

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

What about the A N C? At present it is submitted that the latter's campaign of military violence against the South African government (although rapidly escalating) is not of sufficient intensity to warrant classification as an international conflict. However, this does not imply that the situation is merely internal and hence to be regulated exclusively by South African domestic law. In fact there are a number of factors which indicate the contrary. In the first instance, the ANC enjoys a considerable amount of legitimacy within the international community. Thus, recognition as a liberation movement by the United Nations has accorded the organisation a degree of international legal status which cannot simply be ignored by the South African government. This was considerably enhanced in relation to the laws of war by the decision by the ANC to accept and be guided by general principles of international humanitarian law which relate to armed conflicts. The ANC has further undertaken to respect the rules of the 4 Geneva Conventions of 1949 and Protocol 1 of 1977 when this is practically possible. Although South Africa is not a signatory to the 1977 Protocols, there is a possibility that the latter might crystallize into norms of customary international law (as happened in the case of the 1949 Geneva Conventions). This would mean that the conflict between the S A government and the ANC could be classified as international in terms of article 1 (4) of Protocol I i.e. in the sense of its being a liberation struggle against a racist regime. The other important factor relates to the fact that if the hostilities continue to escalate at the present rate, it is merely a matter of time before South Africa will be plunged into a situation of full-scale civil war. The problem in this regard is that it is difficult to gauge the precise degree of escalation in order to satisfy the requirements of international law. (Indeed, this is what impeded any early settlement of the Rhodesian Bush War because the Smith regime refused to acknowledge that the conflict had become internationalized. Hence the Rhodesian government stubbornly persisted in regarding it as purely domestic and thus to be settled by internal means exclusively). But even at the present stage of development, the conflict situation between the ANC and the South African government cannot be labelled as merely internal. Indeed, the ANC campaign is politically motivated and of a sufficiently sustained military nature to fall within the ambit of an armed conflict not international in character. This serves to distinguish it from a mere riot, temporary disturbance or purely criminal activity and hence renders it liable to international regulation.

It is all very well to talk in terms of international legal regulation, but one is now confronted with the problem

Parts 1 and 2 of this article discussed the historical development of "rules of war" and the attempts to codify them in the Geneva Conventions and the later "protocols" to the Conventions – and the shortcomings of these agreements when confronted by the problems raised by guerrilla-type wars of "liberation".

of analysing the effects of such regulation. It has already been seen that the laws of war governing armed conflicts of an internal character (as contained in common article 3 of the 1949 Geneva Conventions and the 1977 Protocol II) are notoriously vague and lack any real substantive and obligatory content. But perhaps this is advantageous since guerrilla warfare, by its very nature, is extremely difficult to subject to any form of legal regulation and vague formulations afford a necessary measure of flexibility. Therefore, at the outset, one should not view the regulation provided by the laws relating to internal armed conflicts in terms of specific consequences emerging from detailed rules, but rather look at the broad implications arising out of the general principles which underline the laws of war.

OBJECTIVITY

One of the more fundamental effects of legal regulation will be the introduction of a measure of objectivity into one of the most difficult types of armed conflict viz. civil war. The latter is usually characterised by a high level of emotional intensity which, in the case of South Africa, is greatly exacerbated by the fact that the parties to the conflict will ultimately be divided along racial lines. It is clear that only in the case of objective international legal regulation is it possible to effectively deal with a situation in which one man's "criminal terrorist" is another's "heroic freedom fighter". The domestic criminal law of the incumbent government is patently unsuited in this respect.

The international regulation will undoubtedly influence the attitudes of the conflicting parties in relation to each other since it is essentially based on humanitarian principles. In the first place, both sides will be accorded a measure of international legitimacy. This will enable them to develop some form of mutual respect for each other which will inevitably lead to a reduction in the intensity of emotional and personal animosity between them. This in turn will have a positive effect on the concept of reciprocity. In cases where the incumbent government labels internal military opposition groups as mere criminals and affords

them like treatment, such treatment is likely to be reciprocated by the opposing groups. This inevitably leads to an escalation of atrocities. In basic terms this means that if the South African government continues to hang members of the ANC, then what kind of treatment can South African soldiers expect when they fall into the hands of the ANC? This is a practical problem which would be greatly reduced in the event of international legal regulation.

Such international legal regulation will also result in the introduction of a far greater degree of neutrality in internal armed conflicts. This is especially important in respect of the civilian population because one of the fundamental tenets of the laws of war is that civilians should be placed outside the sphere of direct military operations and are hence protected in this regard. And yet one of the tragic characteristics of most civil wars has been the high death toll among civilians. For example the casualty rate for civilians "caught in cross-fire" during the Rhodesian Bush War was fifteen times higher than that pertaining to combatants on both sides.

GOVERNMENT CONTROL

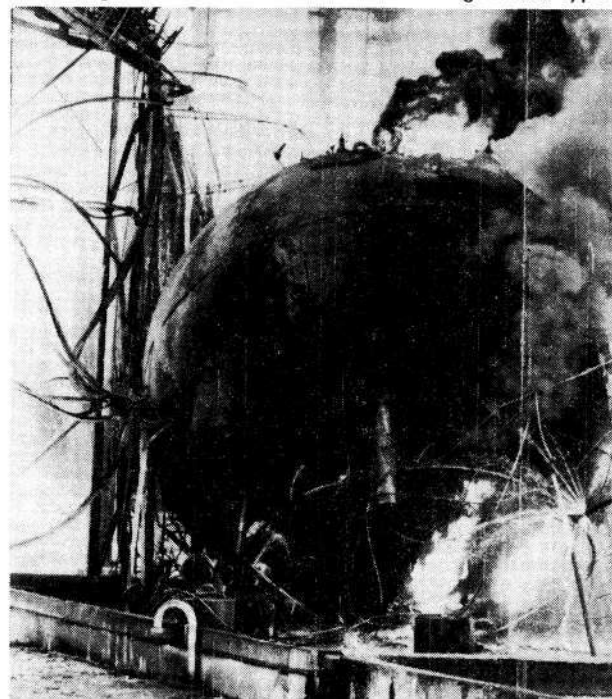
To a larger extent this results from the fact that incumbent governments monopolize state institutions and thus enjoy total control over the civilian population. This has the effect of the South African government being able to define such concepts as "patriotism", "national interest" and "state security" in extremely narrow terms based on the sole interests of the exclusive white minority from which the ruling National Party derives its support and power. And yet, notwithstanding the exclusion of Blacks from all facets of the political process, the government still demands the allegiance of the latter. Therefore, far from being a situation of civilian neutrality, the government is actually requiring indirect (but nonetheless active) support of Black civilians in the form of positive duties to assist security forces by rendering information concerning and refusing assistance to the guerrillas. And those Blacks who do not comply with these duties are branded as traitors and punished. It does not require much imagination to realise the effect this attitude will have on the S A Defence Force since, as occurred in the Rhodesian Bush War, failures in intelligence gathering are generally ascribed to lack of co-operation on the part of the local population. This is bound to lead to a serious degeneration in the treatment of the latter.

The subjective approach to neutrality on the part of incumbent governments would be greatly reduced by objective international legal regulation. As a result incumbent governments would be forced to recognise the claims of the opposite side to limited forms of assistance from the civilians. This especially takes the form of medical assistance and the right to silence on the part of the latter. Thus, the assumption on the part of incumbent governments that they have the sole right to co-operation from the civilian population (and hence the imposition of duties to inform) is a blatant violation of the basic idea of neutrality in civil war. This is especially so in South Africa where the opposing groups are so distinctly divided along racial lines. Surely in such situations neutrality implies that civilians should have the right to choose which side they wish to indirectly support?

OTHER AREAS

There are a number of other areas in which objectivity will have the effect of rendering the conduct of a civil war more humane. Thus, for example, the choice between military and civilian targets will be placed on a realistic level. It is a fundamental principle of the laws of war that only military targets should be the objects of direct attack. However, if the incumbent government labels the opposing group as a mere bunch of criminals, this will mean that no targets will be considered by the government as legally susceptible to attack. Thus, no matter how military the nature of the target might be, an attack on it will be classified as a criminal act. In this regard it is important to note that it has been (up until now at any rate) ANC policy that its operations will be restricted as far as possible to military targets. This does not mean that civilian targets are totally excluded since the latter are nonetheless indirect objects of attack. And it is submitted that international legal regulation will place this issue in a clearer perspective since the South African government would no longer be in a position to classify all acts of sabotage as cowardly, perfidious and treacherous.

But possibly the most important aspect of international legal regulation is the effect that it will have on the issue of participation. Although not specifically enumerated in the laws relating to internal armed conflicts, it is one of the fundamental principles of the laws of war that participants in a conflict should not be punished for the mere act of participation. Therefore, since the ANC enjoys a considerable measure of international legitimacy, it is submitted that members of that group engaged in hostilities against the South African government should not be punished provided they have complied with the general requirements of the laws of war relating to participation, and provided attacks are not aimed directly at civilian targets. The latter requirements entail identification as military personnel (as distinct from civilians) and implies the wearing of some kind of military uniform and the carrying of arms openly during actual military operations. Owing to the exigencies inherent in the nature of guerrilla-type



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warfare, these standards are not very exacting and it can be said that individual members of the ANC have generally complied satisfactorily.

CAPTIVES

This poses the fundamental and very important question as to how should the South African government treat captured ANC Members? More particularly, is the government justified in executing these captives? The laws of war are clear on this issue: any participant rendered **hors de combat** by reason of capture may only be detained by the other side in order to prevent his constituting a threat to the latter. Therefore, should the conflict in South Africa become internationalized, the S.A. government would come under an international obligation to confer prisoner-of-war status and treatment on captured ANC members. So at this stage it is contrary to the fundamental basis of international legal regulation of armed conflicts to bring down the finality of capital punishment on politico-military opponents of an incumbent government. Such action leaves no room for compromise or amnesty in the future and besides, the international legal regime has never looked favourably upon the execution of possible future leaders of a state.

In addition, the issue of international legal regulation will have a positive effect on the question of the ultimate settlement of a particular dispute. Most conflicts can only be finally settled through a process of negotiation between the parties to such a conflict. And negotiation presumes that all parties to a conflict recognise — to a greater or lesser extent — the legitimacy of each others' existence. However this situation cannot arise where a conflict is regulated solely by the internal criminal law of the incumbent government since (as is occurring in South Africa) the latter usually labels members of opposition armed groups as mere criminals. It is extremely difficult from a political point-of-view for any government to undertake negotiations with and grant political concessions to a group that it hitherto regarded as criminal. This was the dilemma that confronted the Smith regime in Rhodesia and is already making itself felt in South African political circles. Thus just as Ian Smith stubbornly refused to negotiate with the Patriotic Front (whom he regarded as nothing more than a bunch of terrorists and murderers) until it was too late, so the South African government seems headed in the same direction. And yet it is submitted that the only possibility of a real settlement of the conflict situation at present confronting South Africa is for all parties to talk to each other around the negotiating table, since one can rest assured that the ANC is not simply going to disappear. And this is precisely what is implied by international legal regulation, viz that the latter confers legitimacy on both sides with the result that parties will not be precluded from negotiating with each other.

NEUTRAL GROUPS

Finally, this concept of neutrality and the concomitant principal of humanity in armed conflict will be further enforced by reason of the fact that the laws of armed conflict confer certain powers of regulation and control upon such internationally neutral groups as the International Committee of the Red Cross. The latter organisation has played an extremely important role in the

formulation of the 1949 Geneva Conventions and the 1977 Protocols. It has a long history of neutrality and objectivity during times of war and has played a very important role as regards treatment of prisoners, distribution of aid and supply of medical facilities as well as undertaking certain general supervisory functions during the latter stages of the Rhodesian Bush War. Thus the mere presence of the Red Cross together with its powers and functions during armed conflict will greatly enhance the cause of humanity in warfare.

In conclusion it can be said that the basic aim of international regulation of internal armed conflicts is to avoid situations where incumbent governments utilise their own domestic laws to label politico-military opposition groups as criminals, terrorists — especially in cases where such groups are regarded as heroic freedom fighters by a substantial section of the population. It is thus clear at the outset that the labels attached to these groups (viz. terrorists, guerrilla, freedom fighter) is of the utmost importance in determining the opposing side's attitudes to each other. So therefore the basic function of international legal regulation is to accord both sides a status of legitimacy in much the same way as the parties to a full-scale international armed conflict. This will tend to defuse the intensity of the situation — even if only in an indirect sense. This is because, in addition to the question of regulating the conduct of parties to a conflict, the laws of war seek to educate and divert individual participants from inhumane practices. In such an atmosphere it becomes easier for participants to resist the pressures of military necessity by qualifying the latter in terms of fundamental humanitarian principles. This means that throughout the hierarchical chain of command inherent in any militarily organised group, the line of least resistance will no longer be to conduct oneself in an inhumane manner (by committing atrocities, etc.) but rather to act as humanely as possible in accordance with the basic principles of the laws of war. And this should extend to government institutions and arms of government which are responsible for the implementation of these ideals. And it is in this sense that the changing attitude of the courts in South Africa (in the form of increasing sentences and greater resort to imposition of the death penalty for political crimes) is to be deplored.

Therefore if one accepts military violence as an inevitable and integral part of South Africa's ultimate political solution (which must necessarily result from the exclusion of the Black majority from the political process), then it must surely be within the interests of all South Africans that such conflict be conducted in as humane manner as possible. And it is in this respect that the laws of war and questions of international legal regulation become relevant. Whereas it is submitted that South Africa is already engaged in a full-scale international armed conflict in Namibia, internal hostilities between the government and the ANC are rapidly escalating. Thus it is only a matter of time before South Africa will come under a clear obligation to apply the full body of the laws of war. Failure to do this is a war crime for which individuals as well as the state may be punished in terms of international law. Although this might seem unlikely at present, the South African government would do well to consider this aspect from a point-of-view of possible future developments. After all, how many Nazis would have thought in 1943 that 3 years hence they would be standing trial for acts considered to be internally legitimate? □