provisions applicable to guerrilla warfare. Once acceptable solutions were found for both issues, the conference adopted Protocol I by consensus. However, still to this day the United States (US) tries to eradicate Protocol I using arguments that evidently revolve around the provisions concerning wars of national liberation and guerrilla warfare.\textsuperscript{104} The latest example is the arguments presented by the US claiming that the captured Taliban forces were not entitled to POW status because the Taliban regime was not recognized as the legitimate regime of Afghanistan.\textsuperscript{105} This of course would release the US from its obligations under the Convention concerning the protection of POWs. As anticipated, the assertion was later withdrawn, as it was shown that quite the opposite is true: the application of the Convention and Protocol I is independent of the recognition of a certain regime or even of as State. If a State entity involved in an international armed conflict has already consented to the Conventions or Protocol I, it should be considered as a party to the conflict in the meaning of the Conventions and Protocol I. The minimum requirement in this case is that it has exited de facto for a certain time as a separate independent entity, even if not recognized by a majority of States.\textsuperscript{106} Ironically these provisions have never been invoked by a party to an armed conflict.\textsuperscript{107}

It should be noted that a part of Protocol I is considered to bind all States regardless of their accession to the protocol as it is a codification of pre-existing customary rules such as the Martens

\textsuperscript{97} Their members may consider themselves as a regime or government which marks and represents "alien domination".
\textsuperscript{98} The movement’s intention in this case is seceding and creating a new State on part of the territory of the existing one.
\textsuperscript{99} ‘... the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’
\textsuperscript{100} See Common Article 1 and 2 to the Conventions.
\textsuperscript{101} Bugnion 2004, p. 9
\textsuperscript{102} Draper in Meyer & McCoubrey 1998, p. 66
\textsuperscript{103} See Combatant and POW Status p.30 in this chapter.
\textsuperscript{104} The provisions mentioned are Article 1(4) and Article 44 of Protocol I. See also Gasser 2002, p. 564
\textsuperscript{105} In fact the Taliban regime was recognized by only three States, Pakistan, Saudi Arabia and United Arab Emirates. This recognition was later redrawn because of the involvement of the Taliban in the 11 September attacks.
\textsuperscript{106} Verhoeven 2007, p. 6
\textsuperscript{107} Gasser 2002, p. 563
Clause, that is reaffirmed in the first article of Protocol I.108 Protocol I has also significant influence on State’s Practice which as a result transformed a lot of its provisions to become a part of customary international law. State’s practice has also created a significant number of customary rules that are more detailed than the elementary provisions in Protocol II. 109

2.1 Article 1 (4)

The restrictive scope of Protocol I is defined in Article 1(4).110 This provision is a manifestation of the intentions behind the protocol, with its precise and very restricted ground for the application of IHL to internal conflicts.111 This provision states:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

By this provision, the application of Protocol I applies to armed conflicts in which people are exercising their right to self-determination against a State Party to the Protocol i.e. struggles against colonial domination, alien occupation or a racist regime. It continues to recognize only three categories of wars of national liberation, the ones against a) colonial domination, b) alien occupation and c) racist regimes and only when the people oppressed by these regimes are fighting for self-determination.112

However, the use of the word 'include' raises a lot of questions as it implies that the list is not comprehensive. Other categories of wars of national liberation based on the principle of self-determination could also be considered to be covered by this provision.113 The UN Charter and the Declaration on Friendly Relations are very clear upon the right to self-determination, granting it to all people equally and in every respect. This means that wars of national liberation or in other words struggles for self-determination cannot be limited to the cases listed in Article 1 (4). However, at the same time, and in order to limit the use of force, ICRC comments on this provision, arguing that it should be regarded as an exhaustive and complete list of the situations in which a people, in order to exercise its right of self-determination, must resort to the use of force against another people, or a racist regime.114

It is not easy to say which view is more accepted or can be the one to represent an established legal position. One can only say that the scope of Article 1 (4) remains restrictive which means that a number of NLMs and the civilians involved in these unrecognized wars of national liberation are left without adequate IHL protection.115 This is definitely a problem, since most contemporary wars of national liberation, are struggles for self-determination against other types of regimes, e.g. authoritarian regimes. Excluding this type from the list of Article 1(4) would leave the combatants

108 Chetail 2003, pp. 246-7
109 Henckaerts 2005, pp. 188-189
110 Greenwood 1989, pp. 193-194
111 Higgins 2004, p.46 See also CDDH/I/11
112 Ibid, p.47, See CDDH / I / SR. 56, Annex. See also CDDH / 1 / SR. 2 (34), 3 (21) and. 14 (8)
113 Ibid. See CDDH /I/ SR. 22 (14)
114 Sandoz, Swinarski & Zimmerman 1987, pp. 54-55
115 Schlindler 1979, p.137
and civilians of these armed conflicts without any legal protection. Needless to say, this provision indicates that Protocol I does not apply to every ANSA which claim to be NLM fighting for self-determination. Add to it that a certain level of intensity beyond isolated acts of violence is needed for the application of this protocol.

While this has been one of the major criticisms of the Protocol by scholars, many have pointed out the importance to appreciate this restrictiveness. However, the real weakness of Article 1 (4) is that it is quite outdated. The drafters focused on three categories of conflict which rapidly declined in frequency soon after 1977. As a result, Article 1 (4) lost its practical importance. Besides any State who has a regime which could be considered to fall within the scope of Article 1 (4), would be very unlikely to accede to Protocol I. NLMs acting in such a State would therefore, find it difficult to comply with the Protocol, or to demand application of the Protocol to its armed conflict with this State’s established government. It is believed that Article 1 (4) may come to be given a less restrictive interpretation if the principle of self-determination itself undergoes an evolution and comes to be interpreted in a wider manner. In the meantime, these conflicts are not left unregulated, as customary international law applies to all kinds of conflicts anyway. These customary rules amount to the basic principles of Protocol I. At the same time that a lot of pre-existing rules were codified in Protocol I, new ones were founded and formed by this protocol too. These rules were even been observed as applicable to non-international as well as international armed conflicts.

2.2 Article 96

The uncertainties and restrictiveness with which Article 1(4) enfold protocol I, would have crippled its application to wars of national liberation if it was not for the powerful instrument that Article 96 of the same protocol provides NLMs with, as it allows them to apply and be bound by the Conventions and the Protocol.

Article 96 of Protocol I states:

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon receipt by the depositary, have in relation to that conflict the following effects:
   a) The Conventions and this protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
   b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
   c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.

116 Wolf 1984, p. 40
117 Greenwood 1989, p. 193
118 Ibid, p. 194
119 Wolf 1984, p. 40
120 Abi-Saab 1979, pp. 397-398 See also Greenwood 1989, p. 194
121 Ibid
122 Henckaerts 2005, pp. 187-188
By the third paragraph, the authority representing the people struggling against the colonial, alien, or racist party to the Protocol can undertake to apply the Conventions and the Protocol by making a declaration to the depository (the Swiss Federal Council). However, certain conditions must be fulfilled first, i.e. the requirements of Article 1 (4); (a) there must be an armed conflict where a people are fighting for self-determination against colonial domination, alien occupation and racist regimes, and (b) the armed conflict must be between such a people and a Party to the Protocol. This authority must then make a declaration to the depository which will in turn notify the other Parties to the Conventions. A similar declaration could be made under Article 7 (4) of the Weapons Convention. A declaration under this convention can bring into force not only the Weapons Convention and its protocols, but also the Conventions, even when the State against which NLM is fighting is not a party to Protocol I.

First now, the weakness of this article reveals itself. While the regimes, against which wars of national liberation are fought, are defined in Protocol I, there is a lack of a clear definition of what might constitute an authority in Article 1 (4). Any group which engages in armed conflict against any of the three categories of regimes mentioned in Article 1 (4) could be acknowledged as NLM and thus fall within the field of application of the Protocol. This could mean that in some wars of national liberation, there may be more than one authority claiming to represent the people struggling for self-determination. However, Article 96 may still be applicable where there is a common declaration or concordant declarations from these multiple authorities. Otherwise, it would only apply between a State Party and the authority which deposited the declaration.

The rights and obligations brought into force between NLM and a State Party by such a declaration are equal to those of the State Party. Despite that, no declaration has ever been made expressly under Article 96 to date. Does that mean that NLMs are not interested in complying with international humanitarian law? Is the law perceived as an instrument to limit their use of force, rather than providing protection to their members and the civilians whose rights they claim to represent? The IRA expressed their intention to make a declaration under this provision already at the Diplomatic Conference of 1974 – 77. Numerous unilateral declarations of this kind have been made to the ICRC. In 1980, the African National Congress (ANC) announced to the ICRC their intention to both accept and apply the Conventions and Protocol I. This Declaration made no specific reference to Article 96 or Article 1 (4). A year later, the South West Africa People’s organisation (SWAPO), followed in the footsteps of ANC and declared their intention to accept and apply IHL.

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123 See Article 100 sub-paragraph (d), Protocol I.
125 Clapham 2004, p. 494
126 Sandoz, Swinarski & Zimmerman 1987, p. 1089
127 Article 7 (Meetings) and all of Part VI except Article 96 of Protocol I are not applicable to this authority.
128 Wolf 1984, p. 40
129 Greenwood 1989, p.197. See also Higgins 2004, p. 51
130 See Ewumbue-Monono for a list of examples
131 Aldrich 1991, p. 7
132 Higgins 2004, p. 51
133 Von Tangen Page 1998, p. 38
The absence of an official declaration under Article 96, which can also be a direct result of its uncertainties, prevented the application of IHL to wars of national liberation. In the absence of any declarations having been accepted, however, attention has turned to the customary status of these rules.

Members of NLMs cannot enjoy the protections offered by these treaties unless their movement formally accepts all the obligations of the Conventions and the Protocol under Article 96, in the same way as the State Parties do. NLMs could not expect to be in a position to carry out such obligations unless they are about to succeed in becoming the government of the State. This was very convenient for the States, since granting protection to members of NLMs would simply legitimize their cause, and States would do anything to avoid that. However, IHL has to apply equally to both sides if they are to be applied to the conflict at all.

3. Combatant and POW status

Already the classification of wars of national liberation as international conflicts would automatically grant the status of combatants to members of NLM who accordingly shall be treated as POW upon capture. Protocol I established new far-reaching rules regarding combatant and POW status in wars of national liberation. But the lack of official declarations under Article 96, made it impossible for members of NLMs to claim this POW status.

Furthermore, Article 1 of the regulations annexed to the 1907 Hague Convention IV, contains established conditions which must be met for a combatant to be recognized as a lawful combatant and thus afforded a special status under IHL. However, this article is intended to deal only with entities that could become subject to IHL. At that time, that meant only States.

Article 1 of these Regulations states:

The laws, rights, and duties of wars apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operation in accordance with the laws and customs of war.
In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

These conditions are restated in the first, the second and the third Geneva Conventions where an indication is expressed as to the application of these criteria to members of NLMs. Article 4A(2) of the third (POW) Geneva Convention of 1949 extended the class of lawful combatants. The article states:

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134 Regarding the question of an article 96 (3) Declaration of an ‘authority’, whose ‘parent State’ is not a State Party to the Protocol, e.g. the ANC and South Africa, see Wolf 1984, p. 40
135 Clapham 2004, p. 494
136 Aldrich 1991, pp. 6-7
137 Ibid, p.7
139 See Article 13 (2) of the first Geneva Convention, Article 13 (2) of the second Geneva Convention and Article 4A (2) of the third (POW) Geneva Convention.
Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating within or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions ....

A proper analysis of these age-old conditions goes beyond the scope of this paper; however, a few indications of their complexity may be pointed out. First of all, it should be noted that already in 1949, these conditions were considered unrealistic because of the nature of these movements and the difficulties they face to fulfill these conditions, especially the “distinction” condition.140 This particular condition was discussed on several occasions141 before the first Diplomatic Conference in 1974. Under these discussions suggestions were being made that the open carrying of arms during military operations could be adequate to distinguish members of NLMS from civilians.142 However, when the issue of distinction was coupled with the possibility of internationalizing wars of national liberation at the Diplomatic Conference in 1974, various delegations opposed claiming that such a concession to members of NLMS would lead to the eradicating of the obligation that IHL is to be respected in military operations carried out by members of NLMS, while still granting the latter the status of legitimate combatants and of POW in case of capture.143

Conducting the hostilities in accordance with IHL uncovered great concerns as it also carried the possibility of internationalizing wars of national liberation. IHL compliance implicates the probability of receiving a belligerent status. Such recognition would mean that these movements are lawfully conducting hostile actions, hence legitimizing their cause and bringing wars of national liberation into the international sphere.144

There is even controversy around the meaning of the first requirement. Does this responsibility mean operational subordination, disciplinary subordination or something in between? Although traditional law seems to assume disciplinary subordination at least to the State upon which these members depend, the question cannot be considered answered.145

Of course these conditions should be viewed disjunctively. While the failure to carry arms openly would not suggest that the members of NLMS concerned are conducting their military operations unlawfully, the failure to have a distinctive sign would.146 Still the unanimously adopted Article 43 of Protocol I that defines armed forces is lacking the “distinction” requirement.

This article states:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law of enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

The significance with this article is that it rejects the traditional distinction between combatant and non-combatant members of armed forces and introduces a new radical definition of armed forces, which allows members of NLMs within the meaning of Article 1(4) to be recognized and included when defining armed forces. Nonetheless the unrealistic conditions of Article 1 of the Hague Regulation were still a problem for these movements. Article 44 of Protocol I came to modify these conditions in order to make them achievable. This Article states:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
   a) During each military engagement, and
   b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members if the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

According to this article a member of NLM does not lose his status as a combatant if, in narrowly defined situations, he does not distinguish himself from the civilians. However, in the lack any specified manner in which combatants have to distinguish themselves, how can one judge if the member has distinguished himself or not. There is no reference to a fixed or distinctive sign. The article only specifies in its third paragraph that the obligation to distinguish combatants from the civilian surroundings applies during "an attack or a military operation preparatory to an attack." At the same time an exception to the "distinction" condition is presented for the first time. This exception, however, would certainly cause new problems, such as determining the nature and the

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147 Pfanner 2004, p. 113
148 Gasser 2002, p. 563
existence of the hostilities that can bring this exception into application. Still, the general understanding of this provision is that members of NLM must carry arms openly throughout the time when they are visible to the enemy and while relocating to a place from which an attack is to be initiated. This unmistakably corresponds with the text and drastically limits the effects of the exceptional rule. To be clear, combatant or POW status does not grant immunity from criminal prosecution for acts contrary to IHL.

4. Conclusion

NLMs involved in wars of national liberation – an international armed conflict - can become a party to the Conventions and Protocol I. However, in order for NLMs to qualify as such they needed to fulfill the strict conditions set up by Protocol I. If these conditions are met, the specific NLM assumes the same rights and obligations in an armed conflict as those of a State. This presumed privilege made States worry that Article 1 (4) and Article 96 (3) of this protocol would lead to the modification of jus ad bellum. For that reason they restricted the scope of Article 1 (4) so that it only applies to three categories of struggles for self-determination. To be fair, self-determination struggles against other regimes than the one listed in Article 1 (4) might not have been anticipated then. And because Article 96 (3) is dependent on the fulfilment of the requirements set out in Article 1 (4), it was made unpractical.

Already with the qualification of wars of national liberation as non-international conflict, the granting of combatant status to members of NLMS is ruled out. However, the POW status offered in Article 44 is almost impossible to achieve. The modification of the antique conditions in Article 1 of the regulations annexed to the Hague Convention, requiring a considerable element of (a) control, (b) identification, (c) openness, and (d) compliance with IHL from NLMs, is insufficient. Apart from the difficulty to meet these conditions, uncertainties still exist as to the legal consequences of any failure and as to which of these conditions are applicable to the whole group, which to the individual in the group, and which to both the group and the individual.

150 Greenwood 1989, p. 203-204. This sentence was the result of a compromise proposed by the US and the Democratic Republic of Vietnam
151 Gasser 2002, p. 560
Chapter VI. Unrecognized Armed Non-state Actors

1. Non-international armed conflicts

ANSAs are often involved in internal conflicts restricted to the territory of a single State and involve at least one ANSA. These conflicts are defined as non-international armed conflicts by IHL as a contrast to wars of national liberation which have been internationalized with the adoption of Protocol I. The key to the identification of these armed conflicts is ANSA’s concentrated use of violence under a relatively long period of time. This intensity is an established requirement which constitutes a threshold or a cut-off that hostilities such as internal disturbances, tensions, riots or other isolated and sporadic acts of violence do not cross and thereby are left beyond the reach of international law. This requirement has become a problem for the application of IHL since armed conflicts have always taken diverse appearances. Therefore, the scrutiny of each armed conflict is very essential in order to decide if IHL should apply. The question that imposes itself here is: at what point on the scale of intensity are we justified in designating an armed conflict as non-international? Unfortunately the transition from a common disturbance to an internal conflict of a non-international dignity is not like the freezing point of water.

There is also the problem of the emergence of new groups of armed conflicts. Globalization has not only internationalized the effects of internal armed conflicts, but also facilitated the transformation of internal armed conflicts into transnational conflicts. Adding to that the intervention of a third State in an otherwise internal armed conflict, to either stop or support one or both parties. IHL avoids dealing with this type of intervention although it is not a new phenomenon. This, nevertheless, does not mean that these rather complex situations are left unregulated. Such intervention might internationalize the conflict and in that case the entire IHL would be applicable, otherwise customary international law is always applicable.

2. Relevant Provisions applicable to non-international armed conflicts.

Due to the frequency of these internal armed conflicts, the international community was forced to realise that some form of regulation of non-international conflicts was needed. The effort to extend IHL to non-international armed conflicts ultimately resulted in the bold and ambiguous Common Article 3. IHL applicable in non-international armed conflict is the result of a compromise between the concept of sovereignty and humanitarian concerns. Internal conflicts involve a high

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152 www.redcross.ca/article.asp?Id=003731&tid=001
153 Transnationality, war and the law 2006, pp. 8-11
155 Ibid, p. 237
156 Suter 1984, p. 15
intensity of violence and cannot remain beyond the reach of international law providing protection to both civilians and combatants.\textsuperscript{157} Non-international armed conflicts are covered by Common Article 3, Protocol II (156 State Parties to date), several other treaties\textsuperscript{158}, as well as by customary law. Customary law acts both as a complement and a confirmation of the basic standards set by both Protocol II and Common Article 3. As already noted, many provisions applicable in international armed conflicts have also become applicable in non-international armed conflicts as customary international law.\textsuperscript{159} Under the following analysis you should have in mind that the part of IHL governing non-international armed conflict is the result of a compromise between the concept of sovereignty and humanitarian concerns.

### 3. Common Article 3

When Common article 3 was first adopted, it was considered a major step in the right direction in the development of the IHL\textsuperscript{160}. Indeed, it is the result of the first attempt ever to impose some basic humanitarian legal restraints upon both parties to an internal conflict carried out within the territory of a State Party to the Conventions.\textsuperscript{161} As is well known, States do not welcome any interference in their domestic security matters. So to agree upon imposing limitations in dealing with internal violence directed against\textsuperscript{162}? is still considered a great achievement. This “mini convention”\textsuperscript{163} is viewed as a part of \textit{jus cogens}.\textsuperscript{164}

The article states that:

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

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed \textit{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.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

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

Despite the undisputed significance of Common Article 3, as an improvement of the traditional international law approach to internal conflicts, it barely employs the most basic principles preserved in the Conventions onto non-international conflicts.\textsuperscript{165} It is true that the parties to the armed conflict are encouraged to apply all the provisions of the Conventions, but it fails to provide

\begin{footnotesize}
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\item \textsuperscript{157} Gasser 2002, p. 560
\item \textsuperscript{158} Such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; 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, and its Protocols.
\item \textsuperscript{159} International Humanitarian Law and The Challenges of Contemporary Armed Conflicts 2003, p. 229
\item \textsuperscript{160} Wilson 1988, p. 43
\item \textsuperscript{161} Draper in Meyer & McCoubrey 1998, p. 108
\item \textsuperscript{162} Ibid.
\item \textsuperscript{163} Wilson 1998, p. 44
\item \textsuperscript{164} Verhoeven 2007, p. 8
\item \textsuperscript{165} Higgins 2004, p. 28
\end{itemize}
\end{footnotesize}
the full application of the entire body of IHL on its own. When governments have been reluctant to recognize the lower threshold in Common Article 3, namely that there is an internal conflict taking place within their territory,\textsuperscript{166} it seems rather unlikely that they would consider applying any additional provisions from the Conventions. To be clear, the application of Common Article 3 starts automatically when the objective criteria listed in this article are met.\textsuperscript{167} Nevertheless, the government´s refusal to acknowledge this rule may contaminate the attitude of the armed group involved in the conflict, especially that they neither participated in the process that produced this rule, nor were allowed to become a party to the treaty. The reciprocity between the government and the ANSA remains important, though it is not a direct requirement for its application. Of course they may be other reasons why an armed group might refuse to comply with the law. Armed groups that do not have an aspiration to achieve international recognition and legitimacy, lack the intention to comply with international norms. They are merely interested in controlling economical/natural resources or running criminal activities.\textsuperscript{168} On the other hand, a government´s reluctance to admit that an internal conflict existed within its territory\textsuperscript{169} had totally different reasons. It was grounded in its concern that such recognition would give legitimacy to the armed group´s cause and at the same time reveal the weak points of the State.\textsuperscript{170} It should be pointed out in this context that Common article 3 does not confer by any means recognition to the ANSA involved in the conflict, nor does it change their status in international law.\textsuperscript{171} It certainly does not provide any legitimization to their cause.

By this provision, it is no longer required that the members of ANSA exercise control over any amount of territory or that they have the characteristic of a government. The threshold for the application of Common Article 3 is lower than that for recognised belligerency; such recognition would bring the whole corpus of IHL, not just the minimum rules of common Article 3, into application. As already mentioned, there are a lot of violent activities left outside the scope of this provision. Under this provision´s rather low threshold lies a range of conflicts, from passing sporadic challenges to State authority to insurgency, which could, conceivably, come within the scope of Common Article 3.\textsuperscript{172}

The greatest weakness in Common Article 3 is the absence of a clear definition of what is to be considered a non-international conflict. This ambiguity of its threshold makes it uncertain if and when violent actions in a State can be regarded as a non-international armed conflict and thereby trigger its application.\textsuperscript{173} Common Article 3 also lacks of the expression of the necessity or even better the formation of a competent authority who can decide if a certain conflict constitutes an 'Article 3 conflict'. As if all these deficiencies are not enough, Common Article 3 fails to take into account the special type of warfare involved in most internal conflicts, i.e. guerrilla warfare. Yet the article fails to take it into account. The Diplomatic Conference of 1949 failed to define the scope of

\textsuperscript{166} Clapham 2006, pp. 510-511  
167 Greenwood 2000, p. 238  
168 Clapham 2006, pp. 510-511  
169 Draper in Meyer & McCoubrey 1998, p. 183  
171 Ibid, p. 510  
172 Wilson 1998, p. 45  
173 Ibid.
the conflict which is covered by Common Article 3.\textsuperscript{174} A lot of difficulties and disputes had to be resolved by the committee of the non-international conflict at the Diplomatic Conference when the drafting of the provision of non-international conflicts came up for discussion. Judging from the conclusion of the article, they obviously had a hard time reaching a consensus.\textsuperscript{175} So the limitations and defects of this article’s final composition must be regarded with this in mind. Indeed, Common article 3 has been the object of more attention and dispute than any other provision in the Conventions. In the end its conclusion can be regarded as an achievement despite the defects it holds.\textsuperscript{176}

4. Additional Protocol II

Protocol II, like Common Article 3, was considered innovative as it was the first separate treaty to establish standards for the protection of persons involved in internal armed conflicts.\textsuperscript{177} It provided basic rules on methods of warfare applicable by both States and ANSAs involved in non-international armed conflicts. Protocol II was meant to define and supplement Common Article 3. But the strong resistance it received from developing States that, although they supported a distinctive treatment for ANSAs fighting against colonial and racist regimes, strived to secure their fragile existence by decreasing the regulations in non-international armed conflicts that occurs within their territory and threaten their authority, led to the failure of this intention. The States severely limited Protocol II and introduced a high threshold for its applicability, since the status of ANSAs combating colonial and racist regimes was established, and they had no interest in adopting a comprehensive framework in Protocol II.\textsuperscript{178} It should be stressed at this point that a compliance with the provisions of Protocol II does not imply recognition of any particular status for armed opposition groups.\textsuperscript{179}

Protocol II turned out to be limited to ensuring the application of the basic rules of IHL to internal conflicts. Thereby, it does not limit the rights of the States or the means available to them to maintain or restore law and order. It cannot even be used to justify humanitarian intervention.\textsuperscript{180} A government faced with an insurrection can in no circumstances use the argument that the insurgents have illegally taken up arms to justify refusing to apply Protocol II, since the instrument was adopted precisely to govern situations of that nature. With respect to the obligations it creates, Protocol II therefore rules out any subordination of \textit{jus in bello} to \textit{jus ad bellum}.\textsuperscript{181} Nevertheless, Protocol II has had a significant influence on State Practice and the following formation of customary law applicable in non-international armed conflicts. As a result, many of its provisions are now considered to be part of customary international law. States practice has also created a significant number of customary rules that are more detailed than the elementary provisions in

\textsuperscript{174} Suter 1984, p. 16
\textsuperscript{175} Ibid, p.19
\textsuperscript{176} Ibid.
\textsuperscript{177} ICRC report on international humanitarian law and the challenges of contemporary armed conflicts
\textsuperscript{178} The ICRC draft Protocol II contained 47 articles, but the legislative process saw many discussions, changes and compromises. The end result was a greatly reduced Protocol of 28 Articles. See Verhoeven 2007, p. 3-4
\textsuperscript{180} Article 3 of Protocol II
\textsuperscript{181} Bugnion 2004, p. 28
Protocol II. Customary law has a very important complementary role as it fixes the deficiencies and fills the gaps in both Protocol II and Common Article 3.\textsuperscript{182}

Both Article 3 and Protocol II can apply simultaneously to a conflict, providing for the minimum amount of protection. However, protocol II provides a much greater substantive protection, introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transports.\textsuperscript{183}

\subsection{Article 1}

Article 1 of Protocol II comprises the foundation of the protocol as it lays down the scope of its application. In order to remedy the shortage of Common Article 3, mentioned earlier, and to improve the protection of victims of non-international conflicts it was necessary to develop rules and define objective criteria to determine the applicability of Protocol II. The uncertainty regarding definitions often led to the rejection of the applicability of Common Article 3. At the same time a strict and rigid definition would have also led to the same result.\textsuperscript{184} Article 1 is the result of many extensive and protracted negotiations. The outcome of the entire protocol hinged on this single provision.\textsuperscript{185}

The article states:

1) This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 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.

2) This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

While Common Article 3 does not provide a definition of “non-international armed conflict”, Article 1 of Protocol II, clarifies that the Protocol applies to armed conflicts which take place (1) in the territory of a State Party to the protocol, (2) between its armed forces and ANSAs which (a) are organized under a responsible command, (b) exercise control over part of its territory, (c) are able to carry out continuous and intensive military operations and to implement this Protocol.

The condition of having a responsible authority and an organization does not imply that a hierarchical system of guerilla organization similar to that of regular armed forces is required. It simply points out the obligation of having an organization that exercise control over a certain amount of territory and capable of planning and carrying out continuous and concerted military

\begin{thebibliography}{9}
\bibitem{Henckaerts 2004} Henckaerts 2004, p. 188-189
\bibitem{Protocol II} Protocol II has been applied in Chechnya, Colombia, El Salvador and Rwanda, see Clapham 2006, p. 510 footnote 80 and Abi-Saab 1988, p. 236.
\end{thebibliography}
operations. In addition to that, it should have a de facto authority imposing discipline on its members and capable of implementing this protocol.\textsuperscript{186} The amount of territory which should be occupied is not stated and in fact is not relevant: the occupation of the territory only has to be such as to allow sustained and concerted military operations and to apply the protocol. Therefore, internal conflicts resulting in a temporary occupation of a small territory without total control over another national territory do not fall under Protocol II. On the other hand being under command and in control of a large amount of the territory is a crucial requirement to be able to implement the protocol, for instance to set up of hospitals and prison camps. So this rather high threshold is fairly realistic since the conditions provided in this article correspond with actual circumstances in which the parties may reasonably be expected to apply the rules developed in Protocol II.\textsuperscript{187} In practical terms, if the ANSA is organized in accordance with the requirements of the Protocol, the extent of territory it can claim to control will be that which escapes the control of the government´s armed forces. However, there must be some degree of stability in the control of even a modest area of land for it to be capable of effectively applying the rules of the Protocol.\textsuperscript{188} This condition of territory control in the mother State is rarely achieved as most ANSAs have their base outside of the mother State.\textsuperscript{189} Obviously, these criteria restrict the scope of application of the Protocol to conflicts of a high intensity only. Therefore, only very few non-international conflicts are covered by Protocol II, unlike Common Article 3.

Once this threshold is passed, the Protocol applies to the conflict in question. The application of Protocol II is automatic, i.e. no declaration has to be made by the parties to the conflict as long as the requirements of Article 1 are met.\textsuperscript{190} Therefore, the question of the applicability of Protocol II can be answered differently in each case, according to the prevailing circumstances.\textsuperscript{191} Despite the efforts made to clarify the problem of the threshold of Protocol II, much ambiguity still surrounds its application. Protocol II does not clearly state how much territory must be under the control of the non-government party to the conflict. Even the implementation of this Protocol by the ANSA remains unclear. A lot is left up to the discretion of the State, which is not a very satisfactory position. If States are allowed to characterise a situation and in accordance with that dictates of their individual disposition, then the broader base of humanitarian concerns may be sacrificed in the process.\textsuperscript{192}

The second paragraph of Article 1 reveals the exclusion of situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, from the scope of Protocol II. As already mentioned, these forms of hostilities are not considered as armed conflicts, not even in the framework of Common Article 3. A State may use armed force to maintain order caused by or even causing internal tensions or when force is used as a preventative measure to maintain respect for law and order without getting to be considered

\begin{footnotes}
\item[186] Verhoeven 2007, p. 10
\item[187] Verhoeven 2007, p. 10
\item[188] Sandoz, Swinarski & Zimmerman 1987, p. 1353
\item[189] Green 2000, p. 66
\item[190] Ibid, p. 331
\item[191] Schindler 1979, p.148
\item[192] Rwelamira in Swinarski 1984, p. 235
\end{footnotes}
internal disturbances.\textsuperscript{193} However, situations of this kind are covered by regional and universal human rights according to the article.\textsuperscript{194}

Nevertheless, practice has laid down certain criteria to draw up the boundaries of non-international armed conflicts from internal disturbances. Firstly, the hostilities have to be carried out by force of arms and reveal such intensity that the government is compelled to utilize its armed forces against ANSA. Secondly, the hostilities are meant to be carried out by the entire ANSA, and not by a single group within. Additionally, the ANSA has to exhibit a minimum amount of organization. Its armed forces should be under a responsible command and thereby be capable of meeting humanitarian requirements. The conflict must demonstrate certain similarities to an armed conflict without fulfilling all conditions necessary for the recognition of belligerency. \textsuperscript{195}

While in conflicts that come within the scope of Common Article 3, the ANSA and the State party involved are also encouraged to apply all the other provisions of the Conventions relating to international armed conflicts, thus offering a much broader base of protection to those involved in wars of national liberation, including a limit on the means and methods of warfare and on the conduct of hostilities. Protocol II only applies to situations of conflicts between ANSA and the established government and not between two or more ANSAs, resulting in a scope of application that is much narrower than that of Common Article 3.\textsuperscript{196}

4. Combatant and POW status

The status of combatants in internal conflicts differs dramatically from the status of combatants in international conflicts. However, the restrictive combatant status offered in Common Article 3 can be accorded to both recognized and unrecognized ANSAs.\textsuperscript{197} But Article 4 of the POW Convention, which automatically applies in international conflicts, does not apply to a non-international conflict unless the parties to such conflict choose to apply it, either by an expressed agreement or by concession. For instance, US Military command applied this article to the captured enemy in Vietnam. \textsuperscript{198}

The combatant status offered in Common Article 3 and Protocol II fail in providing any protection from prosecution to captured combatants. This is rather peculiar considering that both instruments establish a separation, if only to a limited extent, between \textit{jus ad bellum} and \textit{jus in bello}.\textsuperscript{199} The constraints on States provided by Common article 3 or Protocol II, such as the obligation to treat members of ANSAs in a humane manner, have been proven difficult to achieve.\textsuperscript{200} Indeed these instruments fail to achieve any constraints on the penalties these combatants are forced to endure for participating in the hostilities.\textsuperscript{201} This failure is extremely alarming bearing in mind the absence

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\textsuperscript{193} Sandoz, Swinarski & Zimmerman 1987, p. 1355
\textsuperscript{194} Training Manual on Human Rights Monitoring 2001, p. 331
\textsuperscript{195}Schlindler 1979, p. 147
\textsuperscript{196} Sandoz, Swinarski & Zimmerman 1987, p. 1355
\textsuperscript{197} Bugnion 2004, p. 27 See also Art. 43 of Protocol I
\textsuperscript{198} Draper in Meyer & McCoubrey 1998, p. 237
\textsuperscript{199} Bugnion 2004, p. 29
\textsuperscript{201} Bugnion 2004, p. 39
\end{flushleft}
of specific rules and definitions with respect to the principles of distinction and proportionality that makes the distinction between combatants and civilians very minimal in Protocol II.\textsuperscript{202}

Article 44 (3, 4, and 5) of Protocol II states:

3. In order to protect the civilian population from hostilities, civilians are not to be harmed if they are not taking part in attacks or war activities or preparing attacks. Because in certain armed situations it is not possible to differentiate between the combatants and the civilians, people are to be granted combatants status if they: a) are openly carrying a weapon during a military manoeuvre; b) are openly carrying a weapon in view of the enemy while on a military march prior to an attack which they are supposed to take part in.

4. A combatant who falls into enemy hands and who is not covered by the provisions of Section 3/2 is to be considered a Prisoner of War; he is entitled to all rights guaranteed by the Third Convention and this Protocol.

5. A combatant who falls into enemy hands, not while taking part in an attack or preparing for an attack, is not considered a combatant or a Prisoner of War because of his prior activity.\textsuperscript{203}

To be regarded as combatants, members of ANSAs have to fulfill certain conditions. They have to be carrying arms openly either during the attack or in the preparation preceding the attack that they are participating in. If the combatants are caught participating in a military operation or preparing such but not abiding by the distinction rules they are still granted a POW status. Even civilians participating in these conflicts are granted both combatant and POW status under the same conditions. However unlike Protocol I, Protocol II does not grant either combatant or POW status on members of any armed group, for their mere membership. In addition to that domestic law still remains in force in situations where Protocol II is applicable.\textsuperscript{204} Obviously the protection offered by Protocol I regarding combatants and POW, is to be much preferred. However, Article 6, concerning penal prosecutions, lays down the judicial guarantees provided for in Common Article 3; independence of the courts, rights of defence, individual responsibility, non-retroactivity of penalties, presumption of innocence, information on judicial remedies.\textsuperscript{205} The fifth paragraph of this article contains a provision that even urge the established government to grant amnesty to the participants.\textsuperscript{206} There are also various resolutions granting POW status to members of ANSAs when captured, especially those fighting for a certain political objective, such as freedom.\textsuperscript{207} Most recently the US Supreme Court has declared the applicability of Common Article 3 with regard to trying individuals captured in Afghanistan during the conflict there between US and Al Qaeda. The Supreme Court declared that Common Article 3 applies even to that conflict.\textsuperscript{208} In the meanwhile, since neither common Article 3 nor Protocol II contains any provision on criminal responsibility for any violations of IHL in an internal armed conflict, the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded in an important decision that horrific crimes committed in a non-international armed conflict are to be considered as international crimes. As a result, rules concerning international armed conflicts apply when trying a person prosecuted for a crime committed in a non-international armed conflict.\textsuperscript{209}

\textsuperscript{202} Henckaerts 2005, p. 189
\textsuperscript{203} See other regulations in Art. 45 and the clear inclusion of guerrilla warfare in Art. 37 Section 2.
\textsuperscript{204} Rwelamira in Swinarski 1984, pp. 234 -235
\textsuperscript{205} Burgoin 2004, p. 28
\textsuperscript{206} Article 6 (5) states “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”
\textsuperscript{207} Draper in Meyer & McCoubrey 1998, pp. 233-237
\textsuperscript{208} Clapham 2006, p. 496
\textsuperscript{209} Gasser 2002, pp. 561-562
6. Conclusion

Both Common Article 3 and Protocol II apply simultaneously and automatically to internal conflicts when certain threshold criteria are reached. However, the ambiguity surrounding the application and scope of Common Article 3, caused by its lack of definition of what constitutes an internal conflict, made it difficult to distinguish between a non-international armed conflict and internal disturbances or other sporadic acts of violence. This has expectedly helped States escape their international obligation in applying these instruments by denying that such a conflict is taking place in their territory. Protocol II, however, describes its scope in considerable detail, excluding low-intensity conflicts. Article 1 makes the application of Protocol II dependent on the exercise of de facto control of part of the national territory and on the ability of on material circumstances linked to the nature of the hostilities, i.e. the ability to carry out organized and sustained acts of violence and to implement the Protocol. It applies to all armed conflicts in which these conditions are met, regardless of who triggered the conflict and why. Protocol II rules out any subordination of jus in bello to jus ad bellum. Protocol II, reaffirms the separation between jus ad bellum and jus in bello established by Common Article only as far as the obligations it creates are concerned and only to a limited extent as it fails to provide any protection from arbitrary persecution to the participants in these conflicts. It is fair to say that the protection offered by both Protocol II and Common Article 3, to captured members of unrecognized NSAs is very modest and in many cases non-existence.
Chapter V. Conclusion

1. Final remarks

We stand at the dawn of the 21st century with so much violence and blood in our past, present and inescapably in our future too. To our consternation IHL has been proven repeatedly ineffective especially when dealing with the changed nature of global violence. The increase in armed conflicts generated by ANSAs presents both theoretical and practical challenges to international law. The impact of the violent activities of ANSAs on world politics is growing to such an extent that the traditionally exclusive role of States in international law must be reassessed. The first authoritative recognition of the existence and relevance of ANSAs from an international legal perspective came from ICJ. Even today when the existence of ANSAs is frequently acknowledged in international law books and journals, the State-centred conception of international law still prevails.

It is rather obvious that ANSAs are not a new phenomenon; however our perception of them is much different today. Does this mean that the instruments provided by IHL are unsuited to the realities of today's conflicts? It should be remembered that IHL has always aimed at balancing between legitimate concern for the security of the State and its population on the one hand and the preservation of human life, health and dignity on the other.

This paper sought to examine the rules that affirm the applicability of IHL on ANSAs and the armed conflicts in which they are involved. At the same time, it offers some explanation as to why these rules are not applied in such situations. Some light has even been shed over the international development that led to the current wording and form of these provisions to give a bigger picture when evaluating these instruments.

Traditional law allowed the applicability of the whole body of jus in bello only when a state of belligerency was recognized by the involved State or a third State. While such recognition of belligerency rarely occurred, the application of IHL was more of a political expediency with the involved State requiring the principle of reciprocity. Typically, this recognition came at a late stage of the conflict with much destruction and death already having taken place.

State sovereignty played a central role during the drafting period of the conventions, resulting in States refusal to adopt a comprehensive framework for internal armed conflicts since they regarded these conflicts as falling within their domestic jurisdiction and the members of ANSAs as criminals not deserving the protection of IHL. Ultimately this produced the ambiguous Common Article 3 that raised a lot of criticism. While some opine that the uncertainty surrounding the definition of an internal armed conflict as well as the confusion regarding its threshold and automatic applicability made it unpractical. Others argue that its scope covers all cases of armed conflicts not of an international character, especially in the absence of a clear definition for a non-international armed
conflict. In any case, Common Article 3 still remains very significant as it is the first move towards legal intrusion of IHL into the conventional sphere of internal affairs of sovereign States.

By 1977 and as wars of national liberation became more frequent, Protocol I came to confer international status on these conflicts. If NLMS were viewed as a ‘Power’ under Common Article 2 (3), the possibility then existed that they could apply and agree to be bound by these Conventions under article 96, and the whole body of IHL would apply to the conflict in which they were involved. There are divergent opinions regarding the scope of the application of Protocol I as laid down in Article 1 (4), especially regarding inclusion and exclusion of some self-determination struggles, thus its scope has been seen to be very restrictive. However, our belief in the universality of human rights (HR) forces us to realize the inevitability of the transformation of a people’s right to self-determination to even include people who are subject to apartheid, persecution, discrimination and other violations of HR by another group whether it is a minority or majority which prevents the affected group from the realisation of HR and fundamental freedoms. If it is of any comfort conflicts that do not fall within the scope of this article are rescued by Protocol II, and Common Article 3.

The other product of 1977 was Protocol II, which sought to extend the scope of Common Article 3 and present a definition of non-international armed conflicts making States definition or recognition of these situations irrelevant. Protocol II supplements and develops Common Article 3, but it does not substitute its provisions. In other words, Common Article 3 and Protocol II exist autonomously. Thus they can be applied simultaneously to a non-international armed conflict. However Protocol II provides more substantive protection for civilians. But, like Common Article 3, it does not offer any protection to the members of the ANSA. These would still be regarded as criminals and persecuted under domestic laws.

This paper shows that the applicability of IHL to ANSAs and the conflicts in which they are involved has been made unpractical by either the restrictiveness of the provisions or political reluctance. In theory State’s denial of the existence of an armed conflict within its borders, or their being a party to the conventions or the protocols is irrelevant. In practice, however, States prefer to classify internal conflicts of both international and non-international conflicts as internal disturbances or indeed manifestations of terrorism, and deal with them under municipal law, in order to preserve their State sovereignty and image. If they, against all expectations, concede to apply IHL, then it is just an act of “selective humanitarianism”.

IHL’s restrictive applicability to armed conflicts, international and non-international, hinders its application to internal tensions or disturbances or other isolated acts of violence. At the same time, these supposedly unregulated hostilities are the ones causing most harm and the possibility of applying similar protection to these cases is very important to discuss. It has, therefore, been argued that the qualification of the conflict as international or non-international is declining in relevancy, since a considerable amount of customary rules applies regardless of that. However, customary rules cannot weaken the applicable treaty obligations of the Signatory Party. Customary international humanitarian law only fills in certain gaps in protection provided to victims of armed conflict by treaty law. These gaps result either from the lack of ratification of relevant treaties or
from the lack of detailed rules on non-international armed conflicts in treaty law. The advantage of customary law is that it is not necessary for a State to formally accept a rule in order to be bound by it.

Bearing in mind that IHL strives to ease the suffering caused by armed conflicts, we have to admit that it is rather absurd that we still categorize armed conflicts as an international or a non-international conflict. This triggers different instruments offering different measures of protection to members of ANSA and civilians; when the scourges of the armed conflicts are virtually the same and sometimes even worse in non-international conflicts. If an armed conflict is considered to be an international conflict, the whole *jus in bello* would apply. But, if the same conflict is considered to be of a non-international character, then it is simply the basic rules of Common Article 3 or/and Protocol II which will be applicable, significantly limiting the protection offered to those involved in such conflict. On top of that States frequently tried to deny any applicability of IHL to the activities of ANSAs in their territory or in other territories for that matter, warrying of granting legitimacy to ANSAs and their cause. The application of IHL does not confer any legal status on a group or their particular use of force. More important, the applicability of IHL cannot be judged upon the legality of the cause and conduct of hostilities. The rules of IHL apply equally to all parties to an armed conflict irrespective of which is the aggressor or the self-defender or which is a State or an armed group.

Many conflicts today are internal conflicts clashed between ANSAs without an obvious State involvement. These conflicts claim thousands of lives and affect millions of people every year. But because they are less politically sensitive than conflicts in which a State is a party to the conflict they do not get much attention in IHL or the international community. So if the nature of the conflict makes such a difference, maybe blurring the distinction between different categories would make the protection offered by IHL available to civilians and combatants against the barbarism that occurs in these conflicts.

In the end it should be stressed that there is no need to change the existing or to come up with new laws, because that will only lead to more confusion and additional inefficient laws. However let´s face it, States today are no longer capable of controlling ANSAs. Globalisation facilitated the expansion of ANSA´s activities and thereby helped create a space removed from the effective control of any State. This has allowed them to act with virtual impunity; escape their internationally recognized humanitarian obligations and the consequences of their actions. If ANSAs are to be held accountable for violations of humanitarian norms, they have to be addressed directly, even those designated as terrorists by the international community. Although there have been calls for measures to address “all parties” in armed conflicts, States remain reluctant to place ANSAs on their political agenda. International organizations engaging ANSAs are left to work in an often ad hoc manner without any international political support. The most important questions facing the world today are: Is the State still a central actor of international law? Is she the only one ruling and regulating on the national and international level? And of course whether the UN with its member States ignoring ANSAs can cope with the new era? Is it so that the UN´s influence and good reputation is in decline?
The law ought to be made more effective and inclusive. Tomorrow’s mission should not be to determine what the rules are, or how to apply them to a specific situation, or even whether the existing rules are adequate or not, but rather how to secure or compel compliance with the law at all. It may be that we have now passed from the phase of law-making to a period where the focus is not on new substantive law but on how to make existing law effective.
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