

almost totally non-derogable. To paraphrase the Nuremberg Tribunal ruling in the Krupp trial, the essence of war is that someone will lose, and those drafting the laws of war knew that and designed those laws specifically for the ultimate emergency of war in which there would be no further grounds for derogation.

This largely un-derogable nature of the law of armed conflict, makes it particularly useful for protecting human rights in conflict situations. As such, UN human rights operations and others attempting to protect human rights in conflict situations as invariably exist in complex emergencies, should look to the laws of armed conflict. Suffice it to say that in most UN field operations, particularly peace-keeping operations, both international human rights law and the law of armed conflict do apply. The fact that they often overlap is a plus not an impediment to their application, as they complement and support each other, and practitioners can select from whatever category provides the best legal tool for any particular situation.

Much akin to the discussion as to whether the law of armed conflict is binding on the UN and its field operations, so too there has been discussion about the difference between international and internal conflicts. The law of armed conflict was largely codified in a period when the concept of state sovereignty was fairly sacrosanct. As a result, the whole tenor and terminology of the laws pertain almost solely to hostilities between independent states. There is of course the 1949 Geneva Conventions' common Art.3 which sets out minimum rules for internal armed conflicts. Those already minimum rules were further restricted since the state in question in effect made the determination as to whether there was such an armed conflict.⁵⁰

In a step forward, common Art.3 was developed and supplemented by the 1977 Additional Protocol II⁵¹ (APII). To date, APII has received 134 state ratifications⁵², and it makes some important but tentative efforts to widen the definition of internal armed conflict and the material field of application (Art.1). Unfortunately clawback clauses in both Art.1 and Art.3 managed to retain substantial de facto state determination or impact on whether an internal state conflict falls under APII. At the time of their creation both initiatives, common Art.3 and APII, were major steps forward. But now respectively 46 and 18 years later, they are far from sufficient. Their application remains largely in the political arena, so that it is possible for states such as Turkey to deny that they are involved in an internal armed conflict, while at the same time claiming the right to derogate from human rights treaties on the grounds of public emergency⁵³.

⁵⁰ Even the mere "classification of whether there is an armed conflict at all, and if so, what manner of armed conflict is within the almost exclusive decision of the government concerned." p.2 Rachel Brett, *Discussion Paper on ways of improving the implementation of human rights and humanitarian law*, January 1994, Quaker Office to the UN in Geneva. Brett recommends the creation of an independent body to make such determinations, both vis-à-vis international conflict but most importantly vis-à-vis internal conflicts.

⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

⁵² It appears that Protocol II has only been applied four times: El Salvador, the Philippines, Colombia, and Chechnya.

⁵³ It has been proposed by R.Brett and F.Hampson that a state that derogates from its human rights obligations should not be able to deny the applicability of at least common Art.3.