Chapter 3

The Regulation of Wars of National Liberation under International Humanitarian Law – the Jus in Bello

3.0 Introduction

While confusion and disagreement pervade the discussion on the *jus ad bellum* in the context of wars of national liberation, the *jus in bello* framework is much clearer. This is as a result of the adoption of Additional Protocol I to the Geneva Conventions in 1977. Article 1(4) of this instrument grants wars of national liberation the status of international armed conflicts, thus allowing for the application of the whole corpus of international humanitarian law to them. Unfortunately, state practice has shown that in many wars of national liberation, the *jus in bello* is ignored or applied only in an *ad hoc* and inconsistent manner and individuals who believe they have the proper authority to engage in conflict in pursuance of their right to self-determination are generally dealt with solely under municipal criminal law.

It is the aim of this chapter to analyse the international humanitarian law which is potentially applicable to situations of wars of national liberation and to discuss the protection afforded thereby to both civilians and combatants. Law is ever-evolving and developing and therefore this chapter undertakes the study of the international humanitarian law provisions applicable to wars of national liberation in a chronological order. Section 1 examines the development of international humanitarian law through the adoption of the Geneva Conventions for the Protection of War Victims of 1949 and analyses the provisions of these Conventions which could be applicable to wars of national liberation. Section 2 briefly discusses the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 – 1977 and the ‘hijacking’ thereof by national liberation movements. The third section concentrates on one of the results of this Conference i.e., Protocol I regarding international armed conflicts which

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was especially tailored and amended to suit wars of national liberation. The impact of Protocol I on both the political and legal situation of wars of national liberation is also examined here. The final section focuses on the second result of the Conference – Protocol II regarding non-international armed conflicts – and the possible application thereof to situations of conflict between a national liberation movement and government forces.

3.1 The Application of the Geneva Conventions of 1949 to Wars of National Liberation

The main developments in the *jus in bello* during the UN era have been at the initiative of the ICRC. While the UN Charter dealt with the issue of the *jus ad bellum* after World War II, it took a few more years until the *jus in bello* was comprehensively dealt with, with the adoption of the Geneva Conventions for the Protection of War Victims in 1949. Upon the adoption of these conventions, provisions of international humanitarian law could be seen to be directly applicable to wars of national liberation and the use of force by members of national liberation movements could be regulated by international law. The four Conventions, focusing on the wounded and sick on land and at sea, prisoners of war and civilians apply to conflicts of an international character, i.e. conflicts between two High Contracting Parties. In 1949, intra-state conflicts were a lot less common than inter-state conflicts and there is but one provision in the Conventions which applies to those involved in conflicts of a non-international character, i.e. Common Article 3. The classification of a war of national liberation as an international or a non-international conflict is crucial as this dictates the level of protection available to those involved in such wars. If a war of national liberation is regarded as a conflict of an international character, then the whole *jus in bello* framework set out in the

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3 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, hereafter Additional Protocol II.

4 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, hereafter Geneva Convention I.

5 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, hereafter Geneva Convention II.

6 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, hereafter Geneva Convention III.


8 Regarding the Geneva Conventions and Common Article 2, Rwelamira comments: “The only mitigation to this rigorous provision was mildly provided for in common Article 3, which specified certain minimum standards to be applied in internal conflicts, i.e. wars of non-international character. Common Article 3 required parties to the conflict to be guided by considerations of humanity towards each other.” – Medard R. Rwelamira, “The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949” in Christophe Swinarski (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge – en honneur de Jean Pictet* (The Netherlands: Martinus Nijhoff Publishers, 1984), pp. 227 – 36, p. 230.