THE PROTECTION OF CIVILIANS AND HUMANITARIAN INTERVENTION IN INTERNAL ARMED CONFLICTS

By: Sigfrido Roaato

I. Introduction

Since the end of the Second World War, every effort has been taken to prevent the atrocities of such a war. However, it is obvious that armed conflicts have broken out time and again. Such armed conflicts have broken up both in the context of inter-state as well as conflict characterized as an internal one. Sometimes the effect of an internal armed conflict, in terms of cruelty, atrocity, casualties, and the savagery is much biter than international armed conflicts.

In practice, situations classified by humanitarian law as internal disturbances and tensions due to political instability, and not involving resort to armed forces in the formal sense of the term, are more and more frequent. However, it does not necessarily mean that there is an urgency or no legal norms applicable to internal armed conflicts. In this sense, we have to be aware that the legal regulations concerning the conduct of hostilities remain exist. It is important to note that most of the rules in the corpus of rules concerning internal armed conflicts are aimed at protecting non-combatants only, that is, civilians who do not take part in the hostilities and may directly or indirectly suffer from armed violence; the wounded and sick as well as those who have taken part in the hostilities are no longer willing or in a position to fight. Rules applicable to internal conflicts, although they seek to prohibit many of the atrocities of the type that have occurred in such conflicts are more limited than those for international armed conflicts.

However, we have seen that practically the problem of implementation of laws of war both in the context of internal and interstate is both important and difficult. Many lawyers like to think of enforcement exclusively in terms of criminal trial after a violation when implementation may take many other legal, administrative or military forms. An analysis on the implementation of the law governing armed conflicts since the Second World War has been made by Geoffrey Boyce. He came into a pessimistic conclusion and pointed out that the impact of such the laws has been less than had been hoped. Sometimes, indeed, it has been little more than an instrument of propaganda warfare. A similar argumentation has been put forward by Professor Adama Roberts with more narrowly concentrated on the question of implementation in the wake of violations.

Such situation, however, raise humanitarian problems especially to the suffering civilians in the area of conflicts. This would justify the action of independent humanitarian agency such as the ICRC, particularly as concerns the protection of deposed persons generally called "political detainees." For more again there is possibility of invoking intervention action from the external powers to the scared territory for the sake of humanitarian reason especially in terms of rescuing the suffering civilians.


MEMBARUKUM
In this paper the laws of war especially regulations concerning internal armed conflicts and the possibility of invoking humanitarian intervention that sparking the debate over the objection to such intervention in order to protect sovereignty and the need for rescuing the civilians in the name of humanitarian value will be analyzed.

II. Non International Armed Conflict

Today

In the 1980s and 1990s the respond to violations of the laws of armed conflict especially in the conflict with a character of non international4 has been the key issue in international relations and politics of many countries. Disobedience of such the laws has become a crucial point in international diplomacy. The problem related to violations of the law of armed conflicts in the context of internal conflict much more complicated today. Cases in point are such as the situation in Somalia, Iraq, Cambodia and former Yugoslavia i.e. Bosnia and Herzegovina.

At present putting an internal armed conflict or civil war in the context of international law may be seen from different point of view: (1) the rights and obligations of third States with regard to the State where an internal conflict has broken out; (2) the conditions on which insurgents can claim international standing and the extent to which they consequently possess rights and obligations; (3) the extent to which international law regulates the fighting going on between the incumbent Government and the rebels.5

The rules governing the struggle between the lawful government and insurgents, commonly they do not grant the rebels the status of lawful belligerents; in the eyes of both the Government against which they fight and of third States, consequently rebels remain criminals infringing upon domestic penal law. Thus, if captured, they do not enjoy the status of prisoner of war but can be tried and executed for the mere fact of having taken up arms against the central authorities.6

With regard to the protection of civilian, however, customary rules have to be respected, that is, general rules protecting civilians in inter-state wars were applicable to this conflict as well. The rules which generally have to be respected by parties to such a conflict are: the ban on deliberate bombing of civilians; the prohibition on attacking non-military objectives; the rule concerning the precautions which must be taken when attacking military objects; the rule authorizing reprisals against enemy civilians and consequently submitting them to the general conditions exacted for reprisals.7

In practice, however, we have to take into consideration many factors that might put very serious constraints in imposing legal rules to the contemporary internal armed conflicts.8 First, we have to take into consideration the factor of State sovereignty, or domestic jurisdiction. In fact, feottally governments have the right to deal with situations of serious unrest occurring in their own territory and determine the appropriate methods; particularly when such situation endanger the political stability or integrity of State. Government will be very reluctant to accept what they could consider as an outside interference in their sphere of domestic jurisdiction by way of international regulation presumably applicable to such situations. In this regard they

4 The term "internal conflict" mean simply conflicts occurring within the national boundaries of a State. See, R. Abi Sahib, 1988, The "General Principles" of Humanitarian Law, op. cit., p. 4.
5 A. Cassese, op. cit., p. 280.
6 A. Cassese, ibid, p. 280.
7 A. Cassese, ibid., p. 282.

MIMBAR HUKUM

167
will not accept any regulation that affords rights to the rebels as the form of humanitarian protection; that affords any semblance of "legal personality" to the rebels. In line with this context, unfortunately such an argument has also been affirmed in the statute of the new International Criminal Court especially in the article on war crimes and its application to internal conflicts which read as follow: "Nothing... in the preceding paragraphs shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

Secondly, the relation between the belligerents. Contrary to the case of international conflicts, where the relation is one between two or more States, in internal conflicts the relation between the belligerents is essentially between the Government of the State concerned and its own nationals. Accordingly, the humanitarian law obligations of the belligerent State towards the other belligerent party are obligations towards its own nationals. In this regard, any limitation imposed by humanitarian law on the conduct of operations or on the treatment of victims in internal armed conflicts will enter in conflict with certain concept of State Sovereignty. Therefore, there is a debate dealing with the choice between the humanity and sovereignty; and not between humanity and military necessity as generally treating the discourse on the Law of War.

Thirdly, according to the existing rules relating to internal armed conflicts which based upon the concept of State Sovereignty; the humanitarian action for the protection of victims (action by the ICRC for example) it is totally dependent on the Government's acquiescence. Unfortunately in the recent development, such conflicts are very often festured by ethnic or religious character and consequently the humanitarian assistance in such situations have to deal with unprecedented difficulties. In this regard, one even argued that these types of conflicts generate violations of fundamental human rights on a massive scale. In other words, humanitarian action is confronted with a situation in which there is a distortion of order. Even it is confronted with the collapse of State institutions and often with the collapse of State itself. Consequently there is an absence of a responsible command that could assert or acquire the activities of humanitarian institutions, and particularly that could be held responsible for the effective implementation of humanitarian principles.4

Fourthly, we have also to be aware that internal armed conflicts very often it was combined with other disasters. Such disasters whether these are natural disasters simply occurring at the same time as the conflict, or whether they are a consequence of the conflict; whether they are natural or man made disaster; i.e. famine or starvation being used as a mean of warfare; movements of populations being induced by terror as a method of ethnic cleansing, have to be taken into consideration, since they made the suffering of the victims even worse. In such complicated situations humanitarian intervention for the

---

6 See, ibid, Sixth, The "General Principles" of Humanitarian Law... 1991, p. 6. In this regard, she called these types of conflicts as "belligerent conflicts" the absence of Government Structure or centralized command structure and destroy the applicability of the existing regulation.
protection of the victims is confronted with the concept of State Sovereignty and even with the absence of the political will of the belligerents; not only to implement humanitarian law obligations, but also to make it possible for humanitarian institution to bring assistance and protection to the victims.

In terms of international relations the issue concerning the violations of the law of armed conflict regarded as a crucial point and deserves further scrutiny. In this regard the implementation and enforcement of the laws of war has been so central and difficult issue in international diplomacy due to the following five considerations.12

First, the scale and frequency of serious infractions of existing rules have been greater than in earlier decades. There have been violations of basic rules by many belligerents; State and non-State.13

Second, some (but not all) of the atrocities of the 1980s and 1990s have been in conflicts with at least some element of civil war. In practice, however, such wars are more bitter than international wars: they frequently involve deliberate targeting of civilians, and a winner takes all mentality. Getting parties in such wars to act in any kind of disciplined manner has always been difficult.

Third, in many of the atrocities of the recent years, it has not been a serious problem to establish what the law is, or even what the facts of the particular case are. Nor has the critical issue generally been whether in individual cases a state or non-state party concerned has acceded to particular treaties, or has indicated adherence in some other way, or is bound anyway, with or without its explicit consent, by basic customary rules. In this sense, the most critical issue—which affects many key international decisions yet to be made, including over Bosnia—has been what to do when, despite the existence of rules and the clearest possible warnings that they must be implemented, State or non-State bodies persistently violate them, and refuse to investigate and punish those responsible.

Fourth, from the time of Iraq - Iraq War the UN Security Council has acquired a major role in the implementation of the laws of war. Although the United Nations as a war time alliance had been involved in war crime issues, this expanded role was not foreseen in the UN charter, and involved moving into uncharted territory. In the 1990s the Security Council has been particularly preoccupied with war crimes in conflicts involving Iraq, Yugoslavia, Somalia and Rwanda. In addition, several arms control and laws of war treaties have progressively increased the UN’s roles in enforcement matters.

Fifth, the UN, and the Western powers in particular, have faced harsh choices about the extent to which they should pursue war crimes issue in the post-cold-war phase of two major conflicts, namely the Gulf in 1991, and Bosnia and Herzegovina in 1995.

---


13 In this regards Adams Roberts pointed out the cases concerning the violation of such rules which include the following:

- Iraq’s use of chemical weapons during the Golan-Iraq War (1980-88), and its warrant destruction of property and movement of prisoners following its seizure of Kuwait (1990-91)

- Somali factions’ persistent interference with relief efforts and attacks on civilians, especially in 1992-1994.

- Systematically attacks on civilian populations and property by three armed leaders of the conflict in former Yugoslavia that started in June 1991.


- The widespread use of anti-personnel land mines in ways which conflict with fundamental principles of the laws of war, and cause huge casualties (mainly of civilians) during and especially after war.

---

MIMBAR HUKUM

169
have been similar issues in Somalia in 1993-4, and in many other conflicts. The role that legal professionals for war crimes, and the pursuit of compensation for victims, can and should have in the larger process of peace-making has proved to be as tangled an issue in the 1990s as in previous eras.

III. Protection of Civilians in Internal Armed Conflicts.

The laws of war especially the laws of armed conflicts are based on a fundamentally though artificial distinction between international and non-international armed conflicts. This distinction which is deeply entrenched in the 1949 Geneva Conventions on the protection of war victims has been mentioned and even confirmed with the adoption of two Additional Protocols to these Conventions in 1977. These Protocols consist of Protocol I applying solely to international armed conflicts and Protocol II applying to non-international armed conflicts.

It might be noted that the greatest achievement of the Diplomatic Conference of 1949 in Geneva was the (fourth) Convention Relative to the Protection of Civilian Persons in Time of War, which states that persons who fall into the hands of the enemy are protected under international law.

The idea concerning the protection of civilians is deeply rooted on the history of war that has shown that it is the civilian population that suffers most from the consequences of hostilities. The long experience on the consequences of armed conflicts has evolved into theory and even confirmed in the binding regulations whether in a national or in international law. This is evident that there has been a progress since the beginning of the 20th century.

Prior to 1949 an internal conflict, to be more precise, "Non-International Armed Conflict" has not been regulated by traditional International Law. Traditional Humanitarian Law such as the Hague Conventions respecting the laws and customs of war on land of 1907 and the Geneva Convention of 1929 concerning the wounded and sick and the Convention Relative to the Treatment of Prisoners of War do not contain regulation concerning non-international armed conflicts. In such a situation the relations between the incumbent government and its insurgent governed by international law concerning armed conflicts and neutrality only in the light that the insurgent gained the status of recognition belligerent, upon which the insurgents pursue the rights and obligations according to international law.

Since 1949 by the conclusion of the Geneva Conventions of August 1949 the first edition of application of the laws of armed conflict has formally been extended to internal conflict. It is interesting to note in this context that there is no Declaration or Conventions on the laws of War adopted prior to 1949 contained a specific provision on the scope of application of these instruments. The Geneva Conventions of 1949 introduced (for the first time, in Common Article 2 and 3) a distinction in their scope of application and the rather imprecise concept of "non-international armed conflicts."
Moreover the revision of the Geneva Conventions and the introduction of this special regime were very fundamental developments in the laws of armed conflicts. As far as internal conflicts are concerned it was for the first time that a minimum of legal regulation became formally applicable to situations of internal conflicts, that had not been up to then explicitly included in the scope of application of Humanitarian Law. But precisely because it was a special regime, it entailed of the same time a fundamentally unequal legal protection of victims of armed conflicts; very specific and detailed in the case of international conflicts; very unspecific and elementary in the case of internal conflicts.  

Article 2 Common to the Geneva Conventions of 1949 Read as follows:  

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to 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."  

In this respect writers such as Mc Courbrey and White pointed out that the drafting of such article is rather curious and appear to suggest that at least one of the parties to a conflict must recognize it as a "war". However, in reality this argument does not reflect State Practice since 1945. In practice we have noted that The Geneva Conventions apply in internal armed conflicts whether or not they are recognized as "wars". Furthermore, these writers suggested that the criteria for the application of the jus in bello to armed conflicts is that such armed conflicts have broken out between States and regardless the existence of the state of "war".  

Article 3 Common to the Geneva Conventions points out the following:  

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

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

According to paragraph (2) of This Common Article 3 the High Contracting Parties have to treat the victims of internal armed conflicts in line with the principles set up in  

22 Hilaire Mc Courbrey and ND White. op.cit. . p 193.
the paragraph (1) Thase is different from the Geneva Conventions of 1929 which pointed out that a war is the criteria for the application of the regulations prescribed in the Conventions. Common Article 3 of the Geneva Conventions of 1949 pointed out legal guarantee that the application of humanitarian principles recognized by civilized powers in the treatment to the victims of armed conflicts is regardless of the status of the insurgent, or the character of the said armed conflicts.22

Interestingly, legal regulations towards the civilians could be read in the Fourth Geneva Convention of 1949. Most of the regulations contained in the Fourth Geneva Convention concern with the protection of civilians in armed conflicts. Precisely the normative references concerning the protection of civilians have been prescribed in the part II and III of this Convention, Part II of this Convention deals with general protection of populations against certain consequences of war; while part III deals with status and treatment of prospected persons.

In the latter developments as the growing concern to the protection of civilians, the Fourth Geneva Convention was supplemented with the Protocol II of 1977. Protocol II develops and supplements Articles 3 common to the Geneva Conventions of 1949. The basic purpose of the Protocol II has been defined in the preamble, that is "the need to ensure a better protection for the victims of internal conflicts". As we have seen that a complete or perfect regulation could not be attained. For this reason the preamble concludes "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". A prominent humanitarian lawyer such as Kalsbøen pointed out that this drafting is a simplified version of the Martens clause.23 Meanwhile Hans Peter Gautier put forward that Common Article 3 of the Geneva Conventions of 1949 and Protocol II of 1977 regarded as codification of fundamental human rights law for civil war situations. Such a notion based upon the argument that international humanitarian law and human rights have developed separately. They even vary greatly in content; a fact can be explained easily by the differences in their fields of application. Human rights law sets limits to the power of the State with respect to all persons subject to its authority, including nationals, and such limits apply at all times. On the other hand, international humanitarian law, is a special law created for war; it influences relations between the belligerents for the purpose of guaranteeing the human rights of persons in the power of the enemy. In practice, the regulation of human rights is International Conventions and the well-developed international monitoring procedures and implementation mechanisms of human rights treaties supplement the more indirect effects of the Geneva Conventions. The more visible campaigns for the protection of human rights can facilitate the work of hu

22 Machtte Konstitutiounsrecht, op cit. p. 23.
23 Sieger Israenh, op. cit. pp. 63-64.
24 Fritz Kalsbøen, 1994, Commentary on the Working of War. Geneva: ICRC, pp. 137. Martens clause refers to the principles of the law of nations as they result from usage established among civilized peoples. This clause was named after its author, Friedrich von Martens, a Roman-Dutch to The First Hague Peace Conference in 1899. The main purpose of the Conference was to create conditions precluding further war. A number of Articles in the Geneva Conventions of 1949 also refer to such principles, which are still vitally important in Humanitarian Law. They are all other legal domains. This clause provides guidelines in uncertain cases, and constitutes a complete summary of the whole, easy to understand and indispensable for the purpose of distinguishing, see also generally Jean Fritz 1983, Development and Principles of International Humanitarian Law. Dordrecht: Martinus Nijhoff Publishers, p. 59.

172

MIMBAR HUKUK

minal Human Rights Committee, which such they provided

IV.

This is all the more

important to be stressed

that the human rights

committees, including the

European Committee for

the Prevention of

Torture and other

Cruel, Inhuman or

Degradinig Treatment or

Punishment, have been

active as of late in their

manner and

their preventive

measures approach to setting

and maintaining standards

as well as setting standards

and maintaining standards

as well as setting standards

and maintaining standards
manitarian organizations in areas of conflicts. Humanitarian law and human rights have separate existence. In the tragic situations such as civil wars or internal armed conflicts, they must complement each other and thus provide better protection for the victims.22

IV. Humanitarian Intervention: Paradox in the International System.

The last aspect that will be discussed in this paper is as concerns the humanitarian intervention particularly to protect and rescue the suffering civilians as a result of prolonged internal armed conflicts. The definition of the term Humanitarian Intervention succinctly pointed out by Adam Roberts. Professor Roberts put forward that humanitarian intervention, in its classical sense may be defined as military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants.23 We have seen that the 1990s practice of humanitarian intervention has resulted from real and urgent crises. It has also introduced innovative features, of which the most significant is the emphasis on the UN Security Council as the authorizing body.

Within the context of international system, intervention refers to the involvement of an external force in the domestic affairs of another country. In a normal sense we think of military intervention that is, the use of military force, and of situations where there are chaotic conditions or civil wars going on in the country being intervened. In this regard the external power is seen to act in relation with the objectives which have to do with the internal conflict.24

From the practical point of view, foreign interventions have continued to be a paradoxical phenomenon in international relations. The doctrine of the sovereignty of States build on the principle of non intervention, which is a form of defense, legally and politically, against the dominance of the stronger powers. The constant objection to the recognition of the right to intervene is that once it is afforded, it will be misused. However, the studies made by Tillema shows that the number of overt foreign military intervention occurred from 1945 to 1991 were 690.25

On the other hand, there are constant needs for intervention especially, the government and peoples in seeking the solidarity. The demands can arise from the country of severe strife, but also from sectors of the external society. The demands can be strong when a weaker party is facing threats from groups, regimes or other powers. In this context one of particular important example is the right to self-defense which does include the right to appeal for support from the outside. At times, interventions have been acceptable, at other times and occasions they have not.

The end of the Cold-War has given rise to a debate on humanitarian intervention, and even argued that there might be “just” interventions. Some actions undertaken by the United Nations during the first part of the 1990s can be put in such a context. More interestingly Adam Roberts has highlighted the UN-based interventions of the 1990s

25 Peter Wallace, ibid., p. 6.
which have contained following significant new elements.11 (1) A central preoccupation influencing virtually all cases has been the refugee problem: the fear having to cope with huge numbers of refugees, coupled with the growing reluctance of States to accept them, has led to a strong interest in tackling problems at or near the source. (2) For a variety of reasons, the distinction between what is deemed to be a purely internal problem within a State, and what is deemed to be international, has become more diffuse. (3) Intervention in the 1990s has often involved troops from very distant States, often with little direct interest in the crisis. (4) There has been a strong tendency to try to establish safety zones of various types in conflict-ridden areas, but results have been limited. (5) There has been unprecedented focus on the UN Security Council as an authoritative decision-making body.

From the practical as well as academic points of view the debate concerning the justification of humanitarian intervention which swinging between the principle of sovereignty of State on one side and humanitarian values and solidarity all over the other side deserve further scrutiny. Such an argument is plausible since we have noted that in the twentieth century international law has evolved from a system that was primarily concerned with the relations of States with another, to one that embraces both the rights of States and the rights of individuals and groups.10

There are arguments for and against interventions to protect human rights. The basic argument against such intervention is that the issue of human rights is an internal and domestic one, which falls under jurisdiction of each individual State, and in the line of consequence this issue cannot justify a foreign military intervention, no matter how extreme the human rights record is. On the other hand, opponents argue that violations of human rights are serious breaches of the Universal Declaration of Human Rights and the international community has the duty to ensure by all necessary means that human rights are respected.11

Undoubtedly the issue of humanitarian intervention in the present state of international system has led to endless controversy. Writer such as Wallenstein suggest the basis for justification upon such dilemma situation which can be summarized as follows. First, by invoking the United Nation System. It argues that the governmental consent is decisive. If the government of a country demands support then, it is possible for the international community through the UN mechanism extend assistance even in a military form. Such interventions, normally under some other heading, such as peacekeeping operation. This is the principle for the collective and accepting the interposing of external forces between the fighting parties. Case in point such as the first collectively sanctioned force (UNEP) in Sinai 1956.12

Second, the consent of the legitimate government is what is required. On this basis the support given to the legitimate government is based upon case by case considerations. If the government no longer legitimates, the consent principle can be withdrawn, at least should the international community (in the form of the Security Council) agrees that the...
a particular government is illegitimate.

Third, placing the interests of the local population above those of the government. In this regard there is a deliberate choice that solidarity is a norm more important than state sovereignty. Thus in an internal conflict the international community would invoke the right/duty not only (a) to bring out all international citizens, or (b) deliver food, medicine and other necessities to the population at large but also to (c) press the local government to act responsibility. The Commission on Global Governance argues that the security of the people sometimes more important than the security of States. This humanitarian aspect has undoubtedly increased in importance, particularly since the end of the Cold War.

Fourth, the absence of government in the Collapsing States. Case in point is as exemplified in Somalia after 1991. The underlying norm is the need for any area to have a reasonable governing mechanism. The intervention is carried out to deal with the effects of such a collapse, i.e. to recreate human conditions of survival.

Fifth, emphasizing the spill-over and spin-off effects of a particular conflict. In this context the intervention is justified in terms of international repercussions of a continuing crisis. Neighboring countries might become affected or activated, consequently making the internal conflict in one country a problem for an entire region. In fact, the internal strife very often closely connected with a neighboring country (as a staging place, for instance, providing bases, training, equipment, finance and/or political support). Such situation would suggest that either the conflict spreads to the surrounding area or other country are part of the problem. Should international community invoking such justification, we have to develop and refer to the standard operating procedure and evaluation whether there is a threat to international peace and security stemming from the instability of that particular country.

Sixth, taking action of intervention pre-emptively, before the local situation has gone out of hand. Such a preventive intervention is politically less imposing as well as more effective. Such a preventive action would likely involve the stationing of troops before civil strife has occurred. An excellent example in the history of the UN concerning such action is the UN preemptive deployment in Macedonia in early 1991. The mission in Macedonia has obtained an image of being successful and an example for the future. The main tenet in the six proposals put forward by Wallensteen above is that to a certain degree sovereignty and solidarity are principles which could be combined, even in cases of military action if humanitarian concerns and the interests of the international community is at stake. Be that as it may, the proposals put forward by Wallensteen above have to be taken into consideration with a very prudent manner. Such a prudent consideration is necessary since in there were many interested parties and that might be involved in internal armed conflicts. Thus the intervention in the name of humanitarian reasons will not produce a complicating effect to the area of conflict which could lead to a situation in which the settlement of the dispute even much more arduous.

With regard to the intervention for the sake of humanitarian interests, in this context it is plausible to quote the normative reference, especially which has been prescribed in the Geneva Conventions. Obviously the Geneva Conventions of 1949 pointed out the role of the humanitarian organization to per-

---

3Bo Pelsius. The UN Preemptive Deployment in the former Yugoslav Republic of Macedonia, in Peter Wallensteen, op. cit. p. 107

MEMBAR HUKUM

175
a particular government is illegitimate.

Third, placing the interests of the local population above those of the government. In this regard there is a deliberate choice that
solidarity is a norm more important than state sovereignty. Thus in an internal conflict
the international community would involve the rights/ duty not only (a) to bring out all in-
ternational citizens, or (b) deliver food, medicine and other necessities to the population at
large but also to (c) pressure the local go-

vernment to act responsibly. The Commis-
sion on Global Governance argues that the
security of the people sometimes more im-
portant than the security of States. This hu-

manitarian aspect has undoubtedly increased
important, particularly since the end of
the Cold War.

Fourth, the absence of government in the
Collapsing States. Case in point is as exem-
plified in Somalia after 1991. The underlying
norm is the need for any area to have a rea-
nable governing mechanism. The intervention
is carried out to deal with the effects of
such a collapse, i.e. to recreate human condi-
tions of survival.

Fifth, emphasizing the spill-over and
spillover effects of a particular conflict. In this
context the intervention is justified in terms
of international repercussions of a continuing

crisis. neighboring countries might became
affected or activated, consequently making the
internal conflict in one country a problem
for an entire region. In fact, the internal strife
very often closely connected with a neigh-
boring country (as a staging place, for instan-
tce, providing bases, training, equipment, fi-
nance and / or political support). Such situati-
on would suggest that either the conflict spre-
des to the surrounding area or other country
are part of the problem. Should international
community invoking such justification, we
have to develop and refer to the standard
operating procedure and evaluation whether
there is a threat to international peace and
security stemming from the instability of that
particular country.

Sixth, taking action of intervention pre-
ventively, before the local situation ran out
of hand. Such an preventive intervention
is politically less imposing as well as more
effective. Such a preventive action would
likely involve the stationing of troops before

civil strife has occurred. An excellent exam-
ple in the history of the UN concerning such
action is the UN preemptive deployment in
Macedonia in early 1993. The mission in
Macedonia has obtained an image of being
successful and an example for the future.

The main tenet in the six proposals put
forward by Wallenstien above is that to a
certain degree sovereignty and solidarity are
principles that could be combined, even in
cases of military action if humanitarian
concerns and the interests of the internation-
al community is at stake. Be that as it may,
the proposals put forward by Wallenstien
above have to be taken into consideration
with a very prudent manner. Such a prudent
consideration is necessary since in there were
many interest and parties that might be
involved in internal armed conflicts. Thus the
intervention in the name of humanitarian rea-
sion will not produce a complicating effect to
the area of conflict which could lead to a
situation in which the settlement of the dispu-
te even much more arduous.

With regard to the intervention for the sa-
ke of humanitarian interests, in this context it
is plausible to quote the normative referen-
ces, especially which has been inscribed in
the Geneva Conventions. Obviously the Ge-
neva Conventions of 1949 pointed out the ro-
le of the humanitarian organization to per-

5Bo Pelkaus, The UN Preemptive Deployment in the former Yugoslav Republic of Macedonia, in Peter
Wallenstien, op. cit. p. 107
form its functions. Legally speaking the pre-

sence of a humanitarian Body to offer its ser-

tices to the suffering people due to armed con-

flicts has been prescribed in the Para-

graph (2) Common Article 3 of The Geneva

Conventions of 1949. 32 As have been pointed 

out above, the scope of Article 3 of the Gene-

va Conventions showed that Internatio-

nal Humanitarian Law has its role in interna-

tional disputes why if the hostilities attain a 

certain level of intensity. 33 If this is not the 

case, then the situation may be not qualified 

as an armed conflict but 'only' said to be dis-

trubance, unrest, tensions, riots or low inten-

sity conflicts. In a strict sense situations such 

as those are not subject to humanitarian law. 

In that as it may, these situations are of hu-

manitarian interest, since they may give rise 

to human problems coexistent with such 

internal conflicts. From the legal point of 

view they should be remembered that even 

in the described crises, human rights must be 

protected. In so far efforts have been made to 

encourage observance of non-binding codes of 

conduct as a means of ensuring respect for 

humanitarian standard. 34

In the effort of safeguard human dignity 
in times of internal conflicts, the ICRC has an 

unusual role and significant role. It offers 

its services, as an intermediary in humanita-

rian matters, to the government of the State 

concerned. 35 Then, with the consent of the 

authorities, the ICRC delegates visit places of 

detention holding persons deprived of their 

liberty in connection with the disturbances, and, 

where necessary take action to improve 

the conditions of detention. In this context, 

the ICRC speaks of its right to take hu-

manitarian initiatives. This right is based on 

resolutions of the International Conference of 

the Red Cross and codified in the Statutes of 

the International Red Cross and Red Crescent 

Movement. 36

It is obvious that the role in which the 

ICRC has to play in the event of the violati-

ons of humanitarian law is delicate. First, the 

ICRC may take action on its own initiative 

especially when its delegates are directly con-

fronted with violations. Second, the ICRC 

often receives complaints, and is generally 

expected to transmit there or to approach the 

authorities responsible, or to publicly state an 

opinion concerning the alleged violations. 

Third, the ICRC is sometimes asked to con-

duct an investigation to establish the truth of 

an alleged breach, or simply to record that 

violations have been committed. 37

V. Concluding Remarks.

It is obvious that the suffering of the ci-

citizens in the event of armed conflict whether 
in the context of internal or in international 

conflicts attract the concern and apprehension 

32 Common Article 3 of the Geneva Conventions of 1949 points out the following : (1) 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 provision shall not affect the legal status of the Parties to the conflict.

33 As of the 2013 Canada International Protection, Cambridge.


35 Hans Peter Gasser. p. 78. And also the International Committee of the Red Cross. Human Rights and The ICRC. 

36 International Humanitarian Law, Geneva.

37 Statutes of the Red Cross and the Red Crescent Movement, Article 5.2 (4) and 5.3.

38 For further discussion on generality: Action By The ICRC in the Forms of Breaches of International Humanitarian Law, in: Jacques Maués (Ed. 1981. International Review of the Red Cross, Geneva. ICRC.

176

MINTAR HUKUM
of the international community. There is a growing tendency in the international community that morally and legally we have the duty and right to stop the savagery and violence of armed conflict wherever it happened. The commitment of international community to implement and enforce humanitarian value has been manifested in the drafting of humanitarian law as exemplified in the 1949 Geneva Conventions and its Additional Protocols of 1977; and the establishment of international and non-governmental organizations having concern with the humanitarian law. Needless to say that the adherence of States to the International Treaty dealing with humanitarian law have to be improved.

Indeed it is an interesting development that generally there is an increasing awareness that States whether individually and collectively through international organization as well as independent international institutions having concern with humanitarian law have the duty of ending the violence and the savagery of armed conflicts all over the world. Such effort have been justified by legal and political approaches. Be that as it may supervision is one of the most difficult problems in public international law particularly in international humanitarian law applicable in armed conflict.46

Sooner or latter the magnitude and grotesque effects of internal armed conflicts will encourage external powers in the form of international organizations having concern with the respect of human rights values and the maintenance of peace and security to perform their functions, particularly in the effort of protecting the civilians and assuring the protection of the victims of such armed conflicts. In this context constant cooperation and information sharing among the institutions concerned with human rights and humanitarian law have to be emphasized. Such cooperation is necessary to ensure that the effort of protecting civilians in the area of armed conflicts going on smoothly and avoid complicating effect of an overlapping mandate. Thus in this regard international efforts need to be organizationally coherent and accepted by the parties concerned.47

The principle of humanitarian intervention cannot be divorced from the general principle of inter-vention. Only in certain circumstances are outside powers allowed to intervene in the affairs of a sovereign State. The present writer take the view that to a certain degree humanitarian intervention for the sake of protecting civilians in the country suffering civil war could be justified. Such humanitarian intervention have to be carried out in a very prudent manner. Such humanitarian intervention has to be carried out only as a last resort to correct massive abuses of human rights, i.e. to protect the civilians in the State experiencing civil wars or internal armed conflicts from genocide and mass killing. An excellent example that can be put in this context is what have been going on in the former Republic of Yugoslavia in the 1990s more particularly what has been shown in Kosovo recently.

Invoking humanitarian intervention to an area of armed conflicts with a prudent manner is to prevent the situation in the area of conflict getting complicated and the savagery of the civilians getting worse. In this regard implementation of humanitarian intervention could be justified and have to take into consideration the following prerequisites. First, Such humanitarian intervention which manifested in the form of the presence of external power in an independent country have to be

46 Jacques Meunier, op cit, p.1
carried out through the UN system. In such a context, the said action should be implemented according to the normative reference in the UN Charter. Thus, here we are invoking the possibility of the UN Peacekeeping Operation. Second, when it is necessary in the light of the judgment of the United Nations upon the situation going on in the area of conflict, such peacekeeping operation could be channeled into a peace-making mission. Accordingly, there will be a different legal parameter concerning the implemented action. Finally, the presence of the external power in the form of the UN military operation has also been employed as a means of enforcing humanitarian law in the area of armed conflict. In this regard individuals committed gross violation of humanitarian law have to be arrested and brought before the International Criminal Court established under UN mechanism. Thus, here humanitarian intervention could be regarded as an impetus for the enforcement of humanitarian law. It has to be born in mind that a trial of war criminals could also educate the general public not to accept egregious violations of human rights and humanitarian law. Above all, there is a moral imperative to prosecute the offenders of the legal norms. It is true that the enforcement of human rights and humanitarian law is difficult, but it does not necessarily mean that such an effort is a meaningless endeavor.

BIBLIOGRAPHY.

Books:

Kalshoven, Frits, 1991, Consequences of the Waging of War, Geneva: ICRC.

178

MIMBAR HUKUM


Journals:

Foreign Affairs, Volume 72, No. 3, Summer 1993, New York.