by MICHAEL COWLING

TERRORISTS, GUERRILLAS, FREEDOM FIGHTERS - AND OTHER THINGS THAT GO BUMP IN THE NIGHT

In Part 1 of this article it was shown that the traditional laws of war (of which the 1949 Geneva Conventions form the main part) were restricted in their application to war in the classical sense of an armed conflict between two or more sovereign states. This material limitation has the effect of excluding most guerrilla conflicts since the latter usually occur within the borders of a single state and therefore cannot be classified as "international". In addition, guerrilla conflicts, especially in the initial stages, tend to operate at a low level of intensity. Although this level of violence tends to escalate as the conflict progresses, the implication inherent in the Geneva Conventions is that of a full-scale armed conflict in the traditional sense before such conflict is raised onto the plane of international legal regulation. In addition, the Geneva Conventions only apply to "parties to a conflict" – the latter term being restricted to sovereign states. This impliedly excludes guerrilla groups and liberation movements (who lack the status of states) from becoming parties to such conflicts.

Further, irrespective of the nature of the conflict, the conditions laid down for participation by the Geneva Conventions are generally too high with the result that most guerrilla groups are unable to comply with them. Thus, especially in the initial stages of guerrilla conflict, it would be impractical to require that guerrillas should distinguish themselves from the civilian population by wearing fixed and distinctive signs and carrying arms openly. But if they fail to comply with these conditions they are not entitled to combatant status and consequent prisoner of war treatment – which is the cornerstone of protection under the laws of war. In other words, qualification of guerrilla groups for combatant status is conditional upon the latter's conducting operations in accordance with the laws of war. This implies that parties to a conflict should provide certain basic facilities such as field hospitals and prisoner of war camps which is usually beyond the material and logistic capabilities of the average guerrilla group. Finally the laws of war are simply not suited to controlling the vastly differing tactics and techniques of guerrilla warfare.

Limiting the application of the laws of war so as to exclude irregular guerrilla-type wars or conflicts of a limited nature has the effect of excluding any objective international legal regulation thereof. This means that the definition or labelling of a group as "terrorists", "guerrillas" or "freedom fighters" will ultimately depend upon the attitude of the very state which this group is aiming to overthrow by the use of military force. Further, the entire matter will be regulated exclusively by the domestic criminal law of that state with little likelihood of impartiality in the matter.

WIDE FIELD

Thus, it is submitted that the ambit of the laws of war should be extended to cover as wide a field as possible. This should occur in two directions: firstly, the material application of the laws of war would be extended by broadening the definition of armed conflict to include all types of guerrilla and irregular conflicts of a military nature. Secondly, the ambit of the laws of war would be greatly extended by altering the conditions for combatant status in order to accommodate the exigencies of guerrilla-type warfare. This necessitates lowering the standards for participation – like doing away with such rigid requirements as the wearing of fixed and distinctive signs and carrying arms openly. Finally, on a more general level, the rules of warfare should be made more flexible to take account of guerrilla tactics. This is important in the light of the tremendous proliferation in guerrilla-type conflicts and the fact that the Geneva Conventions are essentially backward-regarding in the sense that they have been formulated on the basis of the World War II experience. Thus the 1949 Conventions were based on the assumption that wars would be fought in a conventional regular manner.

However, there have been certain developments which have tended to widen the application of the laws of war to types of conflicts that would be classified as purely internal according to traditional terminology. Firstly, international custom regards certain civil wars as international **per se.** Thus, notwithstanding the internal nature of a particular conflict, it is possible for it to be "internationalized" in certain circumstances. This occurs in such instances as intervention on either side by a third state or, more commonly, where the hostilities between the opposing sides have escalated to such a degree that the initial limited conflict has developed into a full-scale conventional war. This is what occurred in the Spanish Civil War (1936-9). In a southern African context, it can be argued that the same situation occurred during the Rhodesian Bush War. One of the problems confronting this principle is that of attempting to ascertain when the degree of escalation is such that a civil war has become "internationalized." However, it is patently evident that around 1978/9, the Rhodesian conflict had escalated to the extent that the Smith regime could no longer argue that the situation was merely internal. Rather it had developed into a full-scale civil war – the legal effect

being that it could then be raised onto the international plane. The most important consequence is that such conflict now falls to be regulated by the full laws of war.

ARTICLE 3

The second development by means of which armed conflict of a hitherto purely internal nature can be subjected to international regulation occurs in the form of common article 3 of the 4 Geneva Conventions. This article makes provision for some form of regulation of armed conflicts that are "**not** international in character". This constitutes a radical departure from the traditional view-point that war could only be waged between sovereign independent states. Further, it transcends the principle of non-intervention in matters essentially within the domestic jurisdiction of states because it purports to regulate a situation that had hitherto been regarded as an internal matter. Article 3 takes the form of a "mini-convention" that applies exclusively to situations which are not covered by the full body of the Geneva Conventions. Thus, the upper threshold of its application is that of an international armed conflict – to which the Geneva Conventions **in toto** will apply.

This usually occurs where the armed conflict transgresses international boundaries. However, there exist problems regarding the establishment of the lower limits of application since the concept of an armed conflict that is not international in character is rather loose and flexible and hence needs to be more specifically defined. The main problem stems from the fact that it is not within a state's interests to define a disturbance taking place within its borders as an armed conflict, since this would mean that the situation would be subjected to international regulations. The principal effect of this would be that a state could not rely exclusively on its domestic criminal law and this, besides reducing state control over the situation, would also have the effect of conferring a certain amount of international legitimacy on the opposing group. This is why states usually embark on a policy of "auto-interpretation" when it comes to classification of disturbances of a military nature and since it is the state that usually has the chief means of information gathering and evaluation at its disposal, it is scarcely surprising that most states confronted with this type of situation argue that any such uprising is merely internal and perpetrated by a purely criminal or terrorist element.

CLASSIFICATION DIFFICULT

But even in absolute terms it is difficult to objectively classify such situations. Thus, for example, would the Baader-Meinhof incident (which took place in West Germany during the 1970s) have been classified as a mere riot or temporary disorder, or could it have been regarded as a situation of armed conflict and hence subject to regulation by common article 3? What about the position in Northern Ireland? However, certain characteristics have been identified which serve to distinguish an armed conflict from a mere internal disorder. Firstly, an armed conflict should have an underlying political motive. This usually takes the form of an intention to overthrow the incumbent government and hence must be distinguished from a criminal gang operating for purely personal gain. Secondly, the conflict must be of a permanent nature as opposed to a temporary disturbance. Thirdly, the conflict must take the form of sustained military activity requiring a military reaction on the part of the incumbent government. Finally, the conflict must be of such a nature that it constitutes a military and political threat to the incumbent government. Once the above have been satisfied, a particular conflict may be classified as coming within the ambit of article 3.

However, although the concept of common article 3 represents a significant breakthrough in regard to the regulation of internal armed conflict, the actual substantive content of the article is not very onerous. In fact, it merely consists of a number of vague and general exhortations to both insurgents and incumbent government forces alike to conduct the conflict in a humane fashion by providing basic protection to civilians and those rendered **hors de combat.** The article makes no reference to combatant status which means that no standards are laid down in regard to participation. But there is also no reference to prisoner of war status or treatment which means that the incumbent government is still at liberty to punish insurgents for their participation in activities against the

former. However, it was hoped by the drafters of the article that this minimal content would serve as a starting point for subsequent development. But it is to be regretted that a provision to the effect that no captive should be executed before the conflict had been finally resolved was not adopted, although this principle was subjected to vigorous debate at the Diplomatic Conference preceding the formulation of the Geneva Conventions. Moreover, as a result of the proliferation of guerrilla-type wars after the coming into force of the Geneva Conventions, the inadequacy of the latter in regard to such wars soon became evident. Therefore in 1971 at the instance of the International Committee of the Red Cross, a Conference of Experts was set up to examine the current state of the laws of war. This was followed by a Diplomatic Conference which ultimately resulted in the formulation of the First and Second Geneva Protocols of 1977. This Diplomatic Conference revealed the dilemma confronting states (especially those in the Third World) on the question of regulation of guerrilla warfare of an internal nature.

TENDENCIES

On the one hand there was a concerted move to broaden the definition of armed conflict of an international character to include certain conflicts hitherto regarded as internal or, at the very least, to increase the content of regulation in the latter respect. This tendency developed out of anti-colonial trends which emerged in the post 1945 international community, since traditionally, colonial powers had regarded conflicts occurring in their dependent territories (i.e. in the form of armed struggles for independence directed against the colonial regime) as being essentially domestic in character. However, the idea that a colonial power could operate against a rebelling movement in one of its dependent territories without any restraints imposed by the laws of war was clearly anathema to newly-independent states who themselves had just recently cast off the cloak of colonialism. This was especially so in the light of the emergence of a right of self-determination in terms of which it could be argued that colonial dependencies had a right to liberate themselves.

But, on the other hand, these developing states (many of which are experiencing ocnsiderable political instability) found it necessary to distinguish between liberation movements struggling against colonial powers and rebels seeking to overthrow incumbent governments within these states. Thus, the essence of the problem was that if the laws of war were to receive extended application to cover internal situations generally, this would serve to benefit insurgents operating within these self-same states. (i.e. since the laws of war would confer some form of international status on the insurgents as well as hamper any government attempts to wipe out the problem). This is notwithstanding the fact that anti-colonial liberation movements would receive the desired protection of the laws of war.

The obvious solution then was to devise a principle which distinguished between freedom fighters struggling against colonial regimes on the one hand, and mere minority movements rebelling against a lawful authority on the other. The former conflicts would be regarded as international whereas the latter would not.

The result of this is that the definition of armed conflict international in character has been considerably extended to include all conflicts "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

Consequently it was not considered necessary to elaborate on the laws relating to internal armed conflicts since the types of conflict of a **prima facie** internal nature that required international protection had now magically been classified as international. The legal significance of this is that guerrilla groups and liberation movements engaged in irregular types of military conflict can now be "parties to the conflict" in a direct sense. This means that they are subject to all the rights, obligations and protections afforded by the full body of the laws of war. The body of rules regulating internal armed conflicts is contained in Geneva Protocol II and merely consists of re-enactment and extension of the rather vague and ineffective exhortations contained in common article 3.

In order to accommodate these irregular groups within the ambit of the full laws of war it was necessary to lower the standards of participation. Therefore the original conditions for combatant status (i.e. the wearing of fixed and distinctive signs and carrying arms openly) have now been substituted by article 44 (3) of Geneva Protocol I which sets out the minimum standard with which such combatants should comply. This provides that combatants should attempt to distinguish themselves from the civilian population. The article holds further that in situations where "owing to the nature of hostilities, an armed combatant cannot so distinguish himself, then it will suffice if he carries arms openly during or immediately preceding hostilities."

These measures constitute a significant extension of the full laws of war to accommodate guerrilla warfare and must hence be welcomed as a realistic move on the part of the international community in this direction. However,

criticism can be levelled at the fact that no attempt was made to increase the international regulation of internal armed conflicts generally. Instead, the Geneva Protocols operate on the basis of classifying as International in character a certain specified and narrow type of armed conflict hitherto regarded as internal. Therefore, besides conflicts that are directed against colonial or alien occupation or racist regimes, all other armed conflicts not international in character are subject to the same vague and toothless provisions that were contained in common article 3 of the Geneva Conventions which are further supplemented by Geneva Protocol II. Another problem in this regard is whether liberation movements that quality for international status would be able to comply with the vigorous standards implicit in the laws relating to international armed conflicts. In other words, notwithstanding the lowered standards of participation in regard to personal application of Protocol I, it must be remembered that Protocol I is nonetheless based on the assumption of a full-scale international armed conflict being waged in a conventional manner. This implies the provision of such facilities as fully-equipped field hospitals and prisoner of war camps which would doubtless pose severe (if not impossible) demands on liberation movements – especially during the early stages of the struggle. Therefore it can be argued that a far more preferable method would have been the retention of the distinction between international and internal armed conflicts and to strengthen the international regulation of the latter by increasing the substantive content of Geneva Protocol II. Indeed, it is highly unlikely that any state facing internal opposition of a military nature would be prepared to regard itself as a colonial or alien occupant or a racist regime. Therefore this provides a convenient loophole which can be manipulated by auto-interpretive techniques.

SOUTHERN AFRICA

Turning to the situation in southern Africa, it is evident that developments regarding international regulation of all types of warfare are of extreme significance. Indeed, the region is fast developing into one of the world's "trouble spots" where the setting of essentially political problems by military methods has now become accepted as standard procedure. This state of affairs has resulted from the fact that southern Africa has been the last bastion of white-dominated colonial and racist rule in Africa, that military violence has constituted the only means of liberation open to a number of these territories. This in turn has led to such violence forming an integral and institutional part of political expression.

Thus for example, in both Angola and Mocambique the former Portuguese colonial rulers were overthrown by liberation movements employing guerrilla tactics. However, these colonial regimes were replaced by one-party Marxist systems of government with the result that the only means of real political opposition occurs in the form of guerrilla groups operating within those territories (i.e. Unita in Angola and the R N M in Mocambique) in Zimbabwe, the intransigience of the Smith regime resulted in military violence becoming the only means of alternative political opposition. Unfortunately, notwithstanding ZANU's ultimate victory (both military and political) this has left a legacy of violence which still threatens the underlying stability of the country. South Africa on the other hand, is mounting a vigorous and desperate rearguard action as the last outpost of white rule in Africa. The incumbent government's determination in this regard has left some black liberation movements within the country seeing no alternative but to resort to force. In addition, South African security forces are engaged in an ongoing conflict situation in Namibia against SWAPO liberation forces. The chief aim of the latter is to oust South African authority over the territory and instead to introduce self-rule in the form of a sovereign independent state. Hostilities in this conflict have escalated extensively over the past few years.

LEGALLY REGULATED

All these varying conflicts occuring within the region raise the question as to if and how they should be legally regulated. The basic object of the laws of war is to ensure that warfare is conducted in as humane fashion as possible and it is obvious that this can only be achieved by subjecting these conflicts to objective international regulation. The most important consequence of this is that both sides will be accorded some form of international legitimacy which will inevitably influence the internal position. This will have the effect of considerably reducing the emotional intensity, hatred and rivalry that occurs in conflicts where tribal, racial or sectional interests and groups are pitted against each other within the boundaries of a single state. Thus, one might well question the fact that it is left entirely in the hands of the South African government to prescribe the rules and regulations for the expression of political opposition – bearing in mind that this government represents the exclusive interests of the minority White group. In other words, after excluding all Blacks (and hence the overwhelming majority of the population) from participating in the political process, is it possible for this same government to unilaterally label as criminals and terrorists those Blacks who adopt tactics of force and violence as a means of political expression? Further, do incumbent governments have the sole monopoly in regard to the use of violence? These questions must be seen within the background context of the conflicts at present being waged in Southern Africa and the answers will be provided by the current developments in the laws of war as outlined above. Thus, it must be determined whether a particular conflict is international by reason of the fact that it transgresses international boundaries or because it can be defined as a struggle against colonial or alien occupation or against a racist regime. These conflicts will be subject to the full laws of war (Geneva Conventions of 1949 and Geneva Protocol I of 1977). All other conflicts will be classified as internal (provided they satisfy the minimum requirements laid down for military armed conflicts). The latter are regulated by the rather vague and unsatisfactory exhortations contained in common article 3 of the 1949 Geneva Conventions and Geneva Protocol II of 1977.

INTERNATIONAL

Turning to South Africa, one must be careful not to fall into the trap of auto-interpretation of the various conflict situations in order to accord with one's political preferences. It is because of the political factors inherent in any attempt at classification of conflicts that the results have been so diverse. However, it is submitted that the conflict between South Africa and SWAPO in

Namibia is definitely international in character. This is due to a number of factors, the most important being: firstly, in view of the revocation of the Mandate for South-West Africa by the U N General Assembly (backed up by the 1971 International Court of Justice advisory opinion on Namibia), South Africa's continued occupation of Namibia is illegal. This means that the conflict between South African security forces and SWAPO **per se** crosses international boundaries which automatically causes it to be classified as international. In addition, since the question of ultimate control over the territory is of concern to the international community, it follows that any conflict arising within the territory will be of an international character. Finally, the actual hostilities have escalated to such an extent that the conflict can no longer be regarded as purely internal. This latter argument is based on the international legal principle that once an internal conflict of a purely limited nature has erupted into a full-scale civil war, it will automatically be classified as international.

Therefore, since South Africa is a signatory to the Geneva Conventions of 1949 and SWAPO has indicated its intention to abide by the Conventions, the latter should be applicable to the conflict in Namibia. The most important effect of this proposition is that all legitimate participants in the conflict (i.e. members of the S A Defence Force and SWAPO alike who comply with the conditions for participation) will enjoy combatant status. This means that they are entitled to prisoner-of-war treatment on being rendered **hors de combat** by reason of sickness, wounding or capture. It follows from this that the South African criminal law relating to internal security and terrorism is no longer applicable which means that the status of SWAPO members will alter from that of "criminal terrorists" to "legitimate guerrillas" or "freedom fighters". □

(Part 3 will be published in the May issue of REALITY)

BOOKS RECEIVED

Sylvester Stein: **Second-Class Taxi;** David Philip, Africasouth Paperbacks, 1983.

This novel, first published in 1958 and banned within a week, describes as its main action a national non-violent consumer boycott in South Africa - organised by the 'African Congress for Equality' - of all 'racialist' shops and establishments. The boycott, at first immensely successful, degenerates into violence and is violently crushed. The wholly admirable leader is killed. But this gloomy account gives entirely the wrong impression of the novel, which is comic, often hilarious, fast-moving, and full of pointed and amusing satire. Its general good humour derives mainly from the character of the protagonist, Staffnurse Phofolo (named after the most distinguished person present at his birth). Staffnurse is innocent, optimistic, ebullient, undauntedly cheerful and full of resource in the face of all difficulties, (The 'Taxi' of the title is his employer's large limousine, regularly requisitioned and appropriately labelled by Staffnurse for fund-raising or transport to aid the A.C.E. cause). The social and political insights of the novel are interestingly and illuminatingly 'dated': the satire and comedy still very entertaining.

M.D.

FREEDOM FOR MY PEOPLE - The Autobiography of Z.K. Matthews, edited by Monica Wilson.

This book, originally published by Rex Collings in 1981, was at that time warmly reviewed in REALITY. It has now been republished in Africasouth Paperbacks by David Philip of Cape Town, and REALITY heartily welcomes its republication. It is the story of one of the outstanding black men of our country, and that means of course one of the outstanding men of our history. Matthews however never had the opportunity to speak in Parliament, or to take part in government. He, like Lutuli, and our own Selby Msimang, was destined to spend his life in struggle and opposition. He, like them, achieved, not public adulation, but a kind of moral grandeur. He also had the luck of achieving recognition at last, when Seretse Khama sent him to Washington as the Ambassador for Botswana.

A.S.P.

THE GREAT KAROO — Stories by John Howland-Beaumont

These stories were first published in Britain in 1970, with the title "The Tree of Igdrasil". They are now republished in Africasouth Paperbacks by David Philip of Cape Town. They are to be heartily welcomed, being brief and imaginative sketches of life on a farm in the Great Karoo. They attain a high standard of literary achievement, and their writer is clearly a man of considerable learning and considerable simplicity, a simplicity which at times is quietly moving.

A.S.P.

Perceval Gibbon: **Margaret Harding;** David Philip, Africasouth Paperbacks, 1983.

This is an ambitious novel first published in 1911 and largely neglected until this reprinting. It deals with an idealised Platonic encounter between an intelligent and sensitive young Englishwoman in a Karoo sanatorium and a fully anglicised Black man, a doctor, returned to help his own people but uncomprehendingly rejected by them and harassed by the authorities. The responses of the local White people (and one Black) to this encounter form a principal subject of the novel, probably the one most interesting to modern readers. These characters' instant obsessional interpretation of the relationship as sexual, their reactions ranging from violent 'moralistic' outrage, through contemptuous relish to dismayed and tentative support, are presented critically, sometimes ironically, by Gibbon with insight and conviction. (His own obvious White-is-beautiful attitudes add to the interest of the exploration). In spite of some melodrama, there is enough carefully and originally observed detail of social interactions and physical places to give the novel literary as well as historical significance.

M.D.

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